

IN THE HIGH COURT OF TRIPURA
AGARTALA

RSA 31 OF 2012

1. Smti. Bijali Sinha,
daughter of late Basudev Sinha,
P.O. & Village- Ichabpur,
P.S. Kailashahar,
District : Unakoti Tripura

2. Md. Askar Ali,
son of late Siddek Ali,
P.O. & Village- Ichabpur,
P.S. Kailashahar,
District : Unakoti Tripura

3. Md. Takdhir Ali,
son of late Siddek Ali,
P.O. & Village- Ichabpur,
P.S. Kailashahar,
District : Unakoti Tripura

4. Md. Amjad Ali,
son of late Siddek Ali,
P.O. & Village- Ichabpur,
P.S. Kailashahar,
District : Unakoti Tripura

.....Defendant-Appellants

- Vs -

1. Md. Chalek Mia,
son of late Noor Miah,
P.O. & Village- Ichabpur,
P.S. Kailashahar,
District : Unakoti Tripura

2. Md. Kanachir Ali,
son of late Makchad Ullah,
P.O. & Village- Ichabpur,
P.S. Kailashahar,
District : Unakoti Tripura

3. Sri Surajit Sinha,
son of late Surrendra Sinha,
P.O. & Village- Ichabpur,
P.S. Kailashahar,
District : Unakoti Tripura

.....Plaintiff-Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellants : Mr. C.S. Sinha, Advocate
For the respondents : Mr. N. Majumder, Advocate
Date of hearing and
judgment & order : 30.06.2016
Whether fit for reporting : NO

JUDGMENT & ORDER(ORAL)

Heard Mr. C.S. Sinha, learned counsel appearing for the appellants as well as Mr. N. Majumder, learned counsel appearing for the respondent No.1

2. This is an appeal filed under Section 100 of the CPC against the order dated 30.03.2012 delivered in Misc.08(Condonation) of 2012 arising from Title Appeal No. 03 of 2012 and as consequence of which the impugned order dated 30.03.2012 dismissing the Title Appeal No. 03 of 2012 has been passed by the District Judge, North Tripura, Kailashahar, now Unokati Judicial District.

3. At the time of admitting this appeal, the following substantial question of law has been formulated by the order dated 11.12.2012 :

"Whether the District Judge while passing the impugned order dated 30.03.2012 was correct in appreciating the circumstances including the non compliance of the order dated 23.03.2012 in Civil Misc. Appeal No. 10 of 2010? "

4. The relevant facts as would be required to have the perspective of the challenge, may be introduced in short. The respondent No.1 herein, filed the suit being Title Suit 36 of 2007 for declaration of right, title and interest over the suit land, as described in the schedule appended below the plaint and for recovery of the said land as the said land is claimed to have been under possession of the defendants or they have claimed to have been in possession of that land. The claim as well as the basis of such claim has been disputed by the defendants No. 1,4,5 and 6 by filing a joint written statement in the suit . On 22.09.2009 the suit was dismissed for non prosecution. The plaintiff, the respondent No.1 herein, filed an appeal against the said order dated 22.09.2009 and the said appeal was allowed by the order dated 23.02.2011. For purpose of reference the entire order is reproduced hereunder :

"23.02.2011 Ld. Advocate for the petitioner and respondent are present.

Heard both sides on the Misc. Appeal.

Gone through the L.C. Record.

Ld. Advocate for the petitioner submits that date was fixed for hearing on the petition for calling the volume book from Sub Registrar Office on 22.09.2009, but due to inadvertance the Advocate Clerk did not take into notice and failed to inform Ld. lawyer. So, step was not taken on 22.09.09.

The Court below then dismissed the suit T.S. 36 of 07. Some evidence already recorded in the case, but the case was not contested in merit under Order 9 Rule 8.

Ld. Advocate for the respondent argues that the laches of the Advocate's clerk is not proved on giving evidence. Therefore, the court below rightly passed the order and dismissed this suit.

From the perusal of the case record it transpires that the date was fixed for hearing or calling volume book from the Sub Registrar Office. The date was not at all for affective hearing at all.

For admission on document the volume book from Sub Registrar Office is necessary. The sale deed already produced and for it admission as document it was necessary to call the volume book from the Sub Registrar Office, when writer, executants and witnessess are not available.

This case was dismissed as per Order 9 Rule 8 then the pltf is precluded to file the suit a fresh.

Some evidence is the case already recorded, so the case is required not be dismissed on technical ground.

The court below rite passing order in a petition under Order 9 Rule 8 on 5.10.10 did not consider it.

It was observed on hearing that such type of mistake should not be considered. But interest of the litigant should not suffer for the laches of lawyer and their clerk.

Considering all those aspect the order passed by the Civil Judge, Jr. Division in connection with Civil Misc 36(R) of 09 in a consideration of case TS. 36/07 is setaside.

In exercise of appeal power the petition for restoration of case No. TS.36/07 is allowed on condition that plaintiff petitioner should pay cost of Rs.300/- to the respondent. On payment of the cost the case is to be restored and Civil Judge(Jr. Divn.) is directed to complete the trial of the suit TS. 36/07 expeditiously.

Thus, the Civil Misc. is allowed on contest with the above direction.

Send down the L.C. Record. "

5. It is apparent from the said order that the restoration has been directed subject to payment of Rs.300 to the defendants. On 12.05.2011, the plaintiff, the respondent No.1 herein, filed a petition before the Civil Judge, Junior Division, Kailashahar, North Tripura stating that the plaintiff made attempts to hand over the cost, quantified at the sum of

Rs.300/- in terms of the order dated 23.02.2011 to the engaged counsel of the defendants, but the said engaged counsel denied to receive the said amount. Even the court did not make any endeavour as it is apparent from the order, to inform the engaged counsel of the defendants. In the order dated 12.05.2011, the trial court has observed as under :

"Ld. Counsel Mr. M. M. Rahaman is present on behalf of the plaintiff and filed a petition informing the court that plaintiff is willing to pay Rs.300/- (Three Hundred) as per order dated 23.02.2011 passed by the court of the District Judge, North Tripura, Kailashahar in connection with Civil Misc Appeal 10/10. But engaged Counsel on behalf of the defendants is not ready to receive the said Rs. 300/- (three hundred). But the petition is not seen by the engaged counsel of opposite side. Moreover, no step also filed today on behalf of the defendants sides.

Hence, this case will procede exparte against the defedants.

Fix 18.7.11 for exparte evidence Order."

6. It is apparent that the petition dated 12.05.2011 was not supplied to or was acknowledged by the engaged counsel of the defendants or by the defendants and on the very same date i.e. 12.05.2011 the court decided that the suit should proceed ex parte against the defendants and for ex parte evidence, the date was fixed on 18.07.2011. After recording some evidence, as it appears from the judgment and order dated 17.09.2011, the suit was decreed ex parte based on the judgment dated 17.09.2011, declaring the plaintiffs' right, title and interest over the suit land. But no decree for recovery however was passed.

7. Without making any observation on the merit of the reasoning as assigned in the judgment dated 17.09.2011, the fact that appears therefrom is that the defendants didnot have any opportunity whatsoever to participate in the proceeding. Later on, the present appellants, the defendants in the suit, filed an appeal under Section 96 against the said ex parte judgment and decree respectively dated 17.09.2011 and 20.09.2011 as passed by the Civil Judge, Junior Division, Kailashahar, North Tripura in Title Suit No. 36 of 2007 but it is apparent on the face of the record that the suit was not within time. As a result, an application for condonation of delay, accompanied with the appeal, was filed being Misc. 08 (Condonation) of 2012. In that petition, the appellants have stated that on 24.01.2012, when the plaintiffs went to the suit land and tried to enter the suit land on stating that they got the decree in respect of the suit land, they gathered the knowledge of existance of the said decree. On 27.01.2012, the appellants gathered their constructive knowledge about the judgment based on which that decree was passed. Thereafter, the appellants applied for the certified copy of the judgment and decree. On 07.02.2012 they got the certified copy of the judgment and decree. From 08.02.2012 to 24.02.2012, the time was consumed for preparation of the memorandum of appeal and according to the appellant the delay as occurred was

entirely unintentional and imposed by the circumstances beyond their control.

8. By the impugned order dated 30.03.2012, the District Judge, North Tripura, Kailashahar has observed as follows :

"On careful scrutiny of the petition it is found that suit for declaration was filed on 09.10.2007. There was inordinate delay. What prevented the defendant petitioner to take part in the proceeding is not clarified. It is not clear why the petitioner did not take part and did not try to take any information of this case.

After passing of the ex parte decree information also was not taken from the court. What prevented that is not explainted. So, delay about 10 months not explained clearly, even after taking certified copy time taken for preparation of memo of appeal. These are not good ground at all.

No step taken for adjudication of ex parte decree.

In AIR 1998 S.C. Ram Chandra Vs State of Karnataka, page 576, held that law of limitation may firstly affect a particular period, but it has to be applied in all cases when the statutes was prescribed, Court wasnot power to extend the power of law of limitation on acquit-able ground."

Having observed thus, this petition for condonation of delay was dismissed.

9. Mr. C.S. Sinha, learned counsel appearing for the appellants has submitted that while deciding the prayer for condonation of delay in preferring the appeal being TA 03 of 2011, the first appellate court failed to direct its inquiry to the context and records of the case. As a result, the impugned order

has been passed in the premises which is entirely irrelevant in the context of the case.

10. From the other side, Mr. N. Majumder, learned counsel appearing for the respondents, in order to defend the said order has submitted that lack of knowledge of the appellants cannot be believed inasmuch as the order of restoration dated 23.02.2011 was passed in presence of the counsel of the appellants. Therefore, all the events which ensued were very much within the knowledge of the present appellants, the defendants in the suit. Therefore, there is no infirmity in the impugned order or the order declaring the suit to proceed ex parte.

11. Having appreciated the records and submission made by the learned counsel, this court is of the view that the premises on which the petition for condonation has been dismissed, cannot be sustained inasmuch as by filing an affidavit the appellants have stated that only on 24.01.2012, they first gathered the scanty knowledge that there was an ex parte decree against them. On 27.01.2012 they gathered the constructive knowledge of the judgment and decree and thereafter they applied for the certified copy of the judgment and decree. On 07.02.2012 they received the certified copy and it took 16 days for preparation of the memorandum of appeal.

The first appellate court has failed to take this context into consideration.

12. According to this court, the reasons/causes as assigned constitute sufficient cause to condone the delay inasmuch as on 12.05.2011, when the cost was deposited in the trial court, it is an admitted position that neither the counsel was present nor the application that was filed in the court was acknowledged by that counsel. Therefore, the knowledge of the appellants cannot be presumed, as stated by Mr. N. Majumder, learned counsel. As a result, the impugned order dated 30.03.2012 is set aside. In the result the delay in filing the first appeal being TA 03 of 2012 is condoned.

13. As consequence the order dated 30.03.2012 dismissing the Title Appeal No. 03 of 2012 is set aside and the said appeal is remanded for hearing in accordance with law. The District Judge, Unakoti Judicial District, Kailashahar shall hear the appeal as expeditiously as possible.

14. Hence, this appeal stands allowed. Draw the decree accordingly. LCRs be sent down thereafter.

JUDGE