

**THE HIGH COURT OF TRIPURA
AGARTALA**

RSA No.21 of 2012

1. Sri Ali Tripura,
son of late Bansi Sardar (Tripura)
2. Sri Dharma Tripura,
son of late Baisak Dhan Tripura
3. Sri Sachindra Tripura,
son of Sri Sib Chandra Tripura
4. Sri Milan Tripura,
son of late Kasam Roy Tripura,

all of Village-Kaladhepa,
PO & PS – Manubazar, Sabroom, South Tripura

.....Defendant-appellants

- Vs -

Sri Jamini Kumar Tripura,
son of late Mon Chandra Tripura,
Village-Kaladhepa, PO & PS – Manubazar,
Sabroom, South Tripura

.....Respondent-plaintiff

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

For the Defendant-appellants : Mr. R. Dutta, Advocate

For the respondent : Mr. D. K. Das Choudhury, Advocate

Date of hearing and delivery : **29.02.2016**
of Judgment and order

Whether fit for reporting : **NO**

Judgment and Order (Oral)

Heard Mr. R. Dutta, learned counsel appearing for the defendant-appellants as well as Mr. D. K. Das Choudhury, learned counsel appearing for the respondent-plaintiff.

02. This is an appeal under Section 100 of the CPC challenging the order dated 12.03.2012 delivered in Title Appeal

No.25 of 2011 whereby the appeal was consequentially dismissed as the connected petition for condonation of delay was dismissed. While admitting the appeal against the said order dated 12.03.2012 by the District Judge, South Tripura, Udaipur, this court had formulated the following substantial question of law:

"Whether the order passed by the First Appellate Court suffers from perversity?"

03. Mr. R. Dutta, learned counsel appearing for the defendant-appellants has submitted that entirely for the laches of the engaged counsel an *ex parte* decree could be passed by the Civil Judge, Sr. Divn., South Tripura in Title Suit No.16 of 2009 vide judgment and order dated 04.06.2010. The suit was filed for declaration of right, title and interest over the schedule land and for recovery of the possession from the land described in the Schedules-C, D & E by evicting the defendants No.1, 2, 3 and 4. However, the prayer for *mesne profit* has been dismissed by the trial court. By the said *ex parte* judgment, it has been observed that:

"The Plaintiffs right, title and interest over the entire A schedule land is declared. The plaintiff is entitled for recovery of possession of the C, D & E and rest land of A schedule except B Schedule land within A schedule Suit land after evicting the defendants No.1, 2, 3 & 4 from the said schedule C. D & E and rest land of A schedule. Except D Schedule of the suit land which is within A schedule of the suit land. After deliver of possession of the suit land in A schedule to the plaintiff, the defendants and their agents are perpetually restrained not disturbed or dispossess the plaintiff from the suit land in A schedule, neither the defendant nor their agents will enter into the suit land. Further defendant No.1 and also other defendants and their agents are perpetually restrained not to enter into B Schedule land and not to destruct or destroy rubber plantation of the B Schedule land.

The plaintiff is not entitled for any mesne profit. The cost of the suit be borne by the defendants as the plaintiff succeeded in the suit"

It has been also observed in the judgment that:

"The defendants did not contest the suit in a long run save and except filing once written statement at the one point of time denying whole extent of the prayer of the plaintiff in the suit."

04. According to the plaintiff, by virtue of the order of allotment dated 21.02.1980, Exbt.1, which has been recorded in the khatian, Exbt.2, as well as in the revisional cadastral map, Exbt.3, they have become the absolute owner of the Schedule-A land. The plaintiff has further submitted that out of greed the defendants had dispossessed them from the Schedules-C, D & E. Therefore, the plaintiff instituted the suit for recovery of the land, described in the Schedules-C, D & E, preceded by the declaration of title over the entire A schedule land along with the consequential decree restraining the defendants perpetually from interfering with the possession over the Schedule-B land, which is part of the Schedule-A and also for recovery of the land in the Schedules-C, D and E. The plaintiff sought that his possession shall not be disturbed by the defendants or by their agents.

05. Mr. Dutta, learned counsel appearing for the appellants has submitted that without preferring any application under Order-9, Rule-13 of the CPC the defendants filed an appeal after one year three months twenty seven days in the Court of the District Judge, South Tripura, Udaipur. According to Mr. Dutta, learned counsel, the counsel engaged by the defendants did not instruct them properly and they reposed full confidence in their counsel. But

when they gathered the knowledge that the said *ex parte* decree has been put on execution, they rushed to the counsel and gathered all the information and immediately filed the appeal accompanied by an application under Section 5 of the Limitation Act for condonation of the delay. By the impugned order the said application has been dismissed by the first appellate court.

06. Before the first appellate court, the defendant-appellants have stated that they are poor and rustic tribal people and their counsel did not inform them about the steps to be taken by them. When the bailiff of the executing court went to execute the decree, they came to know for the first time that the suit has been decreed by the trial court. When in the said circumstances, they contacted the counsel on 01.01.2011, no step could be taken for the long puja vacation in the court. Thereafter, when they filed it, in the meanwhile, a long delay has been registered. The first appellate court after perusing the records has observed that after filing of the written statement with some documents, the defendants did not take any step till 03.04.2010. As such, the first appellate court did not believe the version of the appellants as regards the cause of delay and accordingly the prayer for condonation was dismissed and as consequence of that, the appeal filed by the defendants was also dismissed.

07. Mr. Dutta, learned counsel has submitted that even though the appellants did not take any action against their counsel nor even did they issue a notice asking why he has acted in that fashion, but for lapse of the counsel engaged by them their

substantive right cannot be denied. The access to justice is a well recognised principle where effective representation is one of the vital elements. Lack of representation sometime unnecessarily gives a convenient handle to defeat the purpose of justice. In this regard, Mr. Dutta, learned counsel has relied on a decision of the apex court in ***Rafiq and another vs. Munshilal and another*** reported in ***AIR 1981 SC 1400*** where the apex court has observed as under:

"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A. K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. May be we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our sea! of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A. K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the

matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs. 200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A. K. Sanghi."

(Emphasis supplied)

08. Mr. Dutta, learned counsel has further submitted that when substantial justice and technical considerations are poised against each other, cause of substantial justice deserves to be preferred. In this regard Mr. Dutta, learned counsel has relied on the decision of ***Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji and others*** reported in ***AIR 1987 SC 1353***.

09. From the other side, Mr. D. K. Das Choudhury, learned counsel appearing for the respondent has submitted that the dismissal is simply not on the technical consideration but for deliberate non-representation that has been caused by the appellants, the Civil Judge, Sr. Divn., South Tripura was compelled to decide the case *ex parte*. Mr. Das Choudhury, learned counsel has further submitted that though the counsel engaged by the appellants did appear on most of the dates but on the material date, no step was taken by that counsel. It is difficult to believe that the appellants did not give any instruction on the appointed

days to the engaged counsel. Even the engaged counsel did not admit such fact in any form. As such, these pleas were rightly rejected by the first appellate court.

10. Having regard to the rival contentions and on scrutiny of the records as produced with the memorandum of appeal, this court is of the view that the appellants by filing the written statement had made out a case how they have been maintaining their possession. However, without making any observation on the merit, this court is of the view that even though the laches are manifest on the records but for substantial ends of justice, the delay as occurred in filing the first appeal be condoned for the substantive ends of justice and accordingly the delay is condoned. As consequence thereof, the impugned order dated 12.03.2012 is set aside.

11. Since the delay has been condoned, the first appellate court shall admit and hear the appeal being Title Appeal No.25 of 2012 on merit. It is made clear that the appellants and the respondent shall appear before the District Judge, South Tripura, Udaipur on 12.04.2016 when it would be considered whether the appeal could be admitted for hearing on merit. No notice shall separately be issued by the first appellate court for appearance of the parties. This order is made subject to payment of Rs.7,000/- (Rupees seven thousand) as costs to the plaintiff-respondent before the date as fixed by this court for appearance before the first appellate court, the District Judge, Gomati Judicial District,

Udaipur (formerly South Tripura Judicial District). Accordingly, this appeal stands allowed.

LCRs be sent down after preparation of the decree.

Copy of this judgment and order be furnished on special consideration to the learned counsel for the parties for their doing the needful.

JUDGE

MB