

**HIGH COURT OF TRIPURA
AGARTALA
RSA No.21 of 2024**

Sri Dipak Chandra Sarkar and another
..... Appellant(s)
V E R S U S

Sri Sunil Chandra Sarkar and others
..... Respondent(s)

For Appellant(s)	:	Mr. Somik Deb, Senior Advocate. Mr. P. Chakraborty, Advocate.
For Respondent(s)	:	None.

HON'BLE MR. JUSTICE S.D. PURKAYASTHA
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31/05/2024

Heard Mr. Somik Deb, learned senior counsel assisted by
Mr. P. Chakraborty, learned counsel for the appellants.

[2] Mr. Somik Deb, learned senior counsel submits that initially one Sunil Chandra Sarkar instituted T.S. No. 32 of 1979 for declaration of his right, title and interest and for recovery of possession against one Manik Sarkar, wherein predecessor of the present appellants namely, Suresh Chandra Sarkar was made a pro-defendant. The said suit was partly decreed in favour of Sunil Chandra Sarkar and thereafter, against the same the principal defendant Manik Sarkar as well as proforma defendants Suresh Chandra Sarkar and Ajit Sarkar preferred Title Appeal No.36 of 1998 and the plaintiff Sunil Chandra Sarkar also preferred one cross objection and both the appeal and cross objection were disposed of by a judgment dated 18.05.1989 whereby cross objection was

allowed and the appeal of the defendants was dismissed. Then, one second appeal was preferred before this Court by all the three defendants and the matter was remanded to the trial court for fresh decision after holding local investigation.

[3] According to Mr. Deb, learned senior counsel, thereafter, the trial court dismissed said T.S. No. 32 of 1979 on 23.08.2005 and then, said Sunil Chandra Sarkar preferred Title Appeal No.03 of 2006 in the Court of learned Additional District Judge, Sonamura and said appeal was allowed by the Court granting declaration of right, title and interest of Sunil Chandra Sarkar and also recovery of possession in respect of a part area of 0.12 acre of Plot No.1043 pertaining to Khatian No.500 of Mouja- Nabadwip Chandra Nagar. Thereafter, second appeal bearing No.RSA 20 of 2007 was filed by said defendant No.1, Manik Sarkar and defendant No.3, Ajit Sarkar. It is also pointed out by learned senior counsel that while the matter was remanded to the trial court by this Court, said Suresh Chandra Sarkar had already died but his legal representatives were not substituted and the suit continued against a dead person culminating to passing of a decree against a dead person which was even affirmed by the learned Additional District Judge, Sonamura and in the second appeal, this Court also affirmed the judgment of the learned First Appellate Court and in second appeal also the legal representatives of late Suresh Chandra Sarkar were not impleaded or substituted.

[4] Mr. Deb, learned senior counsel further submits that said Sunil Chandra Sarkar thereafter filed a execution case bearing No.EX(T) 03 of 2015 in the Court of the learned Civil Judge, (Junior Division), Court No.1, Sonamura. In that case, the legal representatives of late Suresh Chandra Sarkar i.e. present appellants submitted a petition under Order XXI Rule 97 and 99 CPC which was numbered as Civil Misc. 08 of 2015 and was rejected by order dated 30.11.2021. Against said rejection order, the legal representatives of said late Suresh Chandra Sarkar preferred a civil revision before this Court vide No.CRP 34 of 2022 which was dismissed by judgment dated 31.07.2023 holding that the petitioners were not the third party stranger in the lis. Thereafter, the said legal representatives of late Suresh Chandra Sarkar preferred a Title Appeal No.12 of 2023 before the Court of learned District Judge, Sepahijala, Sonamura along with a petition filed under Section 14 of the Limitation Act for exclusion of time in preferring that appeal which was dismissed by the impugned order dated 08.04.2024 in Civil Misc. (Condo) 15 of 2023 and against said rejection order the present appeal has been preferred.

[5] Mr. Deb, learned senior counsel to support his submission that the regular second appeal is maintainable in view of provision of Rule 103 of Order XXI, CPC read with Section 100 CPC, submits that though the petition for exclusion of limitation period was dismissed, it has its effect in the decision of the main appeal and therefore, it was ultimately a decision in the appeal

bearing No.Title Appeal 12 of 2023 and as such the regular second appeal is maintainable. In support of his submission, learned senior counsel relied on a decision of Hon'ble Supreme Court in ***Shyam Sundar Sarma vs. Pannalal Jaiswal & Ors. [(2005) 1 SCC 436]*** and more particularly Para No.10 of the judgment. Learned Senior Counsel also relied on another decision of full Bench of Kerala High Court in ***Thambi vs. Mathew & Anr. [1987 SCC OnLine Ker 99]***.

[6] Mr. Deb, learned senior counsel submits that in the present execution petition bearing No.EX(T) 03 of 2015, order has been passed for execution of that decree and the date for that purpose is fixed today itself.

[7] Regarding exclusion of limitation period during Covid 19 phase, learned senior counsel also relied on another decision of Hon'ble Supreme Court in ***Cognizance for Extension of Limitation, In RE [(2022) 3 SCC 117]*** particularly Paragraphs No.5 to 5.4 of the said decision. Learned senior counsel also submits that some period was consumed by filing revision petition in wrong forum by preferring CRP No. 34 of 2022. According to learned senior counsel, when an order passed under the provision of Order XXI Rule 97 and 99 was an appealable order, in that case, exercising of jurisdiction by this Court under Section 115 of CPC itself was beyond the jurisdiction and therefore, the present appellants were entitled to get said period excluded from

computation of limitation. Learned senior counsel however, informs the Court that against the said final order of CRP, no further challenge was made in any higher forum but according to him, when the Court itself lacks in jurisdiction, any order passed itself is non-est in the eye of law. Learned senior counsel also referred to an additional written statement submitted by Manik Sarkar and Ajit Sarkar in the original suit informing that Suresh Chandra Sarkar died long ago and in spite of that his legal representatives were not substituted and both the trial court and First Appellate Court continued to dispose of the matter without impleading them. Learned senior counsel also referred to a decision of Hon'ble Supreme Court in ***Gurnam Singh (Dead) Through Legal Representatives & Ors. vs. Gurbachan Kaur (Dead) by Legal Representatives [(2017) 13 SCC 414]*** Para 14 to 21 and submits that any decree passed in that suit or in the appeal are not binding on the present appellants.

[8] Considered the submission of Mr. Deb, learned senior counsel and also perused the record.

[9] From the petition submitted before the learned District Judge, Sonamura, it is found that prayer was made for condoning delay of 743 days in filing the appeal bearing No.TA 12 of 2023. In the petition though the relevant provision was mentioned as Section 14 of Limitation Act, 1963 but averments in the contents of the petition were made that some delay was occasioned due to

pendency of CRP No.34 of 2022 before this Court and also thereafter, in collecting certified copy of the order of this Court, absence of Mr. Deb, learned senior counsel from the station and also absence of one of the appellant from the station, collection of brief file from the previous learned counsel etc. and according to the present appellants, the total delay of 743 days in preferring said appeal was occasioned for these reasons. Thus, it appears that the condonation for delay was sought both on the ground of proceeding bona fide in said CRP No.34 of 2022 and also on other grounds as stated above. Said petition was rejected by an exhaustive order dated 08.04.2024 by learned District Judge, Sonamura passed in Civil Misc. (Condo) 15 of 2023 holding that the appellants failed to show sufficient cause for not preferring the appeal within the stipulated period. Incidentally, said First Appellate Court also made certain observations on the merit of the appeal based on the observations made by this Court in said CRP No.34 of 2022 to the effect that the petitioner of said revision petition was not a third party to the original suit.

[10] According to learned senior counsel, based on the said rejection order dated 08.04.2024, the original appeal bearing No. TA 12 of 2023 was also not admitted. Learned senior counsel tried to impress upon the Court that said order dated 08.04.2024 passed in said Civil Misc. (Condo) 15 of 2023 had direct affect upon the said TA 12 of 2023 for which said Title Appeal was also not admitted and was consequently dismissed and therefore, said

impugned order passed in Civil Misc. (Condo) 15 of 2023 is an appealable order.

[11] In ***Shyam Sundar Sarma (Supra)***, Hon'ble Supreme Court held that a petition under Order IX Rule 13 CPC would not lie in view of the filing of an appeal against the decree by the appellant and the dismissal of appeal though for default, since a dismissal for default or on the ground of it being barred by limitation cannot be equated with a withdrawal of the appeal. Hon'ble Supreme Court also took into consideration of the full bench decision of Kerala High Court in ***Thambi (Supra)*** observing that in said case it was held by the High Court that an appeal presented out of time was never the less an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be subject of a second appeal and introduction of Rule 3A of Order XLI CPC did not in any way affect that principle.

[12] If for the time being, the argument of Mr. Deb, learned senior counsel is accepted that the regular second appeal is maintainable, but on perusal of the record it is found that the impugned order challenged in TA 12 of 2023 was the order dated 30.11.2021 passed in Civil Misc. 08 of 2015 by the learned Executing Court and the appeal was preferred in the month of December, 2023 or thereafter and CRP No.34 of 2022 was dismissed by this Court on 31.07.2023. In the case ***Cognizance for Extension of Limitation, In RE (Supra)***, Hon'ble Supreme

Court was pleased to exclude the period of limitation from 15.03.2020 till 28.02.2022 and not beyond that. Even if the benefit of Section 14 of Limitation Act is provided to the appellants, CRP No.34 of 2022 was already disposed of on 31.07.2023 as indicated above. The grounds for delay after said date as averred by the appellants in their petition for condonation of delay before the learned First Appellate Court was also discussed by the learned First Appellate Court in the impugned order 08.04.2024. Even if said grounds for delay in filing said first appeal is taken into consideration by this Court, no substantial question of law is found available in favour of the appellants requiring its formulation by this Court for admitting this appeal. Said CRP No.34 of 2022 was preferred by the present appellants themselves wherein plea of death of father of appellants was also raised before this Court and this Court also observed that the present appellants cannot be termed as third party or a stranger in the suit to have the benefit of Order XXI Rule 97 CPC and ultimately, rejected the revision petition. The present appellants did not challenge that order before any higher forum and therefore, now they cannot avoid the decision of the said revision petition stating that the revision petition was not maintainable and therefore, was not binding on them.

In view of above, no substantial question of law is found involved in the present appeal and accordingly, the appeal is not admitted and disposed of.

Communicate copy of this Order to the learned Executing Court as well as First Appellate Court.

Pending application(s), if any, shall also stand disposed of.

JUDGE

Rudradeep

RUDRADEEP BANERJEE

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BANERJEE
Date: 2024.06.01 11:55:21 +05'30'



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