

GAHC010014792014



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP/289/2014

SMT MOMI SHARMA
W/O LT. RATNAJYOTI SHARMA, R/O H/NO 3, PUB SILPUKHURI, P.S.
CHANDMARI, GHY-3, DIST- KAMRUP METRO, ASSAM

VERSUS

JATINDRA KUMAR MEDHI @ JATINDRA MEDHI
S/O LT. RAMESH MEDHI @ RAMESH CHANDRA MEDHI, R/O BARUAPARA,
GARAL, P.S. AZARA, GUWAHATI, DIST- KAMRUP METRO, ASSAM

2:PHULO MEDHI
D/O LATE RAMESH MEDHI @ RAMESH CHANDRA MEDHI.

4:NRIPEN CH. MEDHI
S/O LT. RAMESH MEDHI @ RAMESH CHANDRA MEDHI

5:UMESH CHANDRA BORA
S/O GOBINDA BORA

6:PADMA RAM BORA
S/O GOBINDA BORA
NO.2 TO 6 ARE R/O BARUAPARA GARAL P.S. AZARA
GUWAHATI
DIST- KAMRUP METRO
ASSA

Advocate for the Petitioner : MR.R SARMA

Advocate for the Respondent : MR.S P CHOUDHURY

**BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI**

ORDER

Heard Shri R Sarma, learned counsel for the petitioner, who has filed this petition under Article 227 of the Constitution of India against an order dated 05.09.2013 passed by the learned Civil Judge No. 3, Kamrup, Guwahati in Petition No. 2562/2013 filed in connection with TS No. 7/2012.

2. The suit was instituted by the petitioner for specific performance of a contract. It is the case of the petitioner that her husband had paid a major part of an agreed amount for purchase of a plot of land and accordingly, the suit was instituted for specific performance. It has been projected that since the petitioner was having financial difficulties, the Court Fee could not be paid at the time of institution of the suit which was to be paid subsequently. However, when the matter was taken up, there was non-appearance and accordingly, the suit was dismissed for default on 21.09.2012. Thereafter, the Petition No.2562/2013 was filed for restoration of the suit. However, the said petition has also been rejected vide the impugned order dated 05.09.2013 as the petitioner had defaulted in appearance.

3. Shri Sarma, learned counsel for the petitioner submits that the order of rejection may be interfered with and an opportunity be granted to the petitioner to continue with the suit as she is in a position to deposit the necessary Court Fee.

4. *Per contra*, Shri SP Choudhury, learned counsel for the respondent no. 1 has submitted that even without going into the merits of the case, the instant petition is not maintainable as the impugned order dated 05.09.2013 is an appealable order. He submits that the suit was instituted on 03.01.2012 and for about 6 months, no steps were taken for deposit of the Court Fee as would reflect from the order dated

10.07.2012. He further submits that on 21.09.2012, the suit was dismissed for non-prosecution whereafter the aforesaid Petition No. 2562/2013 was filed which was also not pursued leading to passing of the impugned order dated 05.09.2013. By drawing the attention of this Court to Order XI Rule 9 of the CPC, the learned counsel submits that the said provision grants an opportunity to a plaintiff to apply for an order to set aside an order of dismissal for default as a fresh suit is barred. Reference has also been made to Order XLIII Rule 1 (c) as per which, any order passed under Order IX Rule 9 rejecting an application of an order to set aside the dismissal of a suit is an appealable order. Shri Choudhury, learned counsel further submits that the conduct of the petitioner has been found to be consistently irregular and there is lack of due diligence to pursue the suit.

5. After hearing the parties, this Court is of the opinion that without even going into the merits of the case, the provision contained in the CPC clearly provides for filing an appeal against an order passed in a petition filed under Order IX Rule 9 of the CPC. There is no manner of doubt that the impugned order dated 05.09.2013 has been passed in a petition to set aside an order of dismissal for default and such application has been preferred by the petitioner who was the plaintiff.

6. In view of the aforesaid provision of law, this Court is of the opinion that the present petition is not maintainable and accordingly, the same is dismissed.

JUDGE

Comparing Assistant