

**HIGH COURT OF TRIPURA  
AGARTALA**

**CRP No.37 of 2024**

1. Prasenjit Shome, son of Late Manmohan Shome, Partner & Attorney of M/s Uma Bricks Industries, South Sonaichari, resident of village Netaji Pally, PO & PS- Belonia, District- South Tripura.
2. Smt. Chhanda Choudhury, wife of Late Srimanta Majumder, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village- Arjya Samaj, PO & PS- Belonia, District- South Tripura.
3. Sri Pulak Majumder, son of Late Srimanta Majumder, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village- Arjya Samaj, PO & PS- Belonia, District- South Tripura.
4. Sri Babul Silsarma, son of Late Kumud Silsarma, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village- Netaji Pally, PO & PS- Belonia, District- South Tripura.
5. Smt. Abha Sarkar (Roy), wife of Sri Priya Rn. Roy, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village- Jail Road, PO & PS- Belonia, District- South Tripura.
6. Sri Jagneswar Datta, son of Late Harendra Kr. Dutta, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village & PO- South Sonaichari, PS- Belonia, District- South Tripura.
7. Sri Bisweswar Datta, son of Late Harendra Kr. Dutta, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village & PO- South Sonaichari, PS- Belonia, District- South Tripura.
8. Smt. Sukla Dutta, wife of Late Gobinda Datta, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village & PO- South Sonaichari, PS- Belonia, District- South Tripura.
9. Miss Sanchita Datta, daughter of Late Gobinda Datta, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village & PO- South Sonaichari, PS- Belonia, District- South Tripura.
10. Miss Puja Datta, daughter of Late Gobinda Datta, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village & PO- South Sonaichari, PS- Belonia, District- South Tripura.
11. Miss Arpita Datta, daughter of Late Gobinda Datta, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village & PO- South Sonaichari, PS- Belonia, District- South Tripura.
12. Smt. Anju Datta, daughter of Late Sudhangshu Bhusan Datta, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village- Arjya Colony, PO & PS- Belonia, District- South Tripura.
13. M/s Uma Bricks Industries, a partnership firm, having its registered office at South Sonaichari, PS- Belonia, District- South Tripura, represented by its Partner & Attorney, namely, Sri Prasenjit Shome, son of Late Manmohan Shome, resident of village- Netaji Pally, PO & PS- Belonia, District- South Tripura. All the Plaintiff-Petitioners are being represented by their duly authorized Attorney, namely, Prasenjit Shome, son of Late Manmohan Shome (i.e., the Plaintiff-Petitioner No.1 herein).

.....Petitioner(s);

Versus

1. Smt. Samagata Sarkar, daughter of Late Sankar Prasad Sarkar, Partner of M/s Uma Bricks Industries, South Sonaichari, resident of village- Jail Road, PO & PS- Belonia, District- South Tripura.
2. Smt. Rikta Paul Sarkar, wife of Late Sankar Prasad Sarkar, resident of village-Jail Road, PO & PS- Belonia, District- South Tripura.
3. Sri Souvik Sarkar, son of Late Sankar Prasad Sarkar, resident of village- Jail Road, PO & PS- Belonia, District- South Tripura.

.....Respondent(s)

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For Petitioner(s) : Mr. Koomar Chakraborty, Advocate.

For Respondent(s) : Mr. Ratan Datta, Advocate,  
Mr. Aditya Baidya, Advocate,  
Mr. Diptanu Das, Advocate.

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**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH**

**Order**

**27/09/2024**

Heard Mr. Koomar Chakraborty, learned counsel for the petitioners and Mr. Ratan Datta, learned counsel for the respondents.

2. Title Suit No.03 of 2014 preferred by the plaintiff-petitioner herein was rejected under Order VII Rule 11(d) of CPC vide order dated 21<sup>st</sup> August, 2015 by the learned Civil Judge (Senior Division), South Tripura, Belonia. Plaintiff-petitioner preferred Title Appeal No.05 of 2015 against the order of rejection which was allowed on 20<sup>th</sup> December, 2018. Thereafter, it seems that petitioner could not submit the deficit Court Fee even after few adjournments granted vide order dated 24<sup>th</sup> July, 2019 and 29<sup>th</sup> July, 2019 by the learned Court of Civil Judge (Senior Division), South Tripura, Belonia. As a consequence thereof, it was dismissed for non-prosecution on 5<sup>th</sup> August, 2019. Meanwhile, the defendants in the Title Suit and Title Appeal preferred RSA No.39 of 2019 against the order dated 20<sup>th</sup> December, 2018 in Title Appeal No.05 of 2015. RSA No.39 of 2019 was ultimately withdrawn on 4<sup>th</sup> January,

2021. Plaintiff-petitioner preferred an application under Order IX, Rule 10 of CPC in November, 2020 with an application for condonation of delay of 232 days counted from 6<sup>th</sup> August, 2019 to 24<sup>th</sup> March, 2020. The same was rejected by order dated 19<sup>th</sup> April, 2021 which is under challenge in the present revision petition under Article 227 of the Constitution of India. One more fact needs to be indicated herein to complete the chronology of events. Petitioner on an erroneous advice preferred miscellaneous appeal under Order XLIII Rule 1 of CPC against the order dated 19.04.2021 before the learned District Judge, South Tripura, Belonia, in Misc. Appeal No.02 of 2021 which was dismissed as not maintainable vide order dated 28.02.2024. Thereafter, the instant revision petition was preferred on 16<sup>th</sup> April, 2024.

3. Mr. Koomar Chakraborty, learned counsel for the petitioners, submits that the learned Court did not consider the explanation furnished by the plaintiff for condonation of delay of 232 days during which period, a regular second appeal was filed and pursued by the respondents against the revival of the title suit. Therefore, petitioner was bearing a bona fide belief that the learned Trial Court may not be proceeding with the title suit. Petitioner's vital right, interest in seeking the relief prayed for in Title Suit No.03 of 2014 may be closed for all purposes if the suit is not revived. Learned counsel for the petitioner has drawn the attention of the Court to the orders dated 24.07.2019 and 29.07.2019 [Annexure-3] to show that on the request of learned counsel for the plaintiff, time was allowed to remove the deficit Court Fee. The regular second appeal had been filed on 27.06.2019 itself. The status report of filing of the regular second appeal has been enclosed at Page 37 of the petition.

However, only for non-appearance on one day after 29.07.2019 i.e. on 05.08.2019, the suit was dismissed for non-prosecution [Annexure-4]. Thereafter, the respondents withdrew the regular second appeal on 04.01.2021 [Annexure-5]. A review petition invoking Order IX Rule 10 of the CPC was preferred in November, 2020 with an application for condonation of delay of 232 days counted from 06.08.2019 to 24.03.2020 when COVID-19 intervened. This has been rejected by the impugned order without considering that during pendency of the second appeal preferred by the respondents, the petitioner under a bonafide impression that learned Trial Court may not proceed with the matter. Learned counsel for the petitioners submits that delay is not inordinate and also properly explained. He however further submits that instead of invoking the provisions of Order IX Rule 4 of the CPC, erroneously, the learned counsel representing the plaintiff-petitioner had invoked the provision of Order IX Rule 10 with a nomenclature of review petition. Plaintiff should not be made to suffer for mistake of his counsel. He also submits that mere non-mentioning of an incorrect provision should not be fatal to the application if the power to pass such an order is available with the Court as has been held by the Apex Court in the case of *Pruthvirajsinh Nodhubha Jadeja v. Jayeshkumar Chhakaddas Shah and Others* reported in (2019) 9 SCC 533 in context of exercise of powers by the trial Court under Civil Procedure Code, 1908 itself. The correct provision for realization of the suit should have been Order IX Rule 4 of the CPC. Therefore, the impugned order may be set aside. The suit may be restored to be decided upon proper contest between the parties.

4. Mr. Ratan Datta, learned senior counsel for the respondents, has strongly opposed the prayer. He submits that right from the outset, the plaintiff has not been diligent in prosecuting the suit as initially it was rejected under Order VII Rule 11(d) of the CPC. Thereafter, litigation pursued and the suit was restored by the First Appellate Court. Even thereafter petitioner was not diligent and did not deposit court fee despite thrice time being granted. Therefore, the learned Trial Court had no option but to dismiss the suit for non-prosecution. The regular second appeal preferred by the respondents was withdrawn on 04.01.2021 as there was no suit in existence. There was no stay of the trial Court proceedings during pendency of the regular second appeal. Moreover, even after dismissal of the petition styled as review petition preferred under Order IX Rule 10 incorrectly, petitioner, instead of pursuing his remedy under Article 227 of the Constitution of India, had filed a miscellaneous appeal under Oder XLIII Rule 1 of CPC which was held to be not maintainable by the learned District Judge, South Tripura, Belonia in Misc. Appeal 02 of 2021 vide order dated 28.02.2024. The instant revision petition has been preferred on 16.04.2024 which shows the lack of diligence in prosecuting the suit in a proper manner leading to unnecessary harassment of the respondents. Learned counsel for the respondents has relied upon a decision of the Apex Court in the case of *Mohamed Ali v. V. Jaya and Others* reported in (2022) 10 SCC 477 on the proposition that application against an ex parte decree in revisional jurisdiction under Article 227 of the Constitution of India should not be entertained since the correct remedy lies under Order IX Rule 13 of the CPC. As such, this Court may not interfere in the matter.

5. I have considered the submission of learned counsel for the parties and taken note of the relevant dates and events in the journey of this litigation starting from institution of the Title Suit No. 03 of 2014 till now. The chronology of facts needs no repetition but the question here before this Court is whether the learned Court was right in rejecting the petition for setting aside the dismissal of the suit for non-prosecution by condoning the delay of 232 days. An incidental question which also arises is whether the petition for restoration styled as 'Review Petition' invoking Order IX Rule 10 of the CPC instead of 'Restoration Petition' under Order IX Rule 4 of the CPC could be entertained by the learned Trial Court.

6. It is well settled that procedural law is handmaiden of justice. In the instant case, invocation of a wrong provision under the same Order IX could not be attributed to the party but to the counsel. For such a mistake of the counsel, litigant should not be allowed to suffer. Even otherwise if the power exists with the authority or the Court, mere non-mentioning or wrong mentioning of the provisions would not denude the Court from the power to pass such an order if it is available with the Court. This is the view also held by the Apex Court in the case of *Pruthvirajsinh Nodhubha Jadeja* (supra) at Para 8 in the context of filing of application under Order I Rule 10 of the CPC instead of Order XXII Rule 10 of the CPC by the respondents therein. Learned counsel for the respondents has placed reliance upon a decision in the case of *Mohamed Ali* (supra). However that decision is on the proposition as to whether the High Court under Article 227 of the Constitution of India should have entertained a challenge to an ex parte decree without exhaustion of the

remedy by the plaintiff by invoking the provisions under Order XLIII Rule 1 of the CPC. It is in those circumstances that the Apex Court observed that the approach of the High Court in entertaining an application under Article 227 without exhaustion of the remedy of regular first appeal available under Order XLIII Rule 1(d) of the CPC was not correct.

7. Having regard to the facts and circumstances noted above therefore wrong invocation of a provision by the plaintiff-petitioner for restoration of the title suit should not have prevented the Trial Court from entertaining the petition for the reasons discussed hereinabove. While dealing with the first issue posed earlier, it is apparent that the title suit was dismissed for non-deposit of the deficit Court Fee only on one date of non-appearance of the plaintiff, i.e. 05.08.2019 though adjournments had been granted earlier on two dates to supply the deficit Court Fee. It is also apparent that during that time, a regular second appeal had been preferred by the respondents against the order of the First Appellate Court whereby the appeal preferred by the plaintiff against the order of rejection of the plaint under Order VII Rule 11(d) of the CPC was allowed. Incidentally the second appeal remained pending till it was withdrawn on 04.01.2021, obviously on account of dismissal of the title suit. Be that as it may, the facts and events disclose that the explanation for the delay of 232 days was not suffering from lack of bona fides. No purpose could have been achieved by the petitioner by the delay in filing the restoration petition for prosecuting the suit. The rejection of the plaint on grounds of Order VII Rule 11(d) or filing of review petition instead of restoration petition under the correct provision of Order IX Rule 4 or erroneously filing of a miscellaneous appeal

under Order XLIII Rule 1 of the CPC, could not be attributed to the litigant. Petitioner has preferred the present application under Article 227 of the Constitution of India after the miscellaneous appeal erroneously preferred under Order XLIII Rule 1 of CPC dismissed on 28.02.2024. Though there are no specific limitation provided for invocation of the jurisdiction of the Court under Article 227 of the Constitution of India but the time spent in prosecuting the appeal before a forum or Court in good faith which lacked jurisdiction to entertain the appeal could be sought to be excluded under Section 14 of the Limitation Act, 1963.

8. Therefore, taking a holistic view of the matter and for reasons recorded hereinabove, this Court is inclined to interfere in the impugned order dated 19.04.2021 rejecting the prayer for restoration of the title suit. The impugned order is accordingly set aside and the delay in seeking restoration of the suit is condoned. Let the suit be restored to its original file. The deficit Court Fee, if any, in the pending suit be removed within a period of 2(two) weeks. Petitioner shall pay a cost of Rs.5,000/- to the respondents within a period of 2(two) weeks.

9. With the aforesaid observations and direction, the instant revision petition is disposed of.

**(APARESH KUMAR SINGH), CJ**

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