

**HIGH COURT OF TRIPURA
AGARTALA**

SAO No.2 of 2023

Sri Amar Roy, S/o Late Hrishikesh Roy, Village-Pecarthal, P.O/P.S-Pecarthal,
District-North Tripura at present – Unakoti.

..... Appellant (s).

Versus

1. Smt. Bani Roy, W/o Late Babul Roy, Village-Pecarthal, P.O/P.S-Pecarthal,
District-North Tripura at present – Unakoti.
2. Miss Barnali Roy, D/o Late Babul Roy, Village-Pecarthal, P.O/P.S-
Pecarthal, District-North Tripura at present – Unakoti.
3. Miss Barni Roy, D/o Late Babul Roy, Village-Pecarthal, P.O/P.S-Pecarthal,
District-North Tripura at present – Unakoti.
4. Smt. Bharati Roy, D/o Late Babul Roy, Village-Pecarthal, P.O/P.S-Pecarthal,
District-North Tripura at present – Unakoti.
5. Smt. Sebika Roy, W/o Late Babul Roy, C/o Bhabatosh Roy, AOT Para, PS-
Manughat, District-Dhalai.
6. Smt. Laxmi Rani Roy (Das), W/o- Shri Badal Das of Rabindra Sarani, PS-
Dharmanagar, District-North Tripura.
7. Smt. Rina Roy (Das), W/o Sri Muhit Lal Das of Baruakandi, PS-
Dharmanagar, District- North Tripura.
8. Smt. Bina Roy, W/o Sri Gunasindhu Roy of Mddya Para, Khayerpur,
Agartala, District – West Tripura.

..... Respondent (s).

For Appellant (s) : Mr. Biswanath Majumder, Advocate.

For Respondent(s) : Mr. S. M. Chakraborty, Senior Advocate,
Mrs. P. Chakraborty, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Order

24/05/2024

Heard Mr. Biswanath Majumder, learned counsel for the appellant
and Mr. S. M. Chakraborty, learned senior counsel assisted by Mrs. P.
Chakraborty, learned counsel for the respondents.

[2] This is an appeal under Section 100 of the Code of Civil Procedure
to set aside the impugned order dated 11.05.2023 along with the consequential
orders passed by the Additional District Judge, North Tripura, Dharmanagar in
connection with Civil Misc. (Condo) No. 20 of 2020 arising out of Title Appeal
No.06 of 2020 which was preferred by the appellant against the judgment of
preliminary decree dated 23.09.2013 and final decree dated 30.07.2015 passed by

the Civil Judge, Senior Division, Dharmanagar, North Tripura in T.S.(P) No.05/2011. By the impugned order dated 11.05.2023, the learned appellate Court rejected the application for condonation of delay of 2460 days in preferring the Title Appeal 06/2020 against the judgment of preliminary decree dated 23.09.2013 passed in T.S(Partition) No.05 of 2011. The operative part of the order dated 11.05.2023 is extracted hereunder:

“Ld. Counsel for the petitioner submitted that application for obtaining judgment and decree was filed on 30.05.2018 and obtained certified copy on 07.06.2018 and as petitioner is a business man he went out side state of Tripura for business purpose and could not attend before the Ld. Trial Court on the date of judgment on 23.09.2013 and therefore, had no knowledge about the judgment and decree. It is also submitted that Ld. Counsel Mr. B. B. Das was advocate of petitioner and he being busy could inform petitioner. It is also submitted that petition was filed in TS(P) 05 of 2011 for final decree and after hearing Ld. Trial Court passed order for appointment of Survey Commissioner for final partition and Survey Commissioner submitted report final decree was passed on 30.07.2015 and thereafter, execution petition was filed vide No. Civil Misc (Ex) 02 of 2018 and present petitioner appeared and raised objection and filed objection under Section 47 of CPC, which was rejected by order dated 25.05.2018 and thereafter petitioner filed Revision petition before the Hon’ble High Court of Tripura, vide No. CRP 54 of 2019 and due to technical defect the said petition was withdrawn on 17.09.2019 with a liberty to file fresh. Thus it is submitted that as proper remedy for the petitioner is to prefer appeal against the preliminary decree and not file application under Section 47 of CPC. Petitioner filed appeal along with his condonation petition. It is further submitted the delay occurred for drafting of appeal etc. Thus, Ld. Counsel for the petitioner prayed for condoning delay.

On the contrary Ld. Counsel for the OP No.3 and 7 submitted that delay of 7 years cannot be condoned without assigning valid and justified ground. It is also submitted that petitioner is negligent in not filing appeal within proper time even though had knowledge about the judgment and decree and appear in the execution case and contested the proceeding. Thus, Ld. Counsel for the OP No.3 and 7 prayed for rejection of the condonation petition.

In this context, I find, preliminary judgment and decree was passed on 29.09.2013 and 30.07.2013 and, thereafter, Survey Commissioner was appointed and final decree was passed on 30.07.2015 by accepting the report of Survey Commissioner. Thereafter, execution petition was filed on 14.07.2017 and petitioner received notice and raised objection under Section 47 of CPC and same was rejected on 25.05.2018 and petitioner preferred a revision petition before the Hon’ble High Court of Tripura but the same was withdrawn. On 24.09.2020 petitioner filed Title Appeal 06 of 2020 along with this condonation petition for condoning delay of 2460 days.

It appears from the petition of the petitioner that Ld. Trial Court passed judgment on 29.09.2013 but the petitioner applied for certified copy on 30.05.2018 and such delay cannot be said to without negligence. I am also of the view that petitioner had knowledge about the judgment and decree but failed to file appeal against preliminary

decree and filed this appeal after long delay. The reason assigned by the petitioner about the delay in preferring appeal is nothing but vague.

Therefore, considering all I am of the view that petitioner failed to show any justified ground to condone the delay of 2460 days.

Thus, present condonation petition is rejected.

The case is disposed on contest.

Make necessary entry in the TR and CIS.

Pronounced in the open court.”

[3] As a consequence thereof, the Title Appeal No.06/2020 was also dismissed by an order dated 11.05.2023 in the following terms:

“Ld. Counsel Mr. R. Bhattacharjee is present for the appellant by filing hazira.

Ld. Counsel Mr. H. Nath is present for respondent No.3 and 7 by filing hazira.

In view of order passed in Civil Misc(condo) 20 of 2020 whereby the petition filed by petitioner-appellant for condoning delay was rejected, I am of the view that the present case is also liable to be rejected and dismissed.

Accordingly the present case is dismissed uncontested.

Make necessary entry in TR and CIS.

Pronounced in the open Court.”

[4] Whether an order of the first appellate Court rejecting the application for condonation of delay preferred under Section 5 of the Limitation Act, 1963 raises any substantial question of law for entertaining this second appeal under Section 100 of the CPC?

[5] Mr. S. M. Chakraborty, learned senior counsel for the respondents at the outset has taken a preliminary objection to the maintainability of appeal as according to him under Section 100 of CPC, an appeal in the nature of a second appeal lies only against a decree. Rejection of an application for condonation of delay by the appellate Court does not amount to a decree. Moreover, he submits that the second appeal is entertainable only on substantial questions of law and there are no substantial questions of law involved as there is no decree in effect. No such substantial question of law has been formulated in the memo of appeal either. He has also drawn the attention of this Court to Section 104 of the CPC

which prescribes a class of orders which are appealable. It is submitted that even under that Section the instant second appeal would not lie. It is further submitted that the learned first appellate Court has rightly refused to condone the delay after going through the explanation urged by the appellant since not only was the preliminary decree prepared on 26.09.2013 in Title Suit(Partition) No.05/2011 but the final decree was also prepared on 30.07.2015 and the certified copy thereof was obtained on 30.05.2018 but the title appeal was preferred after a delay of seven years from the passing of the preliminary decree and judgment only in the year 2020.

[6] The plea of the petitioner that he had preferred an objection under Section 47 of the CPC in the execution case vide No. Civil Misc. (Ex) No.02 of 2018 which was dismissed and CRP No.54 of 2019 preferred before this Court aggrieved thereby was also dismissed as withdrawn, did not absolve the petitioner of the huge and un-explained delay of seven years in preferring the appeal before the first appellate Court against the preliminary decree of the learned Trial Court rendered on 26.09.2013 itself. It is also pointed out that since the preliminary decree was not even under challenge and during the period, the final decree was prepared on 30.07.2015, the preliminary decree has merged into the final decree and the shares of the parties have been duly identified and parties have got their possession of their respective shares in execution thereof. It is submitted that therefore, the appeal is not maintainable.

[7] Learned senior counsel for the respondents has also referred to the grounds raised before the first appellate Court in the Title Appeal No.06/2020, specially ground No.6 which is in fact contrary to the legal position. As per Schedule-I of the Hindu Succession Act, 1956, widow of the pre-deceased son is

a Class-1 heir and as such, the right to succession of such Class-1 share in a partition of Hindu undivided family is legally recognized. On all these grounds, therefore, the appeal is fit to be dismissed as not maintainable.

[8] Mr. Biswanath Majumder, learned counsel for the appellant has, however, reiterated the grounds raised for condonation of delay before the learned first appellate Court and submitted that there were genuine and sufficient cause for condonation of the delay. If the delay is not condoned, no adjudication on the merits of his title appeal could take place though the appellant has good grounds to substantiate the challenge. Learned counsel for the appellant has tried to impress that under Section 100 of the CPC, the appeal is maintainable since even an order passed by the first appellate Court assumes the character of a judgment and decree.

[9] I have considered the submissions of the learned counsel for the parties and taken note of the relevant materials placed on record including the preliminary objection taken by the respondents as to the maintainability of the appeal. The application for condonation of delay was rejected by the first appellate Court as there was no sufficient cause shown for a huge delay of 2460 days in preferring the first appeal. Meanwhile, the preliminary decree passed by the trial Court in Title Suit (P) No.05/2011 dated 26.09.2013 had merged with the final decree prepared on 30.07.2015. The order of the First Appellate Court does not suffer from any perversity which could be termed as a substantial question of law for entertaining this Second Appeal under Section 100 of the CPC. Even though the Appellant was aware of the judgment and decree of the First Appellate Court after obtaining the certified copy thereof on 07.06.2018, he chose to sit over the matter and instead filed objection under Section 47 of the

CPC in the execution proceedings. The possession of the parties on execution of the decree has become final and as such in such circumstances, this Court does not find any perversity in the impugned order to entertain this appeal. Accordingly, the instant appeal is dismissed. Pending application(s), if any, also stands disposed of. Send down the LCRs forthwith.

(APARESH KUMAR SINGH), CJ

