

GAHC010038152022



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

Case No. : CRP/19/2022

PUSHPITA DEVI

D/O- LATE RAKTA CHANDRA SINGHA, R/O- IDGA ROAD, ITKHOLA,
SILCHAR, P.O. BARAKPAR, P.S. SILCHAR, DIST. SILCHAR, ASSAM

VERSUS

MINATI DAS

D/O- LATE NAGAR BASI DAS, R/O- JOGESH ROAD, TARAPUR, P.O. AND P.S.
SILCHAR, DIST. CACHAR, ASSAM, PIN- 788001.

Advocate for the petitioner(s): Mr. S Sahu

Advocate for the respondent(s): Mr. C Gogoi

B E F O R E
HON'BLE MR. JUSTICE DEVASHIS BARUAH
ORDER

06.05.2024

This is an application under Section 115 of the Code of Civil Procedure (for

short, the Code) challenging the order dated 08.12.2021 whereby the learned Court of Civil Judge No.1 Cachar, Silchar had restored the suit by allowing the Misc.(J) Case No.89/2019.

2. I have heard Mr. S Sahu, the learned counsel appearing on behalf of the petitioner and Mr. C Gogoi, the learned counsel appearing on behalf of the respondent.

3. The learned counsel appearing on behalf of the petitioner submits that when a suit is dismissed in terms with Order IX Rule 5, the recourse available is to file a fresh suit, that too, within a period of limitation in terms with Order IX Rule 5(2). He, therefore, submits that the application so filed by the plaintiff for restoration of the suit was not at all maintainable and, accordingly, the learned Trial Court had committed jurisdictional error in passing the order dated 08.12.2021.

4. On the other hand, Mr. C Gogoi the learned counsel appearing on behalf of the respondent submitted that the application had been filed under Order IX Rule 9 for restoration of the suit, but the fact remains that Order IX Rule 5 was not at all applicable taking into account that it has been categorically mentioned in the impugned order that on 11.03.2019 the summons were duly served upon the defendant. The learned counsel submitted that Order IX Rule 5 would have application, if the summons upon the defendant returned un-served. The learned counsel further expanding his arguments submitted that in the instant case, it a mistake being committed by the Court which had caused prejudice to

the plaintiff and as such the Court was justified to recall the order and this power is engraved in the Court under Section 151 of the Code to do complete justice.

5. This Court has perused the impugned order dated 18.12.2021 and from the impugned order, it is seen that it is categorically mentioned that the summons was served upon the defendant on 11.03.2019. It was also mentioned that the service report given by the process server was specific that as the defendant was not found in his residence summons was served upon one of her adult male family member sharing the same mess.

6. Taking into account that in the said suit, there was only one defendant and the summons stood served on 11.03.2019, the order dated 08.08.2019 could not have been passed by the learned Trial Court in exercise of the powers under Order IX Rule 5 of the Code.

7. This Court has duly taken note of that the learned Trial Court vide the impugned order dated 08.12.2021 had duly accepted that it was the mistake on the part of the learned Trial Court in passing the order dated 08.08.2019 and accordingly had recalled the said order. This Court in exercise of the powers under Section 115 of the Code does not find any jurisdictional error in the order dated 08.12.2021 for which the instant petition stands dismissed.

8. This Court duly takes note of that the petitioner is now aware of the suit being pending and, as such, the parties herein i.e. both the plaintiff and the defendant shall appear before the learned Trial Court on 18.06.2024.

9. With the above, the instant petition stands disposed of.

JUDGE

Comparing Assistant