

**HIGH COURT OF TRIPURA  
AGARTALA  
RSA No.36 of 2024**

- 1. Sri Badal Chandra Das**, aged 57 years  
S/O Lt. Chandi Charan Das,
- 2. Sri Subhash Chandra Das**, aged 62 years  
S/O Lt. Chandi Charan Das,  
  
Both residents of Ambassa Ward no.9,  
Near Pramila Guest House, P.O.-Ambassa,  
District- Dhalai Tripura, Pin-799289.

----- Plaintiff-Appellants

Versus

**Sri Babul Deb**,  
S/O Lt. Binod Deb,  
Resident of Ambassa Ward No.9, K P Colony,  
Near Gita Bajaj, P.O. & P.S. Ambassa,  
District- Dhalai, Tripura, Pin-799289.

----- Defendant-Respondents

|                                                      |   |                     |
|------------------------------------------------------|---|---------------------|
| For Appellant(s)                                     | : | Mr. Dipak Deb, Adv. |
| For Respondent(s)                                    | : | None.               |
| Date of hearing &<br>delivery of<br>Judgment & Order | : | 22.04.2025          |
| Whether fit for<br>reporting                         | : | YES                 |

**HON'BLE MR. JUSTICE BISWAJIT PALIT**

**Judgment & Order (Oral)**

This appeal under Section 100 of CPC is preferred challenging the judgment dated 15.06.2024 delivered by Learned Additional District Judge, Dhalai, Ambassa in connection with case No.TA No.10 of 2023 which was dismissed on dismissal of Civil Misc(condonation) No.5 of 2023 (arising out of TA No.10 of 2023) filed for condonation of delay of 247 days in preferring the appeal against the judgment & decree dated 24.11.2022 delivered by Learned Civil Judge(Junior

Division), Dhalai, Ambassa, Court No.1 in connection with case No.T.S. No.2 of 2021.

Along with memo of appeal, another application was filed under Section 5 of the Limitation Act for condoning delay of 14 days in preferring the second appeal before this Court. Despite service of notice, the respondent did not appear before the Court, so, by order dated 31.01.2025, a co-ordinate bench of this High Court allowed the application for condonation of delay fixing the main case for hearing on admission.

**2.** Heard Learned Counsel Mr. Dipak Deb appearing on behalf of the appellant-plaintiffs. But despite service of notice, none appeared on behalf of the respondent.

**3.** This present appeal has been preferred by the original plaintiffs who filed a suit for declaration of right, title, and interest over the suit land, eviction and recovery of possession and for perpetual injunction. Learned Trial Court vide judgment dated 24.11.2022 in connection with case No.T.S. No.2 of 2021 dismissed the suit of the present appellant-plaintiffs and accordingly, consequential decree was passed.

Challenging that judgment and decree, the appellant-plaintiffs preferred an appeal under Section 96 of CPC before the Court of Learned District Judge, Dhalai District, Ambassa which was transferred to the Court of Learned Additional District Judge, Dhalai, Ambassa along with a separate application for condonation of delay which was numbered as Civil Misc.(condonation) No.5 of 2023 (arising out of TA No.10 of 2023). After hearing the appellant-plaintiffs by

order dated 15.06.2024, Learned Additional District Judge, Dhalai, Ambassa dismissed the application for condonation of delay of 247 days in preferring the appeal and by order dated 15.06.2024 also dismissed the main case which was numbered as TA No.10 of 2023.

**4.** In course of hearing, Learned Counsel for the appellants submitted that in the original suit, the judgment was delivered by the Learned Trial Court on 24.11.2022. The Advocate's clerk of the appointed advocate of the plaintiffs applied for certified copy of the judgment on 30.11.2022 and on 07.12.2022, the certified copy was collected and after receipt of the certified copy, it came to the knowledge of the appellants that the suit was dismissed and after that, the appellant-plaintiffs tried to contact with his lawyer for next course of action but could not contact with him and on 13.12.2021, the appellant-plaintiffs came to Agartala and met with their Advocate and discussed about the next course of action when the Learned Counsel advised to prefer appeal and accordingly, some time was consumed to prefer the appeal and on 28.12.2022, the plaintiff No.1 met with the Learned Counsel when Learned Counsel informed him that the appeal memo was not prepared and he was further advised to meet with the lawyer on 13.01.2023 but the Learned Counsel also failed to prepare the memo of appeal within that time. Being dissatisfied, he took back the file from the engaged counsel and after that, he returned back to Ambassa where he met with three advocates. They also could not give any proper advice to him and due to his financial inability, he could not engage proper lawyer and finally, he met with Advocate Abhijit Sengupta on 25.08.2023 who

drafted the memo of appeal and the same was filed. Thus, a total period of 247 days was consumed in preferring the appeal.

It was further submitted by the Learned Counsel for the appellants that the appellants being poor, rustic person of the village did not have sufficient financial means to engage a lawyer at Agartala to conduct their case properly and the lawyers although initially retained the file but finally they returned back the file in absence of sufficient fees for which there was some unintentional delay on the part of the appellants and lastly, when they met with Advocate Abhijit Sengupta at Agartala on 25.08.2023 then he assured to file the appeal and drafted the memo of appeal accordingly and later on, the same was submitted but the Learned 1<sup>st</sup> Appellate Court did not consider the grounds of delay in preferring the appeal by the present appellants and by the said order, dismissed the appeal and as the application for condonation of delay was dismissed, so, naturally the appeal preferred by the appellant was also dismissed.

**5.** At the time of hearing before this Court, a question arose whether this appeal under Section 100 of CPC would be maintainable or not since the appeal was dismissed without any merit on the ground that the condonation application was dismissed by the Learned 1<sup>st</sup> Appellate Court. On this issue, in course of hearing of argument, Learned Counsel for the appellants relied upon few citations.

A full bench of Calcutta High Court in a case of **Manuda Khateen and others v. Beniyan Bibi and others dated 12.08.1976** reported in **AIR 1976 CACUTTA 415** wherein in para Nos.3 and 4 observed as under:

"3. The referring Bench has noted a few conflicting decisions of this Court. In **Sudhansu Bhusan Pandey v. Majhe Bibi**, reported in (1938) 42 Cal WN 72 Mr. Justice Biswas expressed a tentative view that an order rejecting the memorandum of appeal would be a decree.

4. In **Rakhal Chandra Ghosh v. Ashutosh Ghosh**, (1913) 17 Cal WN 807 a Division Bench of this Court held that an order by an appellate Court rejecting an appeal before it has been admitted, on the ground that it was presented out of time, is a decree within the meaning of the definition of sub-section (2) of Section 2 of the Code of Civil Procedure."

Referring the same, Learned Counsel for the appellant drawn the attention of the Court that an order rejecting memo of appeal would be a decree, so the appeal is maintainable.

He also referred another citation of a full bench of Kerala High Court in **Thambi v. Mathew and another dated 24.10.1987** reported in **AIR 1988 KERALA 48** wherein in para No.13B and 14, Hon'ble Kerala High Court observed as under:

"13B. In the present case there was a delay of 3 days in presenting the appeal before the lower appellate court. The cause of the delay is explained in the affidavit in support of the petition for condonation of delay as on account of the appellant's illness. The appellant was examined as P.W.1. There is no evidence contra against the case proved by P.W.1. We therefore find that there was sufficient reason for the delay in presenting the appeal before the lower appellate court. We, therefore, allow I.A. No.758/1980 and condone the delay in filing the appeal.

14. Since the lower appellate court has not considered the case on merits, we set aside the judgment and decree of the court below and remand the case to that court for fresh disposal of the appeal on merits and in accordance with law. The parties will appear before the court below on 23-11-1987. The second appeal is allowed as indicated above. There will be no order as to costs."

Learned Counsel referred another citation of the Hon'ble Supreme Court of India reported **(2005) 1 SCC 436 [Shyam Sundar Sarma v. Pannalal Jaiswal and others dated 04.11.2004]** wherein in para Nos.8, 9, 9.1, 11, 12 and 16, Hon'ble the Apex Court observed as under:

**"8. The first question to be considered is whether an appeal accompanied by an application for condoning the delay in filing the appeal is an appeal in the eye of the law, when the application for condoning the delay in filing the appeal is dismissed and consequently the appeal is dismissed as being time-barred by limitation, in view of Section 3 of the Limitation Act. There was conflict of views on this question before the High Courts. But the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey:(1932) 59 IA 283 held: (AIR p. 167)**

**"There is no definition of appeal in the Civil Procedure Code, but Their Lordships have no doubt that any application by a party to an appellate court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptance of the term, and that it is no less an appeal because it is irregular or incompetent."**

**9. The specific question involved came to be considered by this Court in Mela Ram and Sons v. CIT:1956 SCR 166. This Court held that an appeal presented out of time is an appeal and an order dismissing it as time-barred is one passed in an appeal. This Court referred to and followed the view taken by the Privy Council and by this Court in the two respective decisions above-referred to. This Court quoted with approval the observations of Chagla, C.J. in K.K. Porbunderwalla v. CIT:(1952) 21 ITR 63(Bom) (ITR p. 66) to the following effect: (SCR p. 176)**

**"Although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under Section 31 and the effect of that order was to confirm the assessment which had been made by the Income Tax Officer."**

**9.1. In Sheodan Singh v. Daryao Kunwar:AIR 1966 SC 1332 rendered by four learned Judges of this Court, one of the questions that arose was whether the dismissal of an appeal from a decree on the ground that the appeal was barred by limitation was a decision in the appeal. This Court held: (SCR pp. 308 H-309 B)**

**"We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."**

**11. Learned counsel for the appellant relied on the Full Bench decision of the Calcutta High Court in Mamuda Khateen v. Beniyan Bibi:AIR 1976 Cal 415 to contend that an order rejecting a time-barred memorandum of appeal consequent upon refusal to condone the delay in filing that appeal was neither a decree nor an appealable order. On going through the said decision it is seen that though the Full Bench referred to the divergent views on that question in**

the Calcutta High Court prior to the rendering of the decision of this Court in Mela Ram and Sons it had not considered the decisions of this Court in Raja Kulkarni:1954 SCR 384 and in Mela Ram and Sons:1956 SCR 166 in coming to that conclusion. In fact it is seen that there was no discussion on that aspect as such, though there was a reference to the conflict of views in the decisions earlier rendered by the Calcutta High Court. Since the ratio of that decision runs counter to the principle laid down by this Court in Mela Ram and Sons:1956 SCR 166 obviously the same could not be accepted as laying down a correct law.

12. Learned counsel placed reliance on the decision in Ratansingh v. Vijaysingh:(2001) 1 SCC 469 rendered by two learned Judges of this Court and pointed out that it was held therein that dismissal of an application for condonation of delay would not amount to a decree and, therefore, dismissal of an appeal as time-barred was also not a decree. That decision was rendered in the context of Article 136 of the Limitation Act, 1963 and in the light of the departure made from the previous position obtaining under Article 182 of the Limitation Act, 1908. But we must point out with respect that the decisions of this Court in Mela Ram and Sons:1956 SCR 166 and Sheodan Singh:AIR 1966 SC 1332 were not brought to the notice of Their Lordships. The principle laid down by a three-Judge Bench of this Court in Mela Ram and Sons:1956 SCR 166 and that stated in Sheodan Singh:AIR 1966 SC 1332 was, thus, not noticed and the view expressed by the two-Judge Bench, cannot be accepted as laying down the correct law on the question. Of course, Their Lordships have stated that they were aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the definition of a decree obtaining in the Code. Thereafter, noticing the decision of the Calcutta High Court above-referred to, Their Lordships in conclusion apparently agree with the decision of the Calcutta High Court. Though the decision of the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey:(1932) 59 IA 283 was referred to, it was not applied on the ground that it was based on Article 182 of the Limitation Act, 1908, and there was a departure in the legal position in view of Article 136 of the Limitation Act, 1963. But with respect, we must point out that the decision really conflicts with the ratio of the decisions in Mela Ram and Sons:1956 SCR 166 and Sheodan Singh:AIR 1966 SC 1332 and another decision of this Court rendered by two learned Judges in Rani Choudhury v. Lt.-Col. Suraj Jit Choudhury:(1982) 2 SCC 596. In Essar Constructions v. N.P. Rama Krishna Reddy:(2000) 6 SCC 94 brought to our notice, two other learned Judges of this Court left open the question. Hence, reliance placed on that decision is of no avail to the appellant.

16. Thus, in the case on hand we find that the trial court, the appellate court and the High Court have rightly held that petition under Order 9 Rule 13 of the Code would not lie in view of the filing of an appeal against the decree by the appellant and the dismissal of the 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. Consequently, the decision of the High Court is affirmed and this appeal is dismissed. In the circumstances of the case we make no order as to costs."**

Referring the same, Learned Counsel submitted that the order passed by Learned 1<sup>st</sup> Appellate Court tantamounts to decree, as such, this appeal is maintainable in view of the principle of law laid down by the Hon'ble Apex Court.

**6.** I have heard Learned Counsel for the appellants at length and perused the aforesaid judgments. In addition to that, some exercise is also been carried out which are also referred herein below.

Hon'ble High Court of Cuttack in judgment **dated 10.12.2018 in Jitendra Naik vs. Radhyashyam Naik and others** reported in **2018 SCC OnLine Ori 432** in para Nos.5, 6 observed as under:

**"5. The subject-matter of dispute is no more res integra. An identical matter came up for consideration before this Court in the case of Fakira Mishra v. Biswanath Mishra, 2015 (II) CLR 599. This Court held as follows:**

**"3. A Full Bench of this Court, in the case of Ainthu Charan Parida v. Sitaram Jayanarayan Firm represented by Ramnibas, 58 (1984) CLT 248 (F.B), held that an order rejecting a memorandum of appeal or dismissing an appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of delay in preferring the appeal is not a decree within the meaning of Section 2 (2) of the Code of Civil Procedure. But then, the apex Court, in the case of Shyam Sunder Sarma v. Pannalal Jaiswal, (2005) 1 SCC 436 : AIR 2005 SC 226, held that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.**

**4. In Shyam Sunder Sarma (supra), the view of the Full Bench of the Calcutta High Court, in the case of Mamuda Khateen v. Beniyan Bibi, AIR 1976 Calcutta 415, that an order rejecting a time barred memorandum of appeal consequent upon refusal to condone the delay in filing that appeal was neither a decree nor an appellable order, was held to be not laying down a correct law.**

**5. Further, the Full Bench decision of the Kerala High Court, in the case of Thambi v. Mathew, 1987 (2) KLT 848, that an appeal presented out of**

time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal, was approved by the apex Court. Be it noted that the aforesaid decision of the Calcutta High Court was approved by the Full Bench of the Orissa High Court in the case of Ainthu Charan Parida (supra).

6. In view of the authoritative pronouncement of the apex Court in the case of Shyam Sunder Sarma (supra), the Full Bench decision of this Court in the case of Ainthu Charan Parida (supra) has been impliedly overruled, the same being contrary to the enunciation of law laid down by the apex Court.

7. Thus the logical sequitur of the analysis made in the preceding paragraphs is that an appeal filed along with an application for condonation of delay in filing that appeal when dismissed on refusal to condone the delay is a decree within the meaning of Section 2(2) of the Code of Civil Procedure."

6. In view of the authoritative pronouncement of this Court in the case of Fakira Mishra (supra), the petition under Article 227 of the Constitution is not maintainable. It is open to the petitioner to file the second appeal."

Hon'ble Allahabad High Court in a judgment dated **16.10.2019** in **Som Datt Srivastava v. Smt. Sobha** in connection with **Misc Single No.2761 of 2014** in para Nos.7, 15, 16, and 17 observed as under:

7. Regarding the aforesaid proposition of law, Hon'ble the Supreme Court in the case of Shyam Sunder Sarma(supra) has held as follows:

"10. The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi v. Mathew ((1987) 2 KLT 848 (FB)). Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of the law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3-A of Order 41 introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal."

15. As can be seen from the definition, 'decree' would mean a formal expression of adjudication which conclusively determines the rights of parties and may either be preliminary or final. It would deem to include rejection of a plaint. As such, it can be seen that rejection of application for condonation of delay would definitely determine the rights of parties conclusively so far as it regards the court expressing it. As such, it can be safely held that rejection of application for condonation of delay in filing first appeal would definitely amount to a decree as contemplated under Section 2(2) of the Code of Civil Procedure even without a separate order dismissing the appeal.

16. In view of the aforesaid, it is clear that against the order impugned in the present petition, the only remedy for the petitioner lies in filing a second appeal and not a petition under Article 227 of the Constitution of India, which would, thus, not be maintainable.

17. In view of the aforesaid, the petition being devoid of merit is accordingly dismissed. The petitioner would be at liberty to avail remedy available to him in accordance with law."

Hon'ble High Court of Bombay in **second appeal No.24 of 2023 with CA/758/2023 in SA/24/2023 with CA/759/2023 in SA/24/2023** dated **30.06.2023** wherein in para Nos.14, 15 and 16 observed as under:

"14. The consistent principle laid down by the Hon'ble Supreme Court from Raja Kulkarni (supra) till Shyam Sudar Sarma (supra) has been that if, an application for condonation of delay in filing the appeal is dismissed, then, such a dismissal amounts to a judgment in appeal.

The Hon'ble Supreme Court has further held that the dismissal of an application for condonation of delay in filing the appeal amounts to the affirmation of the judgment of the trial court on merits. [Sheodan Singh (supra)] Thus, we hold that the order passed by the appellate court dismissing the application for condonation of delay in filing the appeal amounts to a decree of the appellate court, which is challengeable under Section 100 of CPC.

15. The law laid down by the 2 judges bench of the Hon'ble Supreme Court in the case of Ratansingh (supra) that if an application for condonation of delay in filing the appeal is dismissed, the Judgment of the appellate court does not amount to decree is specifically negated in Shyam Sudar Sarma (supra).

16. Thus, with utmost respect to the esteemed Single Judge, we hold that the issue referred to us is no more res integra as it has been pronounced by the Hon'ble Supreme Court that an order rejecting an application for condonation of delay in filing the appeal is the Judgment of the appellate court upholding the Judgment of the trial court on merits

**[Sheodan Singh (supra)). The Hon'ble Supreme Court has reversed the law laid down in the case of Ratansingh (supra), that such an order does not amount to a decree within the meaning of Section 2(2) of the CPC (Shyam Sundar Sarma (supra)). Thus, we hold that such an order/decreed of the appellate court is appealable under Section 100 of CPC.]**

From the aforesaid citations and also the citations referred by Learned Counsel for the appellants, it appears that although the Learned 1<sup>st</sup> Appellate Court in view of the order dated 15.06.2024 passed in Civil Misc (Condonation) No.5 of 2023 dismissed the application for condonation of delay and consequently, upon the dismissal of the said condonation application, the Learned 1<sup>st</sup> Appellate Court also dismissed TA No.10 of 2023 which tantamount to decree and challenging that decree, the second appeal is very much maintainable.

So, it appears to this Court that the second appeal filed by the appellants is maintainable.

**7.** Now, regarding condonation of delay, it appears to this Court that the grounds set forth in the application for condonation of delay were not at all satisfactory. However, since the appellants are rustic village people and it is on record that they are the inhabitants of Dhalai District and it had been difficult on their part to engage a good civil lawyer to defend their case from Agartala by spending huge amount of money. So, the delay as explained in the application for condonation of delay could have been allowed by the Learned 1<sup>st</sup> Appellate Court but the Learned 1<sup>st</sup> Appellate Court strictly following the principles of law dismissed the application for condonation of delay without affording any opportunity to the appellant which in my considered view was not proper for the interest of justice.

Accordingly, the order passed by Learned 1<sup>st</sup> Appellate Court in Civil Misc(condonation) No.5 of 2023 dated 15.06.2024 is set aside and the order dated 15.06.2024 delivered by Learned 1<sup>st</sup> Appellate Court in TA No.10 of 2023 is accordingly stands set aside.

**8.** In the result, the appeal filed by the present appellants is hereby allowed. The matter is remanded back to the Learned 1<sup>st</sup> Appellate Court with a direction to rehear the appeal afresh on merit and to deliver a fresh judgment in accordance with law.

Prepare decree accordingly.

The appellants be asked to appear before the Learned Trial Court below either personally or throughout their engaged advocate on 14.05.2025 positively.

A copy of this judgment accordingly be furnished to Learned Counsel for the appellants for information and compliance.

With this observation, the appeal stands disposed of.

Pending applications(s), if any, also stands disposed of.

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**JUDGE**