

IN THE HIGH COURT OF TRIPURA
AGARTALA

CRP 57 OF 2015

1. Smt Madhubala Banerjee,
wife of late Nani Banerjee
 2. Sri Badal Banerjee,
son of late Nani Banerjee
- both are residents of Math Chowmuhani,
Assam-Agartala Road, Agartala-799001,
P.S. East Agartala, District : West Tripura
 3. Smt Bani Banerjee(Ghosh),
wife of Sri Manoj Ghosh,
daughter of late Nani Banerjee,
resident of Madhya Banamalipur,
North of Bodhjung Girls Higher Secondary School,
Agartala-799001, P.S. East Agartala,
District : West Tripura
-Petitioners

- Vs -

1. xxx
2. Sri Saikat Banerjee,
son of late Falguni Banerjee
3. Smt Mousami Banerjee,
wife of Sri Kesharjit Sharma
- all are residents of Math Chowmuhani,
Assam-Agartala Road, South of Baroda Bank
(Sadhana Fast Food Lane), Agartala-799001
District : West Tripura

xxx In compliance with Hon'ble Court's Order
dated 24.08.2015 passed in IA 108/15 in CRP 57/15
the name of Respd. No.1 has been struck off.

.....Respondents

B E F O R E

THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioners : Mr. Samarjit Bhattacharjee, Advocate

For the respondents : Mr. S. Roy, Advocate

Date of hearing,
judgment & order : 16.12.2015

Whether fit for reporting :

Yes	No
	✓

JUDGMENT & ORDER (Oral)

Heard Mr. Samarjit Bhattacharjee, learned counsel appearing for the petitioner as well as Mr. S. Roy, learned counsel appearing for the respondents.

2. This is an application filed under Section 115 of the C.P.C. questioning the legality and propriety of the order dated 30.03.2015, delivered in Misc.(R) 09 of 2014, arising from the Title Suit being No. T.S. 84 of 2012 by the Civil Judge, Jr. Division, Court No.1, Agartala, West Tripura.

3. At the outset, Mr. Bhattacharjee, learned counsel has candidly admitted that this petition is not maintainable under Section 115 of the CPC. For averting the failure of justice, Mr. Bhattacharjee, learned counsel for the petitioner has urged that this petition may be converted into a petition under Article 227 of the Constitution of India.

4. Mr. Roy, learned counsel appearing for the respondents has raised serious objection against such prayer for conversion.

5. This court on taking account of the nature of the challenge, is inclined to convert this petition under Article 227 of the Constitution of India on its own motion.

6. Mr. Bhattacharjee, learned counsel appearing for the petitioner has submitted that on 31.01.2014, the said Title Suit was fixed for filing of the written objection by the plaintiff petitioners against the petition filed by the defendant on questioning the maintainability of the suit and also for hearing of that petition. But the plaintiff neither in person or nor through the counsel appeared before that court, as a result the trial court dismissed the suit for non-prosecution under Order IX Rule 8 of the C.P.C.

7. The petitioner herein having been apprised of the order dated 31.01.2014, filed a petition under Section 151 of the C.P.C. seeking restoration of the suit on the ground that the plaintiff thought that the day was exclusively fixed for hearing on the petition filed by the defendant questioning the maintainability of the suit. It has been further agitated that for non-appearance, the suit could not have been dismissed. Perhaps according to the plaintiff-petitioner the said petition could be allowed ex-parte without affording any further

opportunity to the plaintiff-petitioners. But the trial court dismissed the suit under Order IX Rule 8 of the C.P.C. In that petition filed by the defendants, the maintainability of the suit on the ground of non-joinder of the necessary parties was also raised.

8. It is an admitted position that even the petition filed under Section 151 of the C.P.C. was filed on expiry of 30 days from the order dated 31.01.2014. The trial court while passing the impugned order dated 30.03.2015, has observed that no application under Section 151 of the C.P.C. can be entertained for restoration of the suit. Moreover, even if the said petition is entertained considering that provisions are wrongly cited, would not change the basic character of the application, then also there would be an embargo of limitation as the application was not filed within 30 days. However, the trial court surprisingly observed as under :

"So, I find that the correct provision of law from bringing an application for setting aside the said dated 31.01.2014 in Section 151, CPC and not under Order IX, Rule 9, CPC. And for bringing an application under Section 151, CPC there is no limitation period prescribed for in the limitation Act. So, the provision of Art. 137 of the Limitation Act will be applicable in this case and the period of limitation prescribed is three years when the right to apply accrues. The suit was dismissed on 31.01.2014 and the instant petition was brought on 18.09.2014 which is well within limitation."

The finding is preceded by another observation that when the suit was dismissed for non-appearance of the plaintiff,

the said case was not fixed for recording of the evidence or hearing. It was the date for filing of the objection by the plaintiff and for hearing. According to the trial court, the order dated 30.03.2015 cannot be treated as an order passed under Order IX, Rule 8 of the C.P.C. Hence, there cannot be any application of Rule 9 of the C.P.C. for restoration.

9. But the court has not dwelled upon the aspect that if that was not fixed for hearing of the suit how the suit was dismissed for non-prosecution. Finally, the court dismissed the application for restoration on the ground that the causes so assigned in this petition for non-appearance on 31.01.2014 are not sufficient to recall the order of dismissal for non-prosecution. Thus, it appeared to the trial court as if the application for restoration was the petition for review of the order dated 31.01.2014, passed by the trial court in T.S. 84 of 2012 or for revision of the said order. On observing thus, the trial court has further observed as under :

"This Court has no jurisdiction for revision of its own order. If we treat the instant petition as a petition for review of the order dated 31.01.2014 the same is time barred in view of the Art. 122 of the Limitation Act since it is filed long after 30 days."

10. From perusal of the application filed under Section 151 of the CPC for restoration of the Title Suit being 84 of 2012, it appears that the plaintiffs made the prayer for restoration of the Title suit not for review of the order dated 31.03.2015. Thus,

the trial court has committed a grave error and failed to exercise its jurisdiction, drifting way from the subject matter.

11. Mr. Roy, learned counsel appearing for the respondents, the defendants in the suit has submitted that if it is treated that provision of law under which the said application was filed for restoration was wrongly cited, the said application was admittedly barred by limitation as the petition was not filed within 30 days from 30.03.2015 when the order dismissing the suit was passed. No doubt that for the slipshod approach taken by the plaintiff the mess has been created. The plaintiff has followed a wrong procedure and the same has been admitted by Mr. Samarjit Bhattacharjee, learned counsel appearing for the petitioners without any reservation.

12. Moreover, even the trial court has followed a wrong procedure holding that the petition under Order IX Rule 9 of the C.P.C. would not have been maintainable as the hearing was fixed on the application/petition. If that was so, the court can on his own motion always review its own error. But the court has passed the impugned order wrongly by exercising its inherent jurisdiction, not exercising the jurisdiction as available under Section 114 read with Order 47 Rule 1 of the CPC. There cannot be any amount of dispute that when for non-appearance of the plaintiff a suit is dismissed it has to be inferred that the order has been passed under Order IX Rule 8 of the CPC and for purpose of

restoration if any application is to be filed that has to be filed under Order IX Rule 9 of the C.P.C. But the plaintiff has not filed such application. It is well settled that the provisions of Section 151 of the C.P.C. cannot be exercised by any court where the code provides substantive procedure for that purpose.

13. Having situated thus, this court finds that the suit is for declaration of title in respect of the immovable property and recovery of the same from the possession of the respondents herein. Having regard to the said aspect of the matter and the eminent injury that might land on the plaintiffs if the suit is not restored for lackadaisical and inappropriate approach adopted for restoring the suit, that might occasion failure of justice and hence the petitioner is permitted to file a fresh application under Order IX Rule 9 of the C.P.C. along with application for condoning the delay in approaching the court. The trial court while considering the prayer for condonation should discount the period that the plaintiff has exhausted in this court.

14. The plaintiff has been permitted to file a fresh application along with a petition for condoning the delay subject to payment of cost of Rs.1,500/- and since that cost is the condition precedent for filing of the application for the restoration along with the application for condonation of delay, payment of costs shall precede the filing of fresh application etc. Unless the plaintiff filed such fresh application along with

condonation of delay within 6(six) weeks from today, the trial court will have no authority to entertain such application etc. in view of this order. A copy of this order may be furnished to the learned counsel for the parties.

15. With this observation and direction this petition is allowed to the extent as indicated above.

There shall be no order as to costs.

Send down the LCRs forth with.

JUDGE

Sabyasachi B