

IN THE HIGH COURT OF TRIPURA
AGARTALA

CRP NO.02 OF 2010

Smt. Swapna Dutta (Deb),
wife of Sri Manendra Deb,
resident of Ganki, Saratpalli,
P.O. & P.S. Khowai, District West Tripura.
..... Petitioner

– Vs –

- 1. Sri Tapan Nath Sarma,
son of late Nandalal Nath Sharma.
 - 2. Sri Tapas Nath Sarma,
son of Sri Tapan Nath Sharma.
 - both are residents of village Durganagar (Kuripara),
P.O. & P.S. Khowai, District West Tripura.
-Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. S. Deb, Sr. Advocate
Mr. M.K. Roy, Advocate

For the respondents : Mr. S. Lodh, Advocate

Date of hearing & order : 13.01.2015

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER (ORAL)

Heard Mr. S. Deb, learned senior counsel, assisted
by Mr. M.K. Roy, learned counsel appearing for the petitioner
as well as Mr. S. Lodh, learned counsel appearing for the
respondents.

2. This is a petition under Section 115 of the Code of Civil Procedure, questioning the legality of the order dated 11.11.2009 passed in Civil Misc. Appeal No.04/2009.

3. Mr. S. Deb, learned senior counsel appearing for the petitioner has submitted that an application under Order IX Rule 9 read with Section 151 of the CPC was sought to be filed for setting aside the order of dismissal dated 04.03.2009 for non-prosecution in Civil Misc.(Vio) No.15/2008. But, the said application was rejected on 22.05.2009, holding that :

“The Ld. Advocate for the petitioner himself admitted during argument that the petitioner of the case was present on the date of filing of adjournment petition in Civil Misc.(Vio)15/08, then why the said petitioner did not put her signature in the adjournment petition and moreover the absence of Ld. Counsel of the petitioner was well within the knowledge of the petitioner, then she could have executed the vokalatnama in favour of the Junior counsel of the engaged counsel for the petitioner. Moreover, the Ld. Counsel for the petitioner stated during argument that he talked with the petitioner on the day of filing of the petition with the Junior Advocate then why not the engaged counsel instructed the Jr. counsel to get one vokalatnama being executed in his favour. Though the petitioner side has filed one prescription regarding the medical treatment of her wife but from the prescription it is not clear that the doctor is from which place and so I cannot rely on the prescription filed by the Ld. Counsel for the petitioner. Moreover, in the petition for adjournment, ground was illness of lawyer whereas in this petition reason is illness of wife. So there is contradiction in the statement of Ld. Counsel for petitioner. Moreover, the Ld. Counsel alleged in his petition that he contacted with the Presiding Officer over telephone and the Presiding Officer assured him that the adjournment petition will be accepted but so far as my memory is concerned it is true

that the engaged counsel contacted with the Presiding Officer over telephone but there was no assurance given by the Presiding Officer that the petition will be accepted. Also some one calls over telephone then the person will definitely take up the call and this also happened in this case. Hence, the averments made by the Ld. Counsel for the petitioner that the Presiding Officer assured him that his petition will be accepted is not true and in my opinion the allegation made by him is a false one.

Hence, for the above facts and circumstances I am of the opinion that the petition, filed by the petitioner side U/O IX Rule 9 of C.P.C. for setting aside the order of dismissal dated 04.03.09, passed in Civil Misc.(Vio) 15/08 cannot be allowed. Hence it is hereby rejected."

4. Mr. Deb, learned senior counsel has further submitted that within a week or so the said petition for setting aside the order of dismissal was filed with promptitude not to cause any inconvenience to either of the parties in the proceeding. Despite that, the impugned order was passed.

5. Mr. S. Lodh, learned counsel appearing for the respondents, in his usual fairness has submitted that the said order is indefensible for the reason that the grounds as assigned in the petition cannot be attributable to the petitioner's fault.

6. Mr. Deb, learned senior counsel has further submitted that against the order dated 27.05.2009, a miscellaneous appeal under Section 104 of the CPC was filed in the court of the Addl. District Judge, Khowai, West Tripura, being Civil Misc. Appeal No.4/2009. By the order dated

11.11.2009, the said Civil Misc. Appeal No.4/2009 was dismissed as the application filed under Section 5 of the Limitation Act for condoning the delay of ten days in preferring the said appeal was not entertained by the appellate court. It has been observed in the order dated 11.11.2009 that :

“the negligence and laches in filing the appeal, seeking 10 days condonation of delay, are due to negligence and laches on the part of the appellant-petitioner and as such on the part of the petitioner is apparent and, hence, the application is liable to be dismissed”.

It has been further observed that, the appellant-petitioner has also sought to incorporate better particulars by filing a petition on 20.08.2009. On 20.08.2009, even though the petitioner herein sought some accommodation for filing better particulars, but the petitioner did not file such application, and, as such, the delay of 10/13 days in filing the miscellaneous appeal was not condoned and the application was dismissed.

7. This court has scrutinised the order dated 11.11.2009 and finds that there is a delay of 13 days in filing the miscellaneous appeal. The petitioner herein has stated that for absence of the lawyer from his place, he could not prepare the miscellaneous appeal. At the paras 3, 4 and 5, the petitioner has explained the causes for such delay. This court is satisfied that the delay constitutes sufficient cause and the appellate court ought to have entertain that application. As

such, the order dated 11.11.2009 cannot stand the scrutiny. Accordingly, the same is set aside. As consequence thereof, the Addl. District Judge, Khowai, West Tripura, shall consider the appeal in accordance with law. For that purpose, the parties shall appear in the court of the Addl. District Judge, Khowai, West Tripura on 20.02.2015. It is made clear that, the parties will not receive any further notice from the said court.

8. Accordingly, this petition stands allowed. However, there shall be no order as to costs.

JUDGE

ROY