

**THE HIGH COURT OF TRIPURA
AGARTALA**

RSA 01 OF 2014

Sri Nagendra Chandra Shil

S/O Late Kumud Shil resident of village- Kalyanpur
P.S.- Kalyanpur, Dist- Khowai Tripura.

... **Plaintiff-Appellant**

- **Versus** -

Sri Priyatosh Shil

S/O Late Sunil Chandra Shil resident of Bhati Abhoynagar
P.O.- Abhoynagar, P.S.- West Agartala, Dist- West Tripura
PIN- 799005.

Defendant Respondent.

**BEFORE
THE HON'BLE MR. JUSTICE U.B.SAHA**

For the appellant : Mr. A. Roy Barman, Advocate

For the respondent : Mr. KN Bhattacharji, Sr. Advocate.
Mr. S. Acharjee, Advocate

Date of hearing & delivery
of Judgment and Order : **16.07.2015.**

Whether fit for reporting : YES / NO.

JUDGEMENT AND ORDER (ORAL)

The instant second appeal is filed by the plaintiff appellant challenging the order dated 07.09.2013 passed by the learned Additional District Judge, West Tripura, Agartala, Court No.4 in Title Appeal 55 of 2012 where under the learned Additional District Judge dismissed the appeal in view of the dismissal of the condonation application filed under Section 5 of the Limitation Act i.e. Civil Misc. 329 of 2012.

2. Heard Mr. A.Roy Barman, learned counsel appearing for the plaintiff appellant as well as Mr. KN Bhattacharji, learned senior counsel as assisted by Mr. S.Acharji, learned counsel appearing for the respondent.

3. The appellant, being plaintiff filed a suit under Section 31 of the Specific Relief Act for declaration and cancellation of the 'WILL' executed on 14.04.2008 by the deceased Kalpana Biswas in favour of the defendant bequeathing the landed property and the service benefit, as described in the schedule of the plaint.

4. The plaintiff case before the learned Civil Judge (Senior Division) Court no.1, Agartala, West Tripura (hereinafter referred to as the trial Court) was that the plaintiff was the husband of the deceased Kalpana Biswas and they had their marriage in the month of November, 1988 and they used to live together at Kalyanpur. Since the deceased Kalpana Biswas was posted at IGM hospital, Agartala as Class IV employee, she used to live at her father's house at Bhati Abhoynagar, Agartala for the purpose of her service and used to visit the house of the plaintiff at Kalyanpur every weekend and also the plaintiff used to come to Agartala to live with his wife.

4a. After six months of their marriage, one ganda of land, though shown to be gifted in favour of Kalpana by her father but in fact an amount of Rs.45,000/- was paid by both Kalpana and the plaintiff to the father of Kalpana and thereafter again three kara of land was purchased by the plaintiff and his wife in the name of Kalpana and the entire land was mutated in the name of Kalpana in the khatian No. 110 which creates in the name of Kalpana. In the said land plaintiff constructed three roofed hut where Kalpana used to reside in one hut and the remaining two huts were given on lease.

4.b. The relation between plaintiff and Kalpana was very good. Two brothers of Kalpana used to reside to the adjacent house of the plaintiff along with their family members. Defendant being one of the sons of the

brother of Kalpana was maintained by Kalpana as the plaintiff and his wife have no children. The plaintiff did not raise any objection regarding financial help extended by Kalpana to her brother's family. On 06.12.2008 the plaintiff got information about the death of his wife and he came to Agartala where he came to know that his wife was admitted in the hospital for last few days though no information was given to him regarding serious illness of his wife. The plaintiff did all rituals in the burning ghat and thereafter went to his house at Abhoynagar while the defendant and his parents insulted him without any reason.

4.c. Subsequently the plaintiff applied for the death certificate of his wife while he was verbally informed that the defendant had already submitted an objection to the authority not to issue the death certificate to the plaintiff. The plaintiff was informed by the authority that his wife executed a WILL in favour of defendant bequeathing her all properties. Ultimately the plaintiff preferred a writ petition before the Hon'ble Gauhati High Court and by judgment dated 13.04.2009 a direction was given to the Superintendent of IGM for handing over the original death certificate of Kalpana to the plaintiff within fifteen days and accordingly the plaintiff also received the same. In that writ petition, defendant submitted one copy of WILL on 16.02.2009 and for the first time the plaintiff received the copy of the WILL allegedly executed by his deceased wife on 14.04.2008. As after perusal of the said contents of WILL the plaintiff was confirmed that it was never executed by his wife as because the signatures of his wife are forged and the contents of the WILL had no relation with the reality. He filed the suit with his prayer that the alleged WILL executed by deceased Kalpana Biswas on 14.04.2008 bequeathing her all properties to the defendant as void and it be cancelled.

5. After registration of the suit, summons was issued upon the defendant to which the defendant appeared before the Court through his engaged counsel by filing vakalatnama and filed written statement.

6. In the written statement, the defendant categorically denied all the assertions brought by the plaintiff in his plaint. He also stated that the appearance of Kalpana was not so good and because of ugly appearance, the plaintiff did not accept her heartily but the plaintiff was interested in her money and demanded money time to time. The plaintiff had an affair with another woman. Even shortly after marriage the plaintiff had started torturing Kalpana and also drove her out from his house. Finding no other alternative, Kalpana had taken shelter at her father's house at Agartala and since then she had been living separately from the plaintiff. The plaintiff did not care of her even at the time of illness and she spent her life with her parental relatives.

6.a. Realising her miserable plight her father gifted her land measuring one ganda by executing registered Gift deed in her favour which is a part of a homestead land of the father of Kalpana. At the same time, she had purchased another plot of land adjacent to the gifted land measuring 3 karas 1 kranta by her own earning. As Kalpana could understand that she had no scope of having a child she then adopted the defendant as her son and the defendant is the son of Sunil Shil who is the younger brother of Kalpana. The defendant used to nurse Kalpana at the time of her illness and she had been taken outside Agartala for her treatment and also he used to take care but the plaintiff had not taken any information nor rendered any help to her. After death of Kalpana, the defendant did her ritual, shraddha etc.

6.b. At the time of executing 'WILL' by Kalpana on 14.04.2008 she expressed her last desire in presence of witnesses bequeathing all her properties to the defendant. It is also averred in the written statement that the plaintiff in connivance with Sushil Shil hatched a conspiracy to grab the land of Kalpana by any means, by selling it to Sushil Shil at nominal price. Hence, the suit filed by the plaintiff may be dismissed in limine.

7. The learned trial Court considering the pleadings of the parties framed the issues, which are reproduced below :

- “ (i) Whether the suit is maintainable in its present form and nature?**
- (ii) Whether the WILL executed by deceased Kalpana Biswas on 14.04.2008 is void?**
- (iii) Whether the WILL as stated above is liable to be cancelled?**
- (iv) Whether the plaintiff is entitled to any other relief/reliefs?**

8. The plaintiff examined four witnesses by submitting their examination in chief by way of affidavit and all of them were examined and cross examined by the defendant side. On the other hand, the defendant also examined five witnesses who were cross examined by the plaintiff.

9. Considering the oral evidence and the documentary evidence, the learned trial Court dismissed the suit holding that the plaintiff is not entitled to get a decree, as prayed for vide judgment dated 21.08.2012. Being aggrieved by the judgment of the learned trial Court, the plaintiff appellant preferred the first appeal along with an application under Section 5 of the Limitation Act for condonation of delay of 86 days before the learned District Judge, West Tripura, which was subsequently transferred to the court of learned Additional District Judge, Court no.4, Agartala, West Tripura.

10. The appeal was registered as Title Appeal 55 of 2012 and the condonation application was registered as Civil Misc. 329 of 2012. Learned first appellate Court heard the learned counsel for the parties on question of law and finally dismissed the application for condonation of delay, as the appellant plaintiff did not explain the delay with sufficient cause consequent thereto also dismissed the appeal.

11. Mr. Roy Barman, learned counsel appearing for the appellant plaintiff while challenging the impugned order dated 07.09.2013 passed by the learned Additional District Judge in Title Appeal 55 of 2012, would contend that the learned appellate Court did not consider the evidence recorded by the learned trial Court properly. He also submits that the first appellate Court while disposing the condonation application did not apply his mind and wanted medical certificate regarding the illness of the plaintiff appellant. Thus, it would be proper to set aside the said order of the learned Additional District Judge passed in Title Appeal.

12. On the other hand, Mr. Bhattacharji, learned senior counsel appearing for the defendant respondent submits that the impugned order is not a decree thus no second appeal lie.

13. There is no doubt that when a first appeal is dismissed consequent to the dismissal of the condonation application then obviously a second appeal lies. But question arises as to whether the learned first appellate Court while disposing the condonation application gave reasons for such dismissal and if the learned first appellate Court dismissed the condonation application by giving reasons then another question will come as to whether there is any substantial question of law involved in the second appeal preferred against the said order of dismissal of condonation of delay or not.

14. In the instant case, it appears from the order of the learned first appellate Court in Civil Misc. 329 of 2012 that he has considered the explanation given by the plaintiff appellant for the period he was suffering from chicken pox though he has stated that the plaintiff appellant did not submit any medical certificate in support of his suffering from chicken pox. But at the same time, it is also pointed out that he did not give any explanation for the gap period from 27.08.2012 to 24.09.2012 and even he did not give any explanation since 28.11.2012 to 18.12.2012.

15. After going through the order of the learned first appellate Court, it cannot be said that he has not given any reason for dismissal of the application for condonation of delay. More so, the instant second appeal is filed challenging the order of dismissal of the appeal consequent to dismissal of the condonation application. Admittedly, the appellant did not challenge the order passed in Civil Misc. 329 of 2012 wherein the application for condonation of delay was dismissed. Unless the order in the condonation application is challenged, it is very difficult to set aside the order in the appeal. More so, question of limitation is a mixed question of law and fact.

16. After going through the judgment of the learned trial Court as well as the memo of appeal and the order passed by the learned first appellate Court in the condonation application, this court is of the considered opinion that no substantial question of law is involved in the appeal, thus it would not be proper to admit the same. More so, a second appeal cannot be admitted mere on the ground of question of law. It is settled position of law that the second appeal can be admitted on substantial questions of law. The question of limitation is a mixed

question of fact and law. Thus, according to this Court, there is no substantial question of law in the instant appeal. Hence, the same is dismissed.

17. Accordingly, the instant appeal is dismissed. No order as to costs.

JUDGE

Saikat