

**THE HIGH COURT OF TRIPURA
AGARTALA**

CRP No.92 of 2013

1. Smti. Rina Bala Saha,
wife of Sri Sindhu Gopal Roy,
resident of village-Basanta Nagar,
P.O. Kakraban, PIN-799 105,
PS – Radhakishorepur,
District – Gomati, Tripura
2. Smti. Dhilkhushi Saha,
wife of Sri Sudhan Chandra Saha,
resident of village-Jamjuri,
P.O. Jamjuri, PIN-799 123,
PS – Radhakishorepur,
District – Gomati, Tripura

.....Plaintiff-Petitioners

- Vs -

1. Shri Tarun Kanti Saha,
son of late Girindra Mohan Saha
2. Sri Jayanta Saha
3. Sri Dilip Saha

Both are sons of late Indra Lal Saha,
residents of village-Basanta Nagar
P.O. Kakraban, PIN-799 105,
PS – Radhakishorepur,
District – Gomati, Tripura

.....Defendant-Respondents

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

For the petitioners	: Mr. D. Chakraborty, Sr. Advocate Mr. H. Laskar, Advocate
For the respondent No.1	: Mr. A. Lodh, Advocate
For the respondent Nos.2 & 3	: None
Date of hearing and delivery of Judgment and order	: 09.04.2015
Whether fit for reporting	: NO

Judgment and Order (Oral)

Heard Mr. D. Chakraborty, learned Sr. counsel assisted by Mr. H. Laskar, learned counsel appearing for the petitioner as well as Mr. A. Lodh, learned counsel appearing for the respondent No.1. There is no representation for the other respondent despite due notice from this court and appearance by the counsel.

02. This is a petition filed under Article 227 of the Constitution of India questioning the legality of the order dated 12.04.2013 passed by the Civil Judge, Jr. Divn., Udaipur, South Tripura in Title Suit No.21 of 2004.

03. The essential facts call for reference are noted at the outset. By the petition under Order 47 Rule 1 read with Section 114 of the CPC, the order dated 10.10.2012 passed in TS No.21 of 2014 has been sought to be reviewed inasmuch as the counsel for the plaintiffs had submitted that in view of judgment and order dated 06.06.2012 delivered in RSA No.72 of 2007 reported in **(2013)1 TLR 1066** the suit being Title Suit No.21 of 2014 be deemed barred by res judicata in terms of Section 11 of the CPC.

04. There is no dispute that in view of the pendency of the appeal from the judgment and order passed in Title Suit being TS No.22 of 2002 by the order dated 05.07.2012, the subsequent suit being Title Suit No.21 of 2004 instituted by the petitioner was stayed following the principles of res subjudice as provided under Section 10 of the CPC.

05. The petitioners herein had also challenged the said order dated 10.10.2012 by filing an application under Section 227 of the Constitution of India being CRP No.06 of 2013. But this court dismissed the said petition by the order dated 27.02.2013 having observed as under:

"On going through the order passed by the Court below, it appears that the Court below passed the order based on the submission of learned counsel of both sides and accordingly, dismissed the suit.

Learned counsel, Mr. Chakraborty has submitted that the plaintiff petitioners never instructed his engaged counsel to submit before the Court for dismissal of the suit without adjudication.

If it is so, the plaintiff petitioners may prefer an appropriate application before that Court itself for passing appropriate order according to law".

06. Pursuant to that order dated 27.02.2013 the petitioners herein preferred the said review petition. It appears from the records so produced with the petition that the said review petition was not separately registered but it was considered in the Title Suit itself and by the impugned order dated 12.04.2013 the trial court dismissed the said review petition on holding that:

"After perusal of the record I have seen that on 10.04.06 the suit was stayed on the principle of res sub judice as another suit T.S.22/2002 on the same matter was pending before the Ld. Civil Judge, Senior Division, Udaipur, South Tripura. On 05.07.12 the Court vide order vacated the stay order and issued notice upon both the parties to appear before the Court and to satisfy the Court why the instant suit would not be dismissed on the principle of res judicata.

Accordingly, on 25.09.2012 the Court heard both the parties on the matter of dismissal of the suit. Ld. Counsel for the plaintiff submitted before the Court that the plaintiff having no objection regarding the dismissal of the suit as apparent from the order dated 10.10.12. Even on that day also Ld. Counsel for the plaintiff again submitted that the plaintiff is having no objection on the dismissal of the suit.

After perusal of the suit I have seen that on the step filed by the plaintiff dated 21.09.12, the plaintiff Rina Bala Saha herself put signature on the top of the step and she is properly identified by her Ld. counsel Sri Narayan Naha. Thus, it clearly indicates that Ld. Counsel submitted before the Court in personal in favour of the plaintiff in her presence. The plaintiff neither raised any objection on 25.09.12 nor on 10.10.12 at the date of dismissal of the suit.

To mention, according to law an advocate is an representative of his client land in this case Ld. Advocate Sri N. Naha has been duly appointed by the plaintiffs as per the vokalatnama. Accordingly, after dismissal of this suit the plaintiff now can not raise the point that her representative did not duly represent her or he did not follow her instructions. Till 10.10.12 the plaintiffs were having ample scope to raise the point before the Court that their counsel is not following their instructions and represented them against their instructions and interest.”

07. On considering the nature of challenge, this court by the order dated 27.02.2013 delivered in CRP 06 of 2013 indicated that the remedy, if any for the petitioners, lies in the trial court itself, not before the High Court. For exercising jurisdiction under Article 227 of the Constitution of India the petitioners could not, in fine, make out any case. As stated, an application for review was filed by the petitioners. The delay in filing the review was condoned by the trial court. But while considering the grounds taken by the petitioner as the plaintiffs, the trial court has adopted a hyper-technical approach. When any allegation is levelled against the engaged counsel by the party, it would ordinarily be the duty of the court to have the explanation from the engaged counsel before looking at the merit of such allegation. Merely someone has signed on the memo of appearance would not imply that the engaged counsel has submitted whatever, has submitted in compliance of the instruction. Even sometimes, presence of the party whom the engaged counsel represents in the court room may not imply that what was being

submitted in the court was being submitted on the instruction. If such unfortunate situation emerges in any court, after having the explanation from the engaged counsel the matter would be decided. Even from the order dated 10.10.2012 passed in Title Suit No.21 of 2014 this Court finds that virtually the suit has been dismissed on the statement made by the counsel who was appearing for the plaintiffs. There was no endeavour to return the finding even on considering the said judgment passed in RSA No.72 of 2007 whether the principles of res judicata in terms of the provision of Section 11 of the CPC would likely to hit the subsequent suit or not. Apparently though it appears that the subsequent suit was stayed by the order dated 05.07.2010 on the doctrine of res subjudice provided under Section 10 of the CPC. It is a well known principle of law that when a subsequent suit is stayed under this principle there shall always be a general presumption that on decision in the former suit, the subsequent suit would entirely be determined. If it is found that the former suit has been decreed in the second appeal and it has determined all the issues involved in the subsequent suit, indisputably between the same parties, obviously the principles of res judicata would operate and the trial court will have no further option but to dismiss the subsequent suit claiming contrary reliefs. As unfortunate as it may, the trial court has miserably failed to take that exercise. Merely on the statement of the counsel, the suit may not have been dismissed.

08. Thus, in the considered opinion of this court when the review petition was filed before the trial court it ought to have considered the impugned judgment dated 10.10.2012 having regard

to all these aspects. But no such regard has been given while passing the impugned order.

09. Mr. D. Chakraborty, learned senior counsel appearing for the appellant has submitted that for not exercising the review jurisdiction, miscarriage of justice has been occasioned by the order dated 10.10.2012 as what the petitioners' engaged counsel had submitted was beyond instruction and perhaps on his understanding of law.

10. Mr. Lodh, learned counsel appearing for the respondent No.1 has submitted that there is nothing wrong in the impugned order. Moreover, he has emphasised that the order dated 10.10.2012 was passed in presence of the petitioner No.1 and hence the allegation made against her engaged counsel is a mere ploy to drag the litigation to the serious prejudice of the respondents.

11. Having regard to the submissions made by the learned counsel for the parties, this Court finds that this is one of such cases where this court should exercise its supervisory jurisdiction in the interest of justice. Hence, both the orders dated 10.10.2012 and 12.04.2013 passed in Title Suit No.21 of 2014 are interfered with and set aside. The review petition filed by the petitioners stands allowed. The case is remanded back to the trial Court for fresh determination. The trial court is further directed to decide the preliminary issue as undernoted to settle the controversy, if possible at the threshold: Whether the subsequent suit being Title Suit No.21 of 2014 is hit by the principles of res judicata in view of the

judgment and decree dated 06.06.2012 delivered in RSA No.72 of 2007 by this Court (2013 1 TLR 1066)?

12. By the said judgment, this Court has declined to interfere with the concurrent finding of fact returned by the trial court and the first appellate court. It is to be noted that the judgment and decree dated 01.12.2006 passed in Title Suit No.22 of 2007 merged with the judgment and decree dated 09.06.2007 passed in Title Appeal No.06 of 2007. Both the plaintiffs and the respondents shall appear before the trial court on 2nd July, 2015 without fail when the Civil Judge, Jr. Divn., South Tripura, Udaipur shall fix a day for hearing on the preliminary issue. It is made clear that if on the date so would be appointed by the Civil Judge, Junior Division, South Tripura for hearing, either of the parties does not appear, the case shall be decided in their absence without any further notice as the case is required to be decided on the basis of the records.

Having held so, this petition stands allowed. There shall be no order as to costs.

JUDGE