

THE HIGH COURT OF TRIPURA
AGARTALA

CRP 72 OF 2011

1. Smt. Devibala Saha,
Wife of Late Swadesh Chandra Saha.
2. Sri Manik Lal Saha,
Son of Late Swadesh Chandra Saha.
3. Sri Syamal Saha,
Son of Late Swadesh Chandra Saha.
4. Sri Kamal Saha,
Son of Late Swadesh Chandra Saha.
5. Sri Narayan Saha,
Son of Late Swadesh Chandra Saha.

All village-Maharani,
P.O. & P.S. Radhakishorepur,
Udaipur, South Tripura.

6. Sri Jahar Lal Saha,
Son of Late Swadesh Chandra Saha,
Of Master Para (Chhanban),
P.O. & P.S. Radhakishorepur,
Udaipur, South Tripura.
7. Smt. Biva Rani Saha,
Wife of Sri Nitai Saha,
Of Town Shibnagar,
P.O. & P.S. East Agartala,
Agartala, West Tripura.
8. Smt. Shila Rani Saha,
Wife of Sri Narayan Saha,
Of Town Sonamura,
P.O. & P.S. Radhakishorepur,
Udaipur, South Tripura.

The petitioners No.1,2,3,4,5,7 & 8 are being represented by the petitioner No.6 by virtue of the special power of attorney executed on 02.09.2011 annexed with the petition immediately after the affidavit and marked as Annexure-X.

..... **Petitioners.**

- V e r s u s -

1. Sri Manik Debnath,
Son of Late Gopal Debnath.
2. Sri Ranjit Goswami,
Son of Late Haralal Goswami.

3. Sri Dipak Saha,
Son of Late Mrinal Kanti Saha.

4. Sri Satya Ranjan Das,
Son of Late Alanga Mohan Das.

All of village & P.O.-Chaigharia (Maharani),
P.S. Radhakishorepur,
Udaipur, South Tripura.

5. Sri Bhulan Bhowmik,
Son of Late Sanatan Bhowmik,
Of village & P.O.-Noyabari (Maharani),
P.S. Radhakishorepur,
Udaipur, South Tripura.

..... **Respondents.**

**BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA**

For the petitioners : Mr. Somik Deb, Advocate.

For the respondents : Mr. P.K. Dhar, Advocate,
Mr. R.G. Chakraborty,
Advocate.

Date of hearing & judgment : 05.05.2015.

Whether fit for reporting : **YES.**

JUDGMENT & ORDER (ORAL)

This revision petition filed by the plaintiffs is directed against the order dated 27-08-2011 passed by the learned Civil Judge (Sr. Division), South Tripura, Udaipur in case No. T.S. 15 of 2010 whereby the application filed by the plaintiffs seeking permission to withdraw the suit with liberty to file a fresh one has been rejected.

2. Briefly stated, the facts of the case are that the plaintiffs filed a suit in which they stated that there were shops in the suit land and that the defendants were tenants under the plaintiffs on the shops standing on the suit land. According to the plaintiffs, a fire took place at Maharani Bazaar on 29-03-2010 at about 9.30 p.m. and in such fire 18 shops including the shops of the plaintiffs were totally gutted and destroyed. The plaintiffs claimed that 5 shops belonging to them were in the possession of the defendants as tenants. The only prayer made in the original suit was that the defendants being the tenants had no right to reconstruct the shops and the following relief was claimed:-

“The Plaintiffs pray for a decree:-

(a) For perpetual injunction restraining the Defendants and their men or agent from making any sort of temporary/permanent construction over any portion of the suit land and further restraining the Defendants and their men or agent from making any sort of disturbance upon the Plaintiffs to proceed with construction work on the suit land and further restraining the Defendants to run any sort of business on the suit premises;”

3. The written statement was filed on behalf of the five defendants and various issues were raised but mainly the stand of the defendants was that the shops of the defendants were not on the land of the plaintiffs and that the shops of the defendants were existing on khas land belonging to the Government of Tripura. The defendants did not deny that the shops had burnt down.

4. Thereafter, the plaintiffs filed an application for amendment of the plaint in which it was averred that after the filing of the suit, the defendants had forcibly constructed shops on the suit land and they had no right to do so since they were tenants on the suit land. The plaintiffs prayed for amendment of the plaint but the learned trial Court rejected this prayer for amendment on the ground that if the prayer for amendment was allowed that would change the nature of the suit. I am not commenting on the correctness of that order because that is not under challenge before this Court.

5. Thereafter, the plaintiffs filed an application under Order XXIII of the Code of Civil Procedure (CPC) praying that they may be permitted to withdraw the suit with permission to file a fresh suit to incorporate the developments which had taken place after the filing of the first suit. It was also prayed that the first suit was defective inasmuch as the construction had already been raised and no suit for injunction simpliciter would lie. This application has also been rejected and hence, the plaintiffs have approached this Court.

6. I have heard learned counsel for the parties and I am of the considered view that the second order passed by the learned Court below is totally illegal. No party can be left remedyless. At this stage, this Court is not deciding the merits of the case. Whether, what the plaintiffs are stating is correct or not is for the trial Court to decide after recording evidence. However, if what the

plaintiffs are saying is correct, then the result will be that their first suit is bound to be dismissed because after the suit has been filed, the shops have been raised on the suit land. This matter is not disputed by the defendants but according to them they have reconstructed the shops on land which is not the land of the plaintiffs and according to the defendants, this land is of the government. If that is true, then the plaintiffs will fail but the plaintiffs cannot be left in such a situation that when they pray for an amendment, that application for amendment is disallowed and when they want to withdraw the suit, that prayer is also rejected.

7. It was contended by Mr. P.K. Dhar, learned counsel for the defendant-respondents, that the plaintiffs are free to file a suit on the fresh cause of action. It is very simple to say so but if the plaintiffs' first suit fails even on a technical ground that the suit for injunction is not maintainable on account of the fact that the shops have been reconstructed, then the findings in the suit will operate as *res judicata* against them in the second suit. The main issue is whether the shops are on the land of the plaintiffs and whether a relationship of landlord or tenant existed between the plaintiffs and the defendants at the time when the fire took place in the shops premises. If it is proved that such relationship was in existence, then after the fire had destroyed the buildings the tenants had no right to reconstruct the same. If on the other hand, it is proved that the tenants have constructed the shops on land not belonging to the plaintiffs, then obviously the plaintiffs are bound to fail.

8. In this view of the matter, I am clearly of the view that either the Court below should have allowed the application for amendment or having dismissed the application for amendment of the plaint could not have then rejected the application of the plaintiffs for withdrawal of the suit.

9. Order XXIII Rule 1(3) reads as follows:-

“1. Withdrawal of suit or abandonment of part of claim.— xxx xxx xxx

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.”

10. There are two grounds on which a Court can allow the suit to be withdrawn; (i) the first is that the suit must fail by reason of a formal defect, and (ii) that, there are sufficient grounds for the plaintiff to institute a fresh suit for the subject-matter of a suit or part of the claim. As far as this case is concerned, the plaintiffs satisfy both the grounds. The suit as originally filed was defective though this defect occurred due to events which had happened after the filing of the suit. The suit for injunction as

originally filed was maintainable but if the defendants have reconstructed the shops, then the suit has become virtually infructuous. There are even sufficient grounds to permit the plaintiffs to file a fresh suit because the plaintiffs first approached the Court seeking amendment of the plaint. This amendment should have normally been allowed because it related to subsequent events. However, the Court did not allow the amendment and thereafter, the plaintiffs had no other choice but to withdraw the suit with liberty to file a fresh one. Shockingly, this prayer has also been rejected leaving the plaintiffs virtually remediless facing a situation where their subsequent suit if filed would be rejected on the ground that the first suit had been rejected and which was bound to be rejected because it was defective.

11. In this view of the matter, the petition is allowed. The order of the learned trial Court is set aside and the plaintiffs are permitted to file a fresh suit. The suit be filed within 2(two) months from today and the same shall be treated to be within limitation for all intents and purposes.

12. Send down the lower court records forthwith.

CHIEF JUSTICE