

IN THE HIGH COURT OF TRIPURA
AGARTALA

CRP No. 91 of 2011

Smt. Rafia Begum,
wife of Sri Safik Mia of village
Town Sonamura, P.O. & P.S.
Radha Kishore Pur, South
Tripura District
(In the original suit, the defendant No.3d)

..... **Petitioner**

- V e r s u s -

- 1. Smt. Sakina Bibi,**
daughter of late Hossain Ali of village
Khilpara, P.O. & P.S. Radha Kishore
Pur, South Tripura
(In the original suit, the Plaintiff No.1)
- 2. Smt. Hazera Bibi,**
wife of late Sarik Mia and daughter of
late Hossain Ali
(In the original suit, the Plaintiff No.2)
- 3. Smt. Majani Bibi,**
wife of late Bashir Mia and
daughter of late Hossain Ali
(In the original suit, the Plaintiff No.3)
- the respondents 2 & 3 are of
village Town Sonamura, P.O &
P.S. Radha Kishore Pur, South
Tripura
- 4. Sri Alkas Mia,**
son of late Sona Mia
(In the original suit, the Plaintiff No. 4a)
- 5. Sri Dhana Mia,**
son of late Sona Mia
(In the original suit, the Plaintiff No.4b)
- 6. Sri Manju Mia,**
son of late Sona Mia
(In the original suit, the Plaintiff No. 4c)

-the respondents No. 4,5 & 6 of
village Town Sonamura, P.O. &
P.S. Radha Kishore Pur, South
Tripura

- 7. Smt. Latifa Bibi,**
daughter of Sri Mainuddin Mia of
Town Sonamura, P.O. & P.S.
Radha Kishore Pur, South Tripura
(In the original suit, the Plaintiff No.4d)
- 8. Sri Majal Haque alias Tota Mia,**
son of late Hossain Ali of village
Khilpara, P.O. & P.S. Radha
Kishore Pur, South Tripura
(In the original suit, the defendant No.1)
- 9. Sri Hanif Mia alias Manik Mia,**
son of late Sova Mia
(In the original suit, the defendant No.2a)
- 10. Smt. Hanufa Bibi,**
wife of late Sova Mia
(In the original suit, the defendant No.2b)

- the respondent No.9 & 10 of village –
Khilpara, P.O. & P.S. Radha Kishore Pur,
South Tripura
- 11. Smt. Sukan Bibi,**
wife of Sri Alkas Mia of village
Hirapur (Maharani), P.O. & P.S.
Radha Kishore Pur, South Tripura
(In the original suit, the defendant No.2c)
- 12. Smt. Rasun Bibi,**
wife of Sri Alam Mia of village
Rajdharnagar, P.O. & P.S.
Kakraban, South Tripura
(In the original suit, the defendant No.2d)
- 13. Smt. Khushan Bibi,**
wife of Sri Harun Mia of village
Chandrapur (Kandi), P.S: Radha
Kishore Pur, South Tripura.
(In the original suit, the defendant No.2e)
- 14. Sri Hasem Mia,**
son of late Rajjak Mia
(In the original suit, the defendant No.3a)
- 15. Sri Kasem Mia,**
son of late Rajjak Mia
(In the original suit, the defendant No.3b)

16. Sri Abdul Aziz,
son of late Rajjak Mia
(In the original suit, the defendant No.3c)

-the respondents No.14,15 & 16 of village
– Khilpara, P.O. & P.S. Radha Kishore Pur,
South Tripura

17. Smt. Renu Begum,
wife of Sri Sishu Mia of village
Town Sonamura, P.O. & P.S.
Radha Kishore Pur, South Tripura.
(In the original suit, the defendant No.3e)

.....**Respondents**

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

For the petitioner : Mr. D.K. Das Choudhury, Advocate
For the respondents : Mr. Somik Deb, Advocate
Mr. Samarjit Bhattacharji, Legal Aid Counsel

Date of hearing : 20.01.2015
Date of delivery of Judgment & Order : **08.05.2015**

Whether fit for reporting:	<table><tr><td>YES</td><td>NO</td></tr><tr><td>√</td><td></td></tr></table>	YES	NO	√	
YES	NO				
√					

JUDGMENT & ORDER

This is an application filed under Article 227 of the Constitution of India for interfering with the order dated 04.11.2011 delivered in Civil Misc. 32 of 2011, arising from Civil Misc. 31 of 2011 related to Title Suit(P) 04 of 2009, by the Civil Judge, Senior Division, South Tripura, Udaipur.

[2] The undisputed facts as exposted in this petition are that the petitioner herein, was arraigned as the defendant No.3(d), whereas the respondent Nos. 1 to 7 are the plaintiffs in the suit being Title Suit(P) 04 of 2009, which has been instituted

for partition of the suit properties, description of which has been appended to the plaint.

[3] The petitioner has claimed that the summon issued by the court of the origin was not received by her, but it had been received by her daughter, namely Nur Jahan Begam, who used to resides in a different place and was not keeping relation with the petitioner. Only on 23.05.2011, the petitioner came to know that the suit has been decreed ex-parte on 29.06.2009 and after that for purpose of drawing the final decree, the suit land was surveyed by a Survey Commissioner. According to the petitioner, she immediately filed a petition under Order IX, Rule-13 of the CPC being Civil Misc. 31 of 2011 in the trial court for setting aside the ex-parte judgment and decree. She has claimed that from the date of her knowledge, her petition for setting aside the ex-parte judgment and decree was within time but for the purpose of clarifying that position, she filed a petition under Section 5 of the Limitation Act being Civil Misc. 32 of 2011 for condoning the delay in preferring the said petition. For execution of the final decree, the plaintiffs instituted the execution proceeding being Title No. T.S.Exe(T) 08 of 2011. The petitioner herein, had also filed a petition for staying the said execution proceeding being Civil Misc. 46 of 2011 under Section 151 and 94(c) of the CPC but the trial court by the order dated 04.11.2011 dismissed all those petitions. As the order passed in Civil Misc. 32 of 2011 according to the petitioner is not appealable under Order XLIII, Rule-1(d) of the

CPC, she has preferred this petition under Article 227 of the Constitution of India but the petitioner has admitted that the order dated 04.11.2011 passed rejecting the petition filed under Order IX Rule 13 of the CPC is appealable under Order XLIII Rule 1 (d) of the CPC.

[4] The petitioner has submitted that unless the said order dated 04.11.2011 is interfered with, she would suffer irreparable injury and failure of justice. The respondents have raised preliminary objection regarding maintainability of this petition filed under Article 227 (1) of the Constitution of India. According to them, as consequence of rejection of the petition for condonation of delay being Civil Misc.32 of 2011, Civil Misc. 31 of 2011 has been dismissed and hence, the order of dismissal is clearly appealable under Order XLIII Rule 1 (d) of the CPC.

[5] Mr. D.K. Das Choudhury, learned counsel appearing for the petitioner while responding to that objection has relied on a decision of the Gauhati High Court in **Union of India vs. Khagendra Nath Das**, reported in **[1987] 2 GLR 34**, where it has been held that:

'no appeal lies from an order unless it is expressly provided under Section 104 and/or Order XLIII of the Code and in any event no second appeal lies from the orders.'

[6] Mr. Das Chowdhury, learned counsel has therefore, stoutly contended that Order XLIII of the C.P.C. does not provide

for appeal from the order dismissing the petition under Section-5 of the Limitation Act. Therefore, an order under Section 5 of the Limitation Act, is not an appealable order. According to him, this controversy has been settled by an apex court's decision in **Shyam Sunder Sarma vs. Pannalal Jaiswal and others**, reported in **(2005) 1 SCC 436**, where the apex court has held as under:

The fact of the case was that for setting aside the ex parte decree under Order IX Rule 13 of the Code accompanied by an application for condoning the delay in filing that petition, and subsequently he also filed an appeal against that ex parte decree, again accompanied by an application for condoning the delay in filing that appeal. That application for condoning the delay in filing the appeal against the ex parte decree and the appeal against ex parte decree were both dismissed for default. The petition for setting aside the ex parte decree under Order IX Rule 13 of the Code was filed first and the appeal was filed while that petition was pending. But before the petition under Order IX Rule 13 of the Code could be disposed of, the appeal had been dismissed for default. Thus, on the day the petition under Order IX Rule 13 of the Code was taken up for disposal, no appeal against the decree was pending.

[7] In **Shyam Sunder Sarma vs. Pannalal Jaiswal**, the apex court had occasion to consider the controversy from a different angle. The appeal which was filed latter accompanied by a petition for condoning the delay has been dismissed as being time barred in view of Section 3 of the Limitation Act. That no doubt was consequence of dismissal of the petition for condonation of delay. There were the conflicting views of various High Courts. It has been held to resolve the legal penumbra that though the appeal was dismissed on refusal to condone the delay,

it is nevertheless a decision in the appeal and as such, the said judgment and order in the appeal is appealable.

[8] It has been further observed in **Prafulla Sarkar vs. Kanan Das and others** that:

When an aggrieved party files an appeal against the order then obviously in the very same appeal it can also challenge the order passed in the application for condonation of delay and is not required to file a separate revision petition in that regard. Since the order refusing to condone the delay merges in the final order dismissing the main application or appeal when challenge is made to the final order then the interim order whereby the delay was condoned can also be challenged.

[9] This case is squarely covered by **Prafulla Sarkar vs. Kanan Das and others** and hence, this Court is persuaded to hold that this petition under Article 227 of the Constitution of India cannot be sustained. While observing this, this Court is not oblivious that in the event when it behoves the failure of justice for non-observing the due process, then this Court may exercise its supervisory power, but not as an ordinary rule. In this case, the statement made by the petitioner as regards the service of notice is hardly believable as the address provided by the petitioner in the affidavit appended to this petition and the address provided in the plaint by the plaintiffs are exactly identical. This Court has also gone to the Process Server's Report dated 10.02.2009, where he has categorically stated that when he went to serve the summon on the petitioner in the address given

in the summon, he without finding the petitioner available right at the moment handed over the summon to his major daughter, namely Nur Jahan Begam, who has categorically stated that the petitioner was not temporarily available there.

[11] In this circumstances, this court is of the considered opinion that it is not a fit case where it should exercise the supervisory jurisdiction under Article-227 of the Constitution of India and accordingly, this petition is dismissed.

Send down the LCRs forthwith.

JUDGE

Sujay