

IN THE HIGH COURT OF TRIPURA
AGARTALA

CRP NO.80 OF 2014

1. Smt. Mira Dutta,
wife of late Sadhan Dutta
2. Sri Swapan Dutta,
son of late Sadhan Dutta
3. Smt. Saraswati Dutta,
daughter of late Sadhan Dutta
4. Smt. Radhika Dutta,
daughter of late Sadhan Dutta
5. Smt. Gita Dutta,
daughter of late Sadhan Dutta
- all are residents of Charipara,
Sibir Tilla, P.O. S.D. Mission,
P.S. Amtali, District : West Tripura.

..... Petitioners

Vs.

Sri Basi Ram Dutta
son of late Kajal Dutta
resident of Charipara, Sibir Tilla, P.O. S.D. Mission,
P.S. Amtali, District : West Tripura

.....Respondent

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

For the petitioners : Mr. D.R. Choudhury, Advocate

For the respondent : Mr. J. Majumder, Advocate

Date of hearing & order : 12.06.2015

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER (ORAL)

Heard Mr. D.R Choudhury learned counsel appearing for the petitioners as well as Mr. J Majumder, learned counsel appearing for the respondent.

2. By this petition filed under Section 115 of the CPC, the order dated 26.08.2014 delivered in T.S. No.08/2014 by the Civil Judge, Jr. Division, Agartala, West Tripura, Court No.2, has been challenged. For purpose of reference, the order dated 26.08.2014 is extracted hereunder :

"Ld. Advocate Mr D. Deb filed his appearance memo for the plaintiff.

Ld. Counsel is found absent when the instant case record was taken up for hearing.

Perused the case record.

It is seen that today the case was fixed for service report of summons upon the defendant.

It is also seen that summons issued upon the defendant was returned without service with report that no person in the name of defendant was found in the locality. An order was passed on the last date asking the plaintiffs to take steps for issuance of summons upon the defendant within 02.06.2014.

As per office note it is seen that no requisites filed by the plaintiffs on or before the 02.08.14.

Today also plaintiff side did not file any requisites, nor the plaintiff side applied for any fresh summons.

Order 9 Rule 5 CPC provides inter alia that where, after the summons has been issued to the defendants and returned unserved the plaintiff falls for a period of 7 days from the date of the return made to the Court, to apply for issue of fresh summons, the Court shall make an order that the suit be dismissed as against such defendants, unless the plaintiff has

within the said period satisfy the Court that he has failed after using his best endeavour to discover the residence of the defendants or the defendant is avoid service of process or there is any other sufficient ground for extending time.

Here in this case the plaintiff did not take any steps for issuance of summons upon the defendant against whom summons as returned unserved. There is no justification from the side of plaintiffs regarding non taking of any steps.

Considering the present factual scenario of the case and in view of the provisions of order 9 Rule 5, CPC the instant suit is dismissed against sole defendant.

Thus the case is disposed of accordingly without contest

Make necessary entry in the TR”

3. It is obvious that for not taking steps the suit of the petitioners was dismissed. According to the petitioners, when they took steps for service of summons initially the sole defendant-respondent managed to refuse service of the summons for the wrong committed by the Process Server. Even though the son of the sole defendant was in the home, the summons was not pasted in a conspicuous place of his house for completing the process after refusal. As a result, again the Civil Judge, Jr. Division, West Tripura, Agartala directed the petitioners to re-issue the summons. When the fresh summons were issued on the said defendant-respondent in the given address, the report came that the sole defendant-respondent was not available in that place. Thereafter despite providing opportunities, the plaintiff-petitioners herein did not take any steps and finally the impugned order has been passed. Since the order

passed under order IX rule 5 of the CPC, that cannot be set aside under order IX rule 4 of the CPC, the petitioners have filed this petition.

4. Mr. J. Majumder, learned counsel appearing for the respondent has submitted that in the plaint it has been written as Basi Mohan Dutta, but no one named Basi Mohan Dutta resides in the given address.

5. Sri Basi Ram Dutta, whom Mr. J. Majumder, learned counsel represents in this proceeding resides there. But, Mr. Majumder, learned counsel did not contest the description given in this petition that the said Basi Ram Das is the son of late Kajal Dutta and residing in the address given below alike Basi Mohan Dutta. He has further submitted that without amending the description in the plaint, the petitioner had corrected the name of the defendant-respondent in this proceeding, which is not permissible in law. According to him, such conduct cannot be approved by this court. Mr. Majumder, learned counsel has submitted that there is no infirmity in the order, as after giving opportunities, the Civil Judge, Jr. Division, Court No.2, Agartala, West Tripura, has dismissed the suit under order IX rule 5 of the CPC.

6. This court is in total agreement with Mr. J. Majumder, learned counsel appearing for the respondent. However, the technical objection as raised by Mr. Majumder at the same time cannot eclipse the substantive purpose of justice, because the error

that has been committed was a human error, but not taking the steps by the plaintiffs is also a conduct usually this court could not condone. However, having regard to the substantive ends of justice, this court in exercise of its power under Article 227 of the Constitution of India, is inclined to allow the petition by setting aside the impugned order dated 26.08.2014, giving the plaintiffs a solitary chance to take steps by 26.06.2015, when the matter would be fixed before the trial court. However, this opportunity has been so granted subject to payment of ₹5,000 (rupees five thousand) as cost to the sole defendant-respondent by the next date. It is made clear that on the next date so fixed by this court, if proper step in terms hereof is not taken, this order will have no force whatsoever. The impugned order would be automatically restituted without reference to this court and the suit would be treated as dismissed.

7. With this observation and direction, this petition stands allowed to the extent as indicated above.

JUDGE

ROY