

In the matter of : Surajit Biswas

As usual none appears on behalf of the petitioner.

The matter is appearing almost after nine years.

The conduct of the petitioner demonstrates lack of interest to proceed with the lis.

The Hon'ble Supreme Court in the case of **Robin Thapa vs. Rohit Dora** reported in **AIR 2019 SCC 3225** held :-

"8. Ordinarily, a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the plaintiff or the defendant. The cause of justice does require that as far as possible, adjudication be done on merits."

In view of the aforesaid, I am inclined to dispose of the application on merit based on materials available with the records.

This reivisional application challenges the order no. 39 dated 19.3.2014 passed by the learned Civil Judge, Junior Division, Bongaon in Misc. Case No. 34 of 2012. From the attending facts of the case it appears that the petitioner Surajit Biswas filed an application seeking probate of the last will of Smt. Anumati Biswas which was registered as Misc. Case No. 76 of 2002. The proceeding was, however, dismissed on the ground that petitioner was absent when the matter was called for hearing. The petitioner though at a belated stage filed an application seeking restoration of the proceeding after setting aside the order passed on 23.3.2006 dismissing the case for

default under the caption Order IX Rule 13 of the Code of Civil Procedure. The petitioner, however, took out an application for amendment of cause title by way of incorporating the provision of Order IX Rule 9 of the Code of Civil Procedure in place and stead of Order IX Rule 13 of the Code of Civil Procedure. Learned Trial Court, however, refused to allow such prayer on the ground that amendment sought for would change the nature and character of the proceeding. Though the petition is captioned as one under Order IX Rule 13, but content of the petition demonstrates that the petition was filed by the petitioner for restoration of the application to its original file after recalling the order dated 22.3.2008 by which the application for probate was dismissed for default. The petition was made under Order IX Rule 9 of the Code of Civil Procedure in spirit with wrong caption which learned Trial Court failed to appreciate and dismissed the application absolutely on a wrong notion. The order impugned manifestly indicates erroneous exercise of jurisdiction.

Learned Trial Court is directed to re-admit the case to its original file and dispose of the application for amendment afresh in the light of the observation made hereinabove and also to dispose of the petition under Order IX Rule 9 of the Code of Civil Procedure in accordance with law.

With this observation the revisional application is disposed of.

Let a copy of the order be sent down to the learned Trial Court for information and necessary action.

(Siddhartha Roy Chowdhury, J.)

