

19.08.2025
Court No.25

Sl. No.127
Mujahid

CO 383 of 2023

**Sri Khokan Chandra Adhikary
Vs.
Smt. Usha Adhikary & Ors.**

Ms. Sonini Chakrabarty,
Mr. Samik Sarkar

...for the petitioner

Mr. Partha Pratim Roy,
Mr. Rajdeep Bhattacharya,
Mr. Sanjib Sankar Majumdar

...for the opposite parties

1. Present petition has been filed challenging the order dated 21st December, 2022 in Misc. Appeal No.16 of 2022. The first appeal was filed challenging the order no.84 dated 6th April, 2022 passed by the learned Civil Judge (Sr. Division) 1st Court, Baruipur, District – South 24-Parganas in Misc. Case No.29 of 2020.

2. Briefly stated facts are that an ex parte preliminary decree in partition suit being Title Suit No.160 of 2012 was passed declaring the share of the petitioner/plaintiff by the learned trial court vide order dated 29th July, 2017. Subsequently, the final decree was also passed on 7th December, 2019. The petitioner/plaintiff filed the execution case being Title Execution Case No. 03 of 2020 during which an application under Order 9 Rule 13 (Misc Case No.29

of 2020) read with Section 151 of CPC was filed for setting aside the said preliminary decree and final decree. An application under Section 5 of the Limitation Act for condonation of delay was also filed. This application was dismissed by the learned Civil Judge (Sr. Division) 1st Court, Baruipur vide order dated 6th April, 2022 which was challenged before the learned first appellate court.

3. The learned first appellate court vide the impugned order, inter alia, held that the presumption of good service is a rebuttable presumption and the said presumption can be rebutted by adducing evidence by the party against whom such presumption has been drawn.

4. Learned first appellate court thus, inter alia, held that the opposite parties/petitioners are to rebut such presumption by adducing evidence. It was further, inter alia, held that the learned trial court did not give the opposite parties/petitioners any opportunity to rebut the said presumption while disposing the Misc. Case under Order 9 Rule 13 read with Section 151 of CPC as a consequential rejection in rejecting the petition under Section 5 of the Limitation Act. The learned first appellate court directed the learned trial court to give the opposite parties/petitioners an opportunity to adduce evidence

to rebut the presumption that the summon of the suit had not been duly served upon the defendants.

5. Thus, going through the entire impugned order, it is clear that the learned appellate court set aside the order under Section 5 of the Limitation Act and relegated the matter back to the learned trial court for affording the opportunity to the opposite parties/defendants to lead adduce the evidence to rebut the presumption of good service. However, in the end it seems that the learned appellate court has inadvertently mentioned the petition under Section 5 is allowed. There seems to be an inadvertent error and is liable to be struck down. Hence the present petition is disposed of with a direction that the learned trial court in terms of order dated 21st December, 2022 shall afford the defendants/opposite parties to lead/adduce the evidence to rebut the presumption of good service and the learned trial court shall thereupon decide the application under Section 5 of the Limitation Act and consequently, the application under 9 Rule 13 of CPC afresh.

6. Accordingly, the petition stands disposed of.

7. However, this court has not gone into the merits of the case and no expression made herein shall tantamount to be an expression on the merits of the case.

8. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Dinesh Kumar Sharma, J.)