



GAHC010142702023

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**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : CRP(IO)/242/2023**

SREE PRAKASH SINGH  
S/O LATE B.N. SINGH, R/O JASHODA TALKIES COMPOUND, P.O.-DIGBOI,  
DIST- TINSUKIA, ASSAM

VERSUS

TRISHIT DHAR  
S/O LATE TRIBENI MOHAN DHAR, R/O PROFESSOR PARA, PUBLIC  
SCHOOL ROAD, SILCHAR, DIST-CACHAR, ASSAM, PIN-788005

**B E F O R E**

**Hon'ble MR. JUSTICE SANJAY KUMAR MEDHI**

Advocate for the petitioner: Ms. G. Goswami, Advocate.

Advocate for respondent : xxxxxxxxx,

**Date of hearing : 02.08.2023**

**Date of judgment : 02.08.2023**

## **JUDGMENT & ORDER**

Heard Ms. G. Goswami, learned counsel for the petitioner, who has filed this petition under Article 227 of the Constitution of India against an order dated 24.05.2023 passed by the learned Court of Civil Judge, No. 1, Cachar, Silchar in Misc. (J) Case No. 28/2022 in connection with Misc. (J) Case No. 29/2022 in TS No. 113/2022.

2. The petitioner was the defendant against whom under certain circumstances, an *ex-parte* order was passed which the petitioner was not aware of. Ultimately, the petitioner had approached the learned Court by filing an application under Order 9 Rule 13 CPC along with an application under Section 5 of the Limitation Act to condone the delay. The said petition filed under Section 5 of the Limitation Act has been dismissed resulting in consequential dismissal of the petition in Order 9 Rule 13.

3. The Hon'ble Supreme Court in the case of ***Shyam Sundar Sarma Vs Pannalal Jaiswal & Ors.*** reported in ***(2005) 1 SCC 436*** has held that dismissal of an application under Section 5 of the Limitation Act would also mean a dismissal of the entire case and therefore an appeal would lie. In paragraphs 14 and 15, the Hon'ble Supreme Court has laid down as follows:-

*“14. It was sought to be argued on behalf of the appellant that the above decisions were distinguishable in view of the fact that in those cases, the appeals against the decrees were filed first, followed by the petitions under Order 9 Rule 13 of the Code, whereas in the present case the petition under Order 9 Rule 13 of the Code was filed first and only during its pendency, an appeal against the decree was filed, with an application for condoning the delay in filing it. In our view, this would not make any difference to the principle enunciated by this Court in Rani Choudhury case. Moreover, on the day the trial court was called upon to consider and dispose of the petition under Order 9 Rule 13 of the Code, an appeal, though belated, had been filed against the decree by the appellant and the same had been dismissed as barred by limitation and had not been withdrawn. It is not possible to accept the argument that the application of the Explanation should be confined to cases where an appeal had already been filed against*



*the ex parte decree and it should be held not to apply to cases where an appeal is subsequently filed. The acceptance of such an argument, in our view, would tend to defeat the legislative scheme as noticed in Rani Choudhury case [(1982) 2 SCC 596]. In the light of the object sought to be achieved by the introduction of the Explanation to Order 9 Rule 13, such an argument cannot also be accepted.*

**15.** We are not impressed by the argument of learned counsel for the appellant that the decision in Rani Choudhury case requires reconsideration. On going through the said decision in the light of the objects and reasons for the introduction of the Explanation to Order 9 Rule 13 and the concept of an appeal as indicated by the Privy Council and this Court in the decisions already cited, the argument that an appeal which is dismissed for default or as barred by limitation because of the dismissal of the application for condoning the delay in filing the same, should be treated on a par with the non-filing of an appeal or the withdrawal of an appeal, cannot be accepted. The argument that since there is no merger of the decree of the trial court in that of the appellate court in a case of this nature and consequently the Explanation should not be applied, cannot also be accepted in the context of what this Court has earlier stated and what we have noticed above."

4. In any case, in the case of ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai & Ors Vs Tuticorin Education Society and Ors.*** reported in ***(2019) 9 SCC 538*** the Hon'ble Supreme Court has further laid down a caveat that whenever there is remedy under the Code, constitutional provision are not liable to be invoked. The relevant portion of the judgment is extracted herein below:-

**“12.** But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which Respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3-member Bench of this Court, while



*overruling the decision in Surya Dev Rai v. Ram Chander Rai [(2003) 6 SCC 675] pointed out in Radhey Shyam v. Chhabi Nath [(2015) 5 SCC 423] that "orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts".*

**13.** *Therefore wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."*

5. In view of the above, the present petition is held to be not maintainable and therefore dismissed.

6. Liberty is however granted to the petitioner to prefer an appeal, if so advised. Further to facilitate preferring of such appeal, Registry is directed to return the certified copy of the impugned order, if sought for by the petitioner.

**JUDGE**

**Comparing Assistant**