

GAHC010015662014



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

Case No. : CRP/314/2014

PARAMESH CH. DAS and 2 ORS.

2: ASWINI KUMAR DAS

3: AMAL CH. DAS
ALL S/O- LT. LOHIT CH. DAS
R/O- ASHRAM ROAD
SANTIPUR
GHY- 9
KAMRUP

VERSUS

TANMOY JYOTI MAHANTA and ANR.
S/O- SRI DURLABH CHANDRA MAHANTA, R/O- UTTAR-PUB-
GEETANAGAR, ZOO NARENGI ROAD, GHY- 20.

2: THE ASSAM ASSOCIATION OF THE DEAF
GOPINATH NAGAR
GHY- 16
REP. BY ITS SECY

Advocate for the Petitioner : MR.R P N SINGH

Advocate for the Respondent : MR. M K CHOUDHURY

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioners : Shri S.P. Roy

Advocate for the respondents : Shri M. Sarma, R-1

Date of hearing : **19.06.2024**
Date of Judgment : **19.06.2024**

JUDGMENT & ORDER

The present application has been filed under Section 115 of the Code of Civil Procedure, 1908 challenging an order dated 16.06.2014 passed by the learned Additional District Judge No. 2, Kamrup (M) in Misc(J) Case No. 76/2014 arising out of Misc(Probate) Case No. 1/2013. By the impugned order, the aforesaid Misc(J) case which was filed under Order IX Rule 4 of the CPC was allowed and the case was restored to file.

2. I have heard Shri S.P. Roy, learned counsel for the petitioners. I have also heard Shri M. Sarma, learned counsel for the respondent no. 1. The respondent no. 2 has chosen not to appear in this case.

3. Shri Roy, learned counsel for the petitioners has submitted that in the Probate Case, the present petitioners were not originally made parties and accordingly they had filed impleadment application whereafter they were impleaded as parties. The petitioners claimed that they are legal heirs of Bhuban Chandra Das, who had executed the Will in question and was the subject matter of the Probate Case. The learned Court vide an order dated 20.07.2023 had however dismissed the case on default on both the counts of non-appearance of the party and not taking steps. Subsequently, the respondent no. 1 had filed an application under Order IX Rule 4 of the CPC for restoration of the Probate Case in which the present petitioners had filed

objection. Vide the impugned order dated 16.06.2014, the petition for restoration was allowed, however with a cost of Rs.1,000/-.

4. The learned counsel for the petitioners has submitted that prior to passing of the impugned order, there were at least three dates in which there was continuous default on the part of the present respondent no. 1 in appearing before the learned Court. It is also submitted that a Title Execution Case was continuing and the action of the present respondent no. 1 in filing application in that proceeding would *prima facie* show that he had full knowledge of the present case in spite of which there was non-appearance.

5. By referring to the impugned order dated 16.06.2014, the learned counsel for the petitioners has submitted while the matter was transferred from the Court of the learned District Judge to the Court of the Additional District Judge, the date was already fixed and therefore it could not have been contended by the respondent that the date was not known by him. It is also submitted that the learned Court while considering the matter had come to the conclusion regarding the negligence and default of the party in pursuing the case and yet had restored the same to file by taking into consideration the consequences. It is contended that the consequence should not be the look out of the Court if the Court is otherwise satisfied on the aspect that there was negligence and *laches* in pursuing the matter. Shri Roy, learned counsel for the petitioners accordingly submits that the impugned order dated 16.06.2014 is liable to be set-aside.

6. *Per contra*, Shri Sarma, learned counsel for the respondent no. 1 has submitted that the fact of non-appearance on earlier three dates could not be denied by him as those are matter of records. He however submits that the Probate Case was instituted by the Executor and the beneficiary was the present respondent no. 2. It is submitted that the said Bhurban Chandra Das had died as

a bachelor and had made the Will in which the respondent no. 2 was made the beneficiary and it is for its benefit that Probate Case was instituted. It is submitted that the learned Court while considering the case had taken the cause of justice and accordingly had restored the case vide order dated 16.06.2014 which does not require any interference. The learned counsel has also highlighted the aspect that cost was imposed upon his client for the default.

7. The rival submissions have been duly considered and the materials placed before this Court, including the LCRs have been carefully perused.

8. This Court has noted while issuing notice in this case vide order dated 25.09.2014, the LCR was called for. Therefore, it is apparent that there is no further development in the case before the learned Court below.

9. The impugned order dated 16.06.2014 has recorded that the default was because of the negligence of the conducting counsel. Though a wrong noting of the date was pleaded, the learned Court has also recorded that while transferring the matter vide order dated 04.04.2013 and fixing it before the learned Court of Additional District Judge, the next date was also fixed as 04.05.2013 and therefore, it is difficult to accept the submission that the respondent no. 1 was not aware of the dates. The default / negligence on the part of the conducting counsel is apparent which is also one of the consideration and observation made by the learned Court. The learned Court however has also taken into account the subject matter of dispute which was for Probate of a Will and the beneficiary was the respondent no. 2 and the present respondent no. 1 was only the Executor. The application filed under Order IX Rule 4 of the CPC was not by the respondent no. 2 the beneficiary but by the respondent no. 1 who is the Executor and therefore the *bona fide* of filing such application

cannot not be doubted.

10. The provisions of Order IX Rule 4 CPC is for providing the plaintiff to file an application for setting aside the order of dismissal by assigning sufficient cost. The said provision also gives liberty to the plaintiff to institute a fresh suit subject to the law of limitation.

11. For ready reference, the aforesaid provision of Order IX Rule 4 of the CPC is extracted hereinbelow-

“4. Plaintiff may bring fresh suit or Court may restore suit to file.—Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.”

12. In the considered opinion of this Court, the aforesaid provision, as a matter of abundant caution gives liberty to the plaintiff to file an application for setting aside an order of dismissal by assigning good reasons whereas the substantial right to bring a fresh suit subject to the law of limitation is still left open. The intention of the legislation is to give an adequate opportunity to a party approaching a Court to have a matter adjudicated on merits.

13. The facts however, in the instant case, would show that the initial order dated 20.07.2013 passed by the Court by dismissal of the case was after citing reasons. In the application filed for restoration, the default on the part of the counsel has been cited as one of the main grounds. The law is settled down in

this field that parties should not suffer on account of default of an advocate. However, the said excuse, if taken has to be considered by taking into consideration the other materials on record and not in a routine manner. In the instant case, the approach of the learned Court to explore the aspect regarding who would be the ultimate beneficiary if the Probate Case is allowed does not appear to be unreasonable. This Court has also noticed that while allowing the restoration a cost of Rs.1,000/- has also been imposed. Shri Roy, learned counsel for the petitioners has however submitted that the cost is yet to be paid.

14. After hearing the learned counsel for the parties and on consideration of the facts and circumstances including the provision of Order IX Rule 4 of the CPC, this Court is of the view that the powers to be exercised under Section 115 of the CPC under which the present petition is to be filed may not require interference with the impugned order dated 16.06.2014.

15. Accordingly, the petition is dismissed.

16. The LCR is directed to be transmitted back immediately and the parties are directed to appear before the learned Court on 18.07.2024. On the said date, the respondent no. 1 is also required to deposit the cost which was imposed vide the impugned order dated 16.06.2014 and only on deposit of such cost, the further proceeding may be taken.

JUDGE

Comparing Assistant