

HIGH COURT FORM NO. (J) 2  
HEADING OF JUDGMENT ON ORIGINAL APPEAL

**IN THE COURT OF THE CIVIL JUDGE TEZPUR, SONITPUR**

Present: **N.J. Haque, LLM, AJS**  
Civil Judge  
Tezpur, Sonitpur

**29<sup>th</sup> May' 2019**

**MISC. APPEAL NO. 1/2018**

**Sri Ranjit Ranjan Nath**  
S/o (L): Sailendra Kumar Nath  
Vill – Beseria, Pukhuria  
Mouza- Bhairabpad, PS- Tezpur,  
Dist - Sonitpur, Assam

----- *Appellant/Petitioner*

**-Vs-**

**Sri Jagat Nath**  
S/o (L): Mohodhar Nath  
Vill – Beseria, Pukhuria  
Mouza- Bhairabpad, PS- Tezpur,  
Dist - Sonitpur, Assam

--- *Respondent/Opposite Party*

**This first appeal has been preferred U/O.43 R.1(c) read with Section 104/106 of CPC against the order dated 25-09-2017 of Misc.(J) Case No.40/2017 and order dated 25-09-2017 of Misc.(J) Case No.41/2017 (in Title Suit No.52/2015) passed by the learned Munsiff No.2 at Tezpur and finally came up for hearing on-20/05/2019.**

Counsel for Appellant : Sri P. C. Sarmah

Counsel for Respondent : Sri D. Bose

**J U D G M E N T**

1. This Misc. Appeal preferred under Order 43 Rule 1 (c) /106 of CPC against the orders passed in Misc.(J) No.40/2017 dated 25-09-2017 and Misc.(J) No.41/2017 dated 25-09-2017 arising out of TS No.52/2015, passed by Learned Munsiff No-2, Sonitpur, Tezpur. Instant Misc. Appeal chosen by the petitioner/appellant being aggrieved and dissatisfied with the order dated 25-09-2017 passed by the Id. Munsiff, No.2, Sonitpur, Tezpur in connection

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with Misc.(J) No.40/2017 that filed for restoration the suit and in and Misc.(J) No.41/2017 filed for condonation of delay.

2. The Misc. Appeal on being heard, admitted for hearing and accordingly lower Court's record was called for and received.
3. In order to decide the Misc. Appeal, let me describe, in brief, the facts leading to this appeal:--

**Petitioner' Case**

4. Petitioner's case appears to be in a narrow campus is that the appellant filed T.S No.52/2015 for specific performance of contract along with delivery of khas possession and other reliefs. That Learned Advocate named Dimtansu Sharma was representing the appellant/plaintiff in TS No.52/15 till 25-11-2016 and on that day said advocate filed a petition before the Munsiff No.2 that he has withdrawn from the suit as advocate of plaintiff/appellant and after that said advocate did not take any steps in the suit which was not known to the plaintiff/appellant till 29-04-2017. It is further pleaded that plaintiff/appellant for the first time came to know about the fact on 29-04-2017 and subsequently on 08-05-2017 the plaintiff/appellant filed petition under Order 9 Rule 9 r/w Sec 151 of CPC before the learned court below for setting aside the dismissal order dated 20-01-2017 along with a petition u/s 5 of Limitation Act showing sufficient cause and satisfactory ground for condonation of delay. Accordingly, petition filed under Order 9 Rule 9 registered vide Misc. (J) No.40/2017 and petition filed u/s 5 of Limitation Act registered as Misc.(J) No.41/2017. It is further pleaded by the plaintiff/appellant that learned court below dismissed both the Misc. (J) cases on 25-09-2017 even though the O.P. was absent without any steps. Accordingly, the plaintiff/appellant preferred the instant appeal on the following grounds :

**GROUND OF APPEAL**

1. That learned court below committed great error in dismissing the petition of Misc.(J) Case No-40 of 2017 ;

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2. That learned court below committed great mistake in deciding the petition filed under Order IX Rule 9 of CPC prior to decide the petition filed u/s 5 of the Limitation Act of Misc.(J) Case No-41 of 2017 ;
  3. That learned court below decided the Misc.(J) Case No-40 of 2017 only on the basis of provision made under Order IX Rule 9 CPC, but deliberately failed to go through the provisions of Rule 13 Order IX of CPC ;
  4. That the learned court below deliberately failed to consider that the petition Under Order 9 Rule 9 CPC was filed by the appellant /petitioner for restoration and revival of the suit which was dismissed for default, but not for filing a fresh suit.
  5. That the discussion for dismissal of the petition of Misc. (J) Case No-41 of 2017 is not as per provision of law. The grounds set forth for condonation of delay of 77 days stated in the said petition were not discussed by the court below at the time of passing the order of dismissal ;
  6. That the learned court below committed great error in dismissing both the petitions whimsically, arbitrarily and injudiciously for which the said orders are required to be set aside by this Hon'ble Court.
5. On receipt of Memo. of Appeal preferred by the appellant /plaintiff notice upon the respondent named Jagat Nath was served and he appeared through his learned counsel.

**POINTS OF ARGUMENT PUT FORWARDED BY BOTH THE SIDES**

6. I have heard both sides and perused the entire case record carefully. Ld. Advocate Mr. P. C. Sarmah appearing on behalf of the plaintiff /appellant strenuously argued before this court that learned court below vide its order dated 25-09-2017 dismissed both the Misc. (J) Case No-40/17 and Misc. (J) Case No-41/17 without considering the settled provisions of law. Learned

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counsel for the plaintiff/appellant further argued on the point that the Misc. (J) Case No-41/17 registered upon the petition filed u/s 5 of Limitation Act for condonation of delay and the learned trial court erred both in law and facts in dismissing the said Misc. (J) No-41 after dismissing the restoration petition in Misc. (J) Case No-40/17. Learned counsel of the appellant/plaintiff further submitted that the learned court ought to have disposed the condonation petition at the outset prior dismissing the petition filed under Order 9 Rule 9 of CPC. As such, the plaintiff/appellant prayed to set aside the orders passed by the Ld. Trial court in both the Misc. (J) cases.

7. Per contra, learned advocate Mr. D. Bose appearing on behalf of the respondent categorically submitted that the learned Munsiff No.2, Sonitpur has not committed any error in dismissing the Misc.(J) case No.40/17 and Misc.(J) case No.41/17 and as such the orders passed by the learned court below not deserve any interference from this court.
8. In the light of points of argument put forwarded by both the sides, I have carefully gone through the order dated 25-09-2017 passed by Ld. Munsiff No.2 in the Misc.(J) case No.40/17 and Misc.(J) case No.41/17 along with the entire case record and in the forthcoming discussions this first appellate court shall try to ascertain the following articulated questions :
  1. Whether the learned Munsiff No.2, Sonitpur, Tezpur erred both in law and facts in dismissing the Misc.(J) case No.40/17 and Misc.(J) case No.41/17 ?
  2. Whether the orders of dismissal passed by Munsiff No.2, Sonitpur, Tezpur suffers from materials irregularities and passed without consideration of factual aspects of the both the cases ?
  3. Whether the learned Munsiff No.2, Sonitpur, Tezpur at the time of deciding the Misc. (J) case No.40/17 and Misc. (J) case No.41/17 ignored the settled provisions of law?

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9. Now, coming to the factual matrix of the instant appeal, this court at the very outset feel it necessary to mention that plaintiff/appellant has preferred the instant Misc. Appeal being aggrieved with the orders of dismissal passed in Misc. (J) case No.40/17 and Misc. (J) case No.41/17. Undeniably, the Misc. (J) case No.41/17 arising out of petition of condonation of delay filed by the plaintiff in preferring the restoration prayer under Order 9 Rule 9 of CPC. The restoration prayer filed by the plaintiff under Order 9 Rule 9 of CPC was registered as Misc. (J) case No.40/17.
10. On bare perusal of the orders passed by learned Munsiff No.2, Sonitpur, Tezpur in both the Misc. (J) case No.40/17 and Misc. (J) case No.41/17, it disclosed before this court that Ld. Munsiff No.2 erred both in law and facts in dismissing the Misc. (J) case No.40/17 prior disposal of Misc. (J) case No.41/17. To be more clear from the factual matrix of this case, it is pertinent to mention here that a petition of condonation of delay filed u/s 5 of Limitation Act requires adjudication prior adjudicating the actual prayer upon which the condonation prayer arisen out. But in the instant case, Ld. Munsiff No.2, Sonitpur, Tezpur committed material irregularity in dismissing the Misc.(J) case No.41/17 filed u/s 5 of Limitation Act after dismissing the prayer of restoration vide Misc.(J) case No.40/17. Ld. Munsiff No.2, Sonitpur, Tezpur ought to have disposed the condonation of delay prayer filed u/s- 5 of Limitation Act prior disposal of restoration prayer in Misc.(J) case No.40/17.
11. As such from the aforesaid discussion, this court is of considered opinion that Ld. Munsiff No.2, Sonitpur, Tezpur erred both in law and facts in dismissing and deciding the Misc. (J) case No.41/17 after disposal of Misc. (J) case No.40/17. Accordingly, the order passed by Ld. Munsiff No.2, Sonitpur, and Tezpur in respect of Misc. (J) case No.41/17 deserves interference from this first appellate court and consequent to that the order dated 25-09-2017 passed in Misc. (J) case No.41/17 is set aside.
12. Now, about the order passed in Misc. (J) case No.40/17 that arisen out of a petition filed by the plaintiff/appellant under Order 9 Rule 9 of CPC praying

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for restoration of the suit that was dismissed for default, this first appellate court finds that in Misc. (J) case No.40/17 the O.P Sri Jagat Nath although appeared before the court on receiving notice but failed to submit any written objection and learned trial court below in passing the order dated 25-09-2017 opined that the plaintiff/appellant failed to establish the sufficient reason for non-appearance upon which his case was dismissed for default. Learned court below at the time of passing the order dated 25-09-2017 appreciated the original case record of T.S No.52/2015. Learned Munsiff No.2, Sonitpur, Tezpur at the time of passing the order dated 25-09-2017 committed gross material irregularity by way of appreciating the case record of TS No.52/2015 which was not alive at the time of passing the order dated 25-09-2017. Learned court below in passing the order dated 25-09-2017 considered the case record of TS No.52/2015 and said Title Suit was not alive in the event of dismissed for default upon which the plaintiff/appellant has preferred to get the Title Suit alive and Ld. Trial court below erred in law and facts at the time of appreciating the factual aspects of TS No.52/2015 during passing the order dated 25-09-2017.

13. It is further noticed from the order dated 25-09-2017 that learned trial court below has not asked the plaintiff/appellant to adduce any evidence to establish the sufficient cause. Certainly the dispute arises out of a petition filed under Order 9 Rule 9 CPC that preferred by the plaintiff/appellant contending that he was unknown about the fact that his learned counsel has withdrawn himself from his case and over none taking any steps by his counsel his suit was dismissed for default.
14. It is the settled provisions of law that in absence of any plaintiff generally the suit resulted with dismissed for default. But in this case the crux of the dispute is marginally different from any other cases. Here the plaintiff/appellant claimed that he never received any notice from his counsel and he was unknown about the fact of dismissal of his suit. Considering the nature of contentions, raised from the pleadings on record, before dismissing the suit for default where advocate of plaintiff has withdrawn from the case,

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the right approach of the court below would have different from any other cases and at least the plaintiff/appellant must have issued with a court notice before dismissing the suit for default.

15. Therefore, in the light of aforesaid discussion, this court finds that the order dated 25-09-2017 passed by learned court below found to be erroneous and not as per the settled provisions of law. As the Misc. (J) case No.40/17 filed under Order 9 Rule 9 of CPC disposed of by the learned court below prior to disposing the condonation prayer upon which the Misc. (J) case No.41/17 was registered.
16. Considering all the aspect this first court thinks it deem fit and proper to remand back the case records of both the Misc. (J) cases to the court below with a direction to decide the condonation prayer first and subsequently decide the Misc. (J) No.40/17 filed for the restoration of the suit. Learned court below further directed to provide sufficient opportunities to both the sides for adducing evidence if required and disposed the Misc. (J) cases in accordance with law at the earliest.
17. The order dated 25-09-2017 passed in both the Misc. (J) cases interfered and set aside.
18. Accordingly, upon the above said observations, instant Misc. Appeal stands allowed with cost. Prepare a decree accordingly.
19. Send back the Case Records, along with a copy of this Judgment & Order to the Ld. Munsiff No.2, Tezpur forthwith. Judgment and Order is delivered under the seal of the Court on the 29th May'2019.

**(N. J. Haque)**

Civil Judge  
Tezpur, Sonitpur

Dictated and corrected by me.

**(N. J. Haque)**

Civil Judge  
Sonitpur, Tezpur

Dictation taken and

Transcribed be me:

(J. K Muru) Steno.