

DL. January
57. 27, 2021

F.M.A.T. 60 of 2021

Mr. Sounak Bhattacharya,
...for the appellants.

Re: CAN 1 of 2021 (condonation)
filed on January 22, 2021.

We have perused the report of the stamp reporter. We feel that the stamp reporter was justified in reporting that the appeal is in time in view of the order of the Hon'ble Supreme Court dated March 23, 2020. In view thereof, the application for condonation of delay is disposed of by recording that the appeal is in time.

There will be no order as to costs.

Now, we take up the appeal for admission hearing.

It appears that in a suit for partition, the plaintiffs/respondents filed an application for injunction under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure. On September 30, 2020, the trial court directed the parties to maintain status quo, as on that date, till October 20, 2020 and also allowed an application under Order XXXIX Rule 7 of the Code appointing an advocate commissioner to ascertain the state of affairs of the suit property so as to obviate any future complication as to the true nature and character of the suit property. That order appointing advocate commissioner was not challenged.

The advocate commissioner submitted his report on October 10, 2020. The report of the advocate commissioner is not also under challenge. However, on October 3, 2020, the plaintiffs prayed for police help to prevent violation of the injunction order by

the defendants.

It appears from the record that the commissioner in his report has alleged that the defendant no. 1 is raising a new construction over the suit property by force. On such background, the order for police help was passed.

It is submitted on behalf of the appellants, that the plaintiffs/respondents have suppressed the facts and obtained the order for police help.

We are not convinced with the said submission because the plaintiffs had the opportunity to approach the trial court after September 30, 2020 and even on October 3, 2020 when the matter was taken up for consideration.

It is not the case of the appellants that they were not aware of appointment of the advocate commissioner. Moreover, the commission work was done in presence of the defendant no. 1. It is at least clear from the record that the defendant no. 1 was aware of an order appointing the advocate commissioner for the purpose of ascertaining the state of affairs of the suit property. It was only after an adverse report had been filed, now it is alleged by the appellants that the said order is illegal and was passed ex parte. Once a party had the opportunity to appear and controvert the allegations made in a petition, the submission that there is suppression of fact becomes untenable, as the party by his willful absence creates an impression in the mind of the court that the statements made or submissions made on behalf of the party is presumed to be correct. Nothing also prevented the appellants to approach the trial court for recalling of the order dated October 3, 2020 upon disclosure of sufficient

materials.

On such consideration, we do not find any reason to interfere with the orders impugned. However, we request the learned Civil Judge (Senior Division) at Diamond Harbour, South 24-Parganas, to dispose of the injunction application as early as possible on merits without granting any unnecessary adjournment to either of the parties.

The appellants undertake to file their written objection to the application for injunction within ten days from date. Reply thereto, if any, is to be filed by two weeks thereafter.

The parties will be at liberty to mention the matter before the learned trial judge for early disposal of the injunction application. We observe that in the event such prayer is made, the trial court, subject to its convenience, shall dispose of the injunction application preferably within a period of three months thereafter.

As such, the appeal is summarily dismissed under Order XLI, rule 11 of the Code of Civil Procedure.

In view of dismissal of the appeal, nothing remains in the application for stay and the same is also disposed of.

There will be no order as to costs.

(Soumen Sen, J.)

(Aniruddha Roy, J.)

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