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Ct-12

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FMAT 137 of 2020
with
I.A No. CAN 1 of 2020 (Old No. 2313 of 2020)
CAN 2 of 2020(Old No. CAN 2317 of 2020)
CAN 3 of 2020

Sher Ali & Ors.
Vs.
Bishmadeb Chattopadhyay & Ors.

Mr. Lal Ratan Mondal
Mr. Probal Sarkar
... For the Appellants

Mr. Rwitendra Banerjee
Mr. Devdutta Pathak
Mr. Sandip Kundu
Mr. Shibasis Chatterjee
... For the Respondents

Re:I.A No. CAN No. 1 of 2020
(Old No. 2313 of 2020)
(Condonation of delay)

There is a delay of 161 days in presenting the memorandum of appeal.

We have perused the grounds for delay in preferring the appeal and we are satisfied with the explanation offered by the appellants for not being able to prefer the appeal within the period of limitation.

On such consideration the delay in preferring the appeal is condoned.

Let the appeal be registered if it is, otherwise, in form.

The application for condonation of delay is thus allowed without any order as to costs.

CAN 1 of 2020 is accordingly disposed of.

Re: FMAT 137 of 2020

This appeal has arisen out of an order of open remand. Initially, on 8th November, 2019 a

coordinate bench permitted the appellants to withdraw the appeal as the order impugned is an order of open remand and first miscellaneous appeal is maintainable against the said order.

By consent of parties the appeal and applications are taken up together.

The appellants are aggrieved by the order of open remand on the ground that the said order proceeds on the basis that the plaintiffs were in possession of the property in question when the suit was instituted and was dispossessed during the pendency of the appeal.

It is submitted that the respondents/plaintiffs having failed to establish, before the trial court, semblance of any right in their favour, which is *sine qua non* for any further reliefs in the suit, the appellate court has exceeded its jurisdiction in passing the order of open remand by permitting the application for amendment of the plaint to include the prayer for restoration of possession without deciding as to whether the finding of the trial court as to no possessory right of the plaintiffs is established.

Mr. Rwitendra Banerjee, learned counsel appearing on behalf of the respondents, has very candidly submitted that the order of open remand is on the basis of submission made before the appellate court that the plaintiffs were dispossessed from the suit property and it is now necessary to consider the prayer for restoration of possession as an additional issue to be included and be heard along with other issues.

We have gone through the order under challenge. We find that the trial court has meticulously dealt with the issues as to the possessory right of the plaintiffs vis-à-vis the property in question. It appears that the claim

in the suit, essentially for perpetual injunction, is based on title in the property to the extent indicated in the plaint. Whether the prayer for perpetual injunction would be sufficient without claiming possessory right, which would depend upon the facts of each case. It is a trite law that if a party is not on possession in the property in question, a suit under Section 34 of the Specific Relief Act may not be maintainable without a prayer for recovery of possession. It apparently appears from the order of the trial court that the plaintiffs were found not to be in possession and there was a finding that mere C.S records of the plaintiffs are not sufficient to hold the title and the doctrine of lost grant applies. However, from the order of the appellate court we would not find that the appellate court has arrived at a finding as to the possessory right of the plaintiffs in the property in question when it appears that such issue came up for consideration before the trial court and was answered against the plaintiffs.

On such consideration, we feel that the appeal has to be heard de novo. It was only on a finding arrived at by the appellate court that the plaintiffs have a possessory right and would, therefore, be entitled to get injunction and other consequential reliefs the prayer for restoration may be considered. However, if it appears that on the date of institution of the suit the plaintiffs were not in possession of the suit property and only prayer for declaration is made that the suit may not be maintainable under Section 34 of the Specific Relief Act, 1963. The plaintiffs have also not prayed for partition.

On such consideration, the appeal succeeds. The judgment and order dated 29th March, 2019 is accordingly set aside.

Learned District Judge, Murshidabad, is directed to assign this appeal to the appropriate bench within one week from the date of communication of this order by either of the parties and the said bench shall dispose of the matter preferably within six months after the appeal is assigned by the District Judge.

The said bench shall decide the matter without being influenced by any observation made by us, however, must take into account the brief discussion we have made with regard to the legal position.

We make it clear that if during the disposal of the appeal none of the parties shall deal with the property in any manner whatsoever or change the nature and character of the property without the express leave of the appellate court. It is also made clear that the parties shall not seek any unnecessary adjournment before the appellate court and shall assist the court in disposing of the appeal within the stipulated time.

The trial court shall consider the application for amendment of the plaint afresh upon a finding being arrived at by the appellate court that the plaintiffs were in possession of the suit property at the time of institution of the suit and has proprietary interest in the suit property.

The appeal is accordingly disposed of along with all connected applications.

There will be no order as to costs.

(Aniruddha Roy,J.)

(Soumen Sen, J.)

