

22-09-2023
ct no. 13
Sl.23
pk

**F.A. No. 403 of 1968
With
CAN 4 of 2023 (Not in file)
With
CAN 5 of 2023**

Mohan Lal Gupta
-Versus-
Sm. Kanti Debi

**Mr. Saunak Bhattacharya,
Ms. Madhumanti Das**

...for the appellant

Mr. Sarbananda Sanyal

...for the respondents

CAN 5 of 2023

1. CAN 5 of 2023 has been filed seeking condonation of delay in filing CAN 4 of 2023.
2. The original advocate on record had died and the new advocate on record took over the matter and that is the principal ground for delay.
3. Sufficient grounds have been made out in the instant application explaining such delay. Hence, the delay is condoned.

4. Accordingly, CAN 5 of 2023 is allowed and disposed of.

Re: CAN 4 of 2023 (Not in file)

5. Sufficient grounds have been made out explaining the absence of the appellant's counsel on April 7, 2022. The order dated April 7, 2022 is recalled. Hence, the instant appeal is restored to its original file and number.
6. Accordingly, CAN 4 of 2023 is allowed and disposed of.

Re: F.A. 403 of 1968

1. This appeal is directed against judgement and order dated 16.08.1966 passed by the learned Subordinate Judge, Malda in Partition Suit No. 12 of 1963. The suit was dismissed.
2. The brief facts of the case are that a previous suit was filed by the plaintiff/appellant being No. 40 of 1961 before the same Court. The said suit was allowed to be withdrawn (as necessary parties have not been joined) with liberty to file a fresh suit upon payment of costs assessed at Rs.32/- to each of the answering defendants in the said earlier suit.

Costs were never paid. Yet the new suit being Partition Suit No. 12 of 1963 was filed.

3. The Court below examined the preliminary questions raised by the defendants/respondents as to whether the suit itself was maintainable without payment of costs pursuant to leave granted under Order 23 of the Code of Civil Procedure while allowing withdrawal and consequent dismissal of Partition Suit being 40 of 1961.
4. A number of decisions of this Court have been considered by the court below. The Court came to the conclusions that not having paid costs as directed in the earlier suit being T. S. No. 40 of 1961, the present suit is not maintainable. The suit was accordingly dismissed on contest.
5. This Court is in complete agreement with the impugned judgement, that payment of costs of Rs.32/- to each of the contesting defendants in Partition Suit No. 40 of 1961 was condition precedent to filing of the Partition Suit No. 12 of 1963. The distinction of facts made in respect of the several decisions cited by the learned counsel for the plaintiff in the court below is found to be sound and justified.

6. In those circumstances, this Court finds absolutely no reason to interfere with the impugned judgement dated 16.08.1966.
7. Accordingly, F. A. 403 of 1968 is dismissed.
8. In view of dismissal of the appeal, connected application, if any, shall also dismissed.
9. There will be no order as to costs.
10. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Supratim Bhattacharya, J.)