

Item-9 01-03-2022

FMAT 166 of 2020
CAN 1 of 2020 (CAN 2105 of 2020)
CAN 2 of 2020 (CAN 2107 of 2020)

sg Ct. 8

Ishita Saha
Versus
Nemai Mitra & Ors.

(Through Video Conference)

Mr. Rahul Karmakar, Adv.
Mr. Subhankar Chakraborty, Adv.
Mr. Saptarshi Bhattacharjee, Adv.
...for the appellant

Mr. Saumyajit Ghosal, Adv.
...for the respondent no.1

Mr. Sayantan Bose, Adv.
...for the respondent no.2

Re: CAN 1 of 2020 (CAN 2105 of 2020)

This is an application for condonation of delay.

There is a delay of 42 days in preferring this appeal.

The learned Counsel for the appellant submits that due to inability on the part of the learned Advocate who was engaged in this appeal, the memorandum of appeal could not be presented within the period of limitation.

The delay is only unintentional and there is no lack of diligence on the part of the appellant in filing the said application.

The prayer for condonation of delay is opposed by the respondents.

Considering the explanations offered by the appellant for not being able to present the memorandum of appeal within the period of limitation, we allow this application for condonation of

delay. The delay of 42 days in presenting the memorandum of appeal is hereby condoned.

Accordingly, the application, being CAN 1 of 2020 (CAN 2105 of 2020) stands disposed of.

In Re: FMAT 166 of 2020 and CAN 2 of 2020 (CAN 2107 of 2020)

By consent of the parties, the appeal and the stay petition are treated as on day's list and disposed of by this common order.

The dispute relates to putting up a padlock of the appellant in order to prevent the other flat owners to have ingress and egress at the open space area for the purpose of car parking.

The appellant contends that the developer, in breach of the development agreement, has sold out the portion from the owners' allocation and, therefore, the appellant, as one of the owners, is being prevented from parking her car in the open space. It is further alleged that the remaining portion, which exclusively belongs to the owners, is being illegally occupied by the respondent no.2, who has claimed right, title and interest in respect of the remaining portion on the basis of a deed which apparently gives him right in respect of the portion over which the said respondent no.1 is presently claiming to be the owner and is entitled to keep his car in the said open car parking space.

The appeal is directed only against that portion of the order which has directed the appellant to remove the padlock in order to facilitate the respondent no.2 to access the open car parking space and park her car for the time being in the area demarcated by the developer.

Mr. Rahul Karmakar, learned Counsel appearing on behalf of the appellant, submits that the Commissioner has not taken into consideration the sanctioned plan, which clearly demarcates the owners' allocation and the developer's allocation and having regard to the fact that the developer has no right, title and interest in respect of the remaining portion of the open space exclusively belonging to the owners by reason of the development agreement to be read along with the sanctioned plan, the attempt of the respondent is no.2 to keep her car in the said remaining portion is unauthorised.

However, presently, we are concerned with the observation of the learned Trial Judge, insofar as the learned Trial Judge has directed the petitioner to remove the padlock. Curiously, the appellant did not challenge the report of the Commissioner, which permits the respondent no.2 to park her car in a space where she is presently parking in the open car parking space. The view, of course, is *prim facie* and not conclusive.

The learned Trial Court certainly would be required to examine the development agreement, the sanctioned plan and the title deeds to find out whether the developer had exceeded its allocation under the development agreement read with the sanctioned plan and if at the ultimate trial it is found that the portion which the respondent no.2 presently claiming is in excess of the developer's occupation, the learned Trial Court will be in its jurisdiction to pass appropriate order at the time of disposal of the suit. It may require a deeper consideration at the trial of the suit.

However, having regard to the issues raised in the present

appeal, we do not feel any reason to interfere with the order passed by the learned Trial Judge.

Mr. Karmakar, learned Counsel has further submitted that the Commissioner may be appointed to find out if there has been an encroachment on the owners' allocation on examination of the development agreement read with sanctioned plan.

If such application is made before the learned Trial Judge, it is needless to mention that the learned Trial Judge shall deal with such issues in accordance with law and on merits.

It appears from the impugned order that the learned Trial Judge had fixed 13th January, 2020 for framing the issues. In the event the issues have been framed, we request the learned Trial Judge to dispose of the suit as expeditiously as possible without granting any adjournment to either of the parties unless it is unavoidable. We make it clear that the Learned Trial Court shall dispose of the suit on merit, without being influenced by any observation made by us.

The appeal, being FMAT 166 of 2020 and the application, being CAN 2 of 2020 (CAN 2107 of 2020) are accordingly, disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)