

Item-38 16-02-2022

FMA 971 of 2021
CAN 1 of 2020 (Old CAN 2130 of 2020)

sg Ct. 8

Dipakar Majumder & Ors.
Versus
Animesh Roy & Ors.

(Through Video Conference)

Mr. Rajdeep Bhattacharya, Adv.
Md. I.Q. Zodhi, Adv.
...for the respondents

The appellants are not represented nor any accommodation is prayed for on behalf of the appellants. The appellants continue to remain unrepresented since 14th February, 2022. It does not appear from record that the appellants have taken any initiative for earlier hearing and disposal of the appeal and the connection application. The respondents are represented.

Under such circumstances, we take up the appeal along with the application for consideration.

The respondents are the plaintiffs in Title Suit No. 310 of 2010. The plaintiffs filed a suit for declaration and permanent injunction in respect of the suit property described in the schedule in the plaint. The plaintiffs traced their title through one Saiyad Amir Mirza and it appears that they purchased the property from Akhtar Jahan Begam and Noor Jahan Begam on 4th December, 2009 at a consideration amount of Rs.9,29,519/- in. By dint of such deed of conveyance, the plaintiffs become the owners of the suit property. The plaintiffs alleged that all on a sudden, on 21st July, 2010, the defendants trespassed to the suit property and threatened the plaintiffs to disposes from the suit

property.

The defendants appeared and filed a written statement. The defendants claimed that they are the members of one Jay Hind Club and Library at Kurmitala. It was alleged that they do social service and the members of the club have been worshipping Goddess of Durga and Kali for almost 50 years. The said defendants or their predecessors used to possess the suit property and enjoyed it. From the earnings of the suit property, the defendants used to worship the Goddess at their club compound.

The learned Trial Court framed five issues. The plaintiffs examined four witnesses and relied on four documents in support of their claim. The defendants, however, did not produce any documents nor adduced any oral evidence in support of their defence. On the basis of the oral and documentary evidence, the learned Trial Court held that the plaintiffs are entitled to declaration and permanent injunction. It appears that during trial, the witnesses on behalf of the plaintiffs, proved the exhibits to establish their right, title and interest in the suit property. The original deed of sale and the certified copy of the plaint and judgment and decree in relation to the litigation of the co-sharers of the property from which the plaintiffs purchased the property were all exhibited. The plaintiffs were able to trace their title to the said exhibits. Defendants failed to adduce any evidence to rebut the claim of the plaintiffs either oral or documentary.

The deeds were not under challenge. There is no counter-claim either. When a registered deed is produced in support of the title, mere putting suggestion during cross-examination that the plaintiffs do not acquire any right, title and interest by reason

of such deed, does not take away the evidentiary value of the said deeds. The defendants, at the midst of trial, abandoned the proceeding and they did not even appear to argue the matter on merits.

The learned Trial Judge in arriving at the conclusion has relied upon the certified copy of the plaint, judgment and final decree in the partition suit between the co-sharers of the original owner and accepted the claim of the plaintiffs on the basis of such documentary evidence supported by oral evidence. The defendants could not rebut the claim of the plaintiffs. They also could not establish their right on title in respect of the suit property to certainly entitle to a decree for declaration and injunction. The defendants have failed to discharge their onus. In fact, to delay the said proceeding, an application was filed by setting aside of the ex-parte decree. The appellants filed an appeal and the said appeal was dismissed for default on 24th September, 2018. The application for condonation of delay along with a prayer for restoration of the appeal was filed on 14th August, 2019.

The learned First Appellate Court dismissed the application under Section 5 of the Limitation Act by refusing to condone the delay of 324 days. The appellants could not give any satisfactory answer for not being able to present on 24th September, 2018 or its inability to file the application for restoration of the appeal along with the prayer for condonation of delay within the period of limitation. There is a delay of 324 days in total to file the application for restoration of the appeal. The learned First Appellate Court held that all the petitioners are

the residents of the same locality and frequently visited Lalbagh town. They supposed to act as vigilant litigant and not to sleep over their rights. The learned First Appellate Court, after taking into consideration of the judgments of the Hon'ble Apex Court and the High Courts, held that even if the provision for condonation is liberally construed but it has to be seen whether there has been a culpable negligence on the part of the appellants in pursuing its remedies. Even before us, the appellants remain unrepresented for a considerable period of time. This conduct has certainly created an impression even with us that the appeal was simply filed to delay the proceeding. The appellants availed off some dilatory tactics before the Appellate Court as they are presently doing before us. By reason of the dismissal of the application for condonation of delay, the order of the Trial Court becomes final and we have considered the judgment and decree of the Trial Court on merits. We have gone through the judgment of the learned Trial Court as well as the learned First Appellate Court and we do not find any infirmity in the order of the learned Trial Judge in decreeing the suit nor the impugned order of the learned Appellate Court by which the learned Appellate Court declined to exercise its discretion under Section 5 of the Limitation Act.

The appeal and the application are, accordingly, dismissed on merits. However, there shall be no order as to costs.

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.)