

25.04.2022
SL No.6
Court No.8
(gc)

**SMAT 2 of 2022
With
CAN 1 of 2022**

**Smt. Krishna Das
Versus
Smt. Sumita Sikdar & Anr.**

Mr. Siva Prosad Ghose,
Mr. Sanjib Kr. Mandal,
...for the Appellant.
Mr. Prantick Ghosh,
...for the respondents.

By consent of the parties, the appeal and the connected application are taken up together and disposed of by this common order.

The appeal is arising out of an order dated 23rd February, 2022 by which the learned District Judge dismissed the petition filed by the appellant dated 8th September, 2020 under Section 5 of the Limitation Act.

The learned District Judge was of the view that the appellant had failed to explain the delay of 246 days in filing the Title Appeal. It appears that the appellant erroneously filed a Misc. Appeal against the judgment and decree dated 26th November, 2019 and 10th December, 2019 although, certified copies of the said two decrees form part of the record when the Misc. Appeal was filed. There cannot be any doubt with regard to the intention of the appellant to challenge the said two decrees. It was merely the erroneous nomenclature

ascribed to the description of the appeal that undoubtedly a decree and judgment was challenged.

The learned District Judge on 25th August, 2020 allowed the prayer of the appellant for withdrawal of the Misc. Appeal with liberty to file afresh as a Title Appeal against the said judgment and decree. At that time, the appellant filed the Title Appeal along with an application for condonation of delay to explain the reason for not being able to file the appeal within the period of limitation.

The delay was caused due to erroneous description of the appeal. We feel that the learned District Judge could have converted the Misc. Appeal to Title Appeal instead of allowing the appellant to withdraw the Misc. Appeal and file a Title Appeal afresh. The learned District Judge also seems to have overlooked that due to pandemic, the period of limitation was extended and the district judiciary was not functioning regularly. The inconvenience caused to the litigant and the court, in our view, ought to have been taken into consideration while deciding the application for condonation of delay. On such facts and circumstances, we do not find that there has been any deliberate and intentional delay on the part of the appellant in instituting the Title Appeal.

On such consideration, the impugned order dated 23rd February, 2022 is set aside.

The Title Appeal No.18 of 2020 is restored to its original file and number. The learned Counsel for the appellant has assured that the appellant would pursue the Title appeal with all diligence.

We request the learned District Judge to expedite the hearing of the Title Appeal No.18 of 2020 without granting any unnecessary adjournment to either of the parties unless it is avoidable.

The learned Counsel for the respondents/decreed-holders submit that an application for appointment of an Advocate Commissioner is pending before the Trial Court.

The learned Trial Court may appoint an Advocate Commissioner. The participation of the Advocate Commissioner shall be without prejudice to the rights and contentions of the appellant. The remuneration of the Advocate Commissioner shall be borne by the respondents/decreed-holders at the first instance. However, no final decree shall be passed and/or drawn up till the disposal of the appeal. The report of the Advocate Commissioner shall abide by the result of the Title Appeal.

The application for appointment of Advocate Commissioner before the Trial Court is hereby allowed with the aforesaid observation.

Accordingly, the appeal being SMAT 2 of 2022 and the application being CAN 1 of 2022 stand disposed of.

However, there shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)