

14.11.2022
Item No.13
Court No.32
Avijit Mitra

FAT 141 of 2022
with
IA No. CAN 1 of 2022
with
IA No. CAN 2 of 2022
with
IA No. CAN 3 of 2022

Sri Kamal Saha & ors.
- Versus -
Suchitra Saha & ors.

Mr. Tapas Kumar Dey,
Mr. Rakesh Roy
...for the applicants
Mr. Gautam Brahma,
Ms. Puspaa Saha,
Mr. Arijit Dey
....for the respondent nos.1, 2 and 3

Affidavit of service filed by the applicants be kept
on record.

The application being IA No.CAN 3 of 2022 has
been filed seeking leave to prefer appeal against the
judgment and preliminary decree dated 25th July,
2016 and the final decree dated 17th June, 2017
passed in Title Suit no.183 of 2012 by the learned Civil
Judge (Senior Division), 2nd Court, Barasat. In
connection with the said application, an application
for condonation of delay being IA No. CAN 1 of 2022
and an application for stay being IA No. CAN 2 of 2022
have also been filed.

Mr. Dey, learned advocate appearing for the appellants/applicants submits that the applicants are the legal heirs of late Kalipada Saha and they are co-owners of the suit property on the strength of a will executed by their grandmother, namely, late Abala Rani Saha. The respondent nos.1, 2 and 3 preferred a partition suit in the year 2012 and the same was registered as T.S. No.183 of 2012. Kalipada Saha expired prior to filing of the partition suit and the suit was preferred impleading the applicants herein. The applicants duly contested the suit and filed written statement, as would be explicit from the orders passed by the learned Court below, as annexed to a supplementary affidavit filed in connection with the condonation application. On 23rd July, 2015, a show cause was issued due to the absence of the defendant no.1. In spite of appropriate instruction, no show cause was filed by the applicants' learned advocate and the learned Court below proceeded *ex parte* and the preliminary decree was passed on 25th July, 2016. For such laches on the part of the applicants' learned advocate, the applicants cannot suffer.

Mr. Dey alleges that though the uncle of the applicants, namely, Haripada Saha expired on 21st March, 2019, no steps were taken by the plaintiffs for substitution but such error on records was not noted by the learned Court below. The applicants had no

knowledge that the preliminary decree had been passed *ex parte*. Taking advantage of the *ex parte* preliminary decree, the plaintiffs sought to forcibly take over possession of the shop-room in the suit premises from the applicants. Such fact was immediately informed to the local police station. As no steps were taken, the applicants approached their learned advocate on 16th May, 2022 to take appropriate steps but she expressed her inability. Thereafter upon obtaining the certified copies, the instant appeal was filed on 15th June, 2022. The delay which has occurred towards filing the present appeal is unintentional and not attributable to the applicants. The said period of delay also stands intervened by a period lost due to the pandemic. In view thereof, such delay may be condoned and the applicants may be granted leave to prefer the present appeal.

Per contra, Mr. Brahma, learned advocate appearing for the respondent nos. 1 to 3/plaintiffs submits that the applicants had full knowledge about pendency of the suit, however, they chose not to contest the same. Mere engagement of a lawyer is not sufficient. The applicants ought to have been vigilant. The Court cannot be kept waiting for an indefinite period for the absence of the defendants and it may proceed to dispose of the suit, in accordance with law. In support of such contention reliance has been placed

upon the provisions of Order XVII Rule 2 of the Code. Valuable right has already accrued in favour of the plaintiffs and as such the applicants now cannot seek condonation of the enormous delay and claim sympathetic consideration.

Heard the learned advocates appearing for the respective parties and considered the materials on record.

Records reveal that the preliminary decree in the partition suit was passed *ex parte* on 25th July, 2016. The applicants chose not to contest the suit. The applicants admittedly did not challenge the preliminary decree. From the final Commissioner's report, as produced by the plaintiffs, it appears that the defendants themselves identified the suit property as described in the preliminary decree before the learned Commissioner. Upon completion of such commission work, report was filed by the learned Commissioner and the final decree was drawn up on 17th June, 2017. Having failed to prefer any appeal against the preliminary decree, the applicants are precluded from disputing its correctness in any appeal which may be preferred from the final decree.

The sequence of facts clearly reveals that the delay, which had occasioned, is attributable to the applicants and was intentional. The applicants having adopted dilatory tactics cannot seek sympathetic

consideration moreso when it appears that valuable right has already accrued in favour of the plaintiffs. The explanation given by the applicants towards the delay which has occasioned is not sufficient. It does not appear that the applicants kept regular contact with their learned advocate and were vigilant. The preliminary decree was passed on 25th July, 2016 and the final decree was drawn up in the year 2017. For the first time, in the year 2022, the applicants are raising the plea that the advocate engaged by them in the suit did not take appropriate steps. We do not find any explanation as regards the delay which occurred even after the year 2017 in preferring the present application for leave to appeal. The applicants also chose not to prefer any appeal against the preliminary decree. The final decree had been drawn up in the year 2017 and thus the proceedings which had attained finality about five years earlier, cannot be reopened.

For the reasons discussed above, we are unable to grant the relief as prayed for by the applicants.

The application for condonation of delay being IA No.CAN 1 of 2022 and the application for leave to appeal being IA No.CAN 3 of 2022 are dismissed. Consequently, the appeal being F.A.T. 141 of 2022 and the application for stay being IA No. CAN 2 of 2022 are also dismissed.

There shall be no order as to costs.

Urgent certified photocopy of this order, if applied for, be supplied as expeditiously as possible.

(Partha Sarathi Chatterjee, J.) (Tapabrata Chakraborty, J.)