

17.08.2022

Sl.No. 03
Ct.No.3
Amalranjan

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

SAT 143 of 2022

With
CAN/1/2022

Shibani Gupta & Ors.

VS

Reba Mondal

Mr. Souradipta Banerjee

Ms. Fatima Hassan

...for the appellants/defendants

Mr. Srijib Chakraborty

Mr. Anirban Ghosh

Mr. Aditya Mondal

...for the respondent/plaintiff

The suit is of 2002.

It ultimately resulted in dismissal of the first appeal (Title appeal No. 3 of 2015) on 1st July, 2022.

It was dismissed because an application under Section 5 of the Limitations Act for condonation of delay in preferring the appeal was dismissed by the learned first appellate court.

Although, this ejectment proceeding has a history of over 15 years, it was never decided on merits. This was, in our opinion, completely due to the fault of the appellants/defendants.

In the learned first court their defence was struck off for non-compliance of conditions to defend the suit imposed by the court.

Against the ex parte decree passed by the first appellate court on 1st March, 2006, the appellants/defendants pursued all the remedies available to her. It started with an application under Order IX Rule 13 of the Civil Procedure Code, which was dismissed on 23rd March, 2011. It was followed by an application being made before that court to set aside that order which was also dismissed on 18th January, 2013. This dismissal order was challenged before this court under Articles 226/227 of the Constitution, which met with the same fate on 19th December, 2014.

Having exhausted these remedies, the appellants/defendants filed the said first appeal (Title Appeal No. 3/2015) before the learned first appellate court along with a Section 5 application. On 30th June, 2016, this appeal was dismissed for default. Efforts were made to restore this appeal. It was restored by the court on 27th April, 2022.

On 1st July, 2022, this appeal together with the Section 5 application came up for consideration before the learned first appellate

court. The learned judge was of the view that the long delay had not been explained.

The law permits the judgment debtor in an ex parte decree to apply before the court to set it aside under Order IX Rule 13 of the Civil Procedure Code. At the same time, preferment of that application does not debar a party from preferring a substantive appeal from the ex parte decree.

Availing of that right the judgment debtor preferred the Order IX Rule 13 application which failed.

The law also permits a person to approach the High Court under Articles 226/227 of the Constitution when no appeal is allowed from an order of a civil court. The appellants approached this court under Articles 226/227 of the Constitution challenging the order passed by the learned civil court dismissing the application under Order IX Rule 13 of the Civil Procedure Code and/or the order refusing to revise that order.

Although, the law granted these remedies to the appellants, it did not allow exclusion of time taken to prosecute these proceedings while calculating the period of limitation to prefer an appeal from an ex parte decree.

Therefore, the appellants were faced with the task of explaining the long period of delay in preferring the first appeal.

The learned judge of the first appellate court after discussing the facts of the case, including prosecution of various proceedings by the appellants come to the conclusion that they had been unable to explain the delay. Hence, the Section 5 application connected with the appeal was dismissed. It followed that the appeal was also dismissed.

The decision of the learned judge was on analysis of the facts and law of the subject.

We do not think that the learned judge has appreciated the facts or the law in such a manner so as to call for interference by this court on second appeal.

In those circumstances, we refuse to entertain the appeal.

However, as the very final court available to the appellants on facts and law, considering the facts of this case narrated above, we think it would be just and proper if one year's time is granted, to the appellants to vacate the subject property and deliver peaceful possession thereof to the respondent.

We order accordingly, but on the condition that the appellants/defendants shall pay on and

from 1st September, 2022 payable by the 7th of each and every month in advance occupation charges at the rate of Rs. 500/- per month to the respondent. The respondent shall not take any steps for execution of the decree till 31st August, 2023.

On and from 1st September, 2023, the impugned decree in this appeal shall become executable.

The execution proceeding taken out by the appellants/defendants shall remain stayed till 31st August, 2023.

In this period till 31st August, 2023 both the parties shall maintain status quo regarding ownership and possession of the suit property and shall not also otherwise deal with it.

(Subhendu Samanta,J.) (I. P. Mukerji,J.)