

27.09.2022
SL No.29
Court No.8
(gc)

**SA 83 of 2022
CAN 1 of 2022**

**Sri Nayan Bhebli & Ors.
Vs.
Bhutnath Sardar & Ors.**

Mr. D.P. Mukherjee,
Mr. Debjit Mukherjee,
Ms. Susmita Chatterjee,
Mr. Kaustav Bhattacharya,
...for the Appellants.

An unmeritorious second appeal was presented in the year 2016 without any intention to move the second appeal. The second appeal was kept pending for almost eight years before it was listed on 9th September, 2022 after being transferred from the warning list. The attempt of the plaintiffs to challenge the decree passed on 8th January, 1979 was nipped in the bud by the First Appellate Court and, in our view, rightly so after taking into consideration the subsequent events. The suit filed by the defendants for partition was decreed on 8th January, 1979. The plaintiffs alleged that the said decree is liable to be recalled as no writ of summons was served upon the appellants. The application filed by the appellant under Order 9 Rule 13 of the Code of Civil Procedure was dismissed on 12th April, 1980 and an appeal against the said order was also dismissed. Thereafter, the plaintiffs filed a title suit being T.S. No.87 of 1980 where the decree dated 8th January, 1979 is

required to be set aside. The said suit filed on 5th May, 1980 and was decreed on 31st July, 1985. However, the First Appellate Court reversed the said decree on 31st May, 1991 and a second appeal carried to this Court was also dismissed in the year 2013. The plaintiffs now preferred an appeal against the order passed by the First Appellate Court on 8th January, 1979 by which the suit was decreed. This time, the challenge is on the merits of the decree and not on the ground of non-service of writ of summons or any other ground that may be available to the appellants under the said provision.

Before the First Appellate Court, the appellants have taken the plea of Section 14 read with Section 5 of the Limitation Act. The Appellate Court dismissed the said application after having arrived at a conclusion that the delay of 12779 days cannot be condoned as it cannot be said that the appellants have prosecuted the matter in good faith. The appellants instead of challenging the decree contemporaneously had filed an application under Order 9 Rule 13 of the Code of Civil Procedure. Instead of filing the suit in 1980 it was open for the appellants to file an appeal challenging the decree on merits. After the proceedings have attained finality over a period of time, we feel that the learned Trial Court was justified in dismissing the said application.

The second appeal being SA 83 of 2022, accordingly, stands dismissed.

However, there shall be no order as to costs.

Re: CAN 1 of 2022

There is a delay of 14 months in allowing the application for substitution. In view of the explanation offered in Paragraphs 7 and 8 of the petition, we allow this application for substitution by setting aside the order of abatement upon condoning the delay of 14 months.

The respondent No.2 died intestate on 8th April, 2021 leaving behind legal heirs and representatives mentioned in Paragraph 2 of the said petition. All the heirs and legal representatives are major, sui juris and are of sound mind.

The department is directed to delete the name of the respondent No.2 from the cause title of the memorandum of appeal and incorporate the particulars of the legal heirs and representatives of the deceased respondent No.2 as mentioned in Paragraph 2 of the petition before the Puja Vacation.

Accordingly, the application for substitution being CAN 1 of 2022 stands disposed of.

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

(Uday Kumar, J.)

(Soumen Sen, J.)