

2.12.2022
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Ct. no. 652
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C.O. 3081 of 2016

**Sanjoy Ghosh
Vs.
Ramesh Mondal, since deceased,
represented by his legal heirs, Aloka
Mondal & Ors.**

Mr. Soumen Das ...for the Petitioner

Mr. Gour Baran Sau ... for the opposite party

In Re: **C.O. 3081 of 2016**

Challenging the order dated 10th June, 2016 passed by the learned District Judge, Malda in Misc. appeal no. 34 of 2010, the present application under Article 227 of the Constitution of India has been preferred.

The petitioner states that four brothers namely, Ramesh Mondal, Sudhir Mondal, Suresh Mondal and Subhas Mondal purchased a plot of land each adjacent to each other through their respective independent instrument. On 9th November, 2004, the said Sudhir Mondal and Subhas Mondal have entered into an agreement for sale with the petitioner herein with an intention to sell their demarcated share of land measuring 3 cottahs more or less and received earnest money of Rs. 80,505/- out of total consideration price of Rs. 1,94,205/-. On 5th June, 2006, said Sudhir Mondal and Subhas Mondal jointly executed and registered a

deed in favour of the petitioner herein and as such petitioner herein became absolute owner in respect of their respective plot of land together with existing building standing therein. Subsequently, petitioner has reconstructed and renovated the said building and still in possession.

The petitioner further submits that before the execution of the said agreement for sale, the said Sudhir Mondal and Subhas Mondal offered their elder brother, Ramesh Mondal to purchase and/or acquire the said plot of land in question before the said plot of land was offered to the petitioner but the predecessor of present opposite parties i.e. said Ramesh Mondal refused to purchase the same and thereafter, the aforesaid transfer was effected in favour of the petitioner herein.

In the year 2006, the said Ramesh Mondal since deceased initiated a proceeding under Section 8 of the West Bengal Land Reforms Act, 1955 claiming pre-emption right over the said land of which the petitioner herein is the absolute owner and in possession. Due to family dispute, the petitioner could not take steps properly in the said pre-emption suit and it was posted for ex parte hearing and when the matter was taken up for ex parte hearing, the learned counsel for the petitioner sought for an accommodation but the same was refused by the trial court and the said pre-emption suit was decreed ex parte. The petitioner had no

knowledge about the ex parte decree passed on 28th August, 2009 and after being informed about the exparte decree, on 22nd September, 2010, the petitioner applied the certified copy and he preferred appeal before the learned District Judge, Malda along with an application under Section 5 of the Limitation Act for condonation of delay. Such petition was taken up by the leaned appellate court and upon hearing, the learned court below was pleased to dismiss the application of the petitioner herein /appellant under Section 5 of the Limitation act on contest and accordingly dismissed the appeal.

Being aggrieved by that order, the petitioner preferred the revisional application before this court and this court while disposing of said application was pleased to set aside the order dated 2nd July, 2013 passed by the learned court below and an opportunity was given to contest the said appeal on condition of payment of Rs. 5,000/- to the opposite party. After remand, the first appellate court took up the said appeal on 10th June, 2016 for hearing and upon hearing the parties, the learned court below was pleased to dismiss the said appeal on 10th June, 2016. Being aggrieved by the aforesaid impugned order dated 10th June, 2016, the present application has been preferred.

Learned counsel for the petitioner submits that the court below had acted illegally and with material

irregularity in passing the impugned order and did not appreciate the order dated 31.10.2014 passed by this court where this court allowed the petitioner herein to contest the appeal on condition of payment of cost to the opposite party. Learned court below erroneously observed that the petitioner herein has wilfully given up opportunity to contest the suit and thereafter approached before different authorities with the motive of forum shopping. Learned court below erred in holding that the petitioner herein was disturbing possession of the respondent or threatening the respondent to move from the suit property. Accordingly, learned counsel for the petitioner submits that an opportunity may be given to the petitioner so that he can contest the appeal.

Learned counsel for the opposite party submits that the petitioner intentionally dragging the matter before the appellate court as well as before the trial court and the petitioner had no sufficient cause to prefer the appeal in time and as he has failed to put forth proper reason as to why the appeal was not filed within time, the first appellate court rightly rejected his prayer for condonation of delay and as such the said impugned order does not call for any interference by this court.

Having considered the submissions made by the parties and materials placed before me, it appears that this court while disposing of C.O. 2910 of 2013 was pleased to observe vide order dated 31.10.2014,

“Having heard learned counsel for the petitioner and on consideration of the materials on record, I am inclined to give the petitioner an opportunity to contest the appeal on condition of payment of cost to the opposite party. Accordingly, it is ordered that the impugned order dated 2nd July, 2013 passed by the learned District Judge, Malda in Misc. Appeal no. 34 of 2010 is set aside on condition that the petitioner will make payment of cost of Rs. 5000/- to the opposite party within a period of eight weeks from this date, in default the impugned order will revive.”

It further appears that in terms of said order, the petitioner herein as appellant deposited the cost before the appellate court. On perusal of the impugned order, it appears that learned Appellate Court below had not disposed of the appeal on merit, but he has disposed of the same on the basis of same extraneous considerations with the following observation.

“in the given circumstances, i am not inclined to interfere with the ex parte order passed by Ld. Trial Court in favour of the petitioners/respondents for the reason that the appellant was appearing before the Ld. Trial Court had wilfully given up the opportunity to contest the suit and thereafter has been approaching other authorities while the suit was pending for disposal before the Ld. Trial Court. This Appeal Court cannot encourage the forum shopping of the appellant and thereby prejudiced the right that had accrued in favour of the petitioners/respondents herein.”

In the above facts and circumstances of the case, it appears to me that the learned court below could not follow the spirit of the direction made by this court in C.O. 2910 of 2013 dated 31.10.2014, wherein the

direction was for giving an opportunity to contest the appeal meaning thereby to dispose of the same on merit after contested hearing if the petitioner/appellant pays cost to the opposite party. When there is no dispute for payment of cost, then the appellate court should have disposed of the appeal on merit after giving sufficient opportunity to both the parties, to agitate their respective cause.

In view of the above, the impugned order dated 10th June, 2016 is hereby set aside. The learned court below is directed to hear the Misc. appeal no. 34 of 2010 afresh on merit after giving an opportunity to both the parties to contest and to write a judgement afresh within a period of six months from the date of communication of the order.

Accordingly, C.O. 3081 of 2016 is disposed of.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)