

Item-5. 07-09-2022

sg Ct. 8

SAT 532 of 2016
CAN 1 of 2016 (old CAN 11629 of 2016)
CAN 2 of 2022
CAN 3 of 2022
CAN 4 of 2022

Bablu Biswas
Versus
Amal Mondal & Ors.

Mr. Soumyadeep Biswas, Adv.
...for the appellant

Affidavit of service filed in Court today is kept with the record.

In spite of service upon the respondents, the said respondents are not represented nor any accommodation is made on their behalf.

The matter appeared in the list yesterday when none had appeared on behalf of the respondents.

In Re: CAN 2 of 2022:

Sufficient cause being shown for not being able to represent on 10th December, 2020 when the appeal and the stay application were dismissed for default, the order dated 10th December, 2020 is recalled and the appeal and the application, being CAN 1 of 2016 (old CAN 11629 of 2016) are restored to its original number and file.

CAN 2 of 2022 is, accordingly, disposed of.

In Re: CAN 3 of 2022:

Sufficient cause being shown for not being able to file the restoration application being CAN 2 of 2022 within the period of

limitation, we allow this application for condonation of delay in filing the restoration application.

CAN 3 of 2022 is, thus, disposed of.

In Re: CAN 4 of 2022

This is an application for substitution of the legal heirs and representatives of 2Ka and 3d, who died intestate during the pendency of the proceeding. The petitioner has stated in the petition that they become aware of the death of the said respondent on 22nd July, 2022 for the first time. The proposed substituted legal heirs are all major, sui juries and sound mind.

It is also stated in the petition that the respondent nos. 4Gha and 13Ka have also died during the pendency of the appeal and the legal heirs and representatives of the said deceased respondents are already on record as respondent nos. 4Ka, 4Kha, 4Ga and 4Unga are the legal heirs and representatives of the deceased respondent no.4Gha and respondent nos. 13Kha, 13Ga and 13Gha are the legal heirs and representatives of the deceased respondent no.13Ka.

Accordingly, we allow the prayer for substitution. CAN 4 of 2022 is, thus, disposed of.

Leave is given to the petitioner to correct the prayer portion in course of the day.

The department shall carry out necessary amendments in the memorandum of appeal and the connected applications by deleting the names of the respondent nos. 2Ka and 3d from the cause title and in place and instead of the said respondents, the proposed substituted respondents shall be added as the full addresses of the proposed substituted respondents are mentioned

in paragraphs 16 and 18 of the petition and by expunging the names of the respondent nos. 4Ga and 4Unha from the appeal and the applications.

With the above direction, the application for substitution being CAN 4 of 2022 is disposed of.

In Re: SAT 532 of 2016

The second appeal has come up for admission. The second appeal is directed against a judgment and decree dated 15th July, 2016 passed by the learned Additional District Judge, 3rd Court, Nadia at Krishnagar by affirming the judgment dated 26th September, 2012 passed by the learned Civil Judge (Senior Division), 2nd Court, Krishnagar, in Title Suit no. 19 of 2001 in connection with an application under Section 4 of the Partition Act.

The said matter was taken up along with the final decree proceeding. The application under Section 4 was filed during the course of the final decree proceeding and hence, both the matters were heard together and disposed of by the learned Trial Judge on 26th September, 2012.

The learned Counsel appearing for the appellant has submitted that the learned Trial Judge has completely misconstrued the scope, purport and meaning of Section 4 of the Partition Act. He has submitted that the premise on which his right to claim share in the dwelling house of the ancestral property has been rejected by both the courts was wrong.

The leaned Counsel has relied upon two decisions of the Division Bench of our Court, namely, (i) in the matter of *Manick*

Lal Singh vs. Gouri Shankar Shah, reported in *1968 0 AIR(Cal) 245* and (ii) in the case of *Sunil Kumar Mukhopadhyay vs. Provash Chandra Majumdar* reported in *1969 0 AIR(Cal) 88* and impressed upon this Court that the land appurtenant to the dwelling house should also be construed as part of the dwelling house within the scope and meaning of Section 4 of the Partition Act.

The learned Trial Court has arrived at a conclusion on the basis of the evidence adduced that the appellant, having failed to establish that the property sought to be partitioned is a dwelling house, is not entitled to the said relief. The learned Trial Judge, on the basis of the evidence, arrived at a finding that from the oral evidences of the PW-2 and DW-2, it is clearly established that the defendant since the date of his purchasing has been residing in the suit property and exercising all overt acts regarding his possession therein. It was further recorded that the defendant no.1 has already exercised his right of possession by way of actually residing therein. The property lost its character as dwelling house and on such ground, the learned Trial Judge declined to grant relief to the plaintiff.

The First Appellate Court has noted that the appellant filed a suit for partition of the property in which some of the co-sharers have already transferred their share in favour of the stranger/purchaser.

The evidence on record would show that the defendant is possessing a part of the suit property. This has been admitted by PW-2 during the cross-examination. It also transpired during the trial that the stranger/purchaser has purchased not the dwelling

house but a vacant land adjoining to the road which is clear from the two sale deeds being Exhibit-A and Exhibit-B.

The learned Trial Judge has relied upon the decision of the Hon'ble Supreme Court in the case of *Goutam Paul vs. Debi Rani Paul*, reported in *2001 WBLR Supreme Court page 135*, where the Hon'ble Supreme Court has clearly stated that when a share of dwelling house where the family resides is transferred to stranger/purchaser, the principle of Section 4 is applied in a case where it does not relate to the share in a dwelling house, the provision of the said Act would not apply. In fact, the judgment cited by the learned Counsel appearing on behalf of the appellant while acknowledging that 'dwelling house' may have an extensive meaning but it has to be assessed contextually. There has to be an evidence to show that the vacant land was necessary for the convenient occupation of the dwelling house. Admittedly, there is no evidence on record to show that the appellant adduced any evidence – oral or documentary – to show that the vacant land purchased by the stranger/purchaser was necessary for the convenient occupation of the house, which is claimed to be a dwelling house.

In the absence of any such evidence, it cannot be said that the trial court or the appellate court has committed any error, which requires to be interfered with at the admission stage of a second appeal, as the second appeal can only be admitted if it involves substantial question of law.

On such consideration, the second appeal fails. However, there shall be no order as to costs.

In view of dismissal of the second appeal, the application for stay being CAN 1 of 2016 (old CAN 11629 of 2016) is also dismissed.

(Uday Kumar, J.)

(Soumen Sen, J.)