

31.07.2023.
Item No. 17.
Court No. 13
ap

**F.A. No. 122 of 2007
With
I.A. No. CAN 6 of 2023
And
I.A. No. CAN 7 of 2023
And
I.A. No. CAN 8 of 2023
And
I.A. No. CAN 9 of 2023**

**Anuradha Banerjee & Anr.
(Basudeb Halder since deceased)
Versus
Mrs. Reshma Shah & Anr.
(Capt. Abdul Wahid Khan since deceased)**

Mr. Souradeep Banerjee,
Ms. Sanjana Sinha.

...For the appellants.

Mr. Farhan Ghaffar,
Mr. Bakhtiar Ali Shah.

...For the respondent no.1.

Re: CAN 9 of 2023 (Sec.5)

1. This is an application filed under Section 5 of the Limitation Act, 1963, for condonation of delay of about 3024 days from the date of death of the defendant no.3. The appellants came to know of the death sometime in August, 2022, when a notice for substitution of the deceased original appellant was returned by the Postal Authorities indicating that the defendant no.3 has died. No steps were taken until this Court's order dated 14th July, 2023.

2. This Court counts the delay from the date of knowledge, despite the fact that sufficient explanation may not be there for the delay of even 272 days.

3. Having heard the learned Advocates appearing on behalf of the respective parties, as also considering the statements made in the said application and for the ends of justice, the delay is condoned.

4. The application for condonation of delay being CAN 9 of 2023 is, thus, allowed and disposed of.

5. There will, however, be no order as to costs.

Re: CAN 6 of 2023 (substitution)

1. This is an application for substitution of the name of the deceased defendant no.3 and the respondent no.3 in the appeal, who died on 11th November, 2014.

2. It is submitted that the legal heir and successor of the deceased Respondent No.3 is Ananjan Bose, who is the son of Suranjan Bose may be substituted in place and stead of the original Respondent no.3 herein. It is further submitted that the wife of the defendant no.3 has also died.

3. Let Ananjan Bose be substituted in place and stead of the deceased respondent no.3, namely, Suranjan Bose.

4. We direct the Registry to record the death of the respondent no.3 and substitute the name of the person mentioned in paragraphs 12 and 13 of the said

application instead and in place of the deceased respondent no.3 within two weeks from date.

5. After the amendments are carried out, an amended memorandum of appeal shall be served upon the appellants within a week.

6. The application for substitution being CAN 6 of 2023 shall stand allowed and disposed of.

Re: CAN 8 of 2023 (setting aside abatement)

1. Since the delay in filing the application for substitution being CAN 9 of 2023 has been allowed and the substitution application being CAN 6 of 2023 has also been allowed by this Court, the abatement of the appeal on account of the death of the defendant no.3 shall stand set aside.

2. The application for setting aside of abatement being CAN 8 of 2023 shall also stand disposed of.

Re: F.A. No. 122 of 2007

1. The instant appeal is directed against the judgment and decree dated 30th November, 2006 passed by the learned Civil Judge (Senior Division) at Alipore in Title Suit No. 49 of 1996.

2. The brief facts relevant to the case are that the appellants/plaintiffs entered into an agreement with the defendant nos.1 and 2, who are the landlords of a premises, for purchase of a flat unit at premises No. 10/1, Gurusaday Road, Kolkata. A sum of

Rs.1,46,000/- was paid to the defendant no.3, who is the promoter.

3. The defendants neither returned the consideration money nor delivered the flat to the plaintiffs. The defendants filed written statement in the suit. Issues were framed. In course of argument in the Court below, however, the Counsel for the defendants vehemently raised the question of maintainability of the suit in view of the provisions of Section 12(A) of the West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993.

4. After hearing the parties on this score, the Court below framed an additional issue at the time of argument as regards the maintainability of the suit and dismissed the same as not maintainable. Section 12 (A) of the said Act of 1993, creates a bar on a Civil Court to entertain any proceedings which is subject matter of the Act.

5. The learned Counsel for the appellants would argue before this Court that they do not get a chance to meet the said arguments and the contention of the respondents/defendants. The Act is not attracted as the promoter is not registered under the Act. It is also argued that the issue could not have been framed when there were no pleadings whatsoever either in the plaint or in the written statement. It is, therefore, submitted that the Court below erred in procedure and

application of the provisions of Order 15 of the Code of Civil Procedure in non-suiting the appellant.

6. This Court has carefully considered the argument of the learned Counsel for the appellants and the respondents.

7. It is now well-settled, clear and explicit from Rule 3 of Order XV of the Code of Civil Procedure, 1908 that issues can be framed even at the time of and based on the oral argument advanced by the Counsel for the parties. New issues can also be framed on the basis of interrogatories and evidence that may emerge in course of trial.

8. Since the issue of maintainability of the suit itself and the bar under Section 12(A) of the above Act, goes to the very root of the suit, this Court is of the view that the learned Court below did not commit any error in framing the issue of maintainability of the suit in view of the express bar under Section 12(A) of the aforesaid Act. The impugned judgment cannot be faulted. The appeal fails and is, therefore, dismissed.

9. The right of the appellants and/or the substituted appellant, however, to recover the said sum of money of Rs.1,46,000/- shall remain reserved to him. If any suit or proceeding is instituted by the appellants within a period of two months from date, the provisions of the Limitation Act for recovery of sums of money shall not bar such a suit.

10. It is made clear that apart from the question of maintainability of the suit filed in the Court below, this Court has not adjudicated upon any other issues by and between the parties and the parties shall be free to agitate the same in accordance with law in the new proceeding that may be instituted pursuant to the leave granted hereinabove.

11. In view of the dismissal of the main appeal, the connected applications shall also stand dismissed.

12. There will be no order as to costs.

13. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Supratim Bhattacharya, J.)