

AD-13
Ct No.16
10.12.2024
TN

FAT 286 of 2023
IA No: CAN 1 of 2023
CAN 2 of 2023

Birendra Nath Biswas
Vs.
Sukanta Biswas and others

Mr. Partha Pratim Roy,
Mr. Anindya Bose,
Mr. Santanu Maji

....for the appellant

Mr. Sounak Bhattacharya,
Mr. Sounak Mondal,
Mr. Anirban Saha Roy,
Mr. Abhirup Halder

....for the respondents

In re: CAN 1 of 2023 and FAT 286 of 2023

1. The present application has been filed for condonation of a long delay of about 27 years in preferring the present first appeal against a preliminary decree of partition in which there were also components of a decree of permanent injunction.
2. Learned counsel appearing for the appellant submits that the appellant was unaware of the passing of the preliminary decree and upon being served a copy of an application filed by the respondents in connection with the partition suit, the appellant learnt of the said dismissal for the first time only on May 18, 2017.
3. Learned counsel appearing for the respondents strongly controverts the application and hands over a copy of a

purported application under Order IX Rule 13 of the Code of Civil Procedure which was allegedly preferred by the present appellant himself for restoration of the suit in the year 1990 itself. It is contended that the filing of the said application under Order IX Rule 13 is itself an indicator that the appellant had knowledge of the *ex parte* decree in the year 1990 itself and has made blatant misstatements in the present application under Section 5 of the Limitation Act.

4. That apart, it is pointed out that the impugned decree in the appeal itself records that the defendant was duly served with notice and he appeared in the suit but ultimately did not contest, for which the suit was taken up for *ex parte* hearing.
5. Upon a perusal of the averments in the application under Section 5 of the Limitation Act, we find that no sufficient ground whatsoever has been made out for the prolonged delay of almost three decades in preferring the instant appeal.
6. Also, learned counsel for the appellant at this juncture submits that in the event the court is inclined to dismiss the application, the appellant shall not press the same, since the effect of such dismissal would be that the appeal would also stand dismissed consequentially, which would preclude the appellant from pursuing the Order IX Rule 13 application as well.

7. We are of the definite opinion from the materials before us and from the averments made in the application that the present attempt to have a condonation of delay is palpably *mala fide* on the part of the appellant. Despite having filed an Order IX Rule 13 application and now seeking to pursue the same, the appellant grossly suppressed the same by feigning ignorance of the *ex parte* preliminary decree and has pleaded that he had no knowledge for 27 years regarding the *ex parte* decree.
8. Thus, we were otherwise inclined to dismiss the application and consequentially the appeal. However, since at this juncture the appellant, apprehending the consequence of the same in the Order IX Rule 13 application, seeks to withdraw the condonation application, we permit such withdrawal. However, due to the harassment caused to the respondents and the attempt to mislead the court, heavy costs ought to be then imposed on the appellant.
9. It is further made clear that such costs are also proposed to deter litigants such as the present appellant from misleading the court by their averments made on oath.
10. Hence, CAN 1 of 2023 as well as FAT 286 of 2023 are dismissed as withdrawn with liberty to the appellant to pursue the appellant's Order IX Rule 13 application.

11. The above order, however, is subject to costs of Rs.50,000/- to be paid by the appellant to the respondents within a month from date. It is made clear that in the event such costs are not paid, the respondents will be entitled to execute the same as an order of the court by adopting the procedure for execution available in the Original Side of this Court.

In Re: CAN 2 of 2023

12. CAN 2 of 2023 is also disposed of in the light of the above observations.
13. There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

(Partha Sarathi Sen, J.)