

26.02.2024
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Ct. No.7

C.O. 3430 of 2023
Rama Kar
Vs.
Badri Narayan Gupta & Ors.

Mr. Sourav Sen

.....for the petitioner

1. Leave is granted to the petitioner to file affidavit of service by 27th February, 2024.
2. Mr. Sen, learned Advocate appearing for the petitioner submits that pursuant to the direction passed on 17th January, 2024, a copy of this application has been served upon the learned Advocate representing the opposite parties herein before the learned court below.
3. He further submits that the opposite parties have left the suit premises by putting a padlock on the tenanted premises.
4. Mr. Sen submits that the learned Court of appeal below passed an order of stay of operation of the judgment and decree passed by the learned Trial Judge without deciding the application under Section 5 of the Limitation Act.
5. It appears from the record that the appeal was preferred beyond the statutory period of limitation and an application under Section 5 of the Limitation Act was also filed.

6. In spite of service, none appears to oppose this application.
7. Record reveals that Title Appeal No. 49 of 2023 was presented beyond the statutory period of limitation. It further appears from the record that till 23rd June, 2023 summons have not been issued either by post or through Court. The delay in filing the said appeal does not appear to have been condoned. However, the learned Court of appeal below passed an order of stay of operation of the Judgment and Decree passed by the learned trial Judge.
8. Mere presentation of an appeal does not operate as a stay of operation of the judgment and decree appealed from. Since the delay in filing the appeal is yet to be condoned, there is no appeal in the eye of law. The order impugned is silent as to the exceptional circumstances warranting an order of stay to be passed prior to hearing the application under section 5 of the Limitation Act. It further appears that the order of stay was passed till the disposal of the appeal without affording any opportunity to the petitioner to contest such application.
9. Therefore, the order of stay of operation of the judgment and decree passed in Title Suit No.3956 of 2013 is liable to be interfered with.
10. The order impugned being No.4 dated 2nd August, 2023 passed by the learned District Judge, 24 Parganas

(South) at Alipore in Title Appeal No.49 of 2023 is, accordingly, set aside.

11. The learned District Judge is directed to decide the application under Section 5 of the Limitation Act on the next date fixed.
12. The stay application is restored to the file of the learned Court of appeal below, which shall be considered afresh in accordance with law.
13. With the above directions, C.O. 3430 of 2023 stands disposed of.
14. There shall be no order as to costs.
15. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(HIRANMAY BHATTACHARYYA, J.)