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THURSDAY

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**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

FAT 433 of 2023

with

CAN 1 of 2023

CAN 2 of 2023

Ziaul @ Jiau Haque & Anr.

Vs.

Ajenur Bibi & Ors.

Ms. Shila Sarkar, Advocate

Mr. Sibasish Ghosh, Advocate

.....for the Appellant

Ms. Sohini Chakraborty, Advocate

Mr. Arup Sarkar, Advocate

Mr. Prajaani Das, Advocate

.....for the Respondent No. 1

CAN 1 of 2023

1. This is an application for condonation of delay in filing the instant appeal beyond the statutory period of limitation provided therefor. It is averred in the instant application that immediately after passing of the preliminary decree, the parties decided to settle their disputes amicably and an assurance was also given by the plaintiffs/respondents that they would not take any step in the said suit. Thereafter, the pandemic struck and unfortunately, the mother of the present plaintiff also passed away which constrained the appellant to take immediate steps to file the instant appeal. Though the plea of illiteracy has also been taken but we do not feel that any credence in this regard can be given
2. Learned Counsel for the respondents opposes the

- application and submit that the appellants have the knowledge of the preliminary decree and, in fact, participated in the proceeding which would be evident from the orders passed in the said suit.
3. It is no doubt true that there has been a considerable delay in filing the instant appeal. The present appeal is filed assailing the preliminary decree passed by the Trial Court declaring the shares of the parties and astonishingly directed the appellants to vacate the premises in his occupation.
 4. It is no longer *res integra* that the length of delay in filing a proceeding is not material. What is required to be seen that the appellants have shown sufficient explanation occasioning the delay in filing the instant appeal. Furthermore, the Court must encourage the litigation to be decided on merit as the meritorious matter should not be defeated on the anvil of the period of limitation. If the Court finds the explanation to be sufficient, even if there is minor lapses, there is no difficulty on the part of the Court to compensate the other side by imposing costs.
 5. We have been taken to an order no. 109 dated 18.08.2021 passed in the said suit wherein the Advocate for the defendant appeared. It further appears that there was no 'Hajira' filed on behalf of the defendants/appellants nor we can ascertain therefrom that defendants were represented as we find there are several defendants impleaded in the said suit.
 6. Be that as it may, the subsequent orders would

reveal that there was no representation on behalf of the appellants and, therefore, we are unable to accept the contention of the respondents that the aforesaid appellants on the said date belied the statement made in the instant appeal.

7. We thus **allow** the application being **CAN 1 of 2023** for condonation of delay. The delay in filing the instant appeal is hereby condoned.
8. Office is directed to formally register the appeal.

FAT 433 of 2023

9. By consent of the parties, we decided to hear out the appeal without following the procedures in making the appeal ready for disposal. The reason behind the aforesaid decision can be reasonably ascertained from the impugned preliminary decree passed by the Trial Court where the Court while declaring the shares of the parties proceeded to direct the appellants to vacate the portion occupied by them in a joint property before a final decree is passed therein.
10. There has been a fundamental error on the face of the said preliminary decree which cannot be sustained on legal parameter. Even the Counsel for the respondents could not convince herself the course adopted by the Trial Court at the time of passing the preliminary decree. The fundamental principle in a partition suit does not appear to have been taken into account by the learned Judge at the time of passing the preliminary decree.
11. The partition suit has a unique feature as opposed to the normal suit. The Court may pass more than

one decree. The partition suit passes broadly into two stages. First, at the stage leading to a preliminary decree and secondly, a stage for passing the final decree.

12. It is a settled law that the preliminary decree contained only declaration of the shares of the parties in respect of a joint property and cannot be construed as separation of such shares which can only be done on the strength of the final decree. The moment the Court held that the parties are the co-sharers/co-owners of the joint property and declared their share, the possession cannot be disrupted at such stage as the co-owner possesses the portion of the joint property, not in commensurate with his shares so declared, but on behalf of the other co-sharers unless other co-sharers claim ouster. The possession remained joint even after passing the preliminary decree but can only be severed by the final decree which is capable of being executed.
13. The aforesaid broader principles of the final decree appears to have been ignored and/or overlooked by the learned Judge who appears to have proceeded as if it is an ordinary suit seeking declaration of right, title and interest and recovery of possession.
14. We, therefore, cannot concur with the later portion of the preliminary decree containing a direction upon the appellants to vacate the suit property unto the plaintiff. The reference of the suit property has to be understood in the perspective of the schedule appended to the

plaint which according to the plaintiffs/ respondents are the joint properties of the parties and, therefore, if such portion of the decree is accepted, it would tantamount to uprooting the defendants/appellants from the joint property despite having been declared a share to the extend 260.5 decimals of land.

15. We, therefore, set aside the portion of the said order by which the direction for delivery of possession was given. The other portion of the preliminary decree shall not be deemed to have been interfered with by us.
16. The Trial Court is directed to proceed with the suit in pursuit of passing the final decree and it is open to the parties to participate in the commission work and if any objection is raised by any of the parties to the Commissioner's Report, the Court shall be free to decide the same in accordance with law.
17. With these observations, the appeal being **FAT 433 of 2023** and the connected application being **CAN 2 of 2023** are **disposed of**.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)

