

19
19.8.2025
Ct. No. 16
SB

FAT 122 of 2025
CAN 1 of 2025 (Section 5)
CAN 2 of 2025 (stay)

Raj Kumar Sultania (HUF) & Ors.
Vs.
Asha Bansal & Ors.

Mr. Sourav Sen, Sr. Adv.
Mrs. Jayashree Saha
Mr. Muhammad Obaid ... for the appellants

Mr. Meghnad Dutta
Mr. Subhankar Chakraborty
Ms. Sabita Mukherjee Roy Chowdhury
Mr. Arijeet Doss Mullick
Mr. Saptarshi Bhattacharjee
Ms. Sayani Gupta
Mr. Sanket Das ... for the respondents

CAN 1 of 2025 (Section 5)

1. There is a delay of 168 days in filing the appeal.
2. We are satisfied with the explanation offered for not being able to file the appeal within the period of limitation. The delay of 168 days is condoned.
3. Accordingly, the application for condonation of delay is allowed and disposed of.

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4. In view of the order no. 4 dated 12.12.2023 in which the learned Trial Court has clearly recorded that "SR & AD not yet returned after service", curiously after few lines it has been recorded that the service and summons are satisfactorily served. Moreover, it appears from the order dated 12.12.2023 the plaintiff in order to prove that there is an encroachment filed a petition under Order 26 Rule 9 read with

Order 18 Rule 18 of CPC and the said prayer was allowed. However, surprisingly, no advocate- commissioner report was tendered in evidence.

5. We have been informed that the advocate commissioner appointed was prevented to carry out the commission work. This is not which is appearing from the several orders relied upon by the plaintiffs in this proceeding.
6. Ordinarily, in the case of trespass or encroachment a report is called for from a commissioner in order to ascertain as to whether in fact there has been a trespass or encroachment and it was for that reason the plaintiffs filed the application under Order 26 Rule 9 read with Order 18 Rule 18 of CPC. In spite of such application being allowed surprisingly no report of the commissioner was prepared and the commissioner was not examined.
7. Learned Trial Court has proceeded on the basis of eight documents which in absence of any corroborative piece of evidence like the report of the advocate commissioner would not have been sufficient for the Trial Court to pronounce the judgement in favour of the plaintiffs.
8. It is trite law that even if, the defendants do not appear, the plaintiffs has to prove its case.
9. On such consideration, we allow the appeal and set aside the *ex parte* decree.
10. We direct the appellant to file written statement positively within two weeks from date, failing which the suit shall be heard *ex parte*.

11. We request the learned Trial Court to expedite the hearing of the suit by giving suitable directions with regard to procedural matters. It would be open for the plaintiffs to file fresh application for commission.
12. The appellant shall entire appearance in the suit within one week from date.
13. The appeal and the applications are disposed of.

(Soumen Sen, J.)

(Apurba Sinha Ray, J)