

AD-11
Ct No.16
09.12.2024
(SSS)

FAT 258 of 2023
With
CAN 1 of 2024
With
CAN 2 of 2024

Rabi Sankar Das
Vs.
Smt. Karabi Sarkar and Ors.

Mr. Abhisek Banerjee, Adv.
.....For the Appellant.

Mr. Sankar Narayan Saha
Mr. Deb Kumar Sarkar, Adv.

.....For the Respondent Nos. 1 and 2.

1. Affidavit of service filed today in court be kept on record.
2. In view of sufficient explanation having been furnished for the miniscule delay in preferring the appeal, CAN 2 of 2024 is allowed, thereby condoning the delay in filing the appeal.
3. CAN 1 of 2024 has been filed for stay of all further proceedings in the partition suit, against a preliminary decree passed in which the present appeal has been preferred.
4. Learned Counsel appearing for the petitioner submits that the principles of Section 10 of the Code of Civil Procedure are applicable, since there is a pending probate suit which, if decreed, the

petitioner will become the exclusive owner of the suit property, thereby rendering the partition suit non-maintainable.

5. Learned Counsel for the appellant places the relevant portion of the impugned preliminary decree where the said issue was considered by the learned Trial Judge. The learned Trial Judge, however, refused to grant stay of the partition suit and proceeded to pass the preliminary decree primarily on two grounds. First, it was observed that despite the probate case having been rendered contentious in the year 2015, till the date of the preliminary decree in the partition suit, no plaint had been presented to initiate a probate suit by the present petitioner in pursuance of the same in the Probate Court. Secondly, it was observed that the stage of the probate suit was not disclosed before the Partition Court. As such, it was observed that it can safely be held that the defendants/present appellant had failed to prove the defence taken by him.
6. Learned Counsel appearing for the respondents herein opposes the prayer for stay and submits that there are several things to be disclosed before the court. The respondents seek to rely on an information slip from which it will be evident that allegedly no probate suit has been filed.

7. However, we find from the annexures to the present application for stay that the probate case was originally filed before the District Delegate in the year 2015, that is, the year in which the partition suit was also filed. It was registered as Probate Case No. 54 of 2015. From the subsequent annexures to the stay application, we find that an Act 39 Case, bearing No. 39 of 2023, was initiated only in the year 2023. Hence, it is evident that although the probate proceeding turned contentious in 2015 itself, the present petitioner presented the plaint in connection with the contested testamentary suit only in the year 2023.
8. Hence, the premise on which the learned Trial Judge refused to grant stay of the partition suit was justified. Since the present petitioner filed the plaint in the contested probate case only in the year 2023, that is, a long eight years after the probate proceeding having turned contentious, we do not find any justification in granting stay by applying the principle of Section 10 of the Code of Civil Procedure.
9. Equity does not enure in favour of the appellant in the present case.
10. However, since the present appeal is pending against the preliminary decree, the ends of justice would be sub-served if no final decree is drawn up

by the learned Trial Judge in the partition suit, although otherwise there cannot be any bar in the trial court proceeding with the final decree proceedings in the partition suit up to the final decree stage.

11. Accordingly, CAN 1 of 2024 is disposed of without any order as to costs, by directing the learned Trial Judge to continue with the final decree proceedings and to conclude the same, except from passing or drawing up any final decree in connection with the said suit till disposal of the present appeal.
12. The appellants shall put in requisites, including declaration, written-up notice form, etc. within a week from date.
13. Service of notice of appeal on the plaintiffs/Respondent Nos. 1 and 2 is hereby dispensed with in view of their appearance through learned Advocates.
14. The appellant shall put in special messenger costs for bringing the Trial Court records. The Trial Court records shall accordingly be brought by special messenger at the earliest.
15. The appellant shall prepare and file the requisite number of paper books within eight weeks from the date of service of notice of arrival of the Trial Court records on the learned Advocate for the appellant.

16.Liberty to the parties to mention the appeal for hearing as and when the same is made ready for hearing.

(Sabyasachi Bhattacharyya, J.)

(Supratim Bhattacharya, J.)