(2022) 03 CAL CK 0069

Calcutta High Court

Case No: APDT No. 8 of 2021, CS No. 438 of 1973, APO 83 of 2021, IA No. GA 1, 2, 3/2021

Sarmilee Dutta		APPELLANT
	Vs	
Barnali Dutta And Ors.		RESPONDENT

Date of Decision: March 23, 2022

Acts Referred:

- Code Of Civil Procedure, 1908 - Section 11, 122, 129, Order 20 Rule 3, Order 9 Rule 9, Order 9 Rule 13, Order 26 Rule 13, Order 26 Rule 14, Order 41 Rule 21, Order 41 Rule 33
- Limitation Act, 1963 - Section 5

Hon'ble Judges: I. P. Mukerji, J; Aniruddha Roy, J

Bench: Division Bench

Advocate: Swatarup Banerjee, Saheli Sen, Sariful Haque, Rakesh Sarkar, Arindam Paul, Parna Mukherjee, A. C. Kar, Pramit Kumar Shee

Final Decision: Dismissed

Judgement

Aniruddha Roy, J

1. There were two appeals for consideration. Both the said appeals arose from the same partition and administration suit being P & A suit no. 438 of

1973. The first appeal being APOT No.156 of 2021, APO 83 of 2021 (for short, the first appeal) was filed from the impugned order dated November

19, 2018. By the said impugned order dated November 19, 2018 the application being GA No. 3101 of 2018 filed by the appellant praying for

recalling/modification/variation of the impugned decree for partition dated July 05, 2017 (for short, the impugned decree for partition) was dismissed.

By an order dated July 01, 2021 passed by this court the delay in preferring the said first appeal was condoned and the appeal was admitted.

2. The second appeal being APDT No. 8 of 2021 was filed from the said impugned decree for partition. GA No. 01 of 2021 was filed in the said

second appeal praying for condonation of delay of about 1580 number of days in preferring the appeal. The said application for condonation of delay in

the second appeal was contested thread bare by filing affidavits by the respective parties. The parties had agreed for a consolidated hearing of the

said application for condonation of delay along with the said second appeal on merits.

3. In connection with the said second appeal an application GA No. 3 of 2021 (for short, the substitution application) had been taken out, inter alia,

praying for recording of the death of the respondent no.3 namely Soumen Mullick and respondent no.6 namely Sourendra Mullick and the necessary

substitution by their legal heirs and representatives as indicated therein.

4. The parties further agreed that both the said two appeals along with the connected applications could be taken up for hearing in a consolidated

manner on the basis of the existing records and materials before this court dispensing with all the formalities, as the disputes amongst the parties are

age old in a partition suit of 1973.

Facts:-

5. The partition suit was filed in 1973 amongst the family members of one age old Bengali Mullick family of Kolkata. The said family had several joint

properties. The subject matter of the present appeal is restricted to premises no. 237/P/1B Maniktala Main Road presently known as Sachin Sen

Sarani, Kolkata (for short, the said premises) amongst others mentioned in the plaint. With the passage of time some of the original plaintiffs died and

their heirs and legal representatives were substituted from time to time. Some of the parties to the instant appeal are the successors in interest of the

original plaintiffs. Diverse interlocutory orders were passed in the said partition suit from time to time at the behest of the parties. Lokenath Mullick

being the third plaintiff was the father and as such the predecessor in interest of the appellant.

6. Pursuant to a family division as agreed amongst the family members mentioned in the plaint on September 20, 1973, the preliminary decree (for

short, the preliminary decree) was passed. On May 06, 1979 (for short, the said 1979 family settlement) a family settlement was executed and entered

into amongst the co-sharers who were parties to the said partition suit. Under the said 1979 family settlement the deceased father of the appellant

being a party thereto received and accepted four numbers of tile sheds (for short, the said tile sheds) measuring of about 1 cottah of land at the said

premises.

7. On April 02, 1980 (for short, the said 1980 family settlement) another family arrangement was entered into and executed by and between the co-

sharers under which certain modifications were carried out in respect of the arrangements made under the said 1979 family settlement but the

allotment of the appellant and/or her predecessor in interest remained unaltered in respect of the said premises and it was agreed that the said family

dwelling house would then remain joint for the time being.

8. Some of the parties to the partition suit thereafter challenging their respective allotments under the said family settlements filed applications from

time to time in the pending partition suit, when diverse orders were passed. Some of such orders were also carried in appeal before the diverse

coordinate benches of this court. Ultimately the allotment made in the said 1979 family settlement which was modified under the said 1980 family

settlement stood affirmed. As such the allotment made in respect of the said four tile sheds at the said premises in favour of the father of the appellant

also stood affirmed. Pursuant to the direction made by a coordinate bench in its order dated August 14, 2006 and the direction made by the learned

Single Judge on August 27, 2009 the commissioner of partition on May 20, 2011 had filed its final return on the basis of the valuation caused.

9. On the basis of the said final return filed by the commissioner of partition the first defendant namely Somenath Mullick being the ninth respondent

herein filed GA No. 2542 of 2011 praying for a final decree for partition. On June 15, 2015 a final decree was passed in terms of the

commissionerâ€™s return and direction was also made for sale of some of the lots as mentioned in the said return of the commissioner of partition.

10. In 2015 the appellant filed GA No. 3156 of 2015, inter alia, praying for recalling of the said final decree dated June 15, 2015. By an order dated

September 30, 2015 the learned Judge dismissed the said application. Being aggrieved thereby an appeal was preferred by the appellant, when a

coordinate bench by its order dated February 18, 2016 directed that upon payment of cost of Rs.1 lakh payable by the appellant to the first defendant,

she would file her affidavit-in-opposition to the said GA No.2542 of 2011. Such cost was paid and necessary affidavit was filed by the appellant.

11. By an order dated November 08, 2016 the learned single bench disposed of the said GA No. 2542 of 2011 and a final decree in terms of the

commissionerâ€™s report was directed to be made. Directions were also made for sale of the properties mentioned in the some of the lots as

suggested in the said report of the commissioner and the parties who were in possession of the immoveable properties in excess of their entitlement

were directed to vacate such portions and make over the same to the first defendant. The commissioner was further directed to file a return after the

allotment of shares.

12. By an order dated March 10, 2017 the said order dated November 08, 2016 was recalled and the status was restored as it was subsisting

immediately prior to the said order dated November 08, 2016. Accordingly the said GA No.2542 of 2011 was revived.

13. By a judgment and order dated July 05, 2017 passed by the learned Single Judge the said GA No. 2542 of 2011 was disposed of and the impugned

final decree was passed in terms of the commissionerâ€™s return and, inter alia, the appellant was directed to vacate the portion in the said premises

of which she was in occupation beyond her entitlement.

14. An appeal was carried from the said impugned final decree by Soumen Mullick since deceased and Souren Mullick. By a judgment and order

dated May 17, 2018 a coordinate bench had dismissed the said appeal affirming the said impugned final decree. Hence the appellate decree was made

by a coordinate bench.

15. On or about October 12, 2018 the appellant filed another application GA No. 3101 of 2018 praying for the following orders:

â€œa) The order dated fifth July, 2017 passed by the Honâ€™ble Justice Sen in GA 2542 of 2011 of 2011 in connection with CS 438 of

1973 may be modified insofar as it directs the legal heirs of Lokenath Mullick to vacate the room in their possession in premises

no.237/P/1B, Manicktola Main Road, Kolkata-700054 and;

b) Ad interim order in terms of prayer (a)â€.

16. By an order dated November 19, 2018 the said 3101 of 2018 filed by the appellant was dismissed and the appellant was directed to vacate the

portion at the said premises in her possession.

17. On February 21, 2020 an application GA 593 of 2020 was filed by the appellant praying for direction to tender the report of the Commissioner of

Partition dated May 20, 2011 for cross-examination of the Commissioner of Partition and stay of all further proceedings.

18. By a notice dated October 05, 2020 sent by the Learned Advocate for the first defendant being the ninth respondent herein (Sri. Somnath Mullick)

(for short, the contesting respondent in the appeal) asked the appellant to vacate the said premises and to pay a sum of Rs.2,72,294/- on account of

owelty money and Rs. 3,07,982/- on account of the stamp duty to have the partition decree registered. On November 03, 2020 the appellant filed GA

12 of 2020 praying for stay of operation of the said notice dated October 05, 2020 in which the Learned Single Bench on November 10, 2020 directed

the parties to file and exchange their respective affidavits.

19. The appellant on February 12, 2021 preferred an appeal APOT No.25 of 2021 from the said order dated November 19, 2018 passed in GA 3101

of 2018 being the said first appeal as described above. on January 11, 2021 the ninth respondent herein filed an execution proceeding EC No.22 of

2021 before the Executing Court. On September 23, 2021 an order was passed in the said execution proceeding when receiver was appointed to

implement the final decree for partition. Being aggrieved thereby an appeal was carried being APOT 156 of 2021 arising out of the said EC No. 22 of

2021. By an order dated October 07, 2021 the said APOT 156 of 2021 was disposed of by modifying the order dated September 23, 2021 to the effect

that the receiver will be entitled to take possession of the subject premises notionally without disturbing the possession of the appellant and until further

order the appellant was directed to deemed to be licensees in possession under the receiver.

GA 01 of 2021 in APDT 08 OF 2021, The Application for condonation of delay

20. In preferring the said second of the two appeals from the impugned final decree dated July 15, 2017, there was a delay of about 1580 number of

days. The relevant averments in the said application, as sufficient cause, for condonation of delay are reproduced below:-

â€œ11. The petitioner further states that there has not been any deliberate delay in approaching this Honâ€™ble Court as initially, the

Appellant/petitioners only in the month of October, 2018 when the decree holders had approached your appellant/petitioner with the order

dated 17th May, 2018 passed by the Division Bench of this Honâ€™ble Court asking to vacate the rooms that your petitioner came to know

about such order dated 17th May, 2018 passed by the Division Bench of this Honâ€™ble Court being passed and it is only upon searches

being made that your petitioner came to know about the said impugned judgment and decree dated 5th July, 2017. The appellant/petitioner

without wasting any further time approached her appointed advocate and upon the advice of the advocate had filed the said first

application. The Appellant/petitioners before the Honâ€™ble Single judge was to be represented by her appointed Counsel and advocate

on record who were unfortunately absent on the date of passing of the impugned order and the Appellant/petitioner was absolutely

unrepresented and the said application was dismissed without any fault of your appellant/petitioner. Thus from October, 2018 till 23rd

October, 2018 steps were taken to file the said first application G.A. No. 3101 of 2018 which was dismissed by an order dated 19th

November, 2018 as the petitioner herein who was to be represented by her appointed Counsel and advocate on record were unfortunately

absent on the date of passing of the said order and the Appellant/petitioner was absolutely unrepresented and the said first application was

dismissed without any fault of your appellant/petitioner. Thus from 20th November, 2018 to 15th January, 2019 no steps were taken by the

appointed advocate and this being dissatisfied with conduct of the learned advocate appointed by her, your petitioner took change from her

appointed advocate to another advocate to take further steps in respect of the matter. It is pertinent to mention in this context that being a

lady with child and having no financial support from her husband in respect of continuing with the matter she had to face a lot of trouble in

finding a new advocate and the period from 16th January, 2019 to 15th March, 2019 was used in approaching a new advocate who was

finally appointed on 16th March, 2019. It is pertinent to mention that the new advocate who was appointed had promised that immediate

steps would be taken in filing the instant appeal as well as the other appeal from the said order dated 19th November, 2018. It is pertinent

to mention that your petitioner had to leave for Mumbai for her husbandâ€™s business related work but was always on constant contact

with her newly appointed advocated who kept on saying that after consultation with a counsel he has already prepared a draft of

memorandum of appeal and had sent a copy of such through email at the end of the Month April, 2019 however, as informed by the newly

appointed advocate, such appeals could not be filed due to a resolution that was passed to not to participate in the judicial proceeding

which continued till the end of May, 2019 and your petitioner/appellant was told that after the annual summer vacation when the

Honâ€™ble High Court would re-open he would take steps to filet the instant appeal. On or about last week of June, 2019 when your

appellant/petitioner had approached the newly appointed advocate in respect of filing of the instant appeal your petitioner/appellant was

informed by the newly appointed advocate that he had suffered a major accident and had been advised with bed rest for a month and that

he was planning to resume work from 2nd week of July 2019 and that when he resumes he would take steps to file the instant appeal. Your

petitioner states that upon such incident taken place your petitioner/appellant on humanitarian grounds believed the new appointed

advocate and patiently waited for the instant appeal to be filed. However at the end of July, 2019 when your appellant/petitioner had again

approached the new advocate she was informed by her newly appointed advocate that he could not resume work and asked your

appellant/petitioner herein to take change. The appellant/petitioner absolutely in vain and after waiting from the entire period commencing

from 16th March, to 31st July, 2019, no steps could be taken to file the instant appeal. Having no other option your appellant/petitioner

had to again take change and after several searches had second time appointed a new advocate as her advocate on 20th August, 2019.

However at the end of August, 2019 the appellant/petitioners had to face a major family crisis when her son had become seriously ill with

malaria and further her husband also got affected with malaria and being a lady who being absolutely dependent on her husband your

appellant/petitioner had no option but to cater to her family and for the entire month of September could not attend the conferences that

was scheduled with the counsels as appointed by the second newly appointed advocate. It is only in 1st week of October, 2019 when she

approached her second newly appointed advocate she was informed that the counsel who was appointed was not in town owing to the

annual puja vacation and that steps regarding filing of the appeal could be made on re-opening from the annual puja vacation of this

Honâ€™ble Court. After re-opening when your appellant/petitioner had approached her advocate in the second week of November your

appellant/petitioner was told that he will schedule conferences with the appointed counsels for taking steps to file the said appeal and was

told that by the first week of December he would file the said Appeal. However when your Appellant/petitioner again approached she was

informed that the both the appeals could not be filed and would be filed soon. The appellant/petitioner seeing the conduct of her advocate

further took change and again approached her initially appointed advocate to take steps in filing the both the appeals, however due to

onset of Annual winter vacation of this Honâ€™ble Court the said Appeal could be filed.

14. The Appellant/petitioner further states that upon consultation with a senior advocate as appointed by the initially appointed advocate-

on-record, who had advised that even though the above mentioned applications was pending adjudication the impugned judgment and

decree dated 5th July, 2017 had to be challenged by way of filing an appeal and further was also advised that the said order dated 19th

November, 2018 in which the judgment and decree dated 5th July, 2017 was upheld to extent that was not modified had to be challenged by

way of filing an appeal and it was advised to immediately file both the appeals and upon such advise being made your petitioner has taken

steps in filing this instant appeal as well as another appeal from the said order dated 19th November, 2018. It is pertinent to mention that

the appeal from the said order dated 19th November, 2018 was filed on 12th February, 2021.

15. As such, upon receiving due legal advice from the learned Senior Advocate the appellant/petitioners decided that they should instruct

their present Advocate-on-Record to the steps to file the present appeal challenging the impugned judgment and decree dated 5th July,

2017 as well as from the said order dated 19th November, 2018 in which the judgment and decree dated 5th July, 2017 had been upheld by

not modifying the said judgment and decree. The petitioners took such legal advice from the learned Senior Advocate on 15th January,

2021 and immediately the petitioners instructed their present Advocate-on-record to file the instant appeal. Upon receiving such instruction,

the appointed Advocate-on-Record appointed a junior counsel to draft the appeal from the said impugned judgment and decree dated 19th

November, 2018. The draft was made ready by 24th January, 2021 by the junior counsel. Thereafter, the draft was sent for settling to a

learned Senior Counsel. The draft appeal was settled by the learned Senior Advocate it was made ready for filing by second week of

January, 2021.

16. It is further pertinent to mention that the appointed advocate-on-record of the appellant/petition in order to prefer the instant appeal

had sought for leave to apply for the certified copy of the impugned judgment and decree dated 5th July, 2017 as it had become out of time.

However the petitioner was directed by the Honâ€™ble Court to file a formal application for granting leave to submit the requisition for

drawing up and completion of the impugned judgment and decree dated 5th July, 2017. Such application being G.A. 13 of 2021 was filed

on 29th of January, 2021 which is still pending adjudication. Various orders has been passed in the such application being G.A. No. 13 of

2021 where in by order dated 24th March, 2021 orders were passed directing to file affidavits by both the parties and the matter was due to

appear on 27th April, 2021. Pursuant to such order affidavits were exchanged between the parties, however due to the onset of the Second

wave of Covid-19 outbreak the matter was not taken up and is still pending adjudication. A copy of the said application being G.A. No.13

of 2021 along with the affidavits and the order passed therein are collectively annexed hereto and marked as Annexure-â€œDâ€.

17. It is further stated that from the Affidavit-in-opposition filed by the Respondent No.9 herein in the said application being G.A. no.13 of

2021 which was affirmed on behalf of the respondent No.9 herein on 5th March, 2021 a copy of which was served on 25th March, 2021.

The appellant/petitioner herein for the very first time came to know that the said impugned judgment and decree dated 5th July, 2017 had

been drawn-up and had been filed in the department on 17th November, 2020. Such fact was not known to the appellant/petitioner herein

prior to that.

18. The advocate appointed by the petitioner/appellant herein due to onset of the Second Wave of Covid-19 outbreak could not do anything

for the month of May and June, 2021. It is pertinent to mention that the other appeal being APO 25 of 2021 which was filed from the said

order dated 19th November, 2018 was admitted as appeal by the Division Bench of this Honâ€™ble Court after condoning the delay and

order dated 1st July, 2021 was passed, such appeal is still pending adjudication.

19. The appellant/petitioner herein further states that due to the outbreak of the second wave of Covid-19 the appellant/petitioner herein

was suffering from some financial crisis and further her entire family was affected with the Covid-19 virus and later suffered from after

covid-19 complication for which she could not take any steps to file the instant appeal for the entire month of July and August, 2021 and

after recovering from the deadly disease she again contacted her advocate on September, 2021 to further take immediate steps to file the

instant appealâ€.

21. Mr. Banerjee the learned counsel in support of his contention that on the causes shown in his clientâ€™s condonation application, the delay

occurred in filing this appeal may be condoned, had relied upon the following decisions of the Honâ€™ble Supreme Court:-

(a) In the matter of: Collector Land Acquisition, Anantnag & Anr. vs. MST Katiji & Ors., reported at (1987) 2 SCC107.

(b) In the matter of: N. Balakrishnan vs. M. Krishnamurthy, reported at (1998) 7 SCC 123.

22. The ninth respondent had filed its affidavit to the said application, inter alia, contended that the causes allegedly shown seeking condonation of

delay are without any supportive evidence or material and also bold and general in nature. The cause allegedly shown did not explain the everyday

delay occurred in filing the appeal. The ninth respondent further contended that with the passage of time, a valuable right under the final decree for

partition of the estate had accrued in favour of all the co-sharers including the contesting respondent in the appeal and the parties had also acted upon

the said final decree for partition. It was contended that the story of change of learned advocates by the appellant from time to time was also

concocted and designed to suit the purpose for condonation of delay in filing the said second appeal and without any material being disclosed

explaining the delay. Thus, it was contended on behalf of the ninth respondent who is the contesting respondent in the appeal that, the delay in filing

the appeal was not deserved to be condoned and the application should be dismissed in limine.

Merits of appeal

Arguments:-

23. Mr. Swatarup Banerjee, learned counsel appearing for the appellant drew attention of this court, at the outset, to the preliminary decree dated

September 20, 1973 to which the father of the appellant namely Lokenath Mullick the third plaintiff was a party and accepted the same without any

demur. He then drew attention of this court and placed the various provisions made in the said two family settlements namely the 1979 family

settlement and 1980 family settlement and submitted that, in the said two family settlements the predecessor in interest of the appellant being her

father Lokenath was a party and accepted the same without any demur. Under the said 1979 family settlement the entitlement of the father of the

appellant was mentioned in Schedule-C and the S.L. No. 7 thereunder provided, inter alia, that four tile sheds would be his entitlement at the said

premises and Schedule-E was the provisions made for the ninth respondent who was the contesting respondent in the appeal. The 1980 settlement

only recorded certain modifications in respect of the share of Gauri Bala Mullick, since deceased, who was the mother of the ninth respondent and the

grandmother of the appellant. He submitted that, the said preliminary decree and the said two family settlements, if were taken together, then the

appellant would be entitled to 1/6th share in the entire estate whereas the ninth respondent would be entitled to 11/30th share in the entire estate.

24. Learned counsel then drew attention of this court to the final return dated May 20, 2011 prepared by the Commissioner of Partition on the basis

whereof the final decree was passed. It was submitted that, insofar as the said shares of the appellant being 1/6th and the ninth respondent being

11/30th in the entire estate were concerned, the appellant had no objection or any quarrel thereto. The appellant accepted the same. The attention of

this court was then drawn to the final return dated May 20, 2011 of the Commissioner of Partition on the basis whereof impugned final decree was

passed, the said final return of the Commissioner of Partition was wholly wrongful and erroneous as the same was not in conformity with and was in

contradiction to the said two family settlements.

25. By a judgment and order dated August 14, 2006 passed by a Coordinate Bench the Commissioner of Partition was, inter alia, directed to prepare

his final report for partition taking into consideration the said 1979 family settlement and to give effect thereto as far as possible so that the burden of

any tenant inducted by any co-sharer is not passed into some other co-sharers and accordingly it was directed that the Commissioner of Partition at

the same time should try to adjust equities so that each party gets the declared share in the joined family property. Referring to such direction of the

said judgment of the coordinate bench dated August 14, 2006 the learned counsel for the appellant submitted that, the final return for partition prepared

and submitted by the Commissioner of Partition was in derogation to the said direction of the division bench and accordingly was violative to the 1979

family settlement. Therefore, the impugned decree passed on the basis of the said final return prepared by the Commissioner of Partition is bad in law

and is liable to be set aside insofar as the appellant is concerned.

26. The learned counsel then referred to the averments made by the ninth respondent, who is the contesting respondent in the appeal, in GA No. 2542

of 2011 and referring to paragraph 6 to 14 thereof submitted that, even if the share as accepted by the contesting respondent is taken into account

then also he is not entitled to receive approximately not more than 1,984 sq ft equivalent to 2.75 kathas of areas, which is equivalent to his 11/30th

share in the dwelling house at the said premises measuring about 7 kathas of total land. Whereas the contesting respondent had received the entire 7

kathas property at the said premises. The learned counsel for the appellant submitted that, the four tile sheds which had been allotted to the appellant

should have been within the said dwelling house at the said premises. He submitted that, in between the four tile sheds which had been allotted to the

appellant and the said dwelling house at the said premises there is a municipal road/passage and as such at no stretch of imagination it could be

contended that the said four tile sheds allotted to the appellant were within the dwelling house as per the actual entitlement of the appellant. Thus, the

appellant claimed his allotment of four tile shed within the dwelling house at the said premises and not beyond the dwelling house. Referring to

Schedule-C and Schedule-E of the final report of the Commissioner of Partition dated May 20, 2011 the Learned Counsel submitted that, the area

earmarked for the appellant measured about 1 katha of land and while evaluating the same in his report the Commissioner of Partition valued the same

for a sum of Rs.8,90,942/-.

27. Mr. Banerjee then referred to Rules 13 and 14 under Order XXVI of the Code of Civil Procedure, 1908 (for short, the code) and submitted that,

despite objection/exception being taken by the appellant to the report filed by the Commissioner of Partition on the basis whereof the impugned final

decree of partition was passed, the Learned Trial Judge did not take cognizance of such objection/exception and proceeded to pass the impugned

decree and thus, the learned Judge had committed a serious error in law in passing the impugned final decree. He further submitted going one step

ahead that, even if no objection/exception is filed to the report filed by the Commissioner of Partition, it is the mandatory duty of the court to examine

the report as to its correctness and veracity and come to a conclusion as to whether it deserves to be confirmed, varied or set aside and then to

proceed to pass a final decree. Accordingly in absence of such mandatory exercise of jurisdiction by the Trial Court, as in the instant case, the

impugned final decree stands vitiated and is wholly illegal, wrongful, cannot sustain and deserves to be set aside. In support of such contention the

Learned Counsel relied upon a decision of a Single Bench of the Madras High Court (Madurai Bench) In the matter of: Abdul Rasheed & Ors. vs.

Abdul Jabbar & Ors., reported at 2019(2) CTC 35 equivalent to MANU/TN/3749/2018.

These provisions under Rules 13 and 14 under order XXVI of the code for passing a final decree for partition are mandatory in nature and any non-

compliance thereof, as in the instant case, rendered this impugned final decree invalid and not tenable in law.

28. Mr. Banerjee, further submitted that, the impugned preliminary decree was passed behind the back of the appellant and without even serving any

notice upon her though the parties present then before the Learned Trial Judge were aware of the appellant. The appeal from the said preliminary

decree APD No. 534 of 2017 was carried out by the third and fifth respondent in which the appellate decree dated May 17, 2018 was passed

affirming the said impugned final decree. Such appeal was also proceeded with behind the back of the appellant and without any notice being served

upon her. The appellant was not even aware of the said appeal at the relevant point of time. It was thus, contended that the adjudication while passing

both the impugned decree for partition and the said appellate decree, it was against the principles of natural justice as no opportunity of hearing was

afforded to the appellant, who was a party to the proceedings and a vital interested party therein. On this ground also the said preliminary decree was

liable to be set aside as against the appellant.

29. Mr. Adhip Chandra Kar, learned Counsel appearing for the ninth respondent who is the contesting respondent in the appeal referred to the diverse

orders passed from time to time in the said partition suit both at the trial stage and also at the appellate stage. He submitted that, when the preliminary

decree was passed on September 20, 1973 it was accepted by the predecessor-in-interest of the co-sharers including the appellant and the respondent

no.9 and the shares were amicably and duly settled amongst the co-sharers under the said two family settlements. The predecessor-in-interest of the

appellant unequivocally and unconditionally accepted his allotment. Then on December 30, 1982 Smt. Gauri Bale Mullick the mother of the ninth

respondent and the grandmother of the appellant died. After her demise, her share became vested with the ninth respondent pursuant to her probated

will and by an order August 27, 2009 the shares declared in the preliminary decree dated September 20, 1973 was modified and the share of the ninth

respondent was increased to 11/30th share in the entire estate. The ninth respondent then filed GA No. 2542 of 2011 praying for a final decree in

which the first final decree was passed on June 15, 2015 (for short, the first final decree). The appellant then filed GA No. 3156 of 2015 for recalling

of the said final decree when by an order dated September 30, 2015 the said application of the appellant was dismissed. The appeal APOT 538 of

2015 was carried out when the order was passed recalling the said first final decree subject to the payment of cost of Rs.1,00,000/- payable by the

appellant and appellant was granted an opportunity to file her affidavit-in-opposition to the said GA No.2542 of 2011 filed by the ninth respondent

praying for final decree. Pursuant to such direction cost was paid by the appellant and the affidavit-in-opposition was filed. On November 08, 2016 the

second final decree was passed (for short, the second final decree) and the appellant, inter alia, was directed to vacate the portion in her occupancy in

the said premises beyond her entitlement. Upon payment of cost the said second final decree dated November 08, 2016 was recalled. Subsequently

the said impugned final decree dated July 05, 2017 was passed when appellant did not appear. An appeal was carried out by the third and sixth

respondent and the appellate decree was passed affirming the said impugned final decree on May 17, 2018 which was then drawn up and completed

and filed with the department. Mr. Kar, submitted that, the ninth respondent to give effect to the said impugned final decree for partition paid a sum of

Rs.19,47,887/- towards the stamp duty and the final decree was filed in court on November 17, 2020. The said chronological events, inter alia,

according to Mr. Kar showed that the appellant all along was waiting at the fence as a watch dog but chose not to appear to contest the same when

the said impugned final decree was passed.

30. Learned counsel for the contesting respondent in the appeal then submitted that, the said impugned final decree was passed in conformity and in

strict compliance of the provisions made under the said two family settlements and without any deviation thereof. Insofar as the share of the appellant

was concerned to the extent 1/6th share of the entire estate, the appellant and/or her predecessor-in-interest did not object thereto and on the contrary

allowed it to be carried out till the final report of the Commissioner of Partition was prepared and submitted and the impugned final decree was passed

thereupon. The appellant had received her entitlement commensurate to her share which were four tile sheds at said premises as shown and

earmarked by the Commissioner of Partition in his final report and on the basis thereof the impugned final decree was passed. Mr. Kar then submitted

that, in addition to the said dwelling house situated at the said premises substantial land was available in the said premises, in a portion of which the

said four tile sheds were situated, to which the appellant is entitled to under her allotment. He submitted that, in GA 3101 of 2018 filed by the appellant,

inter alia, praying for modification of the said impugned final decree dated July 05, 2017, the appellant did not challenge the said final report of the

Commissioner of Partition neither had she prayed for setting aside of the same. She also did not challenge the valuation of her share caused at the

instance of the Commissioner of Partition. Such conduct of the appellant clearly showed that she had accepted the final report filed by the

Commissioner of Partition on the basis whereof the impugned final decree was passed. As such she was estopped from challenging the said impugned

final decree.

31. Mr. Kar then submitted that, on the basis of the shares earmarked pursuant to the final report of the Commissioner of Partition which culminated

into the said impugned final decree, many co-sharers had acted thereupon and had also transferred their shares in the estate to third parties. Thus, the

question of reopening or revisiting the said impugned final decree at this stage does not and cannot arise. It was all along within the knowledge of the

appellant that the portion of the dwelling house at the said premises occupied by her was beyond the said four tile sheds at the said premises and was

a temporary arrangement till the time the final decree was passed and effected. Thus, the appellant to give effect to the said impugned final decree

was liable to vacate the portion of the dwelling house occupied by her which were beyond her entitlement and, therefore, the learned judge in directing

the appellant to vacate such portion of the dwelling house did not commit any wrong and such direction was wholly within the parameter of the final

decree for partition.

32. On the applicability of the provisions under Rules 13 and 14 under Order XXVI of the Code, Mr. Kar, Learned Counsel for the contesting

respondent in the appeal referred to Chapter XXVI Rules 86 to 92 of the Original Side Rules and the submitted that, the High Court Rules provides for

the provisions relating to partition suit and for appointment and preparation of the return to be prepared and submitted by a Commissioner of Partition

appointed by the Court and the authority and function of such commissioner is governed thereunder. Any co-sharer who intends to take exception to

the return/report prepared and submitted by the Commissioner of Partition is entitled to do so as of right, which would be adjudicated upon by the

Court. Referring to Sections 122 and 129 under Part X of the Code, he submitted that, notwithstanding anything in the code, any High Court not being

Court of Judicial Commissioner may make such rules not inconsistent with the Letters Patent or order or other law establishing it, to regulate its own

procedure in the exercise of its Original Civil Jurisdiction as it shall think fit and nothing therein contained shall affect the validity of any such rules in

force at the commencement of the code. In exercise of such power the rules, inter alia, under Chapter XXVI of the Original Side Rules of this Court

were framed. In the event there is any conflict between the provisions of the code and the Original Side Rules, the Rules prevail. The subject partition

suit was filed before this Court in its Ordinary Original Civil Jurisdiction and as such was governed by the Original Side Rules. The Commissioner of

Partition was appointed and had carried out its duties and ultimately filed his final return for partition, in terms whereof the impugned final decree for

partition was passed, in strict compliance of the relevant rules framed in the Original Side. The appellant and/or her predecessor-in-interest at all

material time was aware of such final return for partition prepared and submitted by the Commissioner of Partition pursuant to the direction made by

the Suit Court and still did not file any exception/objection to such report. The report of the Commissioner of Partition had attained finality and became

binding upon the parties including the appellant. In support of such contention Mr. Kar relied upon a judgment of the Honâ€™ble Supreme Court In

the matter of: Iridium India Telecom Ltd. vs. Motorola Inc, reported at AIR 2005 SCC 514.

33. The learned counsel for the contesting respondent then submitted that, the Trial Court decree which was impugned in this appeal being dated July

05, 2017 had merged with the appellate decree dated May 17, 2018. By the said appellate decree the impugned final decree was affirmed. While

passing both the decree the Trial Court and the Appellate Court had considered the merits on the issue. By the said appellate decree the appellant

herein being the heir of Lokenath was directed to vacate the rooms in her occupation within three months from the date of communication of the said

appellate decree. Thus, the appellate decree had a binding effect on the appellant herein. He further submitted that, since the impugned final decree

had merged with the said appellate decree, the said impugned final decree is no more open to challenge under the Doctrine of Merger. Thus, if the

appellant is aggrieved he should have challenged the said appellate decree. In support of such contention the learned counsel had relied upon the

decision of a Supreme Court In the matter of: Kunhayammed & Ors. vs. State of Kerela & Anr., reported at AIR 2000 SCC 2587.

34. Mr. Kar, learned counsel then submitted that, both the decrees of the Trial Court and the Appellate Court had since been drawn up, completed and

filed in the department. On July 30, 2018 the said decree was drawn up, completed and filed in the department. On November 17, 2020 the impugned

final decree of the Trial Court was filed in Court after being drawn up and completed. As such in the eye of law both the said Trial Court and

appellate decrees had been perfected. Once a decree had been perfected it was completed in all respect and the same could not be varied or altered

any more, Mr. Kar in this regard referred to Rule 24 under Chapter XVI of the Original Side Rules. Once the decree is drawn up, completed and

filed, in other words perfected the Court loses its jurisdiction to alter or modify the same. In support of such contention he relied upon a decision of a

Coordinate Bench of this Court In the matter of: Steel & Allied Products Ltd. vs. Gerbueder Bohlar and Co., reported at 75 Calcutta Weekly Notes

(CWN) 416.

35. On the issue of violation of natural justice raised on behalf of the appellant, Mr. Kar submitted that, the decree in a partition suit amongst the co-

sharer comes as of right in the proportion to the shares of the co-sharers in the entire estate as per their entitlement. The appointment of a

Commissioner of Partition to carry out the job to decide the share and allocation of the co-sharers is a procedural job to be done in the manner and

mode as provided under the code if the partition suit is filed before a District Court and under the Original Side Rules, as discussed above, if the

partition suit is filed before a High Court in its ordinary Original Jurisdiction as the case may be. In the instant case, it is governed under the Original

Side Rules. The preliminary decree was passed in presence of all the co-sharers including the father of the appellant who had accepted and received

their entitlement under the said preliminary decree. Subsequently, the shares amongst co-sharers of the said Mullick family were settled, accepted and

acted upon under the said two family settlements entered into 1979 and 1980 respectively. This two family settlements were also accepted and acted

upon by all the co-sharers including the father of the appellant. On the basis of the said preliminary decree and thereafter the said two family

settlements Commissioner of Partition prepared and submitted his final report for partition on the basis whereof the said impugned final decree for

partition and the appellate decree were passed. At no stage the appellant contemporaneously or otherwise raised her objection in respect of her

allotment neither her father, Lokenath did. Following the relevant rules under Chapter XXVI of the Original Side Rules the appellant did not file any

exception/objection to the report prepared and submitted by the Commissioner of Partition. It is only when the appellant was directed to vacate the

portion she was occupying at the said premises beyond her entitlement for the said four tile sheds she started filing one after another applications to

have the said impugned final decree recalled. On the basis of the said report of the Commissioner for Partition and/or the impugned final decree co-

sharers had already created third party rights in the estate in respect of their shares. The appellant at all material time was waiting at fence and was

keeping in dark on the proceedings. Even the grounds shown by the appellant in her condonation application seeking condonation of delay for more

than 1500 days are without any materials and devoid of any cogent explanation and merit. This clearly shows that the appeal is clearly a result of an

afterthought and misconceived. The appellant at the relevant point of time was all along with the notice of the proceedings and chose not to take part

at the relevant point of time. Thus, the question of violation of any natural justice, in the facts of the case against the appellant did not and could not

arise. This appeal is liable to be dismissed.

36. Mr. Swatarup Banerjee, learned counsel for the appellant dealt with the submissions made on behalf of the ninth respondent in reply.

37. On the issue of merger of the impugned final decree for partition with the appellate decree, he submitted that, the appeal APD No.534 of 2017

was not filed by the appellant and she was made a party respondent therein. The appellant was not served with any notice of such appeal, as such, the

appellant was not in a position to participate in the said appeal. In such circumstance, the appellate decree had no binding effect on the appellant

herein and as such the Doctrine of Merger had no application. In support of such contention he relied upon a judgment of the Honâ€™ble Supreme

Court In the matter of: U.J.S. Chopra vs. State of Bombay, reported at AIR 55 Supreme Court 633.

38. The learned counsel then submitted that, none of the said two partition decree, namely, the impugned final decree for partition or the appellate

decree had crystallized any right in favour of the appellant to execute it, as the appellant had not paid the required stamp duty payable thereupon in

law. He submitted that, the said two decrees had not become executable at the instance of the appellant. In support of such contention he relied on a

judgment of the Honâ€™ble Supreme Court In the matter of: Shankar Balwant Lokhande vs. Chandrakant Shankar Lokhande, reported at (1995) 3

SCC 413.

Decision:-

39. Considered the submissions made on behalf for the parties and their respective written notes filed in the matter.

Application for condonation of delay:-

40. There was a delay of about 1580 days in preferring the instant appeal. From the averments made in the said application GA 1 of 2021 as already

set out herein above it appears that, initially the appellant was advised to perfect the said first appeal and thereafter she was advised to prefer the

second appeal. The principle grounds stated in the said application, inter alia, were that the appellant at the relevant point of time was staying at

Mumbai and as such she was not aware of the hearing of the application in which the said impugned final decree was passed. The COVID period

intervened. From time to time the appellant changed her advocate on record though the necessary particulars are not available in the averments. The

appellant with all bona fide proceeded in the matter on the previous occasions and paid the substantial amount of costs as was directed by the Court

from time to time. The said impugned final decree for partition was passed without serving any notice upon the appellant and behind her back. She did

not get any opportunity to participate in the proceeding though she was made a party. The appellate decree was also passed behind her back and the

relevant appeal was proceeded with without any notice to the appellant though she was made a party. It was then contended that both the impugned

final decree and the appellate decree were passed ex parte as against the appellant. This court had also considered the objection raised by the ninth

respondent in his affidavit opposing the said application for condonation. According to the ninth respondent the grounds shown in the said condonation

application were flimsy, baseless, devoid of any particulars and it was designed to suit the said application. There was no day to day explanation

regarding delay as required in law.

41. An order condoning the delay in a condonation application much depends upon the discretion of a Court than the right of the party. Considering the

merits of the case, the Court has the power to use or not to use its equitable jurisdiction by exercising its discretion while considering an application for

condonation of delay. The impugned final decree for partition was made in a partition suit amongst the co-sharers. Partition suit stands on a different

footing than the other suits as the same is based upon the heritable rights to a joint estate of the co-sharers comprising of both moveable and

immoveable properties. Right to property is an indefeasible right that flows from the Constitution of India. Such right cannot be denied to a co-sharer

when a co-sharer asserts the same through a due process of law, as in the instant case, the partition suit. The right to claim of the plaintiff and

defendant in a partition suit towards the joint estate are common and same on the basis of their respective shares. This right of a co-sharer is a

substantive right whereas an application for condonation of delay in preferring an appeal is guided by a procedural law. Substantive right cannot suffer

for procedural latches. From the averments, some explanations and sufficient cases appear to have been pleaded.

42. In view of the above, this Court has ample authority to consider the case in the condonation application in a lenient and judicious manner, so that

the substantive right of a party should not suffer. Inasmuch as, the connected appeal APOT No. 25 of 2021 preferred by the appellant was a delayed

appeal, where the delay was for more than 700 days and after condoning the said delay by an order dated July 01, 2021 this Court had admitted the

appeal.

43. Considering the above and on an overall assessment of the matter the delay of 1580 days in preferring the instant appeal is condoned and the

instant appeal APDT 08 of 2021 stands admitted. The department concerned is directed to regularize the said appeal by allotting the regular appeal

number after admission forthwith.

44. On the above terms the said GA 01 of 2021 filed in APDT 08 of 2021 stands allowed.

Application for substitution-GA 03 of 2021 in APDT 08 of 2021

45. The third respondent namely, Soumen Mullick and the sixth respondent namely, Sourendra Mullick had passed away meanwhile. This application

was filed for recording of their death and their substitution in this appeal by their respective heirs. The contesting parties did not raise any objection the

said substitution application being allowed. In fact the parties confirmed the said death of the third and sixth respondent and also as to their legal heirs

mentioned in the said application.

46. Accordingly the said GA 03 of 2021 stands allowed. Let the death of the third respondent and sixth respondent respectively be recorded in the

appeal in terms of Prayer (a) and (b) of the substitution application forthwith. Let the necessary substitution be carried out and effected in terms of

Prayer (c) and (d) of the said substitution application forthwith. Order is also passed in terms of Prayer (e) to the said substitution application.

47. Let these substitutions be effected by causing the necessary amendments in the cause papers and records of the appeal wherever it is necessary

by the department concerned forthwith and not later than seven days from the date of communication of this judgment and order.

Merits of the appeal:

48. It is an admitted position that by the said two family settlements of 1979 and 1980, the co-sharers of the Mullick family had admitted and accepted

their respective shares and allotments without any demur or objection whatsoever. Prior to the said two family settlements the preliminary decree was

passed in September 20, 1973. The Commissioner of Partition was then appointed whose obligation was to file a final return for partition on the basis

of the said preliminary decree and the said two family settlements. On August 27, 2009 Smt. Gauri Bala Mullick, the mother of the ninth respondent

and the grandmother of the appellant died. With the demise of the said Gauri Bala Mullick the ninth respondent, Somenath, became entitled to 11/30th

share in the entire estate of the Mullick. The appellant had no dispute with regard thereto. The appellant through his father became entitled to 1/6th

share in the entire estate. The appellant also did not dispute that. On the basis of the said entitlement of the parties the Commissioner of Partition on

May 20, 2011 had filed his final return along with the valuation of the shares of the co-sharers in the estate. At this juncture the appellant joined issue,

inter alia, contending that the said final report prepared and submitted by the Commissioner of Partition was not in conformity with the said family

settlements and was in violation thereof. It was also contended on behalf of the appellant that the final report was in violation of the direction of a

coordinate bench dated August 14, 2006.

49. On a careful scrutiny of the judgment and order dated August 14, 2006 passed by a coordinate bench it appears that, the said coordinate bench

was of the view that the Commissioner of Partition already appointed was directed to proceed to make their filing report for partition taking into

consideration the said 1979 family settlement and to give effect thereto as far as possible so that the burden of any tenant inducted by any co-sharer

should not pass into some other co-sharers and accordingly the Commissioner of Partition was directed to adjust equities, so that each party gets the

share in the joint family property. On a close perusal of the final report prepared and submitted by the Commissioner of Partition it is clear that the

Commissioner of Partition had evaluated the shares of the co-sharers in the estate on monetary terms and suggested payment and receipt of owelty

money amongst the co-sharers. Such part of the report was not challenged by any of the parties. On the contrary the co-sharers had accepted and

acted upon such final report unequivocally and many of the co-sharers had transferred their shares in the estate to third parties. From the application

filed by the appellant GA 3101 of 2018 it is clear that the allegation made therein are bold and general in nature and no challenge was thrown to the

veracity of the said final report of the Commissioner of Partition with any material particular nor did the appellant challenge the valuation of the shares

mentioned in the final report. She also did not ask for setting aside or cancellation of the said final report. There was no deviation from the said

judgment dated August 14, 2006 in the said final report of partition.

50. The appellant filed her affidavit-in-opposition to GA 2542 of 2011 filed by the ninth respondent in which the said impugned final decree was

passed. From the averments made in the said affidavit filed by the appellant, specifically from paragraph 16 thereof it appears that the appellant sought

to raise certain objections against the said final report prepared and submitted by the Commissioner of Partition. On a close reading of the said

averments it was clear that, the objections were devoid of any material or particulars and were wholly bold and general in nature. On the basis of such

objection as pleaded in her affidavit, it could not have been construed that there was any ex facie or glaring discrepancy in the veracity of the final

report prepared and submitted by the Commissioner of Partition.

51. From a reading of the said two family settlements and the final report of the Commissioner of Partition prepared on the basis thereof, it is clear

that, a temporary arrangement was made to the effect that the co-shares who occupied portion of the dwelling house at the said premises would

remain there, till a final decree for partition is passed and is effected. It was, therefore, clear that immediately after the said final decree for partition

was passed the co-sharers must quit their respective occupation at the dwelling house at the said premises beyond their allotment. Following the same

the trial Court and appellate Court had directed, inter alia, the appellant to vacate the portion of the dwelling house at the said premises in her

occupation which was beyond her entitlement. The appellant was entitled to four tile sheds at the said premises and not beyond that. From the said

two family settlements and from the final report submitted by the Commissioner of Partition it appears that the said four tile sheds which were allotted

to the appellant was at the said premises. It was no where mentioned, in the said settlements that the same was to be situated within the dwelling

house at the said premises.

52. Before the said impugned final decree twice final decrees were passed on June 15, 2015 and November 08, 2016. After careful examination of all

the materials on record. Ultimately both the final decrees were recalled at the instance of the appellant to allow her to participate in the proceeding

and ultimately the impugned final decree was passed. From a close reading of the impugned final decree it appears that the learned trial Judge after

considering all the materials before him and in true and proper appreciation thereof passed the said impugned final decree though the appellant did not

participate in the hearing but her affidavit was there on record.

53. The direction upon the appellant under the said impugned final decree was to vacate the portion in the dwelling house in her occupation beyond her

entitlement at the said premises. Such direction was also affirmed by the said appellate decree and the Appellate Court additionally passed the same

direction upon the appellant. Hence both the said decrees bind the appellant though the appellant herein was not the appellant in that appeal but was a

party respondent. In the matter of: Kunhayammed & Ors. (supra), the Supreme Court had observed that:

â€œ42. â€œTo mergeâ€ means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be

swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist,

but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris

Secundum, Vol. LVII, pp. 1067-1068).

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed

against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only

after granting leave to appeal then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be

reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

To sum up our conclusions are:-

(i) Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and

such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the

decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of lawâ€.

54. In the facts of this case, in both the proceedings before the Trial Court and the Appellate Court, the appellant herein was not the initiator, but a

party respondent. The impugned final decree had not merged with the appellate decree, however, the direction made under the said two decrees upon

this appellant definitely had a binding force on her.

55. The said partition suit was filed before the High Court in its Original Civil Jurisdiction and is thus, governed under the provisions laid down in the

Original Side Rules of this Court. Chapter XXVI Rules 86 to 92 of the Original Side Rules dealt with the provisions regarding the modus operandi of

the partition suit. Such Rules, inter alia, include an appointment of Commissioner of Partition and for filing a final return for partition of a joint estate

amongst the co-sharers. The same do provide for an aggrieved co-sharer to challenge the final report of the Commissioner of Partition by taking

exception thereto. The appellant in his application GA 3101 of 2018 did not raise any objection to the said final report submitted by the Commissioner

of Partition or the valuation caused by him in respect of the shares of the co-sharers in the estate. The appellant did not ask for setting aside of the

said final report for partition nor the valuation mentioned therein. The objection sought to have been raised by the appellant against the final report of

the Commissioner of Partition in its affidavit-in-opposition to the said GA 2542 of 2011 were also bold and general in nature and devoid of any material

particular. The learned Judge while passing the impugned decree considered the same and rightly such objections were overruled.

56. Section 129 of the code authorizes the High Court to frame its own rule which should govern the proceedings initiated in its Ordinary Original Civil

Jurisdiction and thus, the provisions under Order XXVI Rules 13 and 14 of the Code shall not apply in the facts of this case and the relevant High

Court Rules under Chapter XXVI would apply. The judgment relied upon by the learned counsel for the appellant In the matter of: Abdul Rasheed

(supra) of the Madras High Court (Madurai Bench), the partition suit being OS No.114 of 1985 was filed before the Court of the Sub-ordinate Judge

at Kumbakonam, which was the Jurisdictional District Civil Court and the second appeal was decided arising there from before the Madras High

Court. Since the partition suit was filed before the District Civil Court the provisions laid down under Order XXVI Rules 13 and 14 were held to be

mandatory. Thus, the ratio decided in the said judgment of the Madras High Court is not applicable and wholly irrelevant in the facts of this appeal.

57. Both the said impugned final decree and the appellate decree had duly been drawn up, completed and filed with the department, hence, both the

said decrees stood perfected in terms of Rule 24 of Chapter XVI of the High Court Rules framed in its Original Side. It is to give full effect of the said

Rule an order cannot be said to be perfected before it is filed, because until it is filed all the requirements of procedure cannot be said to have been

complied with. A Coordinate Bench of this Court In the matter of: Steel Allied Products Ltd. (supra), observed as under:-

â€œ10. Mr. Chatterjee relied on a decision of Chakravartti CJ. In (2) T. Bhagwandas v. Sitaram Srigopal 63 CWN page 303 at page 312.

The learned Chief Justice said, â€œI would add that the practice of a Judge recalling an order on just grounds before he has signed it, is

not peculiar to the Original Side of this Court, but obtains in other Courts as wellâ€. Relying on this statement Mr. Chatterjee contended

that a Judge can recall an order only before he has signed it and not afterwards. In other words, an order is perfected or completed as

soon as the order is signed by the Judge who makes it. It has to be remembered that in the case before Chakravartti C.J., the order had not

been signed and the application was disposed of not in the exercise of any inherent power to recall or modify an order but under Order 9

Rule 9 of the Code of Civil Procedure. In our opinion, the learned Chief Justice, in observing that a judge can recall an order before he

has signed it, had in mind the facts of the case with which he was concerned. That he did not intend to say that an order is perfected as

soon as it is signed, is clear from the fact that he cited in his judgment the case of re (1) Harrisonâ€™s Settlement without a demur where

Jenkins L.J. said: â€œWe think that an order pronounced by the Judge can always be withdrawn or altered or modified, by him until it is

drawn up, passed and entered. In the meantime, it is provisionally effective, and can be treated as a subsisting order in cases where the

justice of the case required it, and the right of withdrawal would not be there by prevented or prejudiced.â€

12. For a decision of this Court on the point, reference may be made to (3) In the matter of Steel Construction Co. Ltd. 39 CWN 1259 where

McNair J., said: â€œThe order has been drawn up but has not been completed or filed and it has been definitely laid down by this Court in

the case of (4) Sarupchand Hukumchand v. Madhoram Raghumall 28 CWN 755 that an order which has not been perfected may be

reconsidered by the learned Judge who made itâ€.â€

58. Once the impugned decree stood perfected, as stated above, this Court has lost its jurisdiction to sit on it further for recalling of the same or to

make any modification thereof. It is only a Superior Court can receive a challenge against such an order or decree. In the present case also both the

said impugned final decree and the appellate decree stood perfected and as such only the Superior Court can receive a challenge to the said appellate

decree for adjudication.

59. The judgment relied upon on behalf of appellant In the matter of: U.J.S. Chopra (supra) was delivered in a criminal case. The legal principle

regarding admission of a plea of guilty and an admission of a civil liability or a civil consequence in civil suit rest wholly on a different footing.

Therefore, the ratio decided in the said judgment has no application in the facts of this appeal.

60. The judgment relied upon on behalf of appellant In the matter of: Shankar Balwant Lokhande (Dead) (supra), the Supreme Court held that in case

of final decree in a partition suit until the ad valorem stamp duty is not paid the decree does not become executable. This is the settle law. In the

instant case the ninth respondent had already paid more than a sum of Rs. 19,00,000/- on account of the stamp duty on the impugned final decree. The

impugned final decree is thus, now executable.

61. From a close scrutiny of the impugned final decree, this Court is of the view that, the same is a very well considered and reasoned judgment. The

learned judge while passing the said impugned decree had considered all the factual issues on the basis of the materials available due. The jurisdiction

of the Appellate Court is very limited to take part in making a detailed factual enquiry into the matter sitting on appeal on a Trial Court decision, unless

there is a glaring perversity which is ex facie on the face of the impugned order and error is apparent on facts. The Appellate Court would be very

slow to proceed and would seldom interfere in the order impugned. This Court is also of the view that the conclusion arrived at in the said impugned

final decree would not be different or otherwise, even if the impugned final decree is revisited on the materials on record. On the previous two

occasions also the impugned final decrees were passed on due consideration of all factual issues on the available material which were recalled and the

impugned final decree was passed subsequently with the same conclusion. The family disputes for partition of 1973 had been brought to an end by the

Court after almost 50 years.

62. I have read the observations made and the views taken by my esteemed learned senior brother (I. P. Mukerji, J.), to which I am absolutely in

agreement in every respect.

63. In view of the foregoing discussions and reasons, this Court is of the view that the said impugned final decree dated July 05, 2017 does not warrant

any interference by this Court of appeal. The said final decree dated July 05, 2007 stands affirmed and confirmed.

64. APDT No. 08 of 2021 stands dismissed.

65. In view of the above the other appeal APO No. 83 of 2021 also stands dismissed.

66. The department concerned is directed to regularize the said second appeal being APDT 08 of 2021 by allotting regular appeal number, as the same

is being done after admission of appeal. Such exercise must be carried out by the department concerned within a week from the date of

communication of this judgment and order. The department concerned is also directed to effect the substitution in this appeal as directed above.

67. This appellate decree be drawn up in terms of this judgment expeditiously. Such appellate decree must be with the regular number of this appeal

as it is done after admission and with the amended cause title after the substitution is effected.

68. There shall, however, be no order as to costs.

I. P. Mukerji, J

1. I have had the privilege of going through, in draft, the judgment proposed to be delivered by my brother. I am in full agreement with the conclusions

reached by his lordship and the reasons in support thereof. However, I would like to add a few observations of my own.

Delay

2. The first question before this court is whether it should condone the delay in filing the appeal from the decree.

3. Section 5 of the Limitation Act, 1963 empowers the court to condone the delay in filing an appeal or an application.

4. The court can do so if sufficient cause is shown. What is sufficient cause is a question of fact. The standards for measuring sufficient cause are

subjective and flexible. The facts which constitute sufficient cause in one case may not be sufficient in another. Some principles of law and guidelines

have been laid down by the Supreme Court to enable the courts to make this subjective assessment of facts. I attempt to discuss those authorities,

making a random selection.

5. The facts which allegedly constitute sufficient cause vary from case to case and should be adjudged on a case to case basis by sound exercise of

judicial discretion. The court should be liberal when there is no negligence, inaction or want of bona fides imputable to a party. [See The State of West

Bengal vs. The Administrator, Howrah Municipality and Ors. reported in (1972) 1 SCC 366].

6. In Oriental Aroma Chemical Industries Limited vs. Gujarat Industrial Development Corporation and Anr. reported in (2010) 5 SCC 459 the Court

ruled in favour of a liberal approach in condoning the delay of short duration but a stricter approach in cases of inordinate delay. [See also

Improvement Trust, Ludhiana Vs. Ujagar Singh & Ors. reported in (2010) 6 SCC 786, Indian Oil Corporation Ltd. & Ors Vs. Subrata Borah Chowlek

& Ors. reported in (2010) 14 SCC 419, Lanka Venkateswarlu (Dead) by Lrs. Vs. State of Andhra Pradesh and Ors. reported in (2011) 4 SCC 363,

Maniben Devraj Shah vs. Municipal Corporation of Brihan Mumbai reported in (2012) 5 SCC 157; B. Madhuri Goud vs. B. Damodar Reddy reported

in (2012) 12 SCC 693].

7. In Collector, Land Acquisition, Anantnag and Anr. Vs. Mst. Katiji and Ors. reported in AIR 1987 SC 1353 the court remarked that the point had to

be determined in a meaningful manner without presuming that the delay was deliberate. It should be careful not to â€œlegalize injustice on technical

groundsâ€ but is expected to â€œremove injusticeâ€. In adjudging the issue the court should always assume that the litigant does not gain anything but

instead runs a serious risk in delaying the proceeding. This principle was adopted and further expounded by the same court in State of Haryana vs.

Chandra Mani and Ors. reported in AIR 1996 SC 1623; (1996) 3 SCC 132, where it said that sufficient cause should be evaluated with

â€œpragmatismâ€ [See also State of Nagaland vs. Lipok AO and Ors. reported in (2005) 3 SCC 752], [Vedabai alias Vaijayanatabai Baburao Patil

vs. Shantaram Baburao Patil and Ors. reported in (2001) 9 SCC 106, Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy

& Ors. reported in (2013) 12 SCC 649]. In Special Tehsildar, Land Acquisition, Kerala vs. K.V. Ayisumma reported in (1996) 10 SCC 634, it said

that refusal to condone delay must not result in â€œmiscarriage of public justiceâ€. In State of Bihar & Ors. Vs. Kameshwar Prasad Singh and Anr.

reported in AIR 2000 SC 2306, it said that the court should also be watchful that by condoning delay it does not â€œunsettle settled rightsâ€ and

expressed its apprehension that the technicalities of law should not impede â€œsubstantial justiceâ€. However, in N. Balakrishnan vs. M.

Krishnamurthy reported in (1998) 7 SCC 123, the Court while affirming the above principle cautioned that the plea of sufficient cause should not

â€œsmack of mala fidesâ€ or be part of a â€œdilatory strategyâ€ or â€œto justify delay by a party which was deliberate to gain time.â€

8. In Sesh Nath Singh and Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Limited and Anr. reported in (2021) 7 SCC 313 the same Court on a

review of its earlier authorities reiterated that there could not be any â€œstraightjacket formulaâ€ to determine the existence of sufficient cause. It

went to the extent of saying that â€œacceptance of explanation furnished should be the rule and refusal an exception, when no negligence or inaction

or want of bona fides can be imputed to the defaulting party.â€ However, it cautioned that the delay should not be condoned in a routine manner. A

new angle was introduced when the court observed that when â€œstakes are high, the explanation should not be rejected by taking a pedantic and

hypertechnical view of the matterâ€ as that would result in â€œirreparable loss and injury to the party.â€ [See also Sridevi Datla Vs. Union of India &

Ors. reported in (2021) 5 SCC 321.]

9. Upon evaluation of the above authorities, I am of the view that sufficiency of cause may be pleaded but not found to be adequate in the notion of

the judge. A party may be able to show some substantial cause, though not sufficient. Since adjudication on merits is the goal of any adjudicator,

throwing out a matter on technical grounds might keep on rubbing his conscience. He might keep on thinking that the litigant may have had a genuine

case but is unable to establish it because of the delay. In such situations, it is quite necessary and practicable to look into the prima facie merits of the

applicantâ€™s case. If it is found prima facie meritorious, then even if the cause shown is insufficient, the court should exercise its discretion in

favour of such an applicant to condone the delay and hear out the matter on merits. Of course, in doing so, the court should carefully balance the

scales to see that this exercise of discretion does not cause unnecessary damage to the respondent or throws into jeopardy his vested rights.

10. Hence, in this case, I have enquired into the conduct of the appellant as well as the prima facie merits of her case.

11. I have very carefully examined the cause shown by the appellant. There are substantial laches on her part. On 15th June, 2015 an ex parte decree

was made against her. On appeal, on 18th February, 2016 upon payment of costs assessed at Rs.1,00,000/- she was allowed to contest the suit. On

8th November, 2016, once again an ex parte decree against her was passed, revoked on application by the appellant on 10th March, 2017 upon

payment of Rs.50,000/- as costs. Still on 5th July, 2017, the appellant did not appear and suffered an ex parte decree.

12. Now, it is submitted on her behalf that the impugned ex-parte decree was made by the court without proper notice to her. The appellant had notice

of the proceeding. After a long lapse of time, the matter was taken up by the learned judge. In the usual course of things, once a litigant has been

properly notified of a proceeding, it is for him to keep watch of it. It is not the responsibility of his adversary to give notice to him each and every time

the matter appears in the list of the court. Therefore, it was the responsibility of the appellant or her lawyers to keep watch of the list and appear

when the suit came under consideration by the court for passing a final decree.

13. The appeal was dismissed by the division bench on 17th May, 2018. The decree of the appellate court directed inter alia Sarmilee Dutta to vacate

the portion of the residential house (237P/1B) occupied by her. On 30th July, 2018 this judgment and decree of the appellate court was filed in the

department. On 29th September, 2020 stamp duty of Rs.19,47,887/- was paid by Somnath Mallick on the final decree. On 17th November, 2020 the

final decree was filed in court. On 3rd May, 2021 a certified copy of this decree was made available to learned Advocate Rakesh Sardar. It was only

when execution of the appellate courtâ€™s decree was initiated for eviction of the appellant in or about September, 2021 and orders were passed for

the Receiver to take physical possession of her portion that this appeal was filed on 1st December, 2021.

14. Some cause is shown for setting aside the ex parte decree as discussed by my brother, but certainly it does not appear to be sufficient.

15. Now, let me analyse the prima facie merits of the applicantâ€™s case.

16. A dispute which was hitherto not raised so prominently or specifically has been made the principal if not the only dispute in this appeal, by the

appellant.

17. There is no dispute regarding the shares of Somnath being 11/30th and Loknath having 1/6th. It was said on behalf of her by Mr. Swatarup

Banerjee, learned Advocate for the appellant that according to the settlement between the parties arrived at on 6th May, 1979 and modified in 1980,

premises no. 237P/1B, Satin Sen Sarani comprised of 7 k, 15 ch, 18 sq. ft. of land with a two storied building on part thereof. The four tile sheds

allotted to Loknath comprise of an area of 1 cottah and are situated in the said premises. A plan prepared by the Commissioner at page 203 of the

paper book has been relied upon by Mr. Banerjee, to contend that the allotment to Loknath of the four tile sheds comprising 1 cottah has been made

adjacent to a passage abutting the premises but outside it. His client as the heir of Loknath is entitled to this allotment having an area of 1 k within the

premises. Learned counsel submitted that the allotment by the Commissioner in his report dated 20th May, 2011 was in violation of the settlement. The

entire 237P/1B, Manicktala Main Road was described as a residential house comprising of 7 k, 15 ch, 18 sq. ft. and was allotted to Somnath ignoring

the land portion of the premises and the situation of the tile sheds thereon. (Page 416 of the paper book). In those circumstances, the allotment in

favour of Somnath has been more than what was agreed in the settlement and more in the particular premises no. 237P/1B, according to Mr.

Banerjee.

18. I think the conscience of the court should be clear. Let us not, on the ground of delay extinguish any right which legitimately belongs to the

appellant. Prima facie, the appellant has something to say on merits.

19. I am in agreement with the view of my learned brother that the delay should be condoned and the appeal heard on merits.

Merger

20. The impugned judgment and decree was passed on 5th July, 2017 inter alia directing Loknath Mallick to vacate the rooms in his occupation at

237P/1B, Manicktala Main Road, Kolkata â€" 700054 within two months from the date of the judgment and decree. In the appeal that was preferred

from this judgment and decree, the appellant was a party but according to her, she was never given notice of the proceedings or served with copies of

the papers.

21. The question is whether the judgment and decree of the Honâ€™ble first court has merged with the subsequent decision of the appellate court? If

the answer to the question is in the affirmative, then the decree of 5th July, 2017 has become final, operative and binding on all parties. In that case,

there is no question of any interference with it.

22. I will deal with case on merger cited by Mr. Kar after making a short overview of the law on the subject.

23. The procedure for setting aside an ex-parte decree is provided in Order 9 Rule 13 of the Civil Procedure Code. We have to assume that the

judgment and decree of the division bench dated 17th May, 2018 was ex-parte as against the appellant. Order 41 Rule 21 of the Civil Procedure Code

provides for a procedure for setting aside an ex-parte judgment and decree passed in appeal. The principles on which the discretion of the court to set

aside an ex parte decree on appeal is exercised is similar to those governing the power of the court under Order 9 Rule 13 of the Code. The applicant

has to show sufficient cause which prevented him from appearing when the appeal was called on for hearing. Such procedure has not been adopted

by the appellant to set aside the division bench decree. Neither any appeal was preferred before the Supreme Court.

24. The issue with regard to Loknathâ€™s share was not directly and substantially in issue before the division bench. Nevertheless the judgment and

decree of the division bench dated 17th May, 2018 had the effect of confirmation of the Commissionerâ€™s report and the decree with regard to

Loknathâ€™s share. We all know that the powers of a court of appeal are very wide under Order 41 Rule 33 of the Civil Procedure Code. It can not

only rule in favour of or against the appellant but may also vary the decree or order against the respondent. Therefore, although not a direct ground of

appeal, the Commissionerâ€™s report regarding Loknathâ€™s share and the allotment of share to him were deemed to be directly and substantially in

issue in the appeal. If one considers Explanation 4 to Section 11 of the Civil Procedure Code, when the proceedings were decided in the way they

were done, the issue became constructive resjudicata.

25. The decision of the Division Bench has become final and binding on all parties.

26. The principles of merger were discussed in Kunhayammed & Ors vs. State of Kerala & Anr. reported in AIR 2000 SC 2587 cited by Mr. Kar.

The court said that the logic underlying the doctrine of merger is that there cannot be more than one judicial decision on a subject matter at a given

point of time. When an appeal is preferred from an order of an inferior court to a superior court, the finality of the order of the inferior court is kept in

suspension. The final decision of the superior court has the effect of merging the order of the inferior court with that of the superior court. It is the

decision of the superior court which remains operative and is capable of enforcement in the eye of law.

27. Thus, there was also merger of the decree of the trial court dated 5th July, 2017 with the judgment and decree of the appeal court dated 17th May,

2018.

Finality of the trial court decree

28. The general rule is that a judgment shall be dated and signed by the judge and once signed shall not afterwards be altered or added to (see Order

XX Rule 3 of the Civil Procedure Code). However, by convention or practice, whatever have you may call it, on the Original Side of our court, the

judge retains the power to suo moto recall the judgment or order after signature, before the original decree or order, is drawn up, completed and filed

in the department. It is only in this perspective that the argument of Mr. Kar can be entertained.

29. It does not follow that once a decree has been drawn up, completed and filed in court, the judge or the court loses the power to set aside the

decree. Only the inherent power of the judge to suo moto recall the decree or order is lost by filing of the original decree. The power of the court to

set aside an ex parte decree under Order 9 Rule 13 of the Code or to review it under Order 47 of the Code or to set aside an order dismissing an

appeal, suit or application for default under Order 9 Rule 9, Order 41 Rule 21 is retained, subject to the application for obtaining such relief being filed

within time and the maintainability of those applications.

Merits

30. As I have stated at the outset, I am in full agreement with the conclusions reached by my learned brother with regard to the merits of the case.

31. On an examination of said plan at page 203 of the paper book, it is not clear in which premises the four tile sheds are situated. In the report of the

Commissioner, it is shown as being part of premises no. 237P/1B and in this plan or map the four tile sheds are indicated as part of Lot C being the

allotment of Loknath. If one goes by the above documents, the four tile sheds have to be taken as part of premises no.237P/1B. The argument of Mr.

Banerjee that these four tiles sheds do not fall within the premises and lie outside it is not substantiated by any evidence. Nor is any evidence

admissible at this late stage of the proceedings.

32. This partition and administration suit has been pending in this court for five decades. The settlement of 1979 and 1980 on which the decree is

founded is also more than 40 years old. There is more or less consensus between the parties with regard to the settlement. The objection of the

appellant is with regard to the implementation of the settlement by the Commissioner. The conduct of the appellant has not been uniform or consistent.

She has tried to intervene in this proceeding off and on, thereby interrupting it and delaying the final result. As it is, her case based on the assertion

that the four tile sheds are outside the subject premises and that she is entitled to an allotment within the premises is not established.

33. Moreover, this point, in my opinion, is very minor considering the nature, scope and extent of the suit. In those circumstances, even after

condonation of delay, I am not minded to interfere with the decree which has attained finality.

34. I would dismiss the appeal and affirm the impugned decree with similar consequential orders as my brother has made.

35. Urgent certified copy of this judgment, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with all the

necessary formalities.