

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Uday Kumar

FMA No. 838 of 2025
+
CAN 1 of 2025

Smt. Sarala Agarwal and others
Vs.
Sri Tanmoy Banerjee and others

For the appellants : Mr. Piush Chaturvedi, Sr. Advocate,
Mr. Suman Basu,
Mr. Abdul Murshid,
Mr. Debapriya Ghosh.

For the respondents : Mr. Saptansu Basu, Sr. Advocate,
Mr. Supratim Dhar, Sr. Advocate,
Mr. Dhananjoy Nayak.

Heard on : June 25, 2025.

Judgment on : June 25, 2025.

Sabyasachi Bhattacharyya, J.:

1. The present appeal has been filed by the defendant nos. 20 to 22 in a suit for partition instituted by the plaintiffs/respondents, against an order whereby the appellants' application under

Order XXXIX Rule 4 of the Code of Civil Procedure, for vacating an *ex parte* ad interim order obtained by the plaintiffs/respondents, was rejected.

2. Learned senior counsel appearing for the appellants contends that the learned trial Judge erred in law in proceeding on wrong premises to reject the said application.
3. It is submitted that by a sale deed executed on April 3, 2000, one Shyamali @ Fulmani Ghosal, the alleged predecessor-in-interest/donor of the plaintiff/respondent no. 1, had sold her share in the suit property in favour of the appellants.
4. However, by gross suppression of the said fact, the present suit was filed for partition, without challenging the said sale deed, on the strength of a purported deed of gift executed by said Shyamali @ Fulmani Ghosal on January 5, 2010, that is ten years subsequent to the transfer in favour of the appellants.
5. It is submitted by learned senior counsel appearing for the appellants that apart from the suppression of the existence of the sale deed and no relief against the said sale deed having been sought in the suit, the plaintiffs also suppressed the fact that the present appellants have initiated a suit challenging the

purported gift deed executed in favour of the plaintiffs/respondents.

6. In the said suit, although service of summons was sought to be effected at the defendant's (present respondent no. 1) address as given in the cause title thereof, which exactly tallies with the address of the plaintiffs as given in the plaint of the current partition suit, the summons could not be served.
7. The postal articles, despite repeated efforts on the part of the appellants, returned with the endorsement "insufficient address".
8. It is argued that the plaintiffs/respondent no. 1 also suppressed the fact that on the basis of a complaint lodged on the ground of forgery of the purported gift deed against both the plaintiff/alleged donee and Shyamali @ Fulmoni, the alleged donor, a First Information Report was registered, which led to a criminal investigation, culminating in a charge sheet being filed *inter alia* against the plaintiff/respondent no. 1.
9. In the said criminal proceeding, it has been recorded by the concerned court that the plaintiff/respondent no. 1 is absconding, which also indicates that the plaintiff/respondent no. 1 herein is deliberately avoiding service of summons in the

suit filed by the present appellants as well as in the criminal proceedings.

10. It is argued that the expression “absconding” makes it implicit that the plaintiff/respondent no. 1 is deliberately avoiding appearing in the said proceedings.
11. Learned senior counsel argues that the learned trial Judge proceeded on the premise that the parameters of the first proviso to Order XXXIX Rule 4 is not applicable, since no knowledge of the previous sale deed or the appellants’ suit or criminal proceedings could be attributed to the plaintiff/respondent no. 1. It is submitted that in view of the circumstances as indicated above, such finding is erroneous.
12. Also, the learned trial Judge relied on the allegation of the plaintiff/respondent no. 1 in his application under Order VI Rule 17 of the Code of Civil Procedure, for amendment of the plaint of the present suit, to the effect that the vendor of the appellants/donor of the plaintiff/respondent no. 1 was a minor at the relevant juncture when the sale deed was executed, which was also an erroneous basis.
13. It is argued that since the application under Order VI Rule 17 of the Code of Civil Procedure has not yet been allowed, the alleged minority of the vendor of the appellants at the

relevant juncture is not yet a part of the pleadings and was not so even on the date when the *ex parte* ad interim order was passed and as such, could not be taken into consideration by the learned trial Judge while passing the impugned order. Thus, the premise of minority was also erroneous.

14. However, the admission of the plaintiff/respondent no. 1 to the effect there was a sale deed in favour of the present appellants, which was sought to be avoided on the ground that the vendor Shyamali @ Fulmoni was a minor, can be construed from the amendment application for the purpose of an application under Order XXXIX Rule 4 of the Code of Civil Procedure.

15. It is, thus, submitted that the impugned order ought to be set aside on both counts.

16. Learned senior counsel appearing for the plaintiff/respondent no. 1 vehemently opposes the arguments of the appellants and submits that in the plaint of the present suit itself, it has been categorically averred in paragraph no. 5 that the plaintiff, Tanmoy Banerjee, due to his education and thereafter job, went to Lucknow, Uttar Pradesh and started residing therein.

17. It has also been explained in the plaint that therefore, a Power of Attorney was executed in favour of Shri Amit Ganguly, the plaintiff's Constituted Attorney, who has been conducting the proceedings in the trial court as well as this court on behalf of the plaintiff.
18. Thus, it is argued that the service of summons in respect of the suit filed by the present appellants regarding the gift deed executed in favour of the plaintiff/respondent no. 1, at the Kolkata address, could not be completed. As such, it cannot be said that the plaintiff/respondent no. 1 had any knowledge regarding the purported challenge to the gift deed and/or the pendency of any criminal case against the plaintiff/respondent no. 1.
19. Insofar as the existence of the sale deed in favour of the appellants is concerned, it is argued that the knowledge of the same was derived for the first time by the plaintiff / respondent no. 1 from the averments made in the application under Order XXXIX Rule 4 of the Code of Civil Procedure filed by the present appellants.
20. Learned senior counsel hands over a printout of the server copy of Order No. 6 dated June 19, 2025 passed in Title Suit No. 503 of 2025, which is the suit filed by the appellants

challenging the gift deed of the plaintiffs herein, to show the court that the summons of the said suit have not yet been served on the plaintiff/respondent no. 1, thus, negating the contention that the plaintiff/respondent no. 1 could have any knowledge about the previous sale deed and/or the initiation of a criminal case against him.

21. Learned senior counsel appearing for the plaintiff/respondent no. 1 heavily relies on the language of Order XXXIX Rule 4 of the Code of Civil Procedure and argues that the suppression of any material fact, even if any, has to be “knowingly” done in terms of the said provision. It is argued that in the absence of anything to attribute knowledge to the plaintiff / respondent no. 1, the yardsticks stipulated in Order XXXIX Rule 4 of the Code of Civil Procedure could not be applied and as such, the impugned order was justified.

22. In reply, learned senior counsel for the appellants submits that for abundant caution, a copy of the present application was sought to be sent directly to the plaintiff/respondent no. 1, which was also returned with the endorsement “insufficient address”.

23. It is submitted that in view of the deliberate avoidance of service by the respondent no. 1, it can very well be construed

that the plaintiff / respondent no. 1 is well aware of the pendency of the suit as well as the criminal proceedings against him.

24. Upon a careful consideration of the rival contentions of the parties, we find that the first premise of the impugned order, being the alleged minority of the vendor of the appellants and donor of the plaintiff/respondent no. 1, was erroneous.

25. As rightly argued by the appellants, since the amendment application filed by the plaintiff / respondent no. 1 is yet to be disposed of, the allegation regarding the alleged minority of the vendor of the appellants, at the time when the sale deed was executed in favour of the appellants, has not yet seen the light of the day insofar as the pleadings in the present partition suit are concerned. Hence, the maximum worth which could be lend to the averments made in the Order VI Rule 17 application would be by way of admission of the execution of the sale deed, which was sought to be challenged by citing the alleged minority of the vendor. The minority of the vendor itself, not being a part of the pleadings as yet, could not be looked into while deciding the application under Order XXXIX Rule 4 of the Code of Civil Procedure.

26. There is some doubt as to whether knowledge can be attributed to the plaintiffs with regard to the material facts which were suppressed in the present case or not.
27. However, we are of the opinion that sufficient materials have been placed before us to reasonably give rise to the question as to whether the plaintiff/respondent no. 1, despite having full knowledge of the criminal proceedings and the suit filed against him by the appellants, is avoiding the process of law by deliberately absconding from his residence as disclosed in the cause title of the plaint of his own partition suit.
28. The moment the criminal court observed that the plaintiff/respondent no. 1 is “absconding”, a presumption arises that there is an element of willfulness in such abstention. That apart, an evasive game is apparently being played by the plaintiff / respondent no. 1 by disclosing his residential address as 174, Garia Station Road, P.O – Garia, P.S – Nadia, Kolkata – 700084, District – South 24 Parganas in the cause title of the partition suit but in the body of the plaint, in an elusive manner, it has merely been mentioned that due to education and job he has gone to Lucknow, Uttar Pradesh, without caring to disclose the particulars of such address.

29. Order VII Rule 1(b) of the Code of Civil Procedure imposes the duty on the plaintiff/respondent no. 1 to include the name, description and place of residence of the plaintiff. In the absence of disclosure as to his Lucknow residence by the plaintiff / respondent no. 1, it is evident that Order VII Rule 1 has not been complied with.
30. In the event the address disclosed in the cause title of the plaint is the plaintiff's correct address, there could not be any reason why the summons as well as the service intended in the present appeal would return with the endorsement "insufficient address".
31. More importantly, we find that the address of the plaintiff / respondent no. 1, as disclosed in the purported gift deed, on the strength of which the plaintiff claims title, is again different from that disclosed in the cause title of the plaint. The criminal case was initiated on the basis of a complaint where the residential address of the plaintiff / respondent no. 1 which has been given in the gift deed was stated.
32. Despite the same, the plaintiff/respondent no. 1 could not be apprehended or traced in connection with the criminal case, showing that the said address is also an erroneous address.

33. The learned Trial Judge ought to have looked into the matter as to whether the plaintiff/respondent no. 1 genuinely did not have knowledge of the sale deed executed in favour of the appellants as well as the suit filed by the appellants, i.e. Title Suit No. 503 of 2023 and/or the criminal case initiated against the plaintiff / respondent no. 1 at the behest of the appellants or whether the plaintiff / respondent no. 1 is playing an evasive game with the process of law by disclosing different addresses in different places and in an illusory manner states in the body of the plaint that he resides at Lucknow in Uttar Pradesh without disclosing the particulars of the said address.
34. For such purpose, it is necessary that the learned trial Judge gives further opportunity to the parties to establish their respective cases in connection with the application under Order XXXIX Rule 4 of the Code of Civil Procedure.
35. Hence, we also opine that the observation in the impugned order, to the effect that the plaintiff / respondent no. 1 did not have knowledge of the above germane facts, has to be taken with a pinch of salt.
36. In the light of the above observations, FMA No. 838 of 2025 is allowed on contest against the plaintiff / respondent no. 1, thereby setting aside the impugned order, being Order No. 18

dated April 28, 2025 passed by the learned Civil Judge (Senior Division)-cum- Assistant Sessions Judge, Second Court at Baruipur, District South 24 Parganas in Title Suit No. 138 of 2024, and remanding the application under Order XXXIX Rule 4 of the Code of Civil Procedure to the trial Court for a fresh adjudication on merits upon giving opportunity to both sides to produce further materials, if they so deem fit, and to decide the same afresh in the light of the observations made above.

37. Since a written objection has already been filed in connection with the main temporary injunction application pending before the learned trial Judge, it is expected that the learned trial Judge shall decide the application under Order XXXIX Rule 4 of the Code of Civil Procedure afresh along with the application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure as expeditiously as possible, positively within a month from the date of communication of this order to the court below.

38. CAN 1 of 2025 is disposed of accordingly as well.

39. There will be no order as to costs.

I agree.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)