

Form No. J(2)

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present: The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Supratim Bhattacharya

FMAT 373 of 2025
IA No: CAN 1 of 2025
CAN 2 of 2025
CAN 3 of 2025

Smt. Bharati Das
Vs.
Sri Sekhar Das and others

For the appellant	:	Mr. Dyutiman Banerjee, Mr. Arkaranjan Bhattacharya
For the respondent nos. 1 series and 2	:	Mr. Srikanta Paul, Mr. Priyabrata Batabyal
Heard on	:	12.11.2025
Judgment on	:	12.11.2025

Sabyasachi Bhattacharyya, J.:-

Re: CAN 1 of 2025

1. CAN 1 of 2025 is an application for addition of the heirs and legal representatives of one Sekhar Das, who had expired during pendency of the appeal before the first appellate court, which heirs had already been substituted in the appeal.

2. Since the application is technical in nature and, in any event, the heirs of the deceased have already been substituted in the first appellate court, CAN 1 of 2025 is allowed without any order as to costs, thereby directing the heirs and legal representatives of late Sekhar Das to be added as parties to the present appeal in place and stead of the said deceased.
3. Necessary consequential corrections to the cause title of the Memorandum of Appeal and the pending applications, if any, shall be carried out by the learned Advocate-on-record for the appellant during the course of the day.

Re: CAN 2 of 2025

4. CAN 2 of 2025 is an application for condonation of delay.
5. The present appeal challenges an order passed under Order XXII, Rule 10 of the Code of Civil Procedure.
6. Initially, a revisional application was erroneously filed against the impugned order.
7. However, subsequently the error was detected, upon which the said revisional application was withdrawn and the present appeal was preferred on proper legal advice.
8. We find sufficient *bona fides* behind such error, since it might have slipped the notice of the learned Advocate, if not regularly conversant with civil law, as to the availability of an appeal against an order under Order XXII Rule 10 of the Code of Civil Procedure under Order XLIII of the said Code.

9. Accordingly, we are of the opinion that sufficient reasons for the delay has been made out.
10. Hence, CAN 2 of 2025 is allowed on contest without any order as to costs, thereby condoning the delay in preferring FMAT 373 of 2025.

Re: FMAT 373 of 2025
with
CAN 3 of 2025

11. In view of arguable questions of law and fact being involved, we admit the appeal, to be heard on the grounds taken in the memorandum of appeal.
12. Since the ambit of the appeal is brief, we take up the appeal itself for hearing upon notice to both sides.
13. In a suit for partition, after passing of a preliminary decree, two of the parties to the said suit, namely one Sekhar (since deceased) and one Somnath, took out an application under Order XXII Rule 10 of the Code of Civil Procedure alleging that their mother, one of the parties to the suit, executed a deed of gift in the year 2011, that is, prior to filing of the suit in 2013, thereby donating her entire share in favour of the said Sekhar and Somnath in exclusion of her other heirs, who are also parties to the *lis*.
14. By the impugned order, the said application was allowed.
15. Learned counsel for the appellant argues that by allowing the said application, the learned Trial Judge has given a premium to the applicants, that is, Sekhar and Somnath, despite them having not

pleaded or brought on record the said gift deed throughout pendency of the suit till passing of the preliminary decree.

16. As such, it is argued that there was no occasion for the learned Trial Judge to permit such gift deed to be brought on record and, on the basis of it, to go against the grain of the defence taken in the suit by allowing the application under Order XXII Rule 10 of the Code at this belated stage.
17. It is further argued that there was no occasion for allowing an application under Order XXII Rule 10 of the Code, since the two applicants therein were already parties to the suit and their right, title and shares have already been decided in respect of the property by way of the preliminary decree.
18. Learned counsel appearing for the respondent no. 1 series (as substituted) and respondent no. 2, that is, Sekhar (through his heirs) and Somnath, submits that the power vested under Order XXII Rule 10 of the Code of Civil Procedure on the Court is discretionary and must be exercised for the ends of justice if the fact situation so demands. In support of such submission, learned counsel cites *Thomson Press (India) Limited vs. Nanak Builders and Investors Private Limited and others*, reported at (2013) 5 SCC 397, where the Hon'ble Supreme Court held *inter alia* that in the facts of the case a *lis pendens* transferee was required to be added as party to the suit, under the enabling provision of Order XXII Rule 10 of the Code, even if the application for addition was filed under Order I Rule 10.

19. Learned counsel for the respondent nos. 1-series and 2 next argues that the right of a party is required to be established, particularly in the conspectus of a partition suit, where the respective shares of the parties are required to be allotted.
20. Thirdly, it is argued that an order passed under Order XXII Rule 10 does not conclusively determine the title of the parties and, as such, there is no scope of interference by this Court with the impugned order.
21. Upon hearing learned counsel for the parties, we opine as follows:
22. Certain facets of the matter cannot be lost sight of.
23. First, in a partition suit, by way of the preliminary decree, the title as well as the respective shares of the parties is conclusively determined. A preliminary decree is as conclusive as a final decree within the definition of Section 2 of the Code of Civil Procedure and has final and binding effect on the parties.
24. By dint of introducing the existence of the purported gift deed which was executed prior to the execution of the suit by way of the application under Order XXII Rule 10 of the Code of Civil Procedure, the applicants therein now seek to reverse/modify the preliminary decree for all practical purposes. Such reopening/modification of the preliminary decree in the garb of an order under Order XXII Rule 10 is not permissible in law. The respondent no. 1-series and 2, we are apprised, have already preferred an appeal against the preliminary decree, which is now pending. Thus, the fate of the preliminary decree would be decided therein. However, till (if at all) the preliminary

decree is set aside by the appellate court, the same is binding on the parties and cannot be sought to be tinkered with before the trial court itself at the final decree stage.

25. It is also important to note that Order XXII Rule 10 of the Code of Civil Procedure contemplates only the devolution of a right *lis pendens*, that is, during pendency of the suit and not pre-suit passage of title. In the present case, the 2011 gift deed, which was purportedly executed in favour of the applicants in the Order XXII Rule 10 application, was executed even prior to the filing of the suit and thus, is not a *lis pendens* transfer. In view of the defendants/applicants having not pleaded about the said gift deed in their written statement and/or produced the deed throughout the pendency of the suit till passing of the preliminary decree, they are now precluded from relying on the same in the suit itself.
26. Since the preliminary decree still holds good, although an appeal against the same is pending, the applicants in the Order XXII Rule 10 application could not have been permitted to re-open the same at this juncture on the strength of a purported pre-suit deed.
27. Thirdly, the judgment cited by the respondent nos. 1-series and 2 is not apt in the context of the present case, since the Hon'ble Supreme Court was considering a *lis pendens* transfer therein and the ambit of the consideration was whether, if an application for addition of party is filed under Order I Rule 10 of the Code of Civil Procedure but, in effect, the paradigm of Order XXII Rule 10 is applicable, such application should be allowing by invoking the provisions of Order

XXII Rule 10, which is an enabling provision. In such context only, the Hon'ble Supreme Court held the proposition in the affirmative. As such, the questions which have arisen for consideration in the present case did not fall for consideration or were decided by the Hon'ble Supreme Court in the said judgment.

28. Thus, the said judgment is not a binding precedent insofar as the present case is concerned.
29. Since the respondent nos.1-series and 2 submit that they have already preferred a challenge against the preliminary decree, the ground of existence of the gift deed can very well be canvassed there, if otherwise permissible in law. However, unless such appeal is entertained and allowed, thereby modifying the preliminary decree, the respondent nos. 1 and 2 could not have been permitted by the learned Trial Judge at the final decree stage of the suit itself, to re-open or modify the preliminary decree by introduction of the gift deed-in-question.
30. Even otherwise, the application under Order XXII Rule 10 of the Code of Civil Procedure was superfluous, since the applicants therein are already parties to the suit.
31. The only purpose of filing the said application was evidently to seek a validation of the deed of gift which was suppressed all through the pendency of the suit till filing of the preliminary decree and thus, the said application could not have been permitted, being in essence a *mala fide* one, seeking to do something indirectly which could not be directly done.

32. In view of the above, FMAT 373 of 2025 is allowed on contest against the respondent nos. 1-series and 2 and *ex parte* against the proforma respondents, service upon the latter being dispensed with since they are not affected by the present order.
33. Accordingly, the impugned order, bearing Order No. 105 dated June 28, 2024 passed by the learned Civil Judge (Senior Division), Second Court at Chinsurah, District: Hooghly in Title Suit No. 625 of 2013, is set aside.
34. CAN 3 of 2025 stands accordingly disposed of as well.
35. There will be no order as to costs.
36. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Supratim Bhattacharya, J.)