

**Calcutta High Court
In the Circuit Bench at Jalpaiguri
Appellate Side**

**The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
And
The Hon'ble Mr. Justice Uday Kumar**

FAT 30 of 2024

**Sri Upen Barman and Ors.
vs
Sri Dobaria Barman @ Gajendra Barman and Ors.**

For the appellant : Mr. Amalesh Ray, Sr. Adv.
Mr. Nigam Mittal, Adv.

Heard on : 24.07.2025

Judgment on : 24.07.2025

Sabyasachi Bhattacharyya, J.:-

1. Learned counsel appearing for the appellants submits that despite an attempt to serve on the learned advocate representing the respondents in the trial court, the said learned Advocate refused to accept the same, since he does not have any contact with his clients at present.
2. However, we find from the records that service of notice of appeal has already been effected on the respondents and the paper books have also been served.

3. Despite service of notice, none appears for the respondents at the time of hearing. Accordingly, there cannot be any impediment to take up the appeal for hearing *ex parte*.
4. Heard learned senior counsel for the plaintiffs/appellants.
5. A partition suit of the plaintiffs/appellants was dismissed by the learned Trial Court by dint of the impugned judgment and decree primarily on two grounds – that the suit was bad for non-joinder of the wife of one of the defendants, in whose favour a gift deed was allegedly executed by the said defendant, and secondly, that the plaintiffs had failed to prove their title to the suit property.
6. Learned senior counsel cites a coordinate Bench judgment of this Court, sitting in the Principal Bench, in the matter of *Rajul Mukim vs. Sumermal Surana and Anr.*, reported at *AIR 2018 Cal 102*, where the Division Bench, by placing reliance on the doctrine of *lis pendens*, held that in the event a transferee *pendente lite* does not apply for impleading himself/herself as a party to the suit, the suit cannot be held bad for non-joinder of such party.
7. Learned senior counsel also places reliance on the several exhibits and oral evidence adduced on behalf of the plaintiffs.
8. On the issue of title, we find from the evidence on record that several documents were produced to show the recording of the names of the plaintiffs and the defendants in the Records of Rights, coupled with subsequent registered transfer deeds executed *inter se* the parties, where their title was also asserted. Such documents, coupled with the corroboration by oral evidence led by the plaintiffs, was sufficient for

the purpose of arriving at the conclusion that the plaintiffs have proved their title to the property.

9. It may very well be that title deeds of an antecedent period may not be available. However, the test applied in a civil suit is preponderance of probability. By applying such legal yardstick in the present case, we find that the plaint case was amply proved by virtue of oral and documentary evidence, which remained unshaken and unrebutted.
10. Also, the defendants' witness, in his evidence, categorically admitted the plaint case. Since the judgment and decree in a partition suit is in the nature of a judgment in *personam*, the admission of the DW1 in respect of the title and the shares of the parties is binding at least on the defendants, and as such, the learned Trial Judge ought to have passed a preliminary decree of partition on the basis of the admitted title of the parties by declaring their respective shares, which, in any event, would be binding only between the parties.
11. On the question of non-joinder, the ratio laid down by a co-ordinate Bench in *Rajul Mukim (supra)* is binding on us. Even on a plain reading of Section 52 of the Transfer of Property Act, 1882, which categorically recognises the doctrine of *lis pendens*, a transfer during pendency of a suit is barred. The legal effect of Section 52 has been interpreted by courts in several judgments, both of the Apex Court and different High Courts of the country, to the effect that although such provision does not absolutely bar such a transfer, the transferee *pendente lite* is bound by any decision which is arrived at by the court in the legal action during which the transfer was effected.

- 12.** Although the Supreme Court, in certain judgments, have held that in the event a *lis pendens* transferee seeks to implead herself/himself as a party to the suit, such application ought to be allowed, since Section 52 of the Transfer of Property Act, *per se*, does not prevent such a party to be impleaded in the suit, at the same time it has also been the consistent legal opinion that merely due to non-joinder of a transferee *pendente lite*, a suit cannot be dismissed for non-joinder of such party. The principle underlying such proposition is that the genesis of the title of the transferee *pendente lite* is in contravention of the doctrine of *lis pendens*, as embodied in Section 52 of the Transfer of Property Act, 1882.
- 13.** Whereas the law does not prevent a transferee *pendente lite* from being impleaded to the suit on his/her own prayer, the law does not also require such a transferee to be added as party to the suit for a complete and effective adjudication of the suit. A transferee *pendente lite*, in any event, shall be bound by the decision arrived at by the court in the suit even without such transferee being impleaded. Hence, the learned Trial Judge erred in law in holding that the suit is bad for non-joinder of the transferee *pendente lite*.
- 14.** Another important facet of the matter was overlooked by the learned Trial Judge while passing the impugned judgment. Although claiming that a portion of the suit property was gifted in favour of his wife, the concerned defendant did not exhibit any document of transfer at all. Thus, even the case of transfer *pendente lite* was not established by the defendants. Despite it being so, the learned Trial Judge acted on

the premise of such purported transfer, without any document to substantiate such transfer, and held the suit bad for non-joinder of the alleged transferee as a necessary party to the suit, thus rendering the impugned judgment and decree perverse.

15. As such, the learned Trial Judge erred in law and in fact on all aspects of the matter.
16. Hence, FAT 30 of 2024 is allowed ex parte, thereby setting aside the judgment and decree dated May 18, 2024 passed by the learned Civil Judge (Senior Division), Sadar, District – Cooch Behar in Title Suit No. 37 of 2018 and remanding the matter to the learned Trial Judge for a fresh adjudication of the partition suit on merits, in the light of the above observations.
17. In view of the long pendency of the matter, it is expected that the learned Trial Judge shall expedite the hearing of the suit and, preferably, dispose of the same within one year from the date of communication of this judgment to the said learned Trial Judge.
18. Interim order, if any, stands vacated.
19. No order as to costs.
20. A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)