

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 Biswaroop Chowdhury

FMA 327 of 2026
IA No: CAN 1 of 2026
CAN 2 of 2026

Tandra Maity and others
Vs.
Shri Sukumar Mullick, since deceased,
represented by his heir Shri Subhendu Mullick

For the appellants : Mr. Aniruddha Chatterjee, Snr. Adv.,
Mr. Srijib Chakraborty,
Mr. Aditya Mondal,
Ms. Sushmita Singh

For the respondent : Mr. Angshuman Chakraborty,
Mr. Shivaji Mitra,
Mr. Asutosh Singh

Heard on : 12.05.2026

Judgment on : 12.05.2026

Sabyasachi Bhattacharyya, J.:-

Re: CAN 1 of 2026

1. CAN 1 of 2026 is an application for substituting Subhendu Mullick, the heir of late Shri Sukumar Mullick, the original respondent, in place and stead of the said deceased.
2. Learned counsel appearing for the respondent submits that while the matter was pending in the Trial Court, substitution of the said

Subhendu Mullick, son of late Sukumar Mullick, was already carried out on the strength of a gift deed by dint of which the said Sukumar Mullick had transferred his property only to Subhendu Mullick in exclusion of his other heirs. A copy of such order, bearing Order No. 114 dated May 04, 2023, is also submitted by learned counsel for the respondent.

3. In consonance with the said order, CAN 1 of 2026 is allowed, thereby directing the name of Sukumar Mullick, since deceased, to be deleted from the cause title of the memorandum of appeal as well as the connected application(s).
4. Since his transferee/heir Shri Subhendu Mullick is already on record, no further order need be passed in that regard.
5. There will be no order as to costs.
6. Leave is granted to the learned Advocate-on-record for the appellants to carry out the necessary consequential amendments to the cause title of the memorandum of appeal as well as CAN 2 of 2026 to that effect during the course of the day.

Re: CAN 2 of 2026
With
FMA 327 of 2026

7. After we express our mind upon a lengthy hearing, learned counsel for the caveator/respondent seeks an adjournment. However, we deprecate such sharp practice and take up the appeal for admission.
8. In view of the appeal involving questions of fact and law, the same is admitted to be heard on the grounds taken in the memorandum of

appeal. Since a brief question is involved, the appeal itself is taken up for hearing upon dispensing with all formalities.

9. Upon hearing learned counsel for the parties and perusal of the impugned judgment, we find that the learned Trial Judge, by the impugned order, dismissed the appellants' application for condonation of delay in filing an application under Order IX Rule 9 of the Code of Civil Procedure for restoration of their suit.
10. The explanation given for the absence of the learned Advocate for the appellants on the relevant date, that is, on June 07, 2011, as was stated in the condonation application as well as the Order IX Rule 9 application, is that the learned Advocate appearing for the plaintiffs/appellants before the Trial Court had to leave the Court on the said date, that is, June 07, 2011 for attending the Nursing Home where one of his very close relatives, being his uncle, was admitted and, as such, he instructed his clerk to file an application for adjournment.
11. However, on June 10, 2011, the clerk of the learned Advocate, on enquiry from the Court, came to learn that the suit had been dismissed for default on June 07, 2011.
12. Insofar as the delay of about 14 days in filing the application under Order IX Rule 9 is concerned, in paragraph no. 7 of the condonation application, it was mentioned by the appellants that since one of the appellants, being the plaintiff/appellant no.2, was out of Kolkata due to his professional work, there was a delay in filing the application.

13. In the passing, in the said application, it was also mentioned that a change of Advocate had been taken in the meantime.
14. The learned Trial Judge, while dismissing the condonation application, laid much stress on the fact that apparently no fresh Vakalatnama on behalf of the new Advocate was filed by the plaintiffs/appellants. However, the said fact has no germane bearing at all on the issue at hand, since such change of Advocate was not the premise of the ground for delay.
15. Insofar as the delay is concerned, the dismissal for default took place on June 07, 2011 whereas the Order IX Rule 9 application itself was filed on July 22, 2011.
16. The learned Trial Judge, on the basis of the evidence produced before him, held that on July 22, 2011 from 8:32 am to 5:17 pm., the name of the plaintiff/appellant no.2 Soumik Maity was seen in the official records at his workplace, being the Gun & Shell Factory, Cossipore, Kolkata. However, the presence of the appellant no.2 in his workplace on the date of filing of the application under Order IX Rule 9 of the Code is also not relevant at all, since it is not disputed that it is on the said date that the application was actually filed. Even if there was a contrary recording in the work register of the appellant no.2 in his workplace, it is for the employer of the said appellant to consider and not the lookout of the Court while considering the condonation of delay.
17. Since the explanation of the appellant no.2, who was looking after the case on behalf of the appellants, being out of town pertained to the

period between the expiry of the period of limitation, that is, July 06, 2011 till July 22, 2011, when the application under Order IX Rule 9 was filed, the Court had to look into the evidence to ascertain as to whether any contrary evidence had been produced by the respondent to show that the appellant no.2 was not out of town during the said period. His presence on the date of filing of Order IX Rule 9 application in Kolkata is a given, since otherwise he could not have filed such application in the first place. Hence, the very premise of the impugned order, to the effect that the appellant no.2 was in Kolkata on the date of the filing of the application, is totally extraneous to the condonation application, since there is no evidence discussed by the learned Trial Judge to show that the appellant no.2 was present in Kolkata between the dismissal of the suit for default and the date of filing of the Order IX Rule 9 application. Thus, the impugned order, being perverse, is liable to be set aside.

18. Accordingly, FMA 327 of 2026 is allowed on contest, thereby setting aside the impugned order dated January 07, 2026 passed by the learned Judge, Tenth Bench, City Civil Court at Calcutta in Miscellaneous Case No. 502 of 2011.
19. We hereby condone the delay in filing the Order IX Rule 9 application bearing Miscellaneous Case No. 502 of 2011 and direct the learned Trial Judge to decide Miscellaneous Case No. 502 of 2011 on its own merits upon giving adequate opportunity of hearing to both sides.
20. It is expected that such application shall be disposed of as expeditiously as the business of the Trial Court permits.

21. CAN 2 of 2026 is accordingly disposed of as well.
22. There will be no order as to costs.
23. 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.

(Biswaroop Chowdhury, J.)