

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
And
The Hon'ble Mr. Justice Supratim Bhattacharya**

**FMA No.250 of 2026
IA No: CAN 1 of 2026**

**Akshay Vinimay LLP
Vs.
Neeraj Bajoria and Others**

With

**FMAT No.64 of 2026
IA No: CAN 1 of 2026**

**Pawan Kumar Todi
Vs.
Neeraj Bajoria and Others**

For the appellant
in FMA No.250 of 2026 : Mr. Krishnaraj Thakker, Sr. Adv.,
Mr. Pradip Sancheti,
Ms. Arundhati Roy Barman,
Mr. Rohan Thakker,
Mr. Biswajit Chowdhury

For the appellant in
FMAT No.64 of 2026 and
respondent no.2 in
FMA No.250 of 2026 : Mr. Ratnanko Banerji, Sr. Adv.,
Mr. Rudrajit Sarkar,
Mr. Soumyadeb Sinha,
Ms. Suranjana Chatterjee

For the respondent no.1 in
both the matters : Mr. Anirban Ray, Sr. Adv.,
Mr. Soumabho Ghosh,
Mr. Orijit Chatterjee,
Ms. Tiana Bhattacharya,
Ms. Sabarni Mukherjee,
Ms. Safura Ahmed

For the
respondent nos.15 to 17 in
FMA No.250 of 2026 and
respondent nos.14 to 16 in
FMAT No.64 of 2026

: Mr. Arindam Banerjee, Sr. Adv.,
Mr. Debangshu Dinda

For the
Respondent nos.9 to 12 in
FMA No.250 of 2026 and
Respondent nos.10 to 13 in
FMAT No.64 of 2026

: Mr. Shaunak Mukherjee,
Mr. Sanwal Tibrewal,
Ms. Sutapa Mitra

Heard on

: 09.03.2026, 10.03.2026
& 17.03.2026

Reserved on

: 17.03.2026

Judgment on

: 31.03.2026

Sabyasachi Bhattacharyya, J.:-

1. Both the appeals arise out of Order No.02 dated January 28, 2026, passed by the learned Civil Judge (Senior Division), Second Court at Alipore in Title Suit No.120 of 2026, granting *ex parte* ad interim injunction restraining the defendant nos.1 to 13, defendant nos.17 to 23 and defendant nos.25 to 27 and/or their men, agents, assignees and servants from dealing with the properties described in Schedule 'A-1' of the temporary injunction application filed in the said suit so as to create third party rights in respect of the same, pursuant to the Memorandum of Settlement dated March 13, 2019, until further order. The said order was subsequently extended *vide* order dated February 27, 2026 till the next date, that is April 27, 2026.

2. Being aggrieved by the self-same order, Pawan Kumar Todi, defendant no.1 in the suit, has preferred FMAT No.64 of 2026, whereas defendant no.25, Akshay Vinimay LLP has preferred FMA No.250 of 2026.
3. Learned senior counsel appearing for the appellant in FMAT No.64 of 2026, namely Pawan Kumar Todi (in brief, “PK”) argues that the impugned order is devoid of reasons and is contrary to Order XXXIX Rule 3 of the Code of Civil Procedure (for short, “the Code”). It is contended that the learned Trial Judge erred in law and wrongly assumed the jurisdiction of the Testamentary Court in a bid to protect the purported rights of the plaintiffs/respondent no.1, Neeraj Bajoria in a pending probate proceeding in respect of the purported last Will and Testament of Nand Lal Todi (since deceased).
4. It is argued that when allegedly the cause of action arose in May, 2025, there was no basis to pass the ex parte ad interim order in hot haste, since the suit was filed only in January, 2026; more so, since the plaintiffs/respondent no.1 was aware that defendant no.25, Akshay Vinimay LLP had obtained Completion Certificate of the project to be undertaken on one of the suit properties way back in May, 2025.
5. It is next contended that the suit is misconceived and no relief can be granted as the main challenge is with regard to a Memorandum recording Settlement dated March 13, 2019, between the defendant no.1-Group and defendant no.9-Group and some of the defendant-Companies. Neither Late Nand Lal Todi (for short, “NL”) nor the plaintiff are parties to such Settlement, which is an internal arrangement between the parties thereto

inter se. The Settlement, it is submitted, does not deal with any of the alleged assets of NL, to which the plaintiff stakes claim as his Executor. The plaintiff, it is argued, has failed to show as to how the properties and/or estate of NL are affected by execution of the Memorandum dated March 13, 2019.

6. Learned senior counsel for the appellant in FMAT No.64 of 2026 (PK) places reliance on *Morgan Stanley Mutual Fund v. Kartick Das*, reported at (1994) 4 SCC 225, in Paragraph No.36 of which the factors which should weigh with the court in grant of ex parte injunction were enumerated. It is submitted that none of the exceptional circumstances for passing ex parte ad interim order as laid down in the above judgment have been made out by the plaintiff in their temporary injunction application before the Trial Court; hence, no ex parte ad interim injunction order ought to have been passed.
7. Learned senior counsel next contends that there has been suppression of material and relevant facts by the plaintiff in the injunction application filed before the Trial Court. The suit and the injunction application, it is submitted, are based on false premise and seek to Bench-hunt. By clever and crafty drafting, the plaintiff, it is alleged, as deliberately suppressed material facts.
8. In Paragraph No.49 of the plaint and injunction application, as passing comment has been made that the plaintiff had filed GA No.3 of 2025 in Testamentary Suit No.26 of 2023, being an application for appointment of administrator *pendente lite* over the entire estate of NL, but the plaintiff has suppressed that by orders dated March 21, 2025 and March 28, 2025, this

Hon'ble Court was pleased not to pass any ad interim injunction order and merely directed the parties to file their affidavits. The said application is still pending adjudication. An appeal challenging the order dated March 28, 2025, was dismissed by the concerned Division Bench vide order dated May 14, 2025, holding that the appeal was not maintainable.

- 9.** Learned senior counsel appearing for PK further submits that a bare comparison of GA No.3 of 2025 and the present plaint and injunction application, the grounds in the two are seen to be identical. If such facts were placed before the learned Trial Judge, the learned Judge would not have passed the impugned order. Thus, it is submitted that this is a classic case of misleading the court by playing fraud by way of suppression and deliberate non-disclosure of material facts.
- 10.** The defence raised before the Testamentary Court is that the properties cannot form a part of the estate of the deceased Testator as those are admittedly owned by incorporated companies, which is yet to be decided by this Court. Such adjudication has been completely bypassed by the plaintiff by obtaining ex parte ad interim order from the Civil Court behind the back of the appellant, which amounts to overreaching the jurisdiction of this Court.
- 11.** Learned senior counsel next argues that the plaintiff has deliberately made a wrong statement apropos Schedule 'A-1' of the plaint, which has been described as the details of the properties belonging to NL, whereas it is clear from the Memorandum recording Oral Family Settlement dated September 28, 2009, which is a part of the plaint as Annexure "E", that Akshay

Vinimay Pvt. Ltd. (now Akshay Vinimay LLP) is the owner of the property at 12B, Beliaghata Main Road, Kolkata – 700 015, and that the Todi family has only 50 per cent ownership/stake in the Company and out of the said 50 per cent, NL Group, PK Group and RK Group would hold their stake in the ratio 25:50:25.

- 12.** However, NL never claimed such shares during his lifetime and by a Memorandum recording Settlement dated June 4, 2019 had disclaimed all is right, title and interest and claims in the five properties, which include 12B, Beliaghata Main Road, Kolkata – 700 015.
- 13.** It is submitted that it would appear from the personal Income Tax Returns filed by NL during his lifetime that its assets were neither part of his estate nor was any right ever asserted by him over the same.
- 14.** The plaintiff, it is submitted, also suppressed that a similar prayer was made for challenging the Memorandum recording Settlement dated June 4, 2019 in T.S. No.894 of 2025 and on November 29, 2025, no ad interim order was passed by the learned Trial Judge.
- 15.** Learned senior counsel for the appellant in FMAT No.64 of 2026 next contends that if *prima facie* title is not shown, the court ought not to have granted any injunction. The assets as described in the Schedule of the plaint are admittedly owned by the Companies or other juristic entities and it is settled law that shareholders have no rights in the assets of the company.

16. In the affidavit of assets, such assets were shown to be owned by the Companies and the Testator had no personal and/or individual rights in respect of the said assets.
17. The documents annexed to the plaint and injunction application, it is contended, do not show how the properties in respect of which injunction has been sought belong to NL Todi or that the Schedule 'A-1' properties are connected with the document under challenge, being the Memorandum of Settlement dated March 13, 2019.
18. Further, as would appear from the Memorandum of Family Settlement dated September 18, 2009, it was always agreed by the parties to the Settlement, as recorded in Clauses 10.7, 10.8 and 10.9 thereof, that the properties belonging to the Confirming Party Nos.1 and 2 would be taken up for joint development and funds required for such development shall be contributed by the parties in the proportion of 25:50:25.
19. Learned senior counsel for PK cites *Bacha F. Guzdar v. Commissioner of Income Tax, Bombay*, reported at (1954) 2 SCC 563, and *Om Prakash Kalla v. Kalla Properties and Industrial Corporation Limited*, reported at 2025 SCC OnLine Cal 3560, for the proposition that shareholders of a company cannot claim any right, title or interest in the assets of the company.
20. Lastly, learned senior counsel argues that if the Appellate Court finds that the plaintiff knowingly suppressed material facts, it has power to consider such suppressed documents and facts. In support of such proposition, learned senior counsel relies on two Division Bench judgments of this Court in *The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003

Cal 96, and Ila Bhowmik v. Millennium Road Construction Pvt. Ltd., reported at 2011 SCC OnLine Cal 3986.

21. The argument of the plaintiff/respondent no.1 that the appellant ought to have filed an application under Order XXXIX Rule 4 of the Code does not stand as the appellant can also assail a judgment before the Appellate Court on the grounds of suppression of material facts and perversity. It is contended that Order XXXIX Rule 4 is a remedy available to the defendant for discharge and/or setting aside the order of injunction if the party obtaining an ex parte injunction knowingly made a false and/or misleading statement in relation to a material particular. The said provision does not in any manner restrict the right of an aggrieved party to prefer an appeal under Order XLIII Rule 1(r) of the Code. The appellate remedy available to a party, it is argued, cannot be restricted by a plaintiff who has obtained an ex parte ad interim order contrary to law by suppression of material facts and it is the discretion of the Appellate Court to come to a finding as to whether the impugned order is correct in law or not and also to examine the fulfilment of Order XXXIX Rules 1 and 3 of the Code as well as to examine any issue in relation to suppression, if brought to the notice of the Appellate Court.
22. The Appellate Court, it is argued, in effect would be deciding the issue as to whether the Trial Court could have passed an ex parte ad interim order if the suppressed facts were known to the court. The plaintiff cannot be allowed to say that though it had suppressed material facts while obtaining the ex parte ad interim order, such fact should be ignored by the Appellate Court even when brought to the notice of the said court and the said order

should be upheld. The ex parte ad interim injunction order, it is submitted, would have to be granted also on equitable grounds and a person who has not come to the court with clean hands cannot expect such order to be sustained.

23. Learned senior counsel appearing for the appellant in FMA No. 250 of 2026, that is, Akshay Vinimay LLP (erstwhile Akshay Vinimay Pvt. Ltd.) reiterates the submission of the appellant in FMAT 64 of 2026 to the effect that the impugned order is vitiated by non-compliance of the proviso to Order XXXIX Rule 3 of the Code and cites *Binod Khanna v. Sunny Sales, reported at 2014 SCC OnLine Cal 10452*, in support of such contention. It is argued that certain properties have been included in the Schedule of the suit from which the present appeal arises which do not belong to the Todi family. It is submitted that there is no finding as to prima facie case qua the appellant in the impugned order. NL Todi, it is argued, would be entitled to 12.5 per cent share of profit of the appellant-company and it is settled law that a shareholder is only entitled in the dividends and is not the owner of the company's assets. However, the assets belonging to the appellant-company have been incorporated as subject-matter of the suit.

24. Learned senior counsel next argues that the balance of convenience and inconvenience as well as irreparable injury components lie against the grant of injunction. The project being undertaken at 12B, Beliaghata Main Road, Kolkata – 700 015, is registered under the Real Estate (Regulation and Development) Act, 2016 (for short, “RERA”) and there is a statutory obligation on the part of the appellant to execute registered conveyance

deeds in favour of the flat buyers, which is being stalled due to the impugned order. Thus, the balance of convenience and inconvenience is in favour of the defendant no. 25/appellant, which was not considered by the learned Trial Judge.

25. It is further argued that no reasons or urgency for grant of ex parte ad interim order, in terms of Order XXXIX Rule 3, have been enumerated in the impugned order, thereby violating the provisions of the proviso to Order XXXIX Rule 3 of the Code.
26. Next relying on the judgment in *The Bengal Club Ltd. (supra)*¹, learned senior counsel argues that the Appellate Court may very well look into the materials suppressed by the plaintiffs in obtaining the ex parte ad interim order of injunction. Taking the court through the provisions of Order XLIII, Rule 1(r) as well as Order XXXIX Rules 3 and 4 of the Code, it is argued that there is no bar to the Appellate Court exercising its powers under Order XLI Rule 33 to find out the truth as to whether the relevant facts were suppressed by the plaintiff. It is argued that the co-ordinate Bench, in *The Bengal Club Ltd. (supra)*¹, rightly observed that the proposition laid down in *Sm. Muktakesi Dawn and others V. Haripada Mazumdar and another*, reported at AIR 1988 Cal 25, for the proposition that the Appellate Court is bound by the pleadings before the Trial Court while passing an ex parte ad interim injunction, was not a part of the ratio thereof.
27. It is, thus, argued that the learned Trial Judge violated the dictum laid down in *The Bengal Club Ltd. (supra)*¹ in passing the impugned order.

¹ ***The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96**

- 28.** In reply, learned senior counsel appearing for the respondent no. 1 Neeraj Bajoria (plaintiff in the suit), contends that NL Todi had executed his last Will and Testament on February 17, 2018 where the plaintiff Neeraj was appointed as the Executor. In the said Will, the father of the plaintiff, namely Narendra Kumar Bajoria, was made the beneficiary. Narendra Kumar Bajoria, it is pointed out, is the husband of Sushma Bajoria, the daughter of NL Todi. It is argued in the probate proceeding, which turned contentious and has been numbered as Testamentary Suit No. 26 of 2023, pending before this court, a vacating application was filed by Pawan Kumar Todi (PK) bearing GA 4 of 2025 where the existence of the Memorandum of Settlement dated March 13, 2019, executed by the PK Group and Raj Kumar Todi (RK) Group came to light for the first time, necessitating the institution of the present suit. In fact, RK as well as plaintiff/respondent no. 1 herein have challenged the said purported Settlement of 2019. The said Settlement of 2019 defeats the rights of the NL Group as enumerated in the Memorandum of 2009 in the properties which have devolved on NL and are part of the said estate, which are the subject matter of the probate proceeding as well. As the Executor of the Will of NL, the plaintiff/appellant is supposed to protect the property of the Testator, which justifies the challenge to the Settlement dated March 13, 2019.
- 29.** Learned senior counsel submits that the case sought to be made out by the appellants in both the appeals is beyond the scope of the pleadings and materials which were available to the learned Trial Judge at the time of passing the impugned order and, as such, particularly in the absence of any

application under Order XLI Rule 27 of the Code, cannot be taken into consideration by the Appellate Court.

30. It is argued that Annexure-E of the Settlement of 2009 clearly indicated that the list given thereunder was of the joint/common properties owned to the specific family companies, where Serial No. 3 specifically mentions the property at 12B, Beliaghata Main Road, Kolkata – 700 015, in respect of which Akshay Vinimay LLP, the appellant in FMA 250 of 2026 has sought to challenge the ad interim order. Akshay Vinimay LLP and other companies were admittedly parties to the Memorandum of Settlement of 2009, in Clause 10.7 of which it was clearly mentioned that the Companies which formed part of Annexure-E would be treated as parties to the settlement and shall be bound by the terms thereof.
31. Clause 10.9 of the 2009 Settlement, it is argued, also asserts that joint development of the properties covered by Annexure-E to the same would be done by all the three branches, being the NL, PK and RK groups.
32. On the argument of the appellants that the learned Trial Judge, by the impugned order, premised the injunction on the pendency of the probate proceeding, it is argued that the causes of action of the said proceeding and the present suit are completely different. In the probate proceeding, the Executor could not have challenged the fraudulent document of March 13, 2019. The prayers of the suit are all consequential to the challenge to such document on the ground of fraud.
33. Akshay Vinimay LLP, it is pointed out, is not a party to the probate proceeding or in the application for appointment of administrator *pendente*

lite filed therein. The prayers in the probate proceeding are not based upon a challenge to the document of March 13, 2019.

34. Furthermore, a Division Bench of this Court, in its order dated May 14, 2025 passed in an appeal preferred against an order whereby affidavits were directed to be filed in connection with the application for administrator *pendente lite*, held that the said order was not a “judgment” deciding any rights of the parties. Hence, the said order passed in the probate proceeding is not at all material in the present context and the plaintiff cannot be held to be guilty of suppression of such order. The learned Single Judge taking up the probate proceeding, while passing directions on the application for administrator *pendent lite*, did not adjudicate on any of the rights of the parties at all. Thus, there was no refusal of injunction as sought in the present suit on merits in connection with a probate proceeding.
35. Learned senior counsel next submits that the urgency is primarily that any further use of a fraudulent document creates a cause of action at any point of time. Fraud vitiates everything. In the present case, the respondent no.1 came to know that most of the flats and properties in Annexure-E of the 2009 Memorandum have been dealt with and/or conveyed on the strength of the Settlement dated March 13, 2019, which is further evidenced by the admission made in the stay petition filed by Akshay Vinimay LLP in FMA No.250 of 2026. There are only 18 flats left, which will not be sufficient to cover the rights of NL Todi in the property at 12B, Beliaghata Main Road, Kolkata – 700 015. Such aspect was considered by the learned Trial Judge in the impugned order.

- 36.** It is next argued that the PK and RK Groups sought to rewrite their rights and obligations as contained in the Memorandum of 2009 in the Settlement dated March 13, 2019, without the consent or affirmation of NL Todi, which would be evident from Clause 2.2.5 thereof.
- 37.** Clause 2.6 of the said document, it is submitted, shows that one Amalgam is acting for itself and also for the RK Group, contrary to anything recorded in any family settlement previously, including the Agreement of 2009. Thus, the RK Group have relinquished its right in the Todi Mansion in favour of the PK Group to the exclusion of NL Todi.
- 38.** In Clause 2.3 of the impugned Settlement of 2019, a designated partner, being the son of RK, has sought to transfer in favour of any person or entities as identified by the PK Group, which is completely contrary to the agreement of holding the companies in the ratio of 1:2:1. Furthermore, in Clause 2 thereof, Amalgam has been included as a part of the first party, which is RK, and has been allowed to represent all companies, LLPs, firms, partnerships and entities, which are under the control and management of all parties comprising the RK Group. This, it is contended, is contradictory to the 2009 Agreement, to the effect that the Companies of RK, PK and NL shall remain joint in 1:2:1 ratio. Akshay Vinimay LLP is also bound by the 2009 Agreement (being the successor of Akshay Vinimay Pvt. Ltd.) and as such cannot resile from the provisions of the 2009 Agreement.
- 39.** Clause 10.1 of the 2009 Memorandum clearly records that the Companies holding the properties in Annexure-E shall be held by the Todi family members jointly. Admittedly, Amalgam is not a Todi family entity and did

not form a part of the Companies mentioned in Annexure-A of the 2009 Settlement.

40. Learned senior counsel relies on *Intime Spectrum Registry Ltd. v. MCS Ltd.*, reported at 2007 SCC OnLine Cal 121, *Jitesh Pandey v. Smt. Urmilata Singh and Ors.*, reported at 1999 SCC OnLine Cal 460, and *Bijay Kumar Kajaria and Anr. v. Ajay Kumar Kajaria and Ors.*, reported at 2009 SCC OnLine Cal 2241, in support of the proposition that an appeal from an ex parte ad interim order is to be considered on the basis of facts pleaded in the plaint and injunction application, holding them as sacrosanct.
41. It is argued that the corporate entities were merely the vehicles through which the family assets were held, and the rights of the respective groups in such entities were expressly recognized under the 2009 Settlement.
42. Learned counsel for the respondent no.1 submits further that *The Bengal Club Ltd. (supra)*² is distinguishable in the facts of the present case. The plaint case of the present suit proceeds on the basis that the 2019 Agreement is *ex facie* fraudulent and contrary to the testate disposition. The plaint discloses all material facts and does not rely merely on the probate in respect of the Will of Late NL Todi. Thus, there is no question of suppression of any material facts.
43. Learned senior counsel next argues that Askhay Vinimay LLP has been impleaded in the suit since it was dealing with 12B, Beliaghata Road, contrary to the 2009 Memorandum. Surprisingly, Akshay Vinimay LLP has challenged the entire order of ad interim injunction, thereby indicating that

² *The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96

its interest is not only restricted to the said property but to defeat the entire Memorandum of 2009.

- 44.** It is submitted that although there is no dispute to the proposition that a shareholder has no rights over the assets of the Company, in the present case, Akshay Vinimay Ltd. was a party to the 2009 Agreement and the property at 12B, Beliaghata Road, of which 50 per cent is held by Akshay Vinimay, was not to be dealt with by it other than in the ratio provided in Annexure-E to the said agreement. However, as per the disclosure made by the plaintiff himself, the company was converted into a “Limited Liability Partnership (LLP)” in 2016 and the names of the designated partners do not include NL Todi. This, it is submitted, further shows the intent of Akshay Vinimay, in collusion with PK and RK, to dislodge the rights of the NL Group under the 2009 Settlement, in which all of them were parties.
- 45.** Akshay Vinimay, it is submitted, is already acting contrary to the mandate of the RERA to register the properties within three months, since the registration of properties was not completed even prior to the impugned order, although three months had long elapsed.
- 46.** It is pointed out that NL Todi’s rights were not restricted to 25 per cent of the sale proceeds of the developed flats, but his group was entitled to the company Akshay Vinimay to be run as a joint family company. Moreover, 175 flats have admittedly been sold by Akshay Vinimay and, as of now, there are only 18 flats left, without even stating anywhere that any percentage of the sale proceeds has been made over to the NL Group.

- 47.** Learned senior counsel also submits, placing reliance on *Intime Spectrum Registry Ltd. (supra)*³, that an Appellate Court ought not to substitute its own discretion for that of the Court of first instance unless such exercise is shown to be manifestly erroneous.
- 48.** Learned senior counsel appearing for the respondent nos.15 to 17 in FMA No.250 of 2026 that is Sushma Bajoria, Narendra Bajoria and Stuti Bajoria, argues that there are three possible remedies available to a person aggrieved by an order ex parte ad interim injunction – an application under Order XXXIX Rule 4 of the Code, an appeal under Order XLIII Rule 1 of the Code and/or filing a written objection to the injunction application and having a final hearing of the said application on merits. This proposition has been reiterated in several judgments of this Court, including *Jitesh Pandey (supra)*⁴ and *Sm. Muktakesi Dawn (supra)*⁵. However, the Hon'ble Division Bench in *The Bengal Club Ltd. (supra)*⁶ distinguished the proposition laid down in *Sm. Muktakesi Dawn (supra)*⁵ on an erroneous perception of Order XLI Rule 33 of the Code. It is argued that in *State of Punjab v. Bakshish Singh*, reported at AIR 1999 SC 2626, and *K. Kuthuswami Gownder v. N. Gownder*, reported at AIR 1998 SC 3118, the Hon'ble Supreme Court laid down that the Appellate Court cannot enlarge the scope of the appeal under Order XLI Rule 33 of the Code. Under the said provision, the Appellate Court may pass orders as the learned Trial Judge could have passed. Such

³ *Intime Spectrum Registry Ltd. v. MCS Ltd.*, reported at 2007 SCC OnLine Cal 121

⁴ *Jitesh Pandey v. Smt. Urmilata Singh and ors.*, reported at 1999 SCC OnLine Cal 460

⁵ *Sm. Muktakesi Dawn and others V. Haripada Mazumdar and another*, reported at AIR 1988 Cal 25

⁶ *The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96

power, it is submitted, is ordinarily exercised in appeals arising from final judgments and decrees. Thus, the Appellate Court's scrutiny must be confined to the materials which were before the Trial Court.

49. Learned senior counsel cites *Banarsi and others v. Ram Phal*, reported at (2003) 9 SCC 606, which again placed reliance on *Rameshwar Prasad v. Shambahari Lal Jagannath*, reported at AIR 1963 SC 1901, and held that Order XLI Rule 33 would have reference only to the nature of decree or order insofar as it affects the rights of the parties. It was further held therein that a party aggrieved by a decree normally must appeal against it within the time allowed by law and if it fails to do so, no relief should ordinarily be granted under Order XLI Rule 33. Exceptions arose where interference in favour of the appellant required readjustment of the rights of other parties, or where mutual rights and obligations between the same parties must be settled, or where the relief claimed is single and indivisible but sought against several defendants.
50. Learned senior counsel places reliance on *Eastern Coalfields Limited v. Rabindra Kumar Bharti*, reported at 2022 SCC OnLine SC 445, for the proposition that Order XLI Rule 33 clothes the Appellate Court with an extraordinary but rare jurisdiction, enabling it to pass any order which ought to have been passed even in favour of a party who has not preferred an appeal.
51. Thus, it is argued that the essential principle embodied in the said judgments is that the Appellate Court may pass an order which the Trial Court ought to have passed. Such power, however, does not permit

consideration of extraneous or additional materials, nor departure from settled principles governing limited appeals against ex parte ad interim orders of injunction.

52. It is argued that the Division Bench in *The Bengal Club Ltd. (supra)*⁷ differed from *Sm. Muktakesi Dawn (supra)*⁸ on the erroneous premise that *Sm. Muktakesi Dawn (supra)*¹¹ did not lay down any ratio. By applying the reversal test from Salmond on Jurisprudence, the observation in *Sm. Muktakesi Dawn (supra)*¹¹, to the effect that the Appellate Court is bound by the pleadings of the injunction application in an appeal against ex parte ad interim injunction, was a part of the ratio of the said judgment.
53. It is argued that a Bench of equal strength cannot finally decide differently merely on difference of opinion but the only permissible course of action is to refer the matter to a Larger Bench.
54. In support of his contention, learned senior counsel cites *Union of India v. Raghubir Singh*, reported at (1989) 2 SCC 754, *Pradip Chandra Parija v. Pramod Chandra Patnaik*, reported at (2002) 1 SCC 1 and *Roger Shashoua v. Mukesh Sharma*, reported at (2017) 14 SCC 722.
55. Learned senior counsel also places reliance on *Bijay Kumar Kajaria (supra)*⁹, where a co-ordinate Bench of this Court had relied on *Sm. Muktakesi Dawn (supra)*¹¹ and *Jitesh Pandey (supra)*¹⁰.

⁷ *The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96

⁸ *Sm. Muktakesi Dawn and others V. Haripada Mazumdar and another*, reported at AIR 1988 Cal 25

⁹ *Bijay Kumar Kajaria and Anr. v. Ajay Kumar Kajaria and Ors.*, reported at 2009 SCC OnLine Cal 2241

¹⁰ *Jitesh Pandey v. Smt. Urmilata Singh and ors.*, reported at 1999 SCC OnLine Cal 460

56. Thus, it is argued that both the appeals ought to be dismissed.

57. In the context of the arguments advanced by the parties and the decisions cited, the following issues fall for consideration in the present appeals:

- (i) Whether the impugned order is vitiated by contravention of the proviso to Order XXXIX Rule 3 of the Code of Civil Procedure;*
- (ii) Whether any irreparable injury would be suffered in the event injunction was refused by the Trial Court;*
- (iii) Whether any prima facie case was made out by the plaintiff/respondent no.1;*
- (iv-a) Scope of the Appellate Court to look into additional materials in an appeal against an ex parte ad interim order of injunction;*
- (iv-b) Whether The Bengal Club Ltd. v. Susanta Kumar Chowdhary, reported at AIR 2003 Cal 9, and Ila Bhowmik v. Millennium Road Construction Pvt. Ltd., reported at 2011 SCC OnLine Cal 3986, lay down the correct proposition of law to the effect that the appellate court, while hearing an appeal against an ex parte ad interim injunction order, has the power to look into additional and extraneous materials beyond the pleadings in the plaint and injunction application and the documents relied on/referred to therein;*
- (v) Whether there was any suppression of material facts by the plaintiff.*

58. The above issues are decided as follows:

- (i) Whether the impugned order is vitiated by contravention of the proviso to Order XXXIX Rule 3 of the Code of Civil Procedure*

59. Order XXXIX Rule 3 of the Code is set out below:

“3. Before granting injunction, Court to direct notice to opposite party.—The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant—

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with—

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant, relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.”

60. The proviso thereto mandates that when ad interim injunction is granted without giving notice of the application to the opposite party, the court shall record the reasons “for its opinion that the object of granting the injunction would be defeated by delay.” Hence, the reasons contemplated in the proviso pertain to the urgency involved in grant of injunction prior to service of notice.

61. In *Morgan Stanley Mutual Fund (supra)*¹¹, the Hon’ble Supreme Court laid down the factors which should weigh with the Court in grant of ex parte injunction, which were enumerated as follows:

- a) Whether irreparable or serious mischief will ensue to the plaintiff;
- b) Whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

¹¹ ***Morgan Stanley Mutual Fund v. Kartick Das*, reported at (1994) 4 SCC 225**

- c) The court will also consider the time at which the plaintiff first had notice of the act complained of so that the making of improper order against a party in his absence is prevented;
- d) The court will consider whether the plaintiff had acquiesced for some time and in such circumstances it will not grant ex parte injunction;
- e) The court would expect a party applying for ex parte injunction to show utmost good faith in making the application;
- f) Even if granted, the ex parte injunction would be for a limited period of time;
- g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court.

62. *Binod Khanna (supra)*¹², cited by the appellants, also reiterates such proposition.

63. A bare perusal of the impugned order dated January 28, 2026 shows that the same was not passed mechanically. Upon narrating the respective cases of the parties in a nutshell, the learned Trial Judge considered different facets of the matter on balance, which is reflected from the order itself. Upon dealing with the contentions of the parties at length, the learned Trial Judge observed that on an overall consideration of the attending facts and emergent circumstances, the court was of the considered view that at this stage it would be expedient enough to issue an ad interim rule to restrain the defendants from dealing with the suit properties, wherein not only the

¹² ***Binod Khanna v. Sunny Sales, reported at 2014 SCC OnLine Cal 10452***

plaintiff but also the other beneficiaries of the Will have certain right, title and interest and benefit to get, in any manner whatsoever, which would be amounting to creation of third party interest, until adjudication of the disputes raised in the suit. Apart from adverting to the prima facie case made out, the court recorded that there is “imminent necessity” for the issuance of ad interim rule to stop the defendants mentioned therein from dealing with the properties and assets as described in Schedule “A-1” of the injunction application and from dealing with those properties by creating third party rights.

- 64.** The documents of September 28, 2009 and March 13, 2019 were taken into consideration. The pendency of the probate proceeding and the effect of third party transfer of the subject-properties in respect of rights created under the Will-in-question of NL were adverted to as well. Hence, the learned Trial Judge devoted sufficient consideration to all relevant aspects of the matter in a succinct manner befitting the ad interim stage of grant of injunction.
- 65.** Courts have deprecated mini trials even at the stage of disposal of temporary injunction applications time and again, let alone at the *ex parte* ad interim stage. Thus, the learned Trial Judge, having substantially adverted to the case made out in the plaint and the injunction application, having given sufficient reasons for grant of injunction and as to the imminent necessity for such grant at the *ex parte* ad interim stage, cannot be faulted on account of dearth of reasons for the imminent necessity to grant of *ex parte* order without notice to the defendants at this stage. Hence, the challenge to the

impugned order on the ground of contravention of the proviso to Order XXXIX Rule 3 of the Code as well as the principles laid down in *Morgan Stanley Mutual Fund (supra)*¹³ cannot be sustained.

- 66.** In *Binod Khanna (supra)*¹⁴ a co-ordinate Bench of this court had relied on *The Bengal Club Ltd. (supra)*¹⁵, as well as *Supratik Ghosh v. Pasari Housing Development Pvt. Ltd.*, reported at (2000) 1 CHN 614, to reiterate the necessity of compliance with the proviso to Order XXXIX Rule 3. However, in view of our above observations, this Court finds that the learned Trial Judge cannot be faulted on such score.
- 67.** Hence, this issue is decided against the appellants.

(ii) Whether any irreparable injury would be suffered in the event injunction was refused by the Trial Court

- 68.** Learned senior counsel for Akshay Vinimay LLP insinuates that the said company has statutory obligations to comply with, in particular the provisions of the RERA, by registering deeds in favour of the purchasers. It is also contended that the relief of the plaintiff might, at best, lie in damages and not injunction.
- 69.** However, the RERA aspect of the matter was not at all before the learned Trial Judge at the time of passing the impugned order and as such, there is limited scope of looking into such new facet of the matter at this stage. More importantly, it is rightly argued by the respondent nos.15 to 17 that

¹³ *Morgan Stanley Mutual Fund v. Kartick Das*, reported at (1994) 4 SCC 225

¹⁴ *Binod Khanna v. Sunny Sales*, reported at 2014 SCC OnLine Cal 10452

¹⁵ *The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96

the stipulated timeline of three months from the admitted date of commencement of the project had already expired even prior to the passing of the impugned order, thus negating such contention of the appellant Akshay Vinimay LLP as a ground for tilting the balance of convenience and inconvenience in its favour.

70. Insofar as the availability of alternative relief by way of damages is concerned, the spectrum of reliefs sought in the present suit is not confined only to the profits from the development of the property at 12B, Beliaghata Main Road but is also premised on the right of the plaintiff to the control and management of 25 per cent share in the said company (now LLP), which has allegedly been infringed by converting the said company into a Limited Liability Partnership (LLP) and by entering into the 2019 Memorandum, as well as the pervasive rights of dealing with the properties-in-question which is claimed by the plaintiff through the companies mentioned in Annexure-E to the 2009 Memorandum. Hence, the reliefs sought in the suit are not wholly restricted to mere damages or profits in the development project but also to the controlling rights in the companies as well as title to the immovable properties which are the subject matter of the suit.

71. The structure of Akshay Vinimay has already been altered from a private limited company, over which the NL group had partial control through its shareholding by dint of the 2009 Memorandum, to a Limited Liability Partnership (LLP), in which the NL group is not a partner, thus *prima facie* denuding the estate of NL of its right to the control and management of the said company. That apart, a development project has been started on the

property at 12B, Beliaghata Road (Main Road), over which the Todi family, including the NL group, had rights by virtue of the 2009 Memorandum, without taking the NL group into the loop. These manifest attempts to curtail the rights of the NL estate, which are also the subject-matter of last Will of NL (of which the plaintiff is the Executor), gives rise to sufficient apprehension that by the end of the litigation, the structure and the title/rights to the subject properties would be changed beyond recognition, thereby rendering the suit and the testamentary suit infructuous. Such factors sufficiently indicate that the plaintiff may suffer irreparable injury in the event the injunction as sought for in the suit is not granted.

72. In any event, the learned Trial Judge, upon adverting to the respective contentions of the parties and taking into account the salient facets of the dispute, dealt with such issue comprehensively and adopted one of the plausible views on the basis of the materials available before the Trial Court. Hence, this Court agrees with such views of the Trial Court and does not find any necessity of substituting its own opinion for that of the learned Trial Judge on such count.

73. Accordingly, this issue is also decided against the appellants, holding that in the event the injunction prayed for by the plaintiff/respondent no.1 was refused, the plaintiff would suffer irreparable injury which cannot be compensated by mere damages.

(iii) Whether any prima facie case was made out by the plaintiff/respondent no.1

- 74.** In order to decide this issue, the nature of the reliefs sought and the premise of the cause of action of the suit are required to be adverted to in a nutshell.
- 75.** The plaintiff/respondent no.1 Neeraj is the son of defendant no.14, Sushma Bajoria, the daughter of Late NL Todi, and her husband Narendra Bajoria (defendant no.15), who is the sole beneficiary of the alleged last Will of NL Todi dated February 17, 2018. However, the claim of the plaintiff is not through his mother Sushma, who apparently relinquished her rights in favour of the other groups of the Todi family in the 2009 Memorandum itself, but in the capacity of the Executor of late NL Todi's Will.
- 76.** Section 211(1) of the Indian Succession Act, 1925 provides that the Executor or Administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Although Section 213(1) of the said Act stipulates that no right as Executor or legatee can be established in any court of justice unless a competent court has granted probate of the Will under which the right is claimed, the two provisions are to be read harmoniously to lend meaning to either, since it is a settled principle that the Legislature abhors superfluity. Construed so, there is no conflict between the two, since Section 213 mandates a probate to be obtained for an Executor or legatee to establish his/her rights *in such capacity, that is, as Executor or legatee*, whereas Section 211(1) vests the property altogether in the Executor immediately upon the demise of the deceased person, of whose

estate the Executor is acting in such capacity, in the limited capacity of a legal representative of the deceased.

- 77.** Hence, the correct position of law is that immediately upon demise of a person, his assets vest in his Executor for the limited purpose of representing the deceased in all courts and forums and before all authorities and to protect the property from being wasted or frittered away, whereas the right as an Executor to distribute the property pursuant to the assent to legacy in terms of the Will accrues only on grant of probate.
- 78.** Such view finds further support in the well-settled legal proposition that a Probate Court cannot adjudicate the right, title and interest in a property but the scope of examination before the said court is restricted to the due execution of the Will in accordance with law.
- 79.** It cannot be the intention of the Legislature to keep the estate of the deceased in a legal vacuum, unprotected and uncared for, in the interregnum between his demise and the grant of probate of his Will. Hence, the obvious purport of Sections 211 and 213 of the Indian Succession Act, read in conjunction, would be to enable the Executor, in whom the property of the deceased is vested immediately upon the latter's demise, to represent the estate before all courts of law and protect it till it is distributed to the legatees in due course on grant of probate of the Will. However, once probate is granted, it is the incumbent duty of the Executor to distribute the subject properties of the Will among the legatees, at which juncture the Executor acts in such capacity and the legatees obtain the properties in such capacity.

- 80.** The above principle itself brings about a marked distinction between the premise of the causes of action in the pending probate proceeding in respect of the Will of Late NL Todi and the present title suit, where the validity of the 2019 Memorandum is questioned and consequentially the rights of the plaintiff, as Executor of the Estate of the deceased NL Todi, have been asserted. As discussed above, the charter of the probate court in the present case is limited to examine whether there was a due and valid execution of the Will-in-question, in contradistinction with the civil court's powers to examine and adjudicate on the title of the parties and the validity of the 2019 Memorandum, *inter alia* in the context of the 2009 Settlement.
- 81.** Thus, in any event, any order passed in the probate proceeding would not operate on the principle of *res judicata* in the civil suit, since the probate court is not competent to grant the decrees sought before the Civil Court.
- 82.** Secondly, the probate court did not adjudicate on the merits of the ad interim prayer for injunction in respect of the subject-properties at any point of time. On two occasions, the probate court merely directed affidavits to be filed and adjourn the matter, which was held in an appeal from one of the said orders not to qualify as a 'judgment' which would be appealable under the Letters Patent of this Court, since no rights of the parties had been decided by the said order. Thus, there was no adjudication in the probate proceeding at any point of time on the merits of the case made out by the plaintiff/respondent no.1 before the civil court to get an injunction on the subject-properties.

- 83.** Thirdly, the plaintiff has not suppressed about the pendency of the probate proceeding or the filing of an application for administrator *pendente lite* but has disclosed such facts in the plaint, even by giving the particulars of the application. Even if an ad interim prayer of injunction was made in connection with the said application before the probate court, the primary relief claimed in the application was the appointment of an administrator *pendente lite*, which is entirely different on legal yardsticks and scope from an application for injunction simpliciter. Hence, the pendency of the said application having been disclosed, it cannot be said that merely because the orders passed therein were not specifically mentioned in the plaint of the present suit, any relevant fact was ‘suppressed’ before the Trial Court.
- 84.** The premise of the present suit is on three-fold grounds – to protect the subject of the last Will of NL Todi in the capacity of the plaintiff as Executor of such Will, the 2019 Settlement being fraudulent and invalid in view of the contravention of the rights carved out in 2009 Agreement, and the alleged attempts of the defendants to deal with the properties belonging to the estate of the NL Todi and his group. As discussed above, Section 211 of the Indian Succession Act, 1925 vests the right, title and interest of the testator in his properties in his named Executor, albeit in the limited capacity of a legal representative, immediately upon the demise of the testator, without any further pre-condition coming in-between. Such representative rights are not restricted to merely obtain a probate from the testamentary court but clothes the Executor, in such representative capacity, to defend and protect

the estate of the testator for all practical purposes, including before all forums, courts and authorities.

- 85.** In the habendum portion of the 2009 Memorandum, Clause (D), sub-clause (v) provides that certain properties and/or interest in certain properties and assets “*which are held through the various companies as per annexure “E”,* which companies, including the Confirming Parties 1 and 2 to the agreement, shall always be held jointly by NL Group, PK Group and RK Group as mentioned in Annexure-E”. Notably, Akshay Vinimay Pvt. Ltd., which was the predecessor-in-interest of Akshay Vinimay LLP, was the Confirming Party No.2 in the Agreement. Annexure-E of the 2009 Memorandum sets out various properties, including 12B, Beliaghata Road (now known as Beliaghata Main Road). Its owner was mentioned to be Akshay Vinimay Pvt. Ltd. and the Todi family ownership in the said property was mentioned as 50 percent, distributed between the NL, PK and RK Groups in the ratio of 1:2:1 respectively.
- 86.** Thus, read in conjunction, the said Clause and the enumeration in Annexure-E of the 2009 Memorandum raises an arguable case as to the rights of the NL Group to the Beliaghata Road property, of which the Todi family was shown to be the owner of 50 per cent, out of which 25 per cent belong to the NL Group, thus, fixing the “ownership” of the NL Group to 12.5 per cent of the entire property. The perception of the parties to the 2009 Memorandum, including the appellants in both the present appeals, was reflected in Clause (D)(v) thereof, to the effect that such property was held by the Todi family “through the various companies”.

- 87.** Again, Clause (D)(vi) of the habendum clause of the 2009 Memorandum provided that NL Todi and his wife Smt. Shanti Devi Todi were entitled to various assets, both moveable and immovable, as stated in Annexure – B of the Memorandum and were entitled to deal with the same in any manner he/she in his/her absolute discretion deemed fit and proper and were also entitled to sell, transfer and/or alienate the same and none of the members of the PK and RK Groups would be entitled to have any right over and in respect thereof unless so bequeathed or transferred by NL Todi or Smt. Shanti Devi Todi. Annexure - B included the vacant space on the 2nd, 4th and 14th floors of Todi Mansion, which is also a subject-matter of the present suit along with 12B, Beliaghata Main Road. Hence, in respect of the said portions of Todi Mansion, there cannot be any manner of doubt that the NL estate was the exclusive owner thereof. It is relevant to mention here that although the said floors of the Todi Mansion in particular were not the subject-matter of the 2019 Memorandum, the plaintiff has alleged in the present suit that the rights of the NL estate to the floors allocated to them are being hampered by the defendants.
- 88.** In Clause 6.1 of the recital of the 2009 Memorandum, it was stipulated that the parties had agreed that various properties including the shares in various companies and firms, as detailed out in Annexure – B, shall be held by the NL Group.
- 89.** Clause 6.2 thereof recorded that in order to give effect to the above, the members of the PK Group and the RK Group had already transferred their respective shareholding in each of such companies, as mentioned in

Annexure - B, in favour of members of the NL Group with the intent and object that such companies would be under the complete control and management of the NL Group.

90. Hence, the right, title and interest of the NL estate, at least in Todi Mansion and 12B, Beliaghata Main Road properties, both of which form a part of the subject-matter of the present suit, are sufficiently established, at least at the *prima* stage.
91. Clauses 10.7 and 10.8 of the 2009 Memorandum provide that the funds to develop the projects of the Confirming Parties, including Akshay Vinimay Pvt. Ltd. (now Akshay Vinimay LLP), would be contributed in 1:2:1 ratio between the NL, PK and RK Groups and that the Annexure - E properties would be developed, upon which, after deducting 4 per cent overhead cost for Rishi Todi (son of PK), the balance profits would be distributed in 1:2:1 ratio between NL, PK and RK Groups respectively. Thus, the rights of the NL Group were not restricted only to having profits but, on a composite reading of the relevant Clauses of the 2009 Memorandum, which is an admitted document, the rights and interests of the NL Group extended also to the management of the company and the development project itself.
92. The appellants cite *Bacha F. Guzdar (supra)*¹⁶ and *Om Prakash Kalla (supra)*¹⁷ to argue that shareholders do not have title in the assets of the company.

¹⁶ ***Bacha F. Guzdar v. Commissioner of Income Tax, Bombay*, reported at (1954) 2 SCC 563**

¹⁷ ***Om Prakash Kalla v. Kalla Properties and Industrial Corporation Limited*, reported at 2025 SCC OnLine Cal 3560**

- 93.** Such proposition is undisputed. However, in the facts of the case, the said yardstick is sufficiently diluted as per the perception of the parties themselves, as reflected in the 2009 Settlement. The structure of the closely-held Todi family companies, including Akshay Vinimay Pvt. Ltd., is somewhat different from the strict lines of limited companies. It is reflected from all the materials before the Court, relied on by both parties, that NL Todi was the patriarch of the Todi family and the different branches of the said family were in pervasive control over the subject-companies, which were dealt with in the 2009 Settlement. The 2009 Settlement recognised 50 per cent ownership of the Todi family in the property at 12B, Beliaghata Main Road, allegedly owned by the Akshay Vinimay. Apart from that, the control and management of the said companies were also vested in all the three groups of the Todi family, namely NL, PK and RK Groups. Thus, the strict principle of a company being a separate juristic entity was diluted by the parties themselves in the 2009 Settlement. The Court cannot turn a blind eye to the said facet of the matter. Hence, said principle of a company having a separate juristic identity does not come to the aid of the appellants much, insofar as the rights of the parties, as recognized in the 2009 Settlement, play out *inter se*.
- 94.** Accordingly, this issue is decided in favour of the plaintiff/respondent no.1 by holding that the plaintiff made out a sufficiently strong *prima facie* and arguable case as well as raised triable issues to go for trial, sufficient to justify the grant of *ex parte* ad interim injunction.

(iv-a) *Scope of the Appellate Court to look into additional materials in an appeal against an ex parte ad interim order of injunction*

WITH

(iv-b) *Whether The Bengal Club Ltd. v. Susanta Kumar Chowdhary, reported at AIR 2003 Cal 9, and Ila Bhowmik v. Millennium Road Construction Pvt. Ltd., reported at 2011 SCC OnLine Cal 3986, lay down the correct proposition of law to the effect that the appellate court, while hearing an appeal against an ex parte ad interim injunction order, has the power to look into additional and extraneous materials beyond the pleadings in the plaint and injunction application and the documents relied on/referred to therein*

95. These issues are taken up together for adjudication, being inextricably interconnected.

96. Order XLI Rule 33 of the Code of Civil Procedure reads as follows:

“33. Power of Court of Appeal.—The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

97. A bare perusal of the same clearly indicates that it pertains to the powers of the Appellate Court and is an enabling provision to facilitate proper and complete adjudication of the appeal. The said provision relates to the *reliefs* which can be granted by the Appellate Court and *not to the materials which can be adverted to* by it, the latter being covered by Order XLI Rule 27 of the Code, which is also set out below:

“27. Production of additional evidence in Appellate Court.—(1)

The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

98. Under Rule 33, the Appellate Court has the power to pass any decree and make any order “which ought to have been passed or made” and also to pass any further or other decree or order “as the case may require”. Such power, as per the said provision, may be exercised notwithstanding that the

appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents who have not challenged the said decree.

99. Thus, the thrust of the power conferred on the Appellate Court under Rule 33 is to enable it to confirm, modify, vary or rescind parts of the decree which have not been challenged by the respondents, for the ends of justice and if the case so requires.

100. The expression “ought to have been passed or made” in Rule 33 obviously refers to being passed or made by the Trial Court. Thus, even under Rule 33, a blanket charter has not been given to the Appellate Court to enlarge the scope of the appeal beyond the materials which were available before the Trial Court. An appellate hierarchy in any judicial system is pyramidal in structure, becoming increasingly restricted as it goes up. Whereas the court of first instance can deal with all facets of the matter, factual and legal, on the materials available before it, the Appellate Court scrutinizes an order passed by the first court only to see whether there is any legal or patent factual error in it and not to substitute its views for that of the Trial Court. Hence, the entire exercise of the Appellate Court, as reflected in the total scheme of Order XLI of the Code, is to act as a check and bound to the authority of the Trial Court, based on the materials which were available before the Trial Court while passing the impugned order or decree. While doing so, the Appellate Court cannot enlarge the scope of the appeal itself and is restricted by the authority which could be exercised by the Trial Court in the first place while passing the impugned order/decreed and not beyond.

101. Rule 27 of Order XLI strengthens the above view. It is to be noted that sub-rule (1) of Rule 27 is couched in negative language, precluding the parties to an appeal from producing any additional evidence, whether oral or documentary, in the Appellate Court. Thus, by default, the parties to an appeal cannot produce any additional evidence before the Appellate Court which was not before the Trial Court at the time of passing the order impugned in the appeal.

102. Of course, such restriction is subject to certain exceptions as enumerated in Clauses (a), (aa) and (b) of Rule 27(1). In the present case, the appellant never filed any application under Order XLI Rule 27 at all. It is doubtful as to whether even if such an application was filed, the same could be looked into by the Appellate Court within the limited conspectus of an appeal against an *ex parte* ad interim order. Be that as it may, the language of Rule 27 is “*additional* evidence” which necessarily indicates that, in the first place, some evidence ought to have been on record in the Trial Court to which some further evidence is *added*. The appellants herein, who were not represented at the *ex parte* ad interim stage, did not have the opportunity to produce any material or evidence before the Trial Court at all, thereby precluding the possibility of furnishing “additional” evidence.

103. Insofar as Clause (a) of Rule 27(1) of Order XLI is concerned, the provision is not applicable in the present case, since the evidence sought to be brought before this Court by the appellant was not produced before the Trial Court at all, thereby ruling out the possibility of the Trial Court having refused to admit such evidence.

- 104.** Clause (aa) of Rule 27(1) is also not attracted here for the obvious reason that the appellants were not represented at the juncture when the impugned order was passed and thus there was no scope for them to produce the evidence before the Trial Court by application of due diligence.
- 105.** Clause (b) of Rule 27(1), which empowers the Appellate Court, if it so requires, to direct evidence to be produced before it. The phrase “if it so requires” signifies clearly that such power can be exercised *suo motu* by the Appellate Court and cannot be invoked by a party or be exercised at the behest of a particular party.
- 106.** In fact, the proposition, that the restriction in Sub-Rule (1) of Rule 27 is the default position, is bolstered by Sub-Rule (2), which mandates the court to record reasons if additional evidence is admitted, and not the other way round.
- 107.** Seen in such context, there is limited or no scope of permitting new material/evidence to be brought on record for the first time in the appeal, since such material/evidence was not before the Trial Court at the time of passing the order impugned in the appeal.
- 108.** The tests and yardsticks of adjudication of an appeal must borrow their hue from the parameters of the provisions under which the impugned order was passed. For example, the standards and tests applied in an appeal against a final decree has to be guided and shaped by the powers of the court of first instance which passed the decree, whereas the periphery of a miscellaneous appeal against an interlocutory appealable order must be governed by the tests and yardsticks of the statutory provision under which the impugned

order was passed. In a regular first appeal, the Appellate Court may confirm, vary, modify or set aside the impugned decree by finally adjudicating the rights of the parties; however, in an appeal against an order appointing a receiver, the Appellate Court most certainly cannot finally adjudicate the rights of the parties by passing a decree but has to be confined to the Trial Court's powers under Order XL of the Code.

109.In an appeal against an *ex parte* ad interim injunction, thus, it is the parameters of Order XXXIX Rule 1 and 2 and the restrictions applicable to the Trial Court at the *ex parte* ad interim stage which define the periphery of the Appellate Court's jurisdiction. The Appellate Court is to decide whether the Trial Court, on the basis of the materials before it, was justified in passing the impugned order, and cannot expand the scope of the appeal beyond the limits exercisable by the Trial Court.

110.Notably, sub-Section (1) of the Code uses the expression "Subject to such conditions and limitations as may be prescribed" to hedge the appellate court's powers. Again, sub-Section (2) thereof stipulates that "Subject as aforesaid", the appellate Court shall have the same powers and shall perform "as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein". Rule 33 of Order XLI of the Code is not an island standing in isolation, but is circumscribed by Section 107 and Order XLI Rule 27 of the Code, since no *non obstante* clause precedes Rule 33 to insulate it from the other provisions of the Code.

111. Such broad proposition finds support in *Bakshish Singh (supra)*¹⁸, where the Hon'ble Supreme Court observed that the discretion conferred on the Appellate Court under Order XLI Rule 33 has to be exercised with care and caution and that too in rare cases where there has been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The Hon'ble Supreme Court cautioned that the Appellate Court *cannot*, in the garb of exercising power under Order XLI Rule 33, *enlarge the scope of the appeal*.

112. Again, in *Eastern Coalfields Limited (supra)*¹⁹, the contours of exercise of the said provision were laid down by the Hon'ble Supreme Court, where it was observed that the said provision no doubt clothes the Appellate Court with an extraordinary power which, however, is a "rare jurisdiction". It is to reach justice in the special facts of a case and not an ordinary rule to be applied across the board in all the appeals.

113. In *Banarsi and others (supra)*²⁰, the Hon'ble Supreme Court read Rule 4 and Rule 33 of Order XLI in conjunction and observed that while dismissing an appeal and though confirming the impugned decree, the Appellate Court may still direct passing of such decree or making of such order which ought to have been passed or *made by the court below, in accordance with the findings of fact and law arrived at by the court below* and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. Again, the Hon'ble Supreme Court reiterated in the said

¹⁸ ***State of Punjab v. Bakshish Singh, reported at AIR 1999 SC 2626***

¹⁹ ***Estern Coalfields Limited v. Rabindra Kumar Bharti, reported at 2022 SCC OnLine SC 445***

²⁰ ***Banarsi and others v. Ram Phal, reported at (2003) 9 SCC 606***

report that the Appellate Court may pass or make such further or other decree or order as the case would require being done, *consistently with the findings arrived at by the Trial Court*. The object sought to be achieved by conferment of such power, it was held, is to avoid inconsistency, inequity and inequality in reliefs granted to similarly placed parties and unworkable decrees or orders coming into existence. The overriding consideration was held to be achieving the ends of justice.

114. However, the Hon'ble Supreme Court put in a caveat that wider the power, higher the need for caution and care while exercising the power. Usually, it was observed, the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree liable to be set aside or interfered with by the Appellate Court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow.

115. Notably, in the present case, none of the above criteria are fulfilled, so as to justify the invocation of Order XLI Rule 33 of the Code.

116. Let us now consider in the context of the above discussion whether *The Bengal Club Ltd. (supra)*²¹ lays down the correct proposition of law.

117. At the first blush, it is seen that one of the cardinal premises of *The Bengal Club Ltd. (supra)*²¹ was the reliance on Order XLI Rule 33, which was held by the Division Bench to confer wide powers on the Appellate Court. Despite

²¹ ***The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96**

relying on *Bakshish Singh (supra)*²², the learned Division Bench unfortunately failed to take into consideration the caution issued therein that the Appellate Court cannot, in the garb of exercise of Order XLI Rule 33, enlarge the scope of the appeal itself and did precisely so by taking into consideration additional materials placed by the appellant before it, which were not available to the Trial Court at the time of passing the order impugned in the appeal.

118. While doing so, the Division Bench in *The Bengal Club Ltd. (supra)*²³ distinguished the prior co-ordinate Bench judgment which laid down the contrary proposition inasmuch as the confinement of the Appellate Court to the pleadings before the Trial Court in case of an *ex parte* ad interim injunction was concerned. While doing so, two features of *Sm. Muktakesi Dawn (supra)*²⁴ were taken into consideration by the Division Bench which authored *The Bengal Club Ltd. (supra)*²⁶. First, the use of the Latin expression “*modo et forma*” was held to be used inappropriately in *Sm. Muktakesi Dawn (supra)*²⁷. In *Sm. Muktakesi Dawn (supra)*²⁷, the concerned Division Bench had held that the defendant, at the *ex parte* ad interim stage, has not as yet filed his show cause against the plaintiff’s application for injunction “and, therefore, at that stage all the statements made in the application will have to be accepted as true *modo et forma*”.

119. The Division Bench in *The Bengal Club Ltd. (supra)*²⁶ criticised the use of such expression by citing the purported context of usage of the same,

²² ***State of Punjab v. Bakshish Singh, reported at AIR 1999 SC 2626***

²³ ***The Bengal Club Ltd. v. Susanta Kumar Chowdhary, reported at AIR 2003 Cal 96***

²⁴ ***Sm. Muktakesi Dawn and others V. Haripada Mazumdar and another, reported at AIR 1988 Cal 25***

placing reliance on Black's Law Dictionary, 5th Edition (Page 965) and Wharton's Law Lexicon, 14th Edition (Page 663), and held that the said expression *modo et forma* is used to explain the mode of traversing the pleading of the opponent, that is, if such pleading is so traversed the party traversing it is to deny the allegation of the other party not only in its general effect but in the exact manner and form in which it is made. Therefore, it was further held that the proper meaning of the said expression can only be appreciated in the context of traversing the pleading and not while accepting it, but that in *Sm. Muktakesi Dawn (supra)*²⁵, the word was not used to convey such meaning, for which it was deprecated in *The Bengal Club Ltd. (supra)*²⁶.

120. With utmost respect, the Division Bench in *The Bengal Club Ltd. (supra)*²⁹ glossed over the fact that the exact converse of a situation of traverse was being contemplated by the Division Bench in *Sm. Muktakesi Dawn (supra)*²⁸ as, as such, the use of the expression *modo et forma* was perfectly justified. Since, in a case of traverse, the denying party has to controvert the allegations made in the application *modo et forma*, that is, both in manner and in form, it was deduced in *Sm. Muktakesi Dawn (supra)*²⁸ that in the absence of such traversal, the converse principle applies, being that there is a non-denial of the allegations made in the application *modo et forma* (in manner and in form).

²⁵ ***Sm. Muktakesi Dawn and others V. Haripada Mazumdar and another, reported at AIR 1988 Cal 25***

²⁶ ***The Bengal Club Ltd. v. Susanta Kumar Chowdhary, reported at AIR 2003 Cal 96***

121. Secondly, the Latin expression *modo et forma* is not confined to a situation of non-traverse and, taken on its face, merely means “in manner and in form”, which could very well have been used in *Sm. Muktakesi Dawn (supra)*²⁸ in its usual linguistic sense, without necessarily tying it up with a situation of traverse.

122. The other plinth on which the Division Bench in *The Bengal Club Ltd. (supra)*²⁷ refused to recognize *Sm. Muktakesi Dawn (supra)*²⁸ as a binding precedent was that no ratio was laid down therein on the issue at hand, since no arguments were specifically advanced on the point by the appellants therein. The Division Bench in *The Bengal Club Ltd. (supra)*²⁷ observed that the observations in *Sm. Muktakesi Dawn (supra)*²⁸ in Paragraph No. 6 thereof were “without any argument and without reason” for which they did not form a part of the ratio and were to be regarded as “passing *sub silentio*”.

123. With utmost respect, however, the Division Bench failed to read the proposition laid down in *Sm. Muktakesi Dawn (supra)*²⁸ in proper perspective. It is not necessary that a proposition must necessarily be argued by a party and controverted by the other for it to be a part of the ratio of the resultant judgment. It would suffice if such proposition was considered by the court, even if not argued, for the purpose of arriving at the conclusion therein. If a proposition forms an integral part of a judgment, being necessary for arriving at its conclusion, even if not specifically argued

²⁷ ***The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96**

²⁸ ***Sm. Muktakesi Dawn and others V. Haripada Mazumdar and another*, reported at AIR 1988 Cal 25**

by the parties but considered in the circumstance of the case by the court, it would definitely form a part of the ratio of the said judgment, since the proposition was considered and was relevant to the issue at hand.

124.In *Sm. Muktakesi Dawn (supra)*²⁹, the challenge was levelled against the entire impugned ad interim *ex parte* injunction order. Such challenge was not confined only to the two propositions raised by the appellants and quoted in the judgment. In Paragraph No. 6 of the said judgment, the authors thereof observed that “on the merits also”, the Bench was satisfied that the learned Trial Judge was justified in making the impugned order of injunction.

125.In any event, even if the two contentions raised by counsel for the appellants in the said case were to be turned down by the Division Bench, it had to independently consider as to whether the impugned injunction order was sustainable in law and facts. Thus, a consideration of the merits of the impugned order in *Sm. Muktakesi Dawn (supra)*²⁹ was not a surplusage or “passing comment” or an *obiter dictum* but an essential and integral part of the adjudication in the matter. Hence, the doctrine of *sub silentio*, which was applied to ignore such ratio, was not attracted at all.

126.In order to ascertain whether a proposition laid down in a judgment comprises a component of its ratio to make it a binding precedent, the Wambaugh Inversion Principle enunciated by Professor Eugene Wambaugh, a professor of the Harvard University (also known as the “Reversal Test”) is a

²⁹ ***Sm. Muktakesi Dawn and others V. Haripada Mazumdar and another, reported at AIR 1988 Cal 25***

useful litmus. As per the said principle, a proposition laid down in a judgment is to be reversed to see whether despite such reversal, the conclusion in the judgment would have been the same. If the answer is in the negative, and the conclusion would have changed, it is a part of the ratio.

127.Applying such test, the conclusion arrived at in *Sm. Muktakesi Dawn (supra)*³⁰ was utterly dependent on the observations-in-question, that is, at the *ex parte* ad interim stage, since the defendant had not yet filed its show cause against the plaintiff's application for injunction, all the statements made in the application would have to be accepted as true *modo et forma*. The Division Bench further observed that *when so taken*, the allegation, in its view, made out a case for ad interim injunction, and premised its conclusion on such observation. Thus, the Wambaugh Inversion Principle Test squarely applies to *Sm. Muktakesi Dawn (supra)*³⁰ insofar as the dictum laid down therein that at the *ex parte* ad interim stage, in the absence of any traversal, the pleadings in the injunction application have to be taken as true in manner and in form.

128.Hence, with deepest respect, the Division Bench in *The Bengal Club Ltd. (supra)*³¹ ignored the binding precedent laid down in *Sm. Muktakesi Dawn (supra)*³⁰ on an incorrect appreciation of the law of precedents, thus, rendering the disregard of the earlier binding precedent itself vitiated by *sub silentio*, in the sense that the contrary proposition laid down by the earlier

³⁰ ***Sm. Muktakesi Dawn and others V. Haripada Mazumdar and another, reported at AIR 1988 Cal 25***

³¹ ***The Bengal Club Ltd. v. Susanta Kumar Chowdhary, reported at AIR 2003 Cal 96***

co-ordinate Bench was ignored without assigning any proper and valid reason for doing so.

129. Moreover, the doctrine of *per incuriam* also vitiates the *The Bengal Club* judgment, since the same was not only contrary to the earlier binding precedent in the *Sm. Muktakesi Dawn* judgment, which was reversed without reference to a larger Bench, but also since it was contrary to and in the teeth of the scheme of Section 107 and Order XLI, Rules 27 and 33 of the Code as well as the clear dictum in the *Bakshish Singh (supra)*³², to the effect that in the garb of exercising power under Order XLI Rule 33, the Appellate Court cannot enlarge the scope of the appeal.

130. Again, with utmost humility, in *The Bengal Club Ltd. (supra)*³³, the Division Bench proceeded on an erroneous premise, while distinguishing *Jitesh Pandey (supra)*³⁴, to the effect that the provisions of an appeal against an ex parte ad interim injunction are not governed by Order XXXIX but by Order XLI. There is no manner of doubt that an appeal is governed by Order XLI of the Code. However, Order XLI merely lays down the procedure and the contours of an appeal. As discussed above, the Appellate Court is at the tip of the pyramid of the appellate hierarchy. The powers of the Appellate Court, particularly read in the context of Order XLI Rules 27 and 33 as well as the entire Scheme of Order XLI, are restricted to the periphery and parameters of the parent provision under which the order or decree impugned before the Appellate Court was passed. Thus, what the Trial Court could not do, the

³² ***State of Punjab v. Bakshish Singh, reported at AIR 1999 SC 2626***

³³ ***The Bengal Club Ltd. v. Susanta Kumar Chowdhary, reported at AIR 2003 Cal 96***

³⁴ ***Jitesh Pandey v. Smt. Urmilata Singh and ors., reported at 1999 SCC OnLine Cal 460***

Appellate Court also cannot. Such principle is strengthened by Section 107 of the Code of Civil Procedure as well. Accordingly, it is only the parameters of Order XXXIX which provide “spiritual” guidance to the contours of an appeal against an order passed under Order XXXIX.

131. The scheme of Order XXXIX is abundantly clear, has elaborated in *Jitesh Pandey (supra)*³⁵ as well as subsequently in *Bijay Kumar Kajaria (supra)*³⁶. The three remedies available to a defendant aggrieved by an *ex parte* ad interim injunction are as follows:

- (a) Filing an application under Order XXXIX Rule 4 of the Code on the grounds enumerated therein;
- (b) Filing a written objection and canvassing the case its case at the final hearing of the temporary injunction application; or
- (c) Preferring an appeal against the *ex parte* ad interim order itself.

132. In view of the availability of the first two remedies, if an appeal is preferred, the same would be illusory to the extent that the appellants’ contentions, independent of and beyond the materials which were before the Trial Court, could not be looked into because of the limited powers of the Trial Court at that stage, which also govern the powers of the Appellate Court in an appeal against the same. The limited scope of argument in such an appeal would, thus, be that the Trial Court erred in law or in fact in granting injunction even going by the pleadings in the plaint and the injunction application.

³⁵ ***Jitesh Pandey v. Smt. Urmilata Singh and ors., reported at 1999 SCC OnLine Cal 460***

³⁶ ***Bijay Kumar Kajaria and Anr. v. Ajay Kumar Kajaria and Ors., reported at 2009 SCC OnLine Cal 2241***

133. The legislative scheme of Order XXXIX of the Code is abundantly clear, to cover all shades of grievance and provide different modes of redressal for various situations. To argue that in an appeal against an *ex parte* ad interim injunction order, the Appellate Court has co-extensive powers with that of the Trial Court even on grounds envisaged under Order XXXIX Rule 4, would render Order XXXIX Rule 4 itself redundant, since already Order XLIII provides for an appeal against an *ex parte* ad interim order and if such appeal covers grounds enumerated in Order XXXIX Rule 4 as well, there would be no necessity of the latter provision to be introduced in the statute book in the first place.

134. If an *ex parte* order is obtained by misleading the court, by suppression of material facts or otherwise, or making false statements, such conduct of the plaintiff is merely to be brought to the notice of the same court for such order, obtained by such *mala fide* act, to be varied, modified or reversed on such ground alone. On the other hand, if the defendant establishes that the *ex parte* order could not be passed even on the basis of the pleadings in the plaint and the injunction application themselves, it would be open for the defendant to prefer an appeal, where the legality and validity of the impugned order can be tested on such ground.

135. More significantly, if the Appellate Court usurps the power of the Trial Court under Order XXXIX Rule 4, it would be depriving both parties of a forum of challenge. Thus, on such count as well, if there is an allegation of misrepresentation by suppression, which is categorically covered by Order XXXIX Rule 4, such point has to be canvassed before the Trial Court, which

would be empowered to look into pleadings and materials beyond the plaint and the injunction application and adjudicate whether actually a false or misleading statement or a suppression was made by the plaintiff while obtaining the *ex parte* ad interim order, and correct its error on such count.

136. Insofar as *Ila Bhowmik (supra)*³⁷ is concerned, no independent ratio was laid down therein but it followed the ratio of *The Bengal Club Ltd. (supra)*³⁸, which, in our humble opinion, is not a binding precedent, being hit by the doctrines of *per incuriam* and *sub silentio* in view of the above discussions.

137. Thus, this Court comes to the finding that the ratio in *The Bengal Club Ltd. (supra)*³⁸, as followed in *Ila Bhowmik (supra)*³⁷ is not the correct proposition of law for the reasons given above.

(v) Whether there was any suppression of material facts by the plaintiff

138. The question which now confronts the court is whether there was suppression of relevant and material facts by the plaintiff at all.

139. As discussed above, the reliefs sought in the present civil suit are of a much wider spectrum than that in the probate court. The testamentary court's jurisdiction is limited to ascertaining whether the Will, of which a probate is sought, was executed in due process of law and proper manner and to ensure that there are no suspicious circumstances shrouding the execution of the same. However, the probate court does not have the power or

³⁷ *Ila Bhowmik v. Millennium Road Construction Pvt. Ltd.*, reported at 2011 SCC OnLine Cal 3986

³⁸ *The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96

jurisdiction to decide title or cancel instruments, the latter being vested exclusively with civil courts.

140. Hence, the reliefs sought in the civil suit could not be granted by the probate court. Thus, even if it were to be assumed that a similar ad interim injunction was refused in the probate proceeding, the same would not operate on the principle of *res judicata* to debar such prayer before the civil court, for the simple reason that the probate court would not be “competent” within the purview of Section 11 of the Code of Civil Procedure to decide the issues involved before the civil court.

141. Secondly, the premise of the reliefs sought in the civil suit are wider than the probate proceeding, the latter being only on the strength of the Will of Late N.L. Todi. In the Title Suit, apart from representing the estate of NL Todi in the capacity of Executor within the contemplation of Section 211 of the Indian Succession Act, the plaintiff/present respondent no.1 also alleges infraction of the Memorandum of Settlement dated March 13, 2009, to which most of the parties were signatories. The appellants in both the appeals herein were signatories or Confirming Parties of the 2009 document. While discussing the issue on *prima facie* case, this Court has categorically enumerated the arguable questions raised by the plaintiff in the suit on the strength of the 2009 Memorandum.

142. The third plinth of the present suit is independent of the Will or the 2009 Settlement, to the effect that the properties belonging to N.L. Todi’s estate, in general, are being siphoned off or dealt with by the defendants unlawfully.

143. Thus, even if it were to be assumed that contrary orders were passed in the probate proceeding, those would not operate on the principle of *res judicata* in the present suit, since the issues involved and reliefs sought in the civil suit are much wider and substantially different than those in the testamentary proceeding.

144. Furthermore, it cannot be ignored that no rights of the parties were adjudicated on merits and no conclusive finding was arrived at on the merits of the injunction prayer by the probate court at any point of time.

145. In fact, none of the orders of the probate court clearly dealt with or adverted to in any manner the prayer for injunction, either interim or ad interim, of the plaintiff/Executor. Even the Appellate Bench held that the impugned order directing affidavits in the probate proceeding was not a 'judgment' within the contemplation of a Letters Patent Appeal, since the rights of the parties had not been decided at all. Thus, on such grounds as well, non-disclosure of the orders passed in the probate proceeding in the plaint and injunction is immaterial and inconsequential in the present suit.

146. Moreover, the plaintiff has stated in the present suit – both in his plaint and the connected temporary injunction application - about the pendency of the probate suit and the connected application for administrator *pendente lite*. In any event, the factors to be considered in deciding an injunction application and an application for administrator *pendente lite* respectively are quite distinct and different.

147. Hence, it cannot be said that the plaintiffs/respondent no. 1 was guilty of suppression of material facts before the civil court.

148. Thus, even if the ratio of *The Bengal Club Ltd. (supra)*³⁹ was assumed to be correct and binding, in view of the plaintiff not being guilty of suppression of material facts at all, there was no error in the impugned order on such count. Hence, even independent of our decision on the issue of the validity of the proposition laid down in the said report, the appellants have failed to establish their contention of suppression of material facts by the plaintiff for obtaining the impugned order.

149. Accordingly, this issue is also decided in the negative.

CONCLUSION

150. In fine, in the light of the findings arrived at above, this Court is of the opinion that the impugned order of the learned Trial Judge does not suffer from any illegality whatsoever and ought not to be interfered with.

151. Thus, FMA No. 250 of 2026 and FMAT No. 64 of 2026 are dismissed on contest without any order as to costs, thereby affirming the impugned order, bearing Order No. 02 dated January 28, 2026 passed by the learned Civil Judge (Senior Division), Second Court at Alipore, District: South 24-Parganas in Title Suit No. 120 of 2026.

152. The pending applications in both the appeals, each being CAN 1 of 2026, are disposed of accordingly.

153. However, since we respectfully differ from the view taken by the learned Division Bench in *The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96, for the sake of judicial propriety and to finally

³⁹ ***The Bengal Club Ltd. v. Susanta Kumar Chowdhary*, reported at AIR 2003 Cal 96**

resolve the issue, the matter be referred to a Larger Bench, to be constituted by the Hon'ble The Chief Justice, for answering the following question:

“Whether The Bengal Club Ltd. v. Susanta Kumar Chowdhary, reported at AIR 2003 Cal 9, and Ila Bhowmik v. Millennium Road Construction Pvt. Ltd., reported at 2011 SCC OnLine Cal 3986, lay down the correct proposition of law to the effect that the appellate court, while hearing an appeal against an ex parte ad interim injunction order, has the power to look into additional and extraneous materials beyond the pleadings in the plaint and injunction application and the documents relied on/referred to therein”.

[N.B. Paragraph Nos. 95 to 137 of this judgment may be referred to for the discussions pertaining to the question formulated for reference]

154. Let a copy of this judgment be forwarded to the Hon'ble The Chief Justice for constitution of a Larger Bench to answer the above reference.

155. Urgent certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Supratim Bhattacharya, J.)