

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Supratim Bhattacharya

FMAT No. 424 of 2025

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CAN 1 of 2025

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CAN 2 of 2025

Kashinath Kusholi

-VS-

Santinath Kusholi and others

For the appellant : Mr. Debrup Bhattacharjee,
Steven Souradip Biswas
Mr. Siddharth Singh, Adv.

For the respondent : Mr. Gopal Chandra Ghosh, Sr. Adv.,
Mr. Rajkrishna Mondal, Adv.

Heard on : April 6, 2026.

Judgment on : April 6, 2026.

Sabyasachi Bhattacharyya, J.:

Re: CAN 2 of 2025 (Section 5).

1. The affidavit-of-service filed in Court today be kept on record.
2. Heard learned counsel for the parties.

3. We find that sufficient explanation for the delay in preferring the appeal has been furnished in the condonation application.
4. Accordingly, CAN 2 of 2025 is allowed, thereby condoning the delay in preferring FMAT No. 424 of 2025.
5. There will be no order as to costs.

Re: FMAT No. 424 of 2025
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CAN 1 of 2025

6. The appeal is admitted, to be heard on the grounds taken in the memorandum of the appeal.
7. Since a short question is involved in the appeal, we take up the appeal along with the application for hearing.
8. The appeal arises out of the rejection of an application under Order XXXIX Rule 4 of the Code of Civil Procedure filed by the defendant no.1/appellant for variation/modification/vacating an ad interim *status quo* order dated July 17, 2020 passed in favour of the plaintiff/respondent no. 1.
9. In the application under Order XXXIX Rule 4 of the Code, which was dismissed by the impugned order, the defendant no. 1/appellant took the plea that prior to the ad interim injunction being passed, the appellant had substantially

constructed a building on the suit property as per a sanction plan.

10. Not only concrete pillars were erected but also the roof was cast and about half of the construction was completed.
11. It was further alleged that the appellant would be suffering undue hardship in the event the ad interim *status quo* order was not vacated.
12. The appellant further undertook in the application under Order XXXIX Rule 4 of the Code that the appellant would not claim any equity if permitted to complete such construction.
13. Learned senior counsel appearing for the plaintiff/respondent no. 1 submits that the construction was substantially completed after the filing of the suit, which is evident from the Commissioner's reports filed in the trial court both before and after such construction.
14. Such contention is, of course, disputed by learned counsel for the appellant.
15. Be that as it may, we find from the impugned order that the same is cryptic inasmuch as the learned Trial Judge, upon quoting the proviso to Order XXXIX Rule 4 of the Code, proceeded to hold that the application under Order XXXIX

Rule 4 of the Code does not disclose “the clear picture, responsible for invoking the provision of O. 39 R. 4 of the CPC and further the prayer of the defendant no. 1 is coupled with a new construction in the residential accommodation of the defendant no. 1 which stands beyond the legislative intent of Order XXXIX Rule 4 of the Code”.

16. Prima facie, such reasoning is unintelligible.
17. That apart, the proviso to Order XXXIX Rule 4 of the Code, which applies in respect of ad interim injunction orders passed on contest, which has been quoted in bold letters in the impugned order, is not attracted to the present case at all, since the ad interim order sought to be vacated was passed ex parte, in the absence of the defendant no. 1/appellant, and not on contest. Hence, the parameters stipulated in the said proviso were erroneously applied by the learned Trial Judge
18. Accordingly, the impugned order cannot be sustained.
19. However, since the trial court did not enter into the merits of the matter, the appropriate course of action would normally be to direct the learned trial Judge to re-adjudicate the application filed under Order XXXIX Rule 4 of the Code on merits.

20. However, we are apprised that affidavits have already been exchanged in connection with the main temporary injunction application and local inspection reports have already been filed also in respect thereof. Thus, the temporary injunction is itself ready for hearing.
21. Hence, the ends of justice would be subserved if the application filed under Order XXXIX Rule 4 of the Code is heard along with the temporary injunction application itself.
22. Accordingly, FMAT No. 424 of 2025 is allowed on contest, thereby setting aside the impugned order dated May 2, 2025, passed by the learned Civil Judge (Senior Division), Arambagh, District- Hooghly, in Title Suit No. 54 of 2020 and directing the learned Trial Judge to rehear and dispose of the application filed by the defendant no. 1/appellant under Order XXXIX Rule 4 of the Code afresh on its merits along with the temporary injunction application filed by the plaintiff/respondent no. 1, as expeditiously as the business of the said court permits.
23. CAN 1 of 2025 is also disposed of consequentially.
24. There will be no order as to costs.

25. Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties at an early date.

I agree.

(Sabyasachi Bhattacharyya, J.)

(Supratim Bhattacharya, J.)