

16th June,
2025
(AK)
22

S.A. 2 of 2025
IA No: CAN 1 of 2022
CAN 2 of 2023

Sri Nemai Chandra Mondal and others
Vs.
Smt. Basanti @ Champa Kashyapi and others

Mr. Ayan Banerjee
Mr. Suman Banerjee
Mr. Ajeyo Chowdhury

...for the appellants.

Mr. Noni Gopal Chakraborty

...for the respondent no.1.

Mr. Tapas Kr. Ghosh
Mr. Tanmoy Chowdhury

...for the respondent no.2.

In Re: CAN 2 of 2023

1. CAN 2 of 2023 is an application for recall of the order dated August 11, 2022 passed by a coordinate Bench.
2. By the said order, the present second appeal was admitted without formulating any substantial question of law.
3. After hearing learned counsel for the parties, we observe that on a proper interpretation of the inter-play between Order XLII Rule 2 and Section 100 of the Code of Civil Procedure, it is mandatory for this court, while admitting a second appeal, to

formulate the substantial questions of law on which the appeal is to be heard.

4. Although the proviso to Section 100(5) indicates that nothing in sub-Section (5) shall abridge or take away the power of the court to hear the appeal on any other substantial question of law not formulated by it initially, the expression “other” clearly signifies that it is a pre-requisite that the provision of Section 100(4), which mandates the High Court to formulate a substantial question of law at the time of admission and before hearing an appeal, has to be adhered to.
5. That apart, Order XLII Rule 2 does not mince words insofar as it mandates the court admitting a second appeal to formulate the substantial question of law as required by Section 100 while admitting the appeal itself and only then direct the second appeal to be heard.
6. The expression “shall” used in Rule 2 of Order XLII is a clear indicator of the mandatory nature of the said provision.
7. Since no such question was formulated while admitting the present second appeal, CAN 2 of 2023 is allowed without costs, thereby recalling the order of admission of the appeal dated August 11, 2022.

8. On consent of parties, we take up the appeal for hearing under Order XLI Rule 11 of the Code of civil Procedure for the ends of justice.

In Re: S.A. 2 of 2025

9. The present second appeal shall be heard on the following substantial questions of law:
 - i) Whether the plaintiffs/respondents have the *locus standi* to file the suit for declaration that the defendants/appellants have unlawfully encroached on municipal land, in view of the plaintiffs, in their individual capacities, even if acting in representative capacity under Order I Rule 8 of the Code of Civil Procedure, could at best have represented the people in the locality and not the municipal authorities.
 - ii) Whether the suit is barred under Section 8A of the West Bengal Public Land (Eviction of Unauthorized Occupants) Act, 1962, which debars the jurisdiction of civil courts in matters coming within the ambit of the said statute, inasmuch as the provisions of the said Act empower the Collector to take appropriate steps for evicting persons in unauthorized occupation and demolishing illegal encroachments on public land.

- iii) Whether, in view of Section 218 of the West Bengal Municipal Act empowering only the Board of Councillors of the Municipality, upon appropriate prior proceedings having been undertaken, to direct demolition of an unauthorized encroachment, the notice issued by the Chairman of the Hooghly, Chinsurah Municipality, which was marked as Exhibit-1 in the suit and formed the foundation of the impugned decrees of both the courts below, was valid in the eye of law.
- iv) Whether the courts below committed a patent perversity in proceeding on the premise that Exhibit-1, that is, Memo No.4668/Ens-DS dated December 4, 2001, that is, the notice issued by the Chairman of the Howrah, Chinsurah Municipality, was sacrosanct and sufficiently proved the illegality of the construction made by the plaintiff/appellants, without considering or advertng to any substantial independent evidence in support of the illegality of such construction in its capacity as a civil court before coming to such conclusion.

In Re: CAN 1 of 2022

10. Affidavit-of-service filed in respect of the stay application, that is, CAN 1 of 2022, filed today in court, be kept on record.
11. It transpires therefrom that one of the proforma defendants, who had basically supported the case of the plaintiffs/respondents, has died in the meantime.
12. Since there was no effective contest from the said party, nor was any relief sought against him, and as the plaintiffs were permitted in the trial court to file the suit in representative capacity, we are of the opinion that the demise of the said party does not affect the appeal and as such we dispense with substitution of the heirs and legal representatives of the said deceased respondent, being respondent no.6.
13. Learned counsel appearing for the plaintiffs/respondents seeks an opportunity to file an affidavit-in-opposition to CAN 1 of 2022.
14. Accordingly, the plaintiffs/respondents shall file an affidavit-in-opposition to the stay application within a fortnight from date. Reply, if any, shall be filed within a week thereafter.
15. Liberty to the parties to mention the application thereafter before the appropriate learned Single

Judge having determination to hear the second appeal and connected applications.

16. There shall be stay of operation of the impugned judgment and decree as on this date till disposal of the application.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)