

08.04.2021
p.b.
Sl. No.32.

C.O. 3639 of 2018
(via Video Conference)

Roshan Ara & Ors.
Vs.
Belal Ahmed

Mr. Javed K. Sanwarwala.
.....for the petitioners.
Mr. Wasim Ahmed,
Mr. Nayeemuddin Munshi.
.....for the O.P.

The affidavit of service filed in Court today be kept with the record.

The defendants in the suit for partition have filed the instant application under Article 227 of the Constitution of India challenging an order dated June 26, 2018 passed by the Civil Judge (Senior Division) at Sealdah in Title Suit No.43 of 2017.

The opposite party herein filed a suit for partition in respect of a G+3 storied building excepting the third floor of such building. It has been specifically pleaded in the plaint that the entire third floor of the said property was transferred by the erstwhile sole owner, namely, Wali Ahmed in favour of his grand son, namely, Md. Kaif. The defendants have already filed a written statement thereby setting up a counter-claim challenging the deed of gift

executed by Wali Ahmed in favour of Md. Kaif and for cancellation of the said deed.

The defendants have filed an application under Order 1, Rule 10 of the Code of Civil Procedure praying for impleading the said Md. Kaif as a party defendant as he has acquired right, title and interest in respect of the property involved in the suit for partition. The learned trial Judge by the order impugned rejected the application for addition of party.

Being aggrieved, the defendants have preferred the instant application under Article 227 of the Constitution of India.

Mr. Sanwarwalla, the learned advocate for the petitioner contends that Wali Ahmed was the original owner of the entire G+3 storied building. He further contends that upon the death of Wali Ahmed, the entire G+3 storied structure devolved upon the plaintiff and the defendant.

The learned advocate for the petitioners contends that since a portion of the G+3 storied building is alleged to have been gifted by the erstwhile sole owner in favour of his grand son, namely, Md. Kaif, the donee is a necessary party in a suit for partition as the defendants have challenged the deed of gift in the written statement with counter-claim.

Mr. Sanwarwalla, further contends that Md. Kaif is to be added as a party in order to prevent multiplicity of litigation as the dispute concerning the entire G+3 storied building can be decided in the instant suit.

Mr. Ahmed, learned advocate for the opposite party contends that the erstwhile sole owner of the property transferred a specific portion of his property in favour of Md. Kaif and, as such, the donee is not a necessary party in the instant suit for partition.

I have heard learned advocates for the parties and perused the materials on record.

From the schedule of the plaint, it appears that the said gifted property is outside the scope and ambit of the suit for partition.

The subject matter of the instant suit for partition is the G+3 storied building excepting the entire third floor of the said building as the plaintiff contends that the entire third floor was gifted by the erstwhile sole owner in favour of the person proposed to be added as a party. The party sought to be added in the instant suit has no unity of title and possession with the plaintiff and the defendants in respect of the property mentioned in the schedule of the partition suit as it is well settled that when the sole owner transfers a demarcated portion of his property in favour of a third party, the transferee do not become a co-sharer with the transferor upon such transfer. Thus, Md. Kaif

cannot be said to be a co-sharer along with other heirs of the Wali Ahmed who are the parties to the partition suit.

The person proposed to be added as a party do not have any direct interest in the subject matter of the suit for partition. The power under Order 1 Rule 10 of the Code cannot be invoked only for the ground that a fresh litigation can be avoided. Thus, Md. Kaif cannot be said to be a necessary party in the instant suit for partition.

The order impugned does not suffer from any infirmity warranting interference under Article 227 of the Constitution of India.

Accordingly, the C.O. 3639 of 2018 is dismissed without however any order as to costs.

Urgent photostat certified copy of this order, if applied for, shall be given to the parties as expeditiously as possible.

(Hiranmay Bhattacharyya, J.)