

**IN THE CIRCUIT BENCH CALCUTTA HIGH COURT
AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

**C.O. 100 of 2024
DILIP KUMAR DAS**

Vs.

SMT. PRAN KRISHNA SAHA & ANR.

For the petitioner :Mr. Nabankur Paul, Adv.
Mr. Bablu Mitra, Adv.
Ms. Satyaki Basu, Adv.

For the Opposite Parties :Mr. Haider Ali, Adv.
Mr. Satyam Sarkar, Adv.

Heard On :23.07.2024

Judgment On :29.07.2024

Bibhas Ranjan De, J. :

1. Challenge of this revision application is the Order dated 16.02.2024 passed by Ld. Civil Judge, Senior Division Jalpaiguri, in Title Suit No. 131 of 2022 wherein Ld. Judge struck out the name of the defendants/opposite parties herein from the cause title by invoking the provision of Order 1 Rule 10(2) read with Section 151 of the Civil Procedure Code (for short CPC).
2. Background fact is that the plaintiff /petitioner herein filed a partition suit being no. Title Suit No. 131 of 2021 against 3 defendants including the opposite parties of this revisional application.
3. The partition suit was filed with all usual prayers for preliminary decree, declaration of share of the plaintiff, appointment of partition commissioner, final decree & injunction.
4. From the contents of the plaint of that partition suit it appears that plaintiff and the defendant no. 3 were absolute owners of the entire 1.33 decimal of land mentioned in the schedule to the plaint. Out of that property, both plaintiff and defendant no. 3 executed a deed of gift being no. 174/18 in favor of

defendant no. 1& 2 /opposite parties herein with specific boundaries though according to plaint case opposite parties never obtained possession of that land.

5. After filing of the partition suit, defendant no. 1 & 2/ opposite parties herein filed an application under Order 1 Rule 10(2) of the CPC dated 27.04.2023 which was disposed of by the impugned order dated 16.02.2024.

6. Ld. Judge relying on the case of ***Rabi Kumar Dass & Ors Vs. Chittaranjan Das reported 2006(4) CHN 302*** returned his finding that defendant no. 1 & 2/opposite parties herein are not the co-sharer at all and accordingly their names were struck out invoking the provision of Order 1 Rule 10(2) of the CPC.

Argument:-

7. Ld. Counsel, Mr. Nabankur Paul, appearing on behalf of the petitioner emphasized on the contents of the paragraph 8 of the plaint wherein it was stated that defendant no. 1& 2/opposite parties herein did not obtain possession over the land gifted by the plaintiff and the defendant no. 3.

8. Mr. Paul has further submitted on behalf of the plaintiff/petitioner that one application under Order 1 Rule 10(2) of the CPC was filed for inspection of the subject property but that was not considered by the Ld. Trial Judge.
9. In opposition to that, Ld. Counsel, Mr. Haider Ali, appearing on behalf of the opposite parties has strenuously contended that both the opposite parties obtained a portion of the suit property with specific boundary mentioned in the sketch map attached to the deed of gift executed by the plaintiff and defendant no. 3. It is further submitted that both the plaintiff and defendant no. 3 being absolute owners of the entire suit property executed deed of gift in respect of portion of that land in favour of the defendant no. 1 & 2/ opposite parties herein and thereby defendant no. 1 & 2 /opposite parties herein cannot be co-sharers of the property mentioned in the schedule to the partition suit.
10. In support of his contention, he relied on a case of ***Rabi Kumar Dass & Ors Vs. Chittaranjan Das*** reported in ***2006(4) CHN 302***

Analysis:-

11. Pleadings of the parties in the partition suit clearly reveal an admitted position of fact that plaintiff and the defendant no. 3 being absolute owners of the property mentioned in the schedule to the partition suit no. 131 of 2022, executed a deed of gift being no. 174 of 2018 in favour of defendant no. 1& 2/opposite parties herein, that too specifying the boundary in the schedule to the gift deed and further clarified in the sketch map annexed with the deed.
12. Though, it is case of the petitioner that defendant no. 1&2 did not obtain possession but averment of the deed of gift clearly expressed the transfer of possession of the land gifted in favour of defendant no. 1& 2/ opposite parties herein.
13. In ***Rabi Kumar Dass*** (supra) Hon'ble Division Bench of this Court observed in the paragraphs quoted below:-

“8. There is no dispute that one Alamohan Das, since deceased, the father of the defendant, was the original owner of the suit property and other properties. The said Alamohan Das in the year 1951 gifted 3 bighas 15 cottahs and 3 chittaks of land of Dag Nos. 3470, 3480, 3481, 3482 and 3483 in favour of the defendant, his son, as specifically shown in the plan annexed to the deed of gift being surrounded by red dots. The said

Alamohan Das, 10 years thereafter, sold some other properties of the same plot to the plaintiffs and thus, they became the owners in respect of their purchased property by virtue of the said deed of 1961. Once it is admitted by the plaintiffs that their predecessor Alamohan Das was the absolute owner of the property without any co-sharer and out of that property, he first gifted some portion to his son, his son cannot become a co-sharer of Alamohan Das but the defendant in fact became absolute owner in respect of the portion gifted to him. Subsequently, Alamohan Das sold some other properties to the plaintiffs and by virtue of that deed, they also became the absolute owners of those portions. Therefore, Alamohan Das had no right over the transferred portion to either the defendant or the plaintiffs by the aforesaid two deeds. When the plaintiffs acquired the property from Alamohan Das in the year 1961, the defendant was not the co-sharer of his father because the father had already gifted a part of his property to the defendant and, thus, by virtue of the purchase from Alamohan Das, the plaintiffs cannot by any stretch of imagination become the co-sharer of the defendant.

9.*The learned Trial Judge, as it appears from the records, proceeded wrongly in arriving at the conclusion that by virtue of their purchase from Alamohan Das, the plaintiffs became the co-sharer of the defendant.*

10.*It is, therefore, clear that the plaintiffs were never the co-sharer of the defendant they having purchased a definite portion from Alamohan Das at a point of time when the defendant had already acquired*

absolute title by virtue of the deed of gift executed in his favour. If according to the plaintiffs, he had not got possession of the actual area covered by their sale deeds, it was their duty to file a suit for recovery of possession from their vendor or his successors on the basis of title accrued in their favour by virtue of the sale deed of the year 1961 but a suit for partition against the defendant who became the absolute owner long 10 years ago by dint of the deed of gift executed by his father was not maintainable as he cannot be described as the co-sharer of the plaintiffs.

11.*We, thus, find that on the face of the two deeds exhibited in this case, it is apparent that the plaintiffs and the defendant are not the co-sharers of the property. The appropriate remedy of the plaintiffs lies by filing appropriate suit for recovery of possession if according to them they have not got possession of the land sold to them by Alamohan Das.*

12.*We, therefore, set aside the judgment and decree passed by the learned Trial Judge on the sole ground that the plaintiffs and the defendant were never co-sharers of the property and as such, the suit for partition was not maintainable.*

13.*We make it clear that we have otherwise not gone into the question whether the plaintiffs really got possession of the property by virtue of their purchase or whether the defendant has encroached upon any portion of the land purchased by the plaintiffs from the father of the defendant.*

14. The appeal is, thus, allowed. The judgment and decree passed by the learned Trial Judge are, accordingly, set aside.

15. In the facts and circumstances, there will be, however, no order as to costs.”

14. The celebrated judgment, referred to above, dealt with the same set of facts and returned finding with profound clarity that the person in whose favour deed of gift was executed in respect of a portion of the property by the absolute owner, cannot be considered as co-sharers of the entire property involved in a partition Suit.

15. In the aforesaid view of the matter, particularly relying on the ratio of **Rabi Kumar Dass** (supra), I am unable to distinguish the principle enunciated therein.

16. Regard being had to the above, I am also unable to interfere with the impugned order whereby name of the defendant no. 1 & 2/opposite parties herein were struck out invoking the provision of Order 1 Rule 10 (2) of CPC.

17. As a sequel, this Civil Revision Application being no. 100 of 2024 stand dismissed. No order as to costs.

- 18.** All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.
- 19.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]