

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA

Civil Revisional Jurisdictionn

Appellate Side

Present :

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 2318 of 2025

Sri Swapan Kumar Bandopadhyay @ Swapan Kumar Banerjee

-Versus-

Sanjit Kumar Mondal @ Sanjit Mondal & Anr.

For the petitioner : Mr. Purnasish Gupta
Ms. Sibangi Chattopadhyay

For the Opposite parties :

Heard On: : 08.07.2025

Judgment On: : 08.07. 2025

Hiranmay Bhattacharyya, J.

This application under Article 227 of the Constitution of India is at the instance of the plaintiff and is directed against the judgement and order dated 8th April, 2025 passed by the learned Additional District Judge, Nadia, Nabadwip in Miscellaneous Appeal No. 02 of 2024 affirming the judgement and order dated 30th January, 2021 passed by the learned Civil Judge (Junior Division), Nabadwip, Nadia in Title Suit No. 20 of 2021.

The petitioner herein filed a suit under Section 44 of the Transfer of Property Act and filed an application for temporary injunction. The learned trial judge by an order dated January 30, 2024 rejected the application under Order 39 Rule 1 and 2 of the Code of Civil Procedure. Challenging such order, the petitioner preferred an appeal being Miscellaneous Appeal No. 2 of 2024. The learned Additional District Judge, Nabadwip, Nadia by a judgement and order dated April 8, 2025 dismissed the said miscellaneous appeal. Being aggrieved by such judgement and order, the plaintiff has approached this Court by filing the civil revisional application.

The learned advocate appearing for the petitioner submits that the property is a joint family property and the opposite party no.1 is a stranger purchaser. He further submits that since the opposite party/transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, the opposite party no.1 is not entitled to joint possession or enjoyment of the property with the petitioner. In support of such contention he places reliance upon the decisions of the Co-ordinate Benches in the case of Anukul Chandra Sadhukhan Vs. Ajit Kumar Sadhukhan reported at AIR 2004 (Cal) 170 and Ashim Ranjan Das Vs. Bimala Ghosh reported at AIR 1992 (Cal) 44.

The petitioner filed the suit under Section 44 of the Transfer of Property Act. It is the specific case of the petitioner that the suit property originally belonged to one Saroj Kumar Bandyopadhyay who died leaving behind his wife, four sons and two daughters. Thereafter his wife and one of the daughters died in issue less condition for which the property was

inherited by the plaintiff along with his three brothers and one sister having $1/5^{\text{th}}$ share each. The said Saroj Kumar Bandopadhyay executed a deed of family settlement being no. 238/1980 but such deed was not acted upon. After the expiry of Saroj Kumar Bandopadhyay one deed of gift was executed being no. 199/1991 by his wife along with her three sons in favour of her another son Dilip Kumar Bandyopadhyay showing that each one of them had $1/5^{\text{th}}$ share in the suit property and they did not have more than $1/7^{\text{th}}$ undivided share at that point of time. Such deed of gift was based upon the settlement being no. 238/1980 which was never acted upon. Subsequently Dilip Kumar Bandyopadhyay gifted $1 \frac{1}{4}$ decimal in favour of Swadesh and Swapan Kumar Bandyopadhyay by way of registered gift deed being no. 451/2001. Dilip Kumar Bandyopadhyay also gifted 2.925 decimals in favour of Pinaki Ranjan Bandopadhyay by way of registered gift deed being no. 70/2005. Pinaki Ranjan Bandyopadhyay thereafter sold 2.925 decimals in favour of the proforma defendant no.2 by way of a registered sale deed being no. 1032/2005. Alpana Mukherjee, who was a daughter of Swaroj Kumar Bandyopadhyay sold her undivided share in favour of the proforma defendant no.2 by way of a registered sale deed being no. 632/2012. Swadesh Bandopadhyay gifted his undivided share in favour of the plaintiff by way of a registered deed of gift being no. 1108/2017. It is the further case in the plaint that the defendant no.1/opposite party herein is a stranger purchaser in a Hindu undivided property who purchased two decimals of land from Dilip Kumar Bandopadhyay by way of a registered sale deed being no. 99/2005.

Petitioner contended that Dilip Kumar Bandyopadhyay did not have any right over two decimals of land at the time of execution of such deed and alleging that the defendant no.1 is trying to take joint possession of the schedule property the instant suit under Section 44 of the Transfer of Property Act was filed. After filing the said suit the petitioner filed an application for temporary injunction, inter alia, praying for an order of temporary injunction restraining the defendant no.1 from taking in joint possession in the schedule property forcibly till the schedule property is partitioned either by leaps and bounds or by a decree of the court forcibly without being process of law.

The opposite party no.1 herein contested the application for temporary injunction by filing a written objection denying the material allegations contained therein. It is the case of the opposite party no.1 in the said written objection that Saroj Kumar Bandhopadhyay was the owner of 6.5 decimals of land in the suit plot and he executed a family settlement thereby transferring the suit property in favour of his four sons and such deed was acted upon and the other legal heirs of Saroj Kumar Bandopadhyay had full knowledge of the said deed. Thereafter Kamala Bandopadhyay wife of Saroj Kumar Bandopadhyay, Pinaki Bandopadhyay, Swadesh Bandopadhyay and Swapan Bandopadhyay executed a gift deed transferring their 4/5th share in favour of Dilip Kumar Bandopadhyay and accordingly Dilip Kumar Bandopadhyay became the sole owner of 6.5 decimals of the land. Thereafter Dilip Kumar Bandopadhyay sold two decimals of land with proper demarcation in favour of the principal defendant by way of a registered sale deed being no. 890/2005.

It prima facie appears from the record that the opposite party no.1 purchased two decimals of land by virtue of a deed executed in the year 2005. The petitioner herein filed the instant suit only in the year 2021. Record reveals that the property was mutated in the name of the defendant/opposite party herein in khatian no. 4572 and holding no. 188 was also created in the name of the defendant in the year 2005. It further appears from the record that a local inspection was held in respect of the suit property. The learned Advocate Commissioner, in his report, has specifically stated that there is a lane of approximately three feet to the north of the house of the plaintiff after which there is a vacant land enclosed by $\frac{3}{4}$ feet of broken wall. The said report also states that the dwelling house is to the south of the three feet wide lane.

The learned judge of the appellate court after taking note of the documents produced by the respective parties and more particularly the Commissioner's report arrived at a prima facie finding that the defendant no.1 is not claiming any right or title over the dwelling house on the suit plot but is claiming his right, title and possession over two decimals of the vacant plot on the suit property. The learned Judge of the 1st Appellate Court after taking note of the sale deed no. 890 of 2005 noted that the two decimals of vacant land at the north of the suit property has been sold out with specific demarcation.

The learned judge of the appellate court returned a factual finding that after a 3 feet wide land there is a vacant land at North as indicated in the sale deed of the defendant no.1.

Such factual finding could not be controverted by the learned advocate for the petitioner in course of hearing.

The learned judge of the appellate court was right in observing that a vacant land cannot come under the definition of dwelling house when it is separated from the house by a boundary wall.

The learned judge of the appellate court assigned cogent reasons in dismissing the miscellaneous appeal.

The Co-ordinate Bench in the case of **Anukul Chandra Sadhukhan (supra)** reiterated the proposition of law laid down in **Ashim Ranjan Das (supra)** that the possession of a portion of an undivided family dwelling house by a stranger-purchaser would not make any difference even for the purpose of keeping him out of the undivided family dwelling house. There is no quarrel to the proposition of law laid down by the Co-ordinate Bench in the aforesaid decision.

The Co-ordinate Bench in **Anukul Chandra Sadhukhan** took note of a decision of the Hon'ble Supreme Court in the case of **Dorab Cawasji Warden Vs. Coomi Sorab Warden** reported at **AIR 1990 SC 867**. In the said case the appellant therein filed a suit against the vendors i.e. the brother's wife and her sons under Section 44 of the Transfer of Property Act. The appellant's brother died intestate and his widow and his two minor sons sold their undivided one and half share in the said property to the vendee. The suit was filed on the ground that the suit property was a dwelling house belonging to the undivided family and there had not been any division of the said property at any time and the plaintiff appellant and his deceased brother were occupying different portions of the dwelling

house during their life time according to their convenience. After noting the said facts the Hon'ble Supreme Court held that the vendee a stranger to the family had no right to have joint possession or common enjoyment of the property along with the plaintiff on the basis of purchase of the undivided share. The Hon'ble Supreme Court further held that in the absence of a document evidencing partition of the suit house by metes and bounds or documentary evidence showing that the property was held by the appellant and his brother in equal undivided shares, it could be said that the plaintiff-appellant had shown a prima facie case that the dwelling house belonged to an undivided family consisting of himself and his brother.

The said decision of the Hon'ble Supreme Court in the case of Dorab Cawasji Warden (*supra*) specifically states that in the absence of any evidence to show that the property was partitioned and the parties were enjoying the joint family property a prima facie case was made out.

In the case on hand, this Court has already observed that the defendant no.1/opposite party no.1 acquired title by virtue of a sale deed executed in the year 2005 with specific demarcation.

As to whether the deed of settlement was acted upon or not cannot be decided at this stage and the same has to be decided at the time of trial on evidence. Whether Dilip Kumar Bandopadhyay was left with any share to transfer the property in favour of the opposite party no.1 also cannot be decided at the stage of injunction.

In view of the aforesaid discussion, this Court is of the considered view that the petitioner failed to make out any prima facie case to go for trial. The balance of convenience and inconvenience cannot be

said to lie in favour of the petitioner herein. The petitioner cannot be said to suffer irreparable loss and injury as the opposite party herein is in possession of the property which is separated by a boundary wall.

For such reasons, this Court is not inclined to interfere with the order passed by the learned judge of the appellate court.

Accordingly, C.O. 2318 of 2025 stands dismissed.

After this order is passed Mr. Gupta, learned advocate appearing for the petitioner prays that a direction be passed upon the learned trial judge to dispose of the suit expeditiously.

From the ordersheets appended to this application this Court finds that the records of the Title Suit No. 20 of 2021 was sent to the learned Judge of the Appellate Court and it appears from the order dated 7th March, 2025 that 4th August, 2025 has been fixed for awaiting original record. The learned Additional District Judge, Nabadwip, Nadia is requested to remit the records of Title Suit No. 20 of 2021 forthwith. Immediately after receipt of the said records, the learned Civil Judge (Junior Division), Nabadwip, Nadia is requested to make an endeavour to see that the Title Suit No. 20 of 2021 is disposed of as expeditiously as possible without granting any unnecessary adjournments to either of the parties.

It is, however, made clear that all observations made hereinbefore are only for the purpose of deciding this civil revisional application arising out of an order passed in a miscellaneous appeal from an order passed on an application under Order 39 Rule 1 and 2 of the Code

of Civil Procedure and the learned trial judge shall decide the suit on its merit.

There shall be, however, no order as to costs.

Urgent certified photocopy of this order, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(Hiranmay Bhattacharyya, J.)