

**IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)
APPELLATE SIDE**

Present :

The Hon'ble Justice Partha Sarathi Chatterjee

RVW 136 of 2021

With

CAN 1 of 2022

(SANATAN @ SUSANTA SARKAR & ORS. VS. SUMAN DUTTA & ORS.)

IN

SA 36 OF 2008

(KALYAN KUMAR DUTTA VS. SANATAN SARKAR)

For the petitioner : Mr. Rabindra Narayan Dutta,
Mr. Sibasis Ghosh,
Mr. Hare Krishna Halder.

For the Respondent : Mr. Bhudeb Chatterjee.

Heard on : 17.09.2025

Judgment on : 27.10.2025

Partha Sarathi Chatterjee, J.:-

1. This memorandum of review has been filed seeking a review of the order dated 20.04.2021, passed in Second Appeal No. 36 of 2008, along with the connected application, CAN 5 of 2019. By the said order dated 20.04.2021, the Hon'ble Court had partly allowed the second appeal, set aside the common judgment and decree passed by the First Appellate Court in Title Appeal No. 4

of 2000 and Title Appeal No. 19 of 2000 (which had been heard analogously), and restored the judgment and decree of the learned Trial Court in Title Suit No. 174 of 1981.

2. The review of the order dated 20.04.2021 has been sought primarily on the ground that, although the Hon'ble Court decided all the substantial questions of law framed at the time of admission of the appeal in favour of the respondents/petitioners, it proceeded under a misconception of law in deciding a question of fact, namely that the First Appellate Court had erred in treating defendant no. 3/appellant as a rank trespasser in respect of 5½ decimals of land in the Schedule A property, without properly ascertaining the actual possession of defendant no. 3/appellant over the nonsuit plot. It was further observed in that order that, in the absence of a local investigation of the said plot of land, the finding regarding possession was premature, and therefore, the direction for eviction was not sustainable in law.
3. Prior to delving into the nuanced labyrinth of the present controversy, it would be apposite to recount the essential facts that led to the presentation of this review petition.
4. One Sabita Sarkar (hereinafter referred to as Sabita), since deceased, instituted a suit for declaration and injunction before the learned 1st Munsif (now, redesignated as Civil Judge, Jr. Divn., 1st Court) at Barasat on 07.01.1981, registered as T.S. 14 of 1981. Shortly thereafter, on 09.01.1981, she transferred her share in the suit property to Sanatan Sarkar and two others. Due to lack of territorial jurisdiction, the plaint was returned on 24.03.1981, and on the same day, it was re-filed before the learned 2nd Munsif now, redesignated as Civil Judge, Jr. Divn., 2nd Court), Barasat, as T.S. 174 of 1981.

Subsequently, the plaint was amended to include an averment that defendant no.3, Kalyan Kumar Dutta, was in unauthorized possession of the suit property, and a decree of eviction was accordingly sought against him.

5. In the plaint, it was averred that the suit properties originally belonged to Kiran Bala Dasi, who died leaving behind two daughters, Sabita, the original plaintiff, and Nanibala. Sabita was married to Monoranjan Sarkar, and two daughters, Sunita Ghosh and Gita Rani De, the defendant numbers 1 and 2, were born of the said marriage. However, due to strained marital relations, Sabita was compelled to leave her husband and reside with her own relatives. Monoranjan entered into a second marriage during Sabita's lifetime, and their two daughters began residing with Nanibala.
6. In 1981, Sabita came to learn that her two daughters and Nanibala had executed a deed of partition among themselves in respect of the properties left by Kiran Bala, based on a false representation that Sabita had suffered civil death, as she had been untraceable for a considerable period. Nanibala also executed a will bequeathing her share of the properties in favour of Sunita. Subsequently, after demise of Nanibala, the will was probated in Misc. Case no. 181 of 1975 in the Court of 1st Munsif, Barasat.
7. In the plaint, the original plaintiff contended that the deed of partition was void ab initio and that the will was illegal. On 25.05.1979, defendant no. 3 purchased a portion of the property from Gita by virtue of a registered deed of sale. Consequently, a prayer was made for decrees of declaration and injunction, as well as a decree of eviction against defendant no. 3 from 5½ decimals of land with rooms, forming part of the suit property, branding him a rank trespasser.

8. During the pendency of the suit, Sabita passed away in 1990. Following her demise, Sanatan Sarkar and two others, in whose favour she had transferred her share in the suit property, filed an application under Order 22 Rule 10 of the Code of Civil Procedure on 22.02.1990, which was allowed on contest on 07.07.1993.
9. The suit was primarily contested on two grounds. Firstly, that Sabita, having transferred her share to the substituted plaintiffs, could not lawfully continue the suit, rendering it non-maintainable. Secondly, it was alleged that Sabita was not the lawful wife of Monoranjan nor the mother of defendant nos. 1 and 2, but an imposter allegedly introduced by Monoranjan to usurp the properties of Kiran Bala. Defendant no. 1 had earlier instituted an eviction suit, T.S. 538 of 1979, against Monoranjan, wherein he also claimed that Sabita had been untraceable for a considerable period. The defendants placed strong reliance on this statement of Monoranjan.
10. Ultimately, the suit was decreed on contest, rejecting the contentions regarding Sabita's identity as an imposter and the issue of maintainability. The learned Trial Court declined to declare the will and/or the grant of probate as illegal, holding that it lacked the jurisdiction to make such a declaration. However, the plaintiffs were declared owners of an undivided half share in the property described in the decree. Although the learned Trial Court held defendant no. 3 to be a rank trespasser in respect of the suit property, it declined to grant a decree of eviction against him.
11. To remove any ambiguity, it would be appropriate to reproduce the relevant portion of the judgment passed in T.S. 174 of 1981, which reads as follows:

“that the suit be and the same is decreed with costs on contest declaring that the plaintiffs are owners in respect of 8 annas share or undivided ½ share in the property mentioned in Schedule “A” of the plaint being 17 sataks of Dag no. 2521, Khatian 3787; 11 sataks of Dag No. 2520/9238, Khatian 3786; Dag no. 2522/9242, Khatian 206 measuring 4 sataks of land all in Mouza- Halisahar.”

12. Challenging the legality of the decree, both the plaintiffs and defendant no. 1 preferred two separate appeals, registered as T.A. 4 of 2000 and T.A. 19 of 2000, respectively. Both appeals were disposed of by a common judgment and decree dated 10.03.2005, which is reproduced below:

“That the T.A. 04 of 2000 is hereby allowed on contest with costs against the respdt. Nos. 1 and 2 and exparte against the ors. without costs. The judgment of Ld. court below is hereby modified to the extent that plffs. are entitled to get recovery of possession of the suit properties to the extent of 5 ½ decimals now under possession of respdt. No. 1 of T.A. 4/00. The said Kalyan Kr. Dutta is directed to quit and vacate the suit property within 3 months from this date.

The T.A.no. 19 of 2000 is hereby dismissed on contest with costs.

The Judgment of ld. court below is affirmed. The petition U/O 41 rule 27 filed by Sunita Ghosh is hereby rejected.”

13. Aggrieved by the judgment and decree dated 10.03.2005, Mr. Dutta, defendant no. 3/appellant, preferred a second appeal, which was subsequently registered as S.A. 36 of 2008. The appeal was admitted for hearing on the following three substantial questions of law:

“I. The suit having been admittedly filed by one Sabita Sarkar on March 24,1981 and she having already transferred her interest in the property in favour of the present respondents on January 09, 1981, whether the learned courts below committed substantial error of law in holding that the suit originally filed by Sabita Sarkar was maintainable.

II. Whether the learned courts below committed substantial error of law in allowing an application under order XXII Rule 10 of the Code of Civil Procedure filed by the present respondent although he is not the transferee pendente lite, he having acquired interest in the property prior to the institution of the suit.

III. Whether the learned courts below committed substantial error of law in passing a decree for recovery of possession notwithstanding the fact that even after the order allowing amendment of plaint the added plaintiff did not act in terms of Order VI Rule 18 of the Code within the time fixed therein.”

14. The second appeal was disposed of by an order dated 20.04.2021. A perusal of the order dated 20.04.2021 reveals that the question nos. I and II were answered in favour of the plaintiffs/respondent nos. 1 to 4 on the reasoning that, upon the demise of Sabita, the application filed by plaintiff nos. 1 to 4 under Order 22 Rule 10 read with Order 1 Rule 10 of the Code was allowed on contest by an order dated 7.7.1993. Neither defendant nos. 1 and 2 nor defendant no. 3 challenged the said order; rather, the present plaintiffs were permitted to continue with the suit. Therefore, at the stage of second appeal, the issue of maintainability of the suit cannot be agitated by the

appellant in view of the settled position of law that even an erroneous concurrent finding of both the Courts below cannot be interfered with in second appeal. This is notwithstanding the fact that the original plaintiff, having sold the suit property, had no legal right to maintain and continue the suit till her death on 22.02.1990. In support of such reasoning, reliance was placed on the decision reported in *2005 (3) ICC 640 (SC) (Vithalbhai Pvt. Ltd. vs. Union of India)*.

15. In the order dated 20.04.2021, while dealing with question no. III, it was held that the order of amendment passed by the learned Trial Court, treating the amendment application as part of the plaint, does not give rise to any substantial question of law for non-compliance with Order 6 Rule 18, since the application under Order 6 Rule 17 itself was incorporated into the plaint, notwithstanding that Rule 18 of Order 6 stipulates that where leave to amend is obtained but the amendment is not carried out within the time prescribed, or within fourteen days from the date of the order, it cannot be made thereafter unless the time is extended by the Court.
16. In the order dated 20.04.2021, the Court observed that defendant no. 3/appellant, Mr. Kalyan Kr. Dutta, had sought permission to obtain water and electricity connections for his property bearing plot no. 2510/9238 and consistently claimed possession over the said plot, whereas the decree passed by the learned Trial Court related to plot nos. 2521, 2520/9238, and 2522/9242. The Court held that without a proper survey to ascertain the exact plot in possession of defendant no. 3, it could not be determined whether he occupied any part of the suit property. It was further observed that defendant no. 3 had purchased a non-suit plot by virtue of the deed marked Ext. E, and

accordingly, the direction for his eviction from the suit property was held to be unsupported by evidence.

17. In light of the above, the plaintiffs/respondent nos. 1 to 4 preferred the present application for review, contending that the order dated 20.04.2021 ought to be modified, as it held that the legal heirs of defendant no. 3/appellant (since deceased) could not be evicted without a local investigation. It was urged that such finding is contrary to the observation of the learned Trial Court that defendant no. 3/appellant was a rank trespasser in respect of the suit property, particularly when he had not challenged that finding. It was further contended that the said observation in the order dated 20.04.2021 also runs contrary to the concurrent finding that defendant no. 3 was in possession of the suit property, pursuant to which the learned First Appellate Court had directed him to quit and vacate the same.
18. Mr. Dutta, learned Advocate appearing for the respondent/petitioner, submitted that the expression "*sufficient reason*" as employed in Order 47 Rule 1 of the Code of Civil Procedure, 1908 (for short, *the Code*), is broad enough to encompass a misconception of fact or law by the Court. He emphasised that, in the present case, although all the substantial questions of law were decided in favour of the respondent/petitioner, the Hon'ble Court, while disposing of the second appeal, entered into a question of fact, namely whether defendant no. 3/appellant was in possession of the nonsuit plot of land, and held that such question could not be resolved without conducting a local inspection. As a result, the Court upset the judgment and/or order of the First Appellate Court directing eviction of defendant no. 3 from the said plot, thereby causing serious prejudice to the respondent/petitioner.

19. Mr. Dutta argued that a Court should ordinarily confine itself to the substantial questions of law framed at the time of admission of the appeal. However, in the present case, the Hon'ble Court transcended that limit by entering into issues beyond those questions, without formulating any additional substantial question of law. According to him, this amounts to a misconception of law, and therefore squarely falls within the ambit of "*sufficient reason*" as contemplated under Order 47 Rule 1 of the Code.
20. Mr. Dutta further argued that the provisions of Order 47 of the Code do not bar the Court from examining any document which, despite due diligence, could not be produced before the Courts below, in order to ascertain whether such a document would have had a bearing on the final outcome of the second appeal. He submitted that the Court, upon considering such material, could have framed an additional substantial question of law and decided the issue accordingly. However, without doing so, the Court misdirected itself in setting aside the direction of the First Appellate Court regarding the eviction of defendant no. 3/appellant from the plot of land. He prayed for modification of the order dated 20.04.2021 by deleting the findings that defendant no. 3/appellant was not a rank trespasser in respect of the suit property and that the direction of the First Appellate Court upon defendant no. 3/appellant was unsupported by any evidence.
21. To invigorate his submissions, Mr. Dutta cited the decisions, reported at (2005)4 SCC 741 (*Board of Control for Cricket in India & Ors. vs. Netaji Cricket Club & Ors.*), (2019) 3 SCC 687 (*Yatindra Kumar Agarwal & Ors. vs. Mukund Swarup & Ors.*), (2016) 13 SCC 135 (*Chairman and Managing Director, Central Bank of India & Ors. vs. Central Bank of India SC/ST*

Employees Welfare Association & Ors.), 2023(3) ICC (Karn) 529 (*Rajugowda & Ors. vs. Shantakka & Ors.*), 2023 (1) ICC (SC) 167 (*Raman (D) by Lrs. Vs. R. Natarajan*), (201) 13 SCC 216 (*Municipal Committee Hoshiarpur vs. Punjab State Electricity Board & Ors.*), AIR 1999 SC 864 (*Dayanoba Bhaurao Shemade vs. Maroti Bhaurao Marnor*), AIR 1997 S 2517 (*Kshitish Chandra Purkait vs. Santosh Kumar Purkait & Ors.*), (2002) 6 SCC 16 (*Dhannalal vs. Kalawatibai*) & AIR 2025 SC 1172 (*Maharastra State Road Transport Corpn. Vs. Mahadeo Krishna Naik*) & 2025 (2) ICC (SC) 126 (*Rashmi Kant Vijay Chandra & Ors. vs. Bajinath Chowbey & Co.*).

22. In rebuttal, Mr. Chatterjee, learned Advocate representing the opposite parties/appellants, argued that the Court of review exercises only limited jurisdiction, strictly confined by the express language of Order 47 Rule 1 of the Code. He reiterated the well-settled proposition of law that a review is not an appeal in disguise, and that under the guise of a review, no issue can be re-agitated nor can the Court be invited to rehear the entire matter or entertain any new issue.
23. Mr. Chatterjee argued that the expression “sufficient reason” must be interpreted by applying the principle of *ejusdem generis*. He contended that the words “any other sufficient reason” are to be understood as referring to reasons that are at least analogous to those specifically mentioned immediately before, namely, excusable failure to bring new and important matters to the notice of the Court, or an error apparent on the face of the record.
24. He claimed that in the present case, the petitioner has not established any such ground to seek review of the order dated 20.04.2021. He contended that

an erroneous decision cannot be corrected by invoking the provisions of Order 47 Rule 1 of the Code. He further argued that the Court, while dealing with a second appeal, is not without the power to rectify any error committed by the First Appellate Court. He defended that order dated 20.04.2021 by contending that although appellant no. 3 was in possession of the non-suit plot, the First Appellate Court nevertheless passed an order directing the eviction of defendant no. 3 from that plot.

25. He contended that the question of whether the Court exceeded its jurisdiction by deciding a question of fact while dealing with the second appeal should be raised in a regular appeal and not through proceedings under Order 47 Rule 1 of the Code. He argued that even if, for the sake of argument, the order under review was erroneous, such error can only be corrected by the appropriate appellate forum through a properly filed appeal and not by way of a review petition.
26. In support of his contention, he relied on the decisions, reported *at (2000) 6 SCC 224 (Lily Thomas etc. vs. Union of India & Ors.)*, *2023 SCC OnLine Cal 4836 (Eva Seth vs. Bank of Maharashtra)*.
27. Section 114 and Order 47, Rule 1 of the Code of Civil Procedure, 1908, deal with the right of an aggrieved party to obtain a review of a decree, order, or judgment, and prescribe the procedure for such a remedy, respectively. A Court can be invited to review its judgment only on three grounds: (i) the discovery of new and important matter or evidence, which, after exercising due diligence, was not within the applicant's knowledge or could not have been produced at the time the decree was passed or the order made; (ii) a

mistake or error apparent on the face of the record; or (iii) any other sufficient reason.

28. As noted earlier, in the present case, this Court has been invited to review the order dated 20.04.2021 on the ground that, although all the substantial questions of law framed at the time of admission of the appeal were decided in favour of the plaintiffs/respondent nos. 1 to 4, the Court, by a misconception of law, exceeded its jurisdiction by entering into a question of fact and observed that the defendant no. 3/appellant was not a rank trespasser in respect of suit property, and consequently held that the direction of the First Appellate Court was unsupported by evidence, without formulating any corresponding question of law and such an order can be reviewed on the ground of “any other sufficient reason”.

29. In the decision of Lily Thomas (*supra*) (SCC Para 52), it was observed as follows:

“The dictionary meaning of the word ‘review’ is the ‘the act of looking, offer something again with a view to correction or improvement’. It cannot be denied that the review is the creation of a statute. This Court in *Patel Narshi Thakershi v. Pradyumansinghji Arjunshinghji* [(1971) 3 SCC 844], held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also no an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. *Law has to bend before justice. If the Court find that the error pointed out in the review petition was under a*

mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in a miscarriage of justice nothing would preclude the Court from rectifying the error.”

30. In the decision of BCCI vs. Netaji Cricket Club (supra), it was ruled that the words ‘sufficient reason’ in Order 47 Rule 1 of the Code is wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine “*actus curiae neminem gravabit*’.
31. Therefore, if the Court finds that, due to any of the reasons set out in Order 47 Rule 1, the earlier judgment would not have been passed, and allowing the order sought to be reviewed to stand would result in a miscarriage of justice, nothing would prevent the Court from rectifying the error. The order can thus be recalled and/or modified, since no one should be made to suffer due to an act of the Court.
32. Indisputably, after the amendment in 1976, the scope of a second appeal has been significantly curtailed. Following the amendment, a second appeal is entertainable only on a substantial question of law. A judgment passed without the formulation of such a question is patently illegal. Section 100 mandates that a second appeal shall be heard on the question so formulated. However, it is open to the High Court to reframe a substantial question of law, frame a substantial question of law afresh, or hold that no substantial question of law is involved at the time of hearing the second appeal. Nevertheless, the reversal of a judgment and decree passed in appeal by a subordinate court under Section 100 of the Code is impermissible without formulating a

substantial question of law and deciding it. A useful reference may be made to the decision, reported at (2011)9 SCC 684(*Umrkshan vs. Bismillabi*).

33. The Code does not define the phrase “substantial question of law.” The term “substantial,” as qualifying “question of law,” denotes something of substance, essential, real, significant, or of considerable importance. It is to be understood in contrast with matters that are merely technical, inconsequential, or academic. Accordingly, a substantial question of law is said to arise where the findings of subordinate courts are perverse, not supported by evidence on record, or result from non-application of mind.
34. In the case at hand, admittedly, the order dated 20.04.2021 reversed the findings of the learned Trial Court that the defendant no.3/appellant was rank trespasser in respect of suit property and it also reversed the findings of First Appellate Court that the defendant no.3/appellant was in possession of the suit property and set aside the order of the First Appellate Court directing the defendant no.3/appellant to quit and vacate the suit property without formulating the a substantial question of law.
35. At this junction, it would be apt to reproduce the provisions of Section 103 of the Code which empowered the High Court to determine the issue of fact, which reads as follows:

“103. Power of High Court to determine issue of fact. - in any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal, -

(a) Which has not been determined by the lower appellate court or both by the Court of first instance and the lower appellate court, or

(b) Which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in Section 100.

36. Therefore, if it appears that any issue of fact has not been determined by lower appellate court or both by the Court of first instance and the lower appellate court or that issue has been wrongly determined by such court or courts, then only, the High Court dealing with a second appeal, can enter into a question of fact.
37. It is condign to note that the word 'record' employed in the Order 47 Rule 1 cannot be restricted only to the judgment or the order but the entire material available on record. In the decision of Maharashtra State Road Transport Corporation (supra), it was held that Or. 47 permits the Court to look into any document which not be produced by party despite due diligence to ascertain as to whether said document had such intrinsic worth that if the same had been produced, outcome could have been different.
38. In the present case, the findings of the Court on the three substantial questions of law have not been challenged by the appellants/opposite parties in any forum. Their interest lies in protecting the rights derived from the registered deed of sale dated 25.05.1979, marked as Ext. E, and their possession of the plot purchased from Gita Rani De under Ext. E. Accordingly, the dispute now centers on a question of fact: whether defendant no. 3/appellant, and after his demise, his legal heirs, are in possession of any part of the suit property or a non-suit plot, and whether the findings of the learned Trial Court that defendant no. 3 was a rank trespasser and the direction of the First Appellate Court to quit and vacate the suit property were unsupported by evidence.

39. In the judgment of the learned Trial Court, regarding eviction of the defendant no.3/appellant, following observation was made:

“In the Sale deed dated 25.5.79 being Exhibit-“E” Gita Rani transferred properties to Kalyan Kr. Dutta. The 05 ½ sataks of land in Dag no. 2510/9238 was allotted to Gita Rani in the partition Deed dated 2.6.72 as mentioned in Schedule “Kha’ of the said Deed. Partition Deed itself being void Gita Rani had no right to transfer 05 ½ sataks mentioned to the Defendant no. 3.

However, property purchased by the Defendant no. 3 does not tally with the schedule mentioned property of the same and as such any declaration in respect of same is reduldation.

Plaintiffs have prayed for recovery of possession from the defendant no. 3 in respect of his illegal possession in the suit property.

By way of amendment of plaint, it was stated that Kalyan Kr. Dutta is required to be evicted from 05 ½ decimals of land out of the suit property in respect of which his status is not better than that of a trespasser.

It is true that the purchase deed of Kalyan Kumar Dutta does not substantiate his ownership or any right or title over the suit property, he having purchased separate Dag Nos. His occupation of the suit property is nothing better than that of a trespasser. But plaintiffs have not specified which .05 ½ decimals of land he is occupying unlawfully in the suit property. Nor is the plaintiff entitled to recover possession by eviction of the defendant no. 3 as because he being owner in respect of 8 annas share or undivided ½ share of the suit property cannot

claim eviction from any portion of the suit property because prior to partition it cannot be ascertained which portion of the suit property would fall in his share so as to entitle him to seek eviction when the defendant no. 1 the owner of the other half is silent about such eviction. So at this point of time Kalyan Kr. Dutta cannot be evicted by plaintiffs and possession cannot be recovered by plaintiff from him.”

40. Therefore, on perusal of the relevant portion of the judgment of the learned Trial Court, it appears that the learned Trial Court held that plot no. 2510/9238, a non-suit plot, was allotted to Gita Rani in the partition deed dated 2.6.1972, but that deed is void, and Gita Rani had no right to transfer 5½ sataks to defendant no. 3, Mr. Dutta. The Court further observed that Mr. Dutta was in possession of the suit property, but his possession was no better than that of a trespasser. However, the learned Trial Court declined to order his eviction on the ground that, unless the joint property is partitioned, a co-sharer cannot seek a decree for eviction of an unlawful occupier.

41. On the self-same issue, the findings of the learned First Appellate Court are as follows:

“Now it further appears, that here in this case, the plffs. also come with a prayer for recovery of possession of the properties to the extent of 05 ½ decimals. The suit properties i.e., the same 5 ½ decimal now is in under the possession of Kalyan Kr. Dutta. The ld. court below is inclined to accord the prayer of the plffs. on the ground that the plffs. only became the owner to the extent of undivided half share. He further observed that since the properties has not been partitioned the plffs. are not entitled to get the relief as prayed for. In this respect, I am of the view that like Sabita Sarkar, Nanibala also had

no authority to alinate any property more than that of their half share. The ld. court below observed that the said Kalyan Kr. Dutta is a rank trespasser. The ld. Advocate for the plff/repdt./applt. in this regards refers three decisions reported in 2000 WBLR Cal. Page 313 and 92(1) CHN page 42 and AIR 2000 Cal page 53. It is undoubtedly true that the plffs. are not the owner 16 annas of the suit properties. It is also true that the suit properties are not partitioned.

Considering the fact I am of the view that every co-sharers is the owner of every inch of the undivided property. The decision reported in AIR 2001 Cal page 53 observed that jurisprudentially it is not correct to say that the co-owner of a property is not its owner. He owns every part of the composit property along with ors. and it can not be said that he is only a part owner or fractional owner of that property. The position will be changed when partition takes place. So, the decision made it clear that given circumstances the plffs. are entitled to recover of possession. Furthermore, the rank trespasser can not live peacefully and co-exist with real owner. Court can not indulge the wrong-doer and in order to eradicate the multiplicity of proceeding and to shorten the litigation I am of the view that plffs. should get the order of recovery of possession as prayed for. The observation in this respect of the ld. court below is not sustainable.”

42. It is clear from the concurrent findings of both the Courts below that Kalyan Kr. Dutta was in occupation of 5½ decimals of the suit property as a rank trespasser. The learned Trial Court further held that Gita Rani transferred the property to Kalyan Kr. Dutta by virtue of the deed of sale dated 25.5.1979, marked as Exhibit “E.” The 5½ sataks of land in Dag No. 2510/9238 had been allotted to Gita Rani under the partition deed dated

2.6.1972, as mentioned in Schedule “Kha” of the deed. Since the partition deed was void, Gita Rani had no right to transfer the land to defendant no. 3. While the learned Trial Court held that a co-sharer cannot seek eviction of an unauthorized occupier before partition, the learned Appellate Court reversed this finding, holding that a co-sharer may maintain an action for eviction even prior to partition. It would not be out of context to mention that such finding of the learned Trial Court has not been upset by the First Appellate Court.

43. It is a well-settled proposition of law, established in a catena of decisions, that concurrent findings of fact by the trial court and the first appellate court cannot ordinarily be disturbed by a second appellate court, particularly without framing any substantial question of law. However, the order dated 20.04.2021 set aside the concurrent finding that defendant no. 3/appellant was in occupation of 5½ decimals of the suit property without formulating any question of law on the issue. In view of this, I find merit in the submission of Mr. Dutta. Consequently, for this reason, which qualifies as a “sufficient reason” within the meaning of Order 47 Rule 1 of the Code, the order dated 20.04.2021 requires modification.

44. It is well-settled that when a court entertains a review application and decides to partly recall or modify its order, it may do so by setting aside only the defective portion while leaving the rest intact. The court can amend the specific part containing an error without disturbing its other findings. It may also permit a re-hearing limited solely to the issue found to be erroneous. The power of the court under Section 114 and Order 47, Rule 1 of the CPC to correct its own errors is thus flexible enough to allow for a partial recall of an order. This approach ensures that a correct judgment need not be set aside in

its entirety merely to rectify a single mistake. Accordingly, without disturbing the findings on the three substantial questions of law, the determination regarding the status of possession of Defendant No. 3 over the suit property and his eviction therefrom can be modified in the exercise of review jurisdiction.

45. There is no scintilla of doubt regarding acceptability of the precedent set in the decisions cited by Mr. Chatterjee on behalf of the opposite parties; however, they do not assist the opposite parties in the factual context of this case.
46. Accordingly, for the reasons and discussions set out in the foregoing paragraphs, the order dated 20.04.2021 is modified by deleting the observations therein to the effect that, without conducting a local and/or survey investigation to ascertain the portion of the suit property in occupation of defendant no. 3/appellant, and upon his demise, by his legal heirs, they cannot be considered rank trespassers or evicted from the suit property. Further, the portion of the order dated 20.04.2021 that set aside the judgment and decree of the First Appellate Court regarding the eviction of defendant no. 3/appellant from 5½ decimals of land in the suit plot is also deleted. All other portions of the order dated 20.04.2021 remain unaltered.
47. With these observations and order, this petition for review and its connected application are, thus, disposed of; however, without any order as to the costs.

(Partha Sarathi Chatterjee, J.)