

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

C.S. No. 90 of 2012

Rabindra Kumar Mehra

Versus

Tara Chand Mehra & Ors.

Mr. Abhrajit Mitra, Sr. Adv.

Mr. Satadeep Bhattacharya

Ms. Sonia Sharma

... For the plaintiff

Mr. Lalratan Mandal

... For the defendant No.1

Mr. Sankarsan Sarkar

Mr. Aditya Kanodia

Ms. Shreya Trivedi

... For the defendant No.2

Mr. Aniruddha Chatterjee, Sr. Adv.

Mr. Rahul Karmakar

Ms. Papiya Roy

... For the defendant No.3 series

Mr. Rajib Ray
Ms. Oishanee Ghosh
Mr. Debashis Halder

... For the defendant nos. 4 and 5

Hearing Concluded On : 22.04.2025

Judgment on : 19.06.2025

Krishna Rao, J.:

1. The plaintiff has filed the suit for preliminary decree and/or final decree for partition of the premises No.13, Rabindra Sarani, Kolkata- 700 073 as described in Schedule-B by metes and bounds or in the alternative, by sale and division of the sale proceeds in accordance with the shares of the parties and for appointment of Commissioner for partition of the suit premises.
2. The plaintiff, namely, Rabindra Kumar Mehra, the defendant no.1 Tara Chand Mehra, the defendant no. 2 Ramesh Kumar Mehra and original defendant no.3 Indra Kumar Mehra (now deceased) are brothers. The defendant no.4 Rajesh Kumar Mehra and the defendant no.5 Rakesh Kumar Mehra are the sons of Tilak Raj Mehra who was also the brother of the plaintiff and the defendant nos.1, 2 and 3. During pendency of the suit, the original defendant no.3 Indra Kumar Mehra died leaving behind his wife and two sons, namely, Smt. Sheila Mehra, Sanjeev Mehra and Pawan Mehra who have been substituted as defendant nos. 3B, 3C and 3D respectively.

3. CASE OF THE PLIANTIFF:

- a.** On 25th November, 1966, the plaintiff along with the defendant nos.1, 2, Tilak Raj Mehra (since deceased) and mother of the plaintiff, namely, Roop Rani Mehra purchased the suit property. After purchase of the suit property all have taken possession of the suit property. The suit property consist of ground plus three storied building and its 1st, 2nd and 3rd floor of the building being used for residential purpose and ground floor has been let out for commercial purpose.
- b.** The mother Roop Rani Mehra by way of gift deed dated 6th March, 1972, transferred her right, title and interest in the suit property in favour of her son, namely, Indra Kumar Mehra (original defendant no.3). The five brothers by a registered deed of gift dated 18th February, 1974, gifted total 1/6th share in the suit property out of their 1/5th share each to their father Ram Prasad Mehra. It was agreed between all five brothers that the father's 1/6th share in the suit property would be vest upon mother Roop Rani Mehra.
- c.** Mother Roop Rani Mehra executed a Will on 21st August, 1987 wherein she claimed to be 1/6th share holder of the suit property and probate was granted to the said Will on 11th August, 1997. It is also the case of the plaintiff that a family arrangement was recorded in the meeting dated 6th October, 1976 and a partition suit was also filed being Suit No. 710 of 1991 with respect to the

suit property and other properties but none appeared in the said suit and the suit was dismissed on 10th May, 1994 as default. Even after allotment of some parts of the premises at the meeting of the five brothers held on 6th October, 1996, no partition of the suit property was done. When the plaintiff approached for partition of the suit property, the defendants failed to come forward for amicable partition of the suit property and thus the plaintiff has filed the present suit.

4. CASE OF THE DEFENDANT NOS. 3B, 3C and 3D:

- a.** The defendant no. 3 series raised the issue with regard to the maintainability of the suit on the ground that the suit is barred by non-joinder of parties. It is the case of the defendant nos. 3 series that the plaintiff has not made the other joint owners of the suit property as party to the instant suit as they are the necessary parties to the suit.
- b.** By a Deed of Conveyance dated 25th November, 1996, the mother Roop Rani Mehra, Tilak Raj Mehra (sinec deceased), Tara Chand Mehra, Ramesh Kumar Mehra and Rabindra Kumar Mehra purchased the suit property in equal shares. By a registered deed of gift dated 6th March, 1972, the mother Roop Rani Mehra bequeathed her undivided 1/5th share in favour of her son Indra Kumar Mehra (the original defendant no.3) as Karta of his Hindu

Joint Family consisting of himself and his son Raj Kumar Mehra and his wife Smt. Sheila Mehra.

- c.** By virtue of Deed of Conveyance dated 25th November, 1966 and the Deed of Gift dated 6th March, 1972, the plaintiff and the defendants are all jointly seized and possessed their respective shares of the suit property but the plaintiff failed to implead Smt. Sheila Mehra, wife of the defendant no.3 as a party to the suit though by virtue of Deed of Gift dated 6th March, 1972, Smt. Sheila Mehra is jointly entitled to the $\frac{1}{5}$ th share in the property along with the defendant no.3 (original) in his capacity as Karta if Hindu Undivided Family in the suit property.
- d.** The five brothers by a registered Deed of Gift dated 18th March, 1974 gifted in total $\frac{1}{6}$ th share in the said property out of the respective $\frac{1}{5}$ th share each to their father Late Ram Prasad Mehra. After his death all his heirs being seven sons, two daughters and his wife became entitled to an undivided $\frac{1}{10}$ th of undivided $\frac{1}{6}$ th share. But apart from the five brothers, none claimed any interest in the property. The other two brothers and two sisters were not interested in the property, the other two brothers and two sisters were not interested in such a small fraction of the suit property and the five brothers always treated the property as each being entitled to an undivided one fifth share in the property.

- e.** The mother Roop Rani Mehra died on 25th September, 1987, leaving a Will dated 21st August, 1987 wherein under, out of the seven sons and two daughters, only five sons, namely, Tilak Raj, Tara Chand, Ramesh Kumar, Indra Kumar, Rabindra Kumar and one daughter Usha Seth were named as beneficiaries of the deceased Roop Rani Mehra in respect of various movable and immovable properties. In the Will, the mother bequeathed her undivided 1/6th share in the suit property to her five sons, namely, Tilak Mehra, Tarachand Mehra, Ramesh Mehra, Indra Kumar Mehra and Rabindra Kumar in equal share.
- f.** On 6th October, 1996, 6th August, 1996 and lastly on 23rd May, 1998, a family settlement agreement was entered between five brothers in order to better enjoyment of the suit premises. In the deed, it was agreed that the portion as demarcated in the deed would be used, enjoyed and entitled by the parties in the manner set out and the same would be binding upon the heirs of the respective parties. As per terms of the agreement, the third floor of the premises was vacated by other brothers for the exclusive use of the original defendant no.3 and the original defendant no.3 is enjoying the same throughout without any objection from any corner.
- g.** The original defendant no.3 in terms of the agreements with consent of other brothers had undertaken repair the premises at his own expenses to ensure that no dangerous situation further

would arise. The original defendant no.3 also number of occasions, had to clear unpaid dues of property tax to the Municipal Corporation as the plaintiff and the other defendants failed to pay the said tax.

- h.** The original defendant no.3 in the written statement set up, a Counter Claim praying for decree for a sum of Rs. 11,93,935/- being the expenses incurred by the original defendant no.3 along with interest at the rate of 12% per annum till realization and further decree of permanent injunction restraining the plaintiff and other co-sharers from disturbing the possession of the original defendant no.3.

5. CASE OF DEFENDANT NO. 2, 4 AND 5:

- a.** The defendant nos. 2, 4 and 5 have supported the case of the plaintiff and prayed for decree.

6. SUBMISSIONS ON BEHALF OF THE PLAINTIFF:

- a.** Mr. Abhrajit Mitra, Learned Senior Advocate representing the plaintiff submits that the plaintiff through his witness being P.W.1 has proved the undivided shareholding of the brothers in respect of the suit properties. He submits that the D.W.1 in the course of re-examination had admitted his shareholding in respect of the suit property i.e. 1/5th share each of the parties.

- b.** Mr. Mitra submits that the D.W.2 for the defendant nos. 4 and 5 in course of his cross-examination have not only admitted that the undivided share of the defendant no.4 and the defendant no.5 but have also agreed that the suit property can be partitioned on the basis of such shares.
- c.** Mr. Mitra submits that the Deed of Conveyance dated 25th November, 1966 by which the suit property was purchased by the plaintiff along with Tilak Raj Mehra, the defendant no.1, the defendant no.2 and mother Roop Rani Mehra (since deceased) have been admitted by the defendants in their respective written statements. He submits that by virtue of the Deed of Conveyance dated 25th November, 1966, the plaintiff, the defendant no.1, the defendant no.2, Tilak Raj Mehra (since deceased) and Smt. Roop Rani Mehra (since deceased) became the owners of undivided 1/5th share each and interest in the suit property.
- d.** Mr. Mitra submits that by way of Deed of Gift dated 6th March, 1972, the mother Smt. Roop Rani Mehra (Since deceased) had transferred her right, title and interest in respect of the suit property in favour of the plaintiff, Indra Kumar Mehra (since deceased, the original defendant no.3) as Karta of Hindu Undivided Family and to the Sheila Mehra wife of Indra Kumar Mehra (defendant no. 3B herein). The Hindu Undivided Family comprises of Indra Kumar Mehra, his wife and two sons. He submits that the Deed of Gift dated 6th March, 1972, has been disclosed by the

original defendant no.3 and made part of the Judge's Brief of Documents.

- e. Mr. Mitra submits that from the two registered documents, it is evident that the plaintiff, Tilak Raj Mehra (since deceased, father of the defendant nos. 4 and 5), the defendant no.1, the defendant no.2 and Indra Kumar Mehra (since deceased, husband of the defendant no. 3B and father of the defendant nos. 3C and 3D) became the joint owners of the suit property, having undivided 1/5th share each.
- f. Mr. Mitra submits that as to the alleged Deed of Gift dated 18th February, 1974 from the five co-owners, i.e. the plaintiff, the defendant no.1, the defendant no.2, the original defendant no.3 and Late Tilak Raj Mehra to their father Late Ram Prasad Mehra, none has disclosed the said document. He submits that if at all the five co-owners admitted in their pleadings, the transfer of the said property from the five sons to the father by way of Deed of Gift, in the absence of a registered Gift Deed, the Court merely on the basis of admission cannot treat the said property transferred to Late Ram Prasad Mehra, the father of the parties. Mr. Mitra relied upon the judgment in the case of ***Ambika Prasad Thakur and Ors. Vs. Ram Ekbal Rai (Dead) by His Legal Representatives and Others*** reported in ***AIR 1966 SC 605*** and ***Canbank Financial Services Ltd. Vs. Custodian and Others*** reported in

(2004) 8 SCC 355 and submits that mere admission in pleadings title to a property cannot pass.

- g.** Mr. Mitra submits that if at all title could be passed by pleadings, then as per the pleadings of the plaintiff and written statement of the defendant no.3 (series) by a family settlement after the death of the father, the mother became owner of the alleged 1/6th share of the property. This is followed by mother's probated Will dated 25th September, 1997 by which her right, title and interest in property was bequeathed to the five co-owners. Thus, the effect would be the same i.e. the property belongs to the five brothers i.e. five sons of Late Roop Rani Mehra.
- h.** Mr. Mitra submits that if this Court holds that by way of admission in pleadings by some of the parties title to a property could have passed to the father Late Ram Prasad Mehra without any registered instrument evidencing such transfer and if the Court thereafter does not accept the pleadings with regard to the family settlement vesting the property to Late Roop Rani Mehra can the question of non-joinder at all come up.
- i.** Mr. Mitra submits that the defendant no.3 series in their written statement stated that only five brothers own the property. He submits that no argument beyond the pleadings can be entertained. He submits that the contention of the defendant no.3 is contrary to the last Will of the deceased Roop Rani Mehra dated

21st August, 1987 and the probate dated 11th August, 1997, granted with consent of all the legal heirs of the deceased wherein the undivided share of Roop Rani Mehra in respect of suit property was bequeathed in favour of the five brothers. He submits that the factum of execution of Will and grant of probate thereof by consent of the parties has not been disputed by any of the parties in the suit. He submits that the Probate is a judgment in rem and the same is binding on all the parties as well as all the courts unless revoked. In support of his submissions, he has relied upon the judgment in the case of **Smt. Rukmani Devi and Others vs. Narendra Lal Gupta** reported in **(1985) 1 SCC 144**.

- j. Mr. Mitra submits that if the registered Deed of Conveyance dated 25th November, 1996 and registered Deed of Gift dated 6th March, 1976 is considered, it will be evident that the other children of Late Ram Prasad Mehra and Roop Rani Mehra had never acquired any share in respect of the suit property, thus they are not the necessary parties to the instant suit.

7. SUBMISSIONS ON BEHALF OF THE DEFENDANT NOS. 3B, 3C AND 3D:

- a. Mr. Aniruddha Chattrejee, Learned Senior Advocate representing the defendant nos. 3 series submits that the Gift Deed dated 18th February, 1974, need not to be proved as the same case is made out in the plaint and unequivocally accepted and admitted by all the defendants. He submits that as per Section 58 of the Indian

Evidence Act, 1872, the fact which is admitted is not required to be proved. He submits that the defendant no.2 has cross-examined the plaintiff as well as the defendant no.3 but has not put any single question on the existence and non-existence of the Gift Deed dated 18th February, 1974. He relied upon the judgment in the case of **A.G.E. Carapiet Vs. A.Y. Derderian** reported in **AIR 1961 Cal 359** and submitted that non cross-examination or putting suggestion on a particular point deems admission. He submits that no issues were ever framed for the existence or non-existence of the Deed of Gift dated 18th February, 1974. He submits that the document is 30 years old shall have to be presumed to be correct as to the execution and the contents thereof under Section 90 of the Indian Evidence Act, 1872.

- b.** Mr. Chatterjee submits that Kewal Kishore Mehra, Usha Seth, Pyare Lal Mehra and Padmavati Kapoor being two sons and two daughters of late Ram Prasad Mehra and Roop Rani Mehra have been left out from the array of the parties. He submits that once the shares of suit property was transferred in favour of late Ram Prasad Mehra by virtue of registered Deed of Gift dated 18th February, 1974, the 9/60th share devolved upon the ten (10) heirs including the widow Roop Rani Mehra and other four heirs who have not been made party to the suit.

- c. Mr. Chatterjee submits that only because Roop Rani Mehra had executed a Will wherein she claimed entire 1/6th share of Late Ram Prasad Mehra and grant of Probate upon such Will with the consent of limited five heirs cannot percolate the right, title and interest with respect to the 1/6th share in favour of Roop Rani Mehra. He submits that share to Late Ram Prasad Mehra cannot devolve upon Roop Rani Mehra without any registered deed. He submits that the four legal heirs are the co-sharers in the suit property but the plaintiff has not made them as parties to the suit, thus, the suit is not maintainable. In support of his submissions, he has relied upon the judgment in the case of **Sk. Riyasat Ali Vs. Sk. Safiuddin Ahamed & Ors.** reported in **2016 2 ICC 1**. Mr. Chatterjee further relied upon the judgment in the case of **Kanakarathanammal vs. V.S. Loganatha Mudaliar and Anr.** reported in **AIR 1965 SC 271** and submitted the plaintiff has not made all the legal heirs as parties to the suit who are also having shares in the property and thus the suit is not maintainable for non-joinder of parties.
- d. Mr. Chatterjee submits that on behalf of the plaintiff one witness, namely, Ricky Mehra was examined as P.W.1 but he is not the party to the suit nor has produced any document or authority to depose on behalf of the plaintiff. He submits that as the evidence of P.W1, he is a hearsay witness and he does not have any personal knowledge. He has admitted that the plaintiff is available

but he did not come to depose in the suit. Mr. Chatterjee relied upon the judgment in the case of ***Janki Vashdeo Bhojwani and Anr. Vs. Indusind Bank Ltd. and Others*** reported in **(2005) 2 SCC 217** and submitted that Power of Attorney holder can depose only to the extent of his personal knowledge and not otherwise. He submits that in the present case, the plaintiff has not examined himself as witness and the P.W1 has no personal knowledge, thus the plaintiff failed to prove his case.

- e. Mr. Chatterjee submits that the case of the defendant regarding family settlement in the year 1996 had been categorically admitted by P.W.1. He submits that the defendant no.3 series have filed counterclaim for Rs. 11,93,935/- being the expenses incurred with respect to the repairs made in the suit premises over the years but the plaintiff has not filed any written statement to the counter claim filed by the defendant no.3 series. He submits that the defendant no.3 series have proved their counter claim by exhibiting documents being Exhibit – “1”.

8. SUMISSIONS ON BEHALF OF DEFENDANT NO. 2:

- a. Mr. Sankarsan Sarkar, Learned Advocate representing the defendant no.2 submits that the defendant no.3 series have not disclosed the alleged Gift Deed dated 18th February, 1974 by which the five brothers, namely, Rabindra Kumar Mehra, Indra Kumar Mehra, Tara Chand Mehra, Ramesh Kumar Mehra and Tilak Raj

Mehra had gifted $1/6^{\text{th}}$ share of the suit property out of their respective $1/5^{\text{th}}$ share each to their father Late Ram Prasad Mehra. He submits that the defendant no.3 series failed to prove the said gift, the question of receiving any share by the father in the suit property does not arise.

- b.** Mr. Sarkar submits that the defendant no.3 series during his cross-examination by the defendant no.2 has admitted that the parties to the suit had $1/5^{\text{th}}$ share each in the suit property. He submits that immovable property can only be transferred by a registered deed but in the present case, the defendant no.3 series failed to bring Deed of Gift dated 18th February, 1974 to prove that any Deed of Gift was ever executed.
- c.** Mr. Sarkar submits that the defendant no.3 series has not proved their counter claim for a sum of Rs. 11,93,935/-. He submits that only certain payment vouchers have been disclosed by the defendant no.3 series but it is not proved whether the said vouchers relates to the suit property.
- d.** Mr. Sarkar submits that during cross-examination of the defendant no.3 series by the plaintiff, the case of the defendant no.3 series is totally demolished. He submits that the defendant no.3 series has not proved the counter claim and thus no decree can be passed in relation to the counter claim set up by the

defendant no.3 series. Mr. Sarkar has adopted the submissions of the Learned Counsel for the plaintiff.

9. SUBMISSIONS ON BEHALF OF DEFENDANT NO. 4 AND 5:

- a.** Mr. Rajib Ray, Learned Advocate representing the defendant nos. 4 and 5 submits that the defendant nos. 4 and 5 has admitted their undivided $1/10^{\text{th}}$ share each i.e. undivided $1/5^{\text{th}}$ share of their father Tilak Raj Mehra in the suit property and prayed for partition of the suit property.
- b.** Mr. Ray submits that all the parties to the suit have admitted $1/5^{\text{th}}$ undivided share of the respective parties either by way of pleadings or by evidence.
- c.** Mr. Ray submits that by Deed of Gift dated 18th February, 1974, five co-owners, namely, plaintiff, the defendant no.1, the defendant no.2, the original defendant no.3 and the father of the defendant nos. 4 and 5, namely, Tilak Raj Mehra gifted $1/6^{\text{th}}$ share each to the father Late Ram Prasad Mehra and after the death of father, by a family settlement, the mother Roop Rani Mehra (since deceased) became the owner of the $1/6^{\text{th}}$ share in the property.
- d.** Mr. Ray submits that the mother executed her Will with respect to the said property which was probated on 25th September, 1997 by which the said portion was bequeathed to the five co-owners, thus the suit property belongs to the five brothers and are entitled to get $1/5^{\text{th}}$ share each.

- e. He submits that the other children of Late Ram Prasad Mehra never acquired any share in the suit property. He submits that the defendant no.3 has let out the other dwelling unit situated at ground floor of the suit property to different tenants and is collecting rent. There is no proof that the defendant no.3 incurred any expenses in the suit property as claimed in the counter claim.

10. **ISSUES:**

All parties to the suit have filed their respective written statements but at the time of preparing judgment, this Court finds that no issues were framed, thus on the basis of the pleadings, the following issues are framed:

- i. Whether the plaintiff, mother of the plaintiff, Roop Rani Mehra, Tarachand Mehra, Ramesh Kumar Mehra and Tilak Raj Mehra purchased the suit property by way of Deed of Conveyance dated 25th November, 1966?*
- ii. Whether the mother, Roop Rani Mehra executed a Gift Deed of her 1/5th share on 6th March, 1972 in favour of her son, Indra Kumar Mehra?*
- iii. Whether all five sons have executed a Gift Deed on 18th February, 1974 of 1/6th share out of their 1/5th share each in favour of their father Late Ram Prasad Mehra?*

iv. Whether all children of Late Ram Prasad Mehra relinquished their respective shares in favour of their mother Roop Rani Mehra?

v. Whether the mother had right, title and interest over the property to execute the Will?

vi. Whether the defendant has incurred any expenditure to repair the suit property?

vii. Whether the suit filed by the plaintiff is suffered from non-joinder of the parties?

viii. Whether the plaintiff is entitled to get decree as prayed for?

ix. Whether the defendant is exhibited to get decree in terms of counterclaim?

11. EVIDENCE OF THE PARTIES:

- a.** The plaintiff to prove his case has examined one witness, namely, Ricky Mehra as P.W.1 being the son of the plaintiff. During his evidence, one document is marked as **Exhibit- "A"** being the Indenture dated 25th November, 1966.
- b.** The original defendant no.3 has examined himself as D.W.1 and during his evidence, two documents were marked as **"Exhibit -1 and Exhibit - 2"**.

Exhibit - 1 is 191 receipts and vouchers for the period from 8th July, 1998 to 15th March, 2011 (subject to objection).

Exhibit - 2 is the total cost of Rs. 11,93,935/- incurred for repair and construction of the suit premises by the defendant no.3.

- c. The defendant no. 4, Shri Rajesh Kumar Mehra is examined as D.W.2 for himself as well as on behalf of the defendant no.5. No document is exhibited by the defendant nos. 4 and 5.

12. DECISIONS WITH REASONS:

As all the issues are connected to each other, all issues are taken up together for decision.

- a. Late Ram Prasad Mehra, the father of plaintiff, the defendant no.1, the defendant no.2, the original defendant no.3 (Indra Kumar Mehra, father-in-law of the defendant no. 3B and Grandfather of the defendant nos. 3C and 3D) and grandfather of the defendant nos. 4 and 5 died on 17th March, 1977, leaving behind the following legal heirs:
 - i. *Smt. Roop Rani Mehra - Wife (since deceased died on 25th September, 1987).*
 - ii. *Tilak Raj Mehra – Son, Tilak Raj Mehra died on, namely, Rajesh Kumar Mehra (Defendant no.4), Rakesh Kumar Mehra (Defendant no.5), Smt. Poonam Wada and Smt. Seema Arora.*

- iii. *Ramesh Kumar Mehra- Son (Defendant no.2).*
- iv. *Tara Chand Mehra- Son (Defendant no.1).*
- v. *Indra Kumar Mehra – Son (Defendant no.3 since deceased died on 6th October, 2023) leaving behind wife Smt. Sheila Mehra (Defendant no. 3B) and two sons Sanjeev Kumar Mehra (Defendant no. 3C) and Pawan Mehra (Defendant no.3D).*
- vi. *Rabindra Kumar Mehra- Son (Plaintiff).*
- vii. *Payarelal Mehra – Son - not a party to the suit.*
- viii. *Kewal Kishan Mehra- Son - not a party to the suit.*
- ix. *Usha Seth – Daughter - not a party to the suit.*
- x. *Padmavati Kapoor- Daughter- not made party to the suit.*

- b.** As per the case of the plaintiff on 25th November, 1966, the plaintiff along with Tilak Raj Mehra (father of the defendant nos. 4 and 5), the defendant no.1, the defendant no.2 and the mother Roop Rani Mehra have jointly purchased the suit property by way of registered Deed of Conveyance being Exhibit-1. The building consists of ground floor plus three floors. None of the parties disputed the Deed of Conveyance dated 25th November, 1966. The mother by way of Gift Deed dated 6th March, 1972, transferred her right in the suit property in favour of her son, Indra Kumar Mehra (the Original Defendant no.3). The Gift Deed dated 6th March, 1972, is not brought on record by any of the parties but the defendants in their respective written statement admitted that the

mother has transferred her share in the suit property to the original defendant no.3 by way of gift.

- c.** The plaintiff has also made out a case in the plaint that all five brothers by a registered Deed of Gift dated 18th February, 1974, gifted in total 1/6th share in the suit property out of their respective 1/5th share each to the father Late Ram Prasad Mehra. It is also the case of the plaintiff that it was agreed by all including the five brothers that the 1/6th share in the suit property of the father would be vested upon the mother and to that extent, all the children of late Ram Prasad Mehra relinquished their respective shares in the suit property in favour of Roop Rani Mehra.

As regard to the gift of 1/6th Share to the father by the five brothers is admitted by all but the defendant no.3 series raised an issue that after the death of father, the share of father in the suit property is to be devolved upon all the legal heirs as no Deed of Relinquishment or settlement is brought on record, thus the other legal heirs of the deceased Ram Prasad Mehra are the necessary parties but the plaintiff has not made the other legal heirs as party to the suit.

- d.** The plaintiff has examined the son of the plaintiff as P.W.1 and during his evidence, the copy of Deed of Conveyance dated 25th November, 1966, is marked as Exhibit – “A”. All the parties have admitted the said document. Under the said document, Smt. Roop

Rani Mehra, Tilak Raj Mehra, Tara Chand Mehra, Ramesh Kumar Mehra and Rabindra Kumar Mehra have jointly purchased the suit property. As none of the parties have disputed the existence and execution of the said document, thus it is proved that Smt. Roop Rani Mehra, Tilak Raj Mehra, Tara Chand Mehra, Ramesh Kumar Mehra and Rabindra Kumar Mehra became the owners of the suit property and got their equal undivided $1/5^{\text{th}}$ share in the suit property.

- e.** Execution of Deed of Gift by Smt. Roop Rani Mehra on 6th March, 1972 in favour of Indra Kumar Mehra with respect to her $1/5^{\text{th}}$ share in the suit property, though the parties have admitted the said fact but neither the plaintiff nor the defendants have produced the Deed of Gift dated 6th March, 1972. The parties have also not produced any documents to the effect that after the said gift dated 6th March, 1972, the suit property was mutated in the name of Indra Kumar Mehra.
- f.** In the plaint, the plaintiff has made out a case that on 18th February, 1974, five brothers have gifted $1/6^{\text{th}}$ share in the suit property out of their $1/5^{\text{th}}$ share each to their father Late Ram Prasad Mehra but during argument and in the written notes of argument, Mr. Abhrajit Mitra, Learned Senior Advocate has taken the stand that mere admission by the parties, an immovable property cannot be transferred without any registered instrument.

Section 17 and 49 of the Registration Act, 1908, reads as follows:

“17. Documents of which registration is compulsory.—(1) *The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—*

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]

Provided that the [State Government] may, by order published in the [Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if

they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) [any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by [Government]; or

(viii) any instrument of partition made by a Revenue-Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

[(xa) any order made under the Charitable Endowments Act, 1890 (6 of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer.

[Explanation.]—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.]

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered.

49. Effect of non-registration of documents required to be registered.— No document required by section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

*[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) , [***] or as evidence of any collateral transaction not required to be effected by registered instrument.]*

- g.** In the case of **Ambika Prasad Thakur (supra)**, the Hon'ble Supreme Court held that :

“13. On the question of title also, the plaintiffs must fail. In the plaint, the basis of their claim of title was (a) occupation of 426 bighas. 18 kathas and 9 dhurs of Dubha Taufir by their ancestor Naurang Thakur as occupancy tenant and the record of his rights in the survey papers of 1892 and (b) the oral arrangement with the Dumraon Raj. The first branch of this claim is obviously incorrect. The survey papers of 1892 do not record occupancy tenancy rights of Naurang Thakur in 426 bighas, 18 kathas and 9 dhurs. In the High Court, counsel for the plaintiffs conceded that in the Khasra of 1892-1893 survey the plaintiffs' branch was recorded as tenant for about 19 bighas only. The oral arrangement is not established, and the second branch of this claim also fails. The Subordinate Judge did not examine the basis of the plaintiffs' claim of title. His finding in favour of the plaintiffs' title was based chiefly on (1) oral evidence, (2) depositions of witnesses in previous litigations, (3) possession, (4) an admission of the Maharaja. The oral evidence on the point is not convincing. The claim is not supported by the documentary evidence. The survey papers of 1892, 1895, 1904, 1909 and 1937 do not support the plaintiffs' claim of occupancy rights in the lands in suit. The depositions of witnesses in other litigations do not carry the matter further. The deposition of Defendant 11, Ram Dass Rai, in Suit No. 217 of 1911 is of weak evidentiary value. Though admissible against him as an admission, it

is not admissible against the other defendants. The other depositions relied upon do not satisfy the test of Section 33 of the Indian Evidence Act, and are not admissible in evidence. We have already found that the plaintiffs and their ancestors were not in possession of the disputed land since 1909. The oral evidence as to their possession before 1909 is not convincing, and we are not inclined to accept it. The documentary evidence does not support the story of their possession before 1909. With regard to the admission of the Maharaja in Suit No. 247/10 of 1913 relating to the plaintiffs' title to 244 bighas, we find that in his written statement the Maharaja asserted his khas zeraiti rights and denied the alleged guzashta kastha rights of the plaintiffs' ancestors. It seems that in Bihar 'guzashta kasht' means a holding on a rent not liable to enhancement. Later, on 10-06-1913, a petition was filed on his behalf stating that the plaintiffs' ancestors were tenants in occupation of the disputed land having guzashta kasht rights. The Maharaja was interested in the success of the suit, and it was necessary for him in his own interest to make this admission. The admission was made under somewhat suspicious circumstances at the end of the trial of the case when the arguments had begun. Though this petition was filed, the written statement of the Maharaja was never formally amended. In the circumstances, this admission has weak evidentiary value. In this suit, the plaintiffs do not claim tenancy right either by express grant or by adverse possession. Title cannot pass by mere admission. The plaintiffs now claim title under clause (1) of Section 4 of Regulation 11 of 1825. The evidence on the record does not establish this claim."

In the case of **Canbank Financial Services Ltd. (supra)**, the Hon'ble Supreme Court held that:

"85. *The constitutional validity of the Act came up for consideration before this Court in Harshad Shantilal Mehta v. Custodian. The vires of the said statute was upheld, inter alia, on the ground that by reason thereof the right, title and interest in a property belonging to Respondent 3 is not affected. The interest of the appellant, thus,*

was not affected by the said Act or by the Benami Transactions Act. Extinction in right, title and interest in a property must be caused as a result of operation of law and not otherwise. Creation of title by an act of parties is subject to law. Once a title vests in a person he cannot be divested therefrom except by reason of or in accordance with a statute and not otherwise. An admission does not create a title; the logical corollary whereof would be that an admission of a party would not lead to relinquishment of his right therein, if he has otherwise acquired a title in the property.”

In the case of **Shakeel Ahmed (Supra)**, the Hon’ble Supreme Court held that “*Law is well settled that no right, title or interest in immovable property can be conferred without a registered document.*”

- h.** Except the registered deed dated 25th November, 1966, no other deed dated 6th March, 1972 or dated 18th February, 1974, are exhibited. The further case of the plaintiff that all including five brothers have agreed that 1/6th share of the father would be vested upon the mother is also not proved by any cogent evidence.
- i.** As the plaintiff has not proved the Deed of Gift dated 6th March, 1972 by which the mother has gifted her 1/5th share to her son, namely, Indra Kumar Mehra (the original defendant no.3, since deceased) and Deed of Gift dated 18th February, 1974 wherein the 1/6th share of the property gifted to the father by all brothers, thus question of relinquishing the said share of property to the mother by all the legal heirs does not arise. The plaintiff has not proved that the 1/6th Share in the suit property relinquished to mother by

all legal heirs and thus the Probate relied by the plaintiff cannot be taken into consideration and neither the Probate was exhibited in the suit nor the plaintiff proved that the mother was having title of the said property to execute Will.

- j.** This Court finds that the plaintiff has only proved the Deed of Conveyance dated 25th November, 1966 wherein the plaintiff, the mother of the plaintiff Smt. Roop Rani Mehra, Tara Chand Mehra, Ramesh Kumar Mehra, and Tilak Raj Mehra have purchased the suit property. Neither the plaintiff nor the defendant no.3 series proved that the mother has executed a Deed of Gift dated 6th March, 1972 by transferring her 1/5th share of land to the original defendant no.3 (Indra Kumar Mehra). The plaintiff also failed to prove that all five brothers by a registered Deed of Gift dated 18th February, 1974, transferred 1/6th share of the suit property from their 1/5th share each to their father.
- k.** The plaintiff failed to prove a Gift Deed dated 6th March, 1972 by which the mother transferred her 1/5th share to the original defendant no.3 (Indra Kumar Mehra) or subsequent transfers as stated by the plaintiff, thus after the death of the mother, the share of the mother is to devolve upon all the legal heirs but the plaintiff has not made all the legal heirs, namely, Payarelal Mehra, Kewal Kishan Mehra, Usha Seth, Padmavati Kapoor being the other sons and daughters and Poonam Wadwa and Seema Arora being the grand-daughters of Roop Rani Mehra.

In the case of **Kanakarathanammal (supra)**, the Hon'ble Supreme Court held that:

“15. It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under Section 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1 Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1 Rule 10, sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In *Naba Kumar Hazra v. Radheshyam Mahish* [AIR 1931 PC 229] the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of Order 1

rule 9 of the Code. In rejecting the said prayer, Sir George Loundes who spoke for the Board observed that “they are unable to hold that the said Rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India.”

- 13.** This Court finds that other than the Deed of Gift dated 25th November, 1966, none of the parties proved other deeds dated 6th March, 1972, 18th February, 1974, Deed of Relinquishment and probate granted by the Court. Thus, the plaintiff has only proved the Deed of Gift dated 25th November, 1996 and after the death of the mother, the 1/5th share of the mother is to be devolved upon all the legal heirs of the mother, Smt. Roop Rani Mehra (since deceased) but the plaintiff has not made all the legal heirs of Smt. Roop Rani Mehra (since deceased) as party to the Suit, the suit filed by the plaintiff suffers from non-joinder of parties and no decree can be passed.

- 14.** The defendant no.3 series have filed counter claim for a sum of Rs. 11,93,935/- being the cost invested by the defendant no.3 for repair of the suit property. The defendant no. 3 to prove his case has exhibited 191 bills and vouchers through his witness and the same were marked as Exhibit- “1” (with objection) but the defendant no.3 has not proved the said document by adducing any evidence. Mere producing the document cannot be said that the document is proved. The plaintiff and the other defendants have objected the said documents but the original defendant no.3 has not proved his case made out in the counter claim

that the original defendant no.3 has actually incurred the said amount for repair of the suit property.

15. CONCLUSION:

- a.** Considering the above, the Suit filed by the plaintiff and the Counter Claim filed by the defendant no.3 series are dismissed.
- b. C.S. No. 90 of 2012 is dismissed.**
- c.** Decree be drawn accordingly.

(Krishna Rao, J.)