

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Biswajit Basu.

SA No. 145 of 2017
(IA No: CAN 04 of 2021)

SMT. SHYAMALI DUTTA
VS.
SATTYA SANDIP DUTTA.

For the appellant/petitioner:

Mr. Siva Prosad Ghose.

For the respondent:

Mr. Sourav Sen,

Ms. Adrisnata Chakroborty.

Heard on : 23.03.2022

Judgment on : 11.05.2022

Biswajit Basu, J.

1. The instant second appeal is at the instance of the defendant in a suit for eviction of licensee and is directed against the judgment and decree passed by the learned Additional District Judge, Fast Track, 2nd Court at Alipore, District- 24 Parganas(south) in Title Appeal No. 66 of 2015 thereby affirming the judgment and decree dated March 20, 2015 passed by the 1st Court of Learned Civil Judge (Junior Division) at Alipore, District 24 Parganas (South) in Title Suit No. 1252 of 2010.

2. The plaint case of the said suit is thus, the father of the parties was the owner of the entire first floor and the roof of the Premises No. 32/3A Gariahat Road together with the undivided share in the common areas of the said premises. He, by a registered deed of settlement dated August 10, 1990 settled the said first floor in favour of his younger son, the plaintiff and the said roof in favour of his elder son subject to the condition that so long he and his wife are alive, they would hold the said property as the trustees of the beneficiaries of the said deed and for their benefit, but they shall not be entitled to sell, mortgage or otherwise encumber the said property, the further stipulation of the said deed was that the younger daughter of the settlor, the defendant, shall have a right of residence in one room of the said first floor, the suit room so long she is unmarried and in the event she becomes physically disabled, her brothers, the beneficiaries of the said deed of settlement would be obliged to maintain her and in the event of sale of the said property after the death of the settlor and his wife, she will be entitled to 1/6th share of the sale proceeds. The defendant got married after the death of the father but she returned to the said property after her marriage was dissolved by a decree of divorce and she was permitted to stay in the suit room. The widow of the settlor died subsequently. In the mean time, the plaintiff has become the absolute owner of the said property as his elder brother by a registered deed of gift dated September 18, 2006 transferred his allotment in the said property to the plaintiff.

The plaintiff alleged that the defendant is a quarrelsome lady and has caused various nuisance and annoyance to the plaintiff and his family members, she even tried to forcefully occupy other rooms of the said

property, the plaintiff under such circumstances was forced to revoke the license of the defendant to occupy the suit room by a notice dated May 06, 2010 even thereafter the defendant did not quit and vacate it, hence the suit.

3. The defendant contested the suit. In her written statement, she asserted her right to occupy the suit room on her own right which she claimed to have derived from the said deed of settlement. She denied that her right to reside in the said property was extinguished on her marriage. She denied the allegation of the plaintiff that she misbehaved with the plaintiff and his family members, on the contrary, she alleged that she was subjected to torture by the plaintiff and his family members.

4. Whether or not in terms of the said deed of settlement, the defendant still has right of residence in the suit property or it was extinguished with her marriage, is the main issue which the learned Trial Judge addressed in deciding the suit. The learned Trial Judge answered the said issue against the defendant, holding that in the deed, the settlor did not make any financial or residential arrangement for his other married daughters and there is also no provision for the said daughters to get any residential or financial support from the settlor in case their marriage is broken, therefore the intention of the settlor is clear that he intended to provide the defendant a right of residence in the said property till her marriage only. The Learned Trial Judge further held that the said intention of the settlor gets amplified when he, with unambiguous terms settled the said property in favour of his

two sons in exclusion of all other sons and daughters. The learned Trial Judge further held that in terms of the said deed of settlement the right of the defendant to get 1/6th of the sale proceeds of the said property was also extinguished on her marriage and accordingly decreed the suit. The defendant aggrieved by the said judgment and decree preferred the appeal, out of which the present second appeal arises. The appeal Court below by the impugned decree has dismissed the said appeal, thereby has affirmed the decree of the learned Trial Judge.

5. The 'Hon'ble Division Bench has admitted the present second appeal under Order XLI Rule 11 of the Code of Civil Procedure to answer the following substantial question of law:-

Whether the learned Additional District Judge committed substantial error of law in misconstruing and/or misinterpreting the Deed of Family Settlement executed by the father of the parties wherein the father of the parties made arrangement so that she may reside in the suit premises in her helpless condition and because of her marriage she should not be deprived from her right to stay in the suit premises as per intention of the original owner namely the father of the parties or not?

6. The appellant has filed an application under Order XLI Rule 27 of the Code being C.A.N. 4 of 2021 for reception of the certified copy of the decree dissolving the marriage of the appellant passed in the Matrimonial Suit No. 31 of 2003 and the certified copy of the deposition of the parties recorded in a proceeding under the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the said Act of 2005', in short) initiated by

the appellant being A.C. Case No. 1038 of 2010. The said application was directed to be considered along with this appeal.

7. Mr. Siva Prosad Ghose, learned advocate for the appellant argues as follows:-

- I. The courts below have failed to appreciate that the said deed of settlement is a will by its character as by the said document a future interest in the said property has been created in favour of the defendant, therefore, the plaintiff cannot claim title over the said property without obtaining probate of the said document. He refers to the decision of the Hon'ble Supreme Court in the case of **P.K. MOHAN RAM VS. B.N. ANANTHACHARY & ORS.** reported in **AIR 2010 (SC) 1725** to contend that the nomenclature of the instrument is not conclusive, the Court is required to look into the substance thereof.
- II. The intention of the settlor was to save his daughter from future vagrancy, the said intention of the settler cannot be frustrated merely because of her marriage, particularly when such vagrancy of the appellant still exists as she is the victim of a failed marriage, the plaintiff, being the son of the settlor is obliged to honour the said intention of the settlor.
- III. The learned Courts below have committed substantial error of law in holding that since the settlor did not make any provision for his other married daughters in case their marriage failed, the appellant post dissolution of her marriage, has lost her right to reside in the suit

room inasmuch as the appellant is not similarly placed with that of her married sisters, as their marriages are still surviving.

IV. The entitlement of the appellant to get 1/6th share of the sale proceeds of the said property is a charge over the said property, as such the appellant has acquired an indefeasible right over the said property irrespective of her marital status but the Courts below have erroneously interpreted the terms of the said deed to hold that appellant has lost her right to get the said 1/6th share of the sale proceeds of the said property after her marriage.

V. The respondent is bound to provide a residence to the appellant as the appellant and the respondent stand in a domestic relationship within the meaning of the definition of “domestic relationship” defined under Section 2(f) of the said Act of 2005 and in view of Section 26 of the said Act of 2005 the appellant is entitled to claim residence order under Section 19 thereof in the present appeal. The following decisions have been referred on this point:-

a. **JUVERIA ABDUL MAJID PATNI VS. ATIF IQBAL**

MANSOORI AND ANOTHER reported in **(2014) 10 SCC 736**

b. **KIRAN BALA SAHA VS. BANKIM CHANDRA SAHA**

reported in **AIR 1967(Cal) 603**

c. **THULASIKUAR ANIL KUMAR AND ANOTHER VS.**

RAGHAVAN NAIR reported in **AIR 1985 (Kerala) 20.**

d. **PRADEEP KUMAR KAPOOR VS. MS. SHAILJA KAPOOR**

reported in **AIR 1989 Delhi 10.**

e. **MANGAT MAL (DEAD) AND ANOTHER VS. PUNNI DEVI (SMT) (DEAD) AND ANOTHERS** reported in (1995) 6 SCC 88.

f. **SATISH CHANDER AHUJA VS. SNEHA AHUJA** reported in AIR 2020 (SC) 5397.

g. **SANJAY KUMAR AND ANOTHER VS. STATE OF U.P. AND OTHERS** reported in (1995) 6 Supreme Court Cases 99.

VI. Right to get shelter is a fundamental right under Article 19 (e) of the Constitution of India, the appellant cannot be deprived of her said right, particularly when she is totally helpless, the decision of the Hon'ble Supreme Court in the case of **U.P. AVAS EVAM VIKAS PARISHAD AND ANOTEHR VS. FRIENDS CO- OPERATIVE HOUSING SOCIETY LIMITED AND ANOTHER** reported in AIR 1996 (SC) 114 is referred in this context.

VII. The appellant is passing her days in a helpless condition, the respondent, being her brother must treat her sympathetically and should not press hard for her eviction from the suit room.

VIII. Regarding scope of Section 100 of the Code the following decisions have been referred:-

a. **USHABAI AND OTHERS VS. BALAKRISHNA BIHARILAL AND OTHERS** reported in (2006) 3 Supreme Court Cases 686.

b. **STATE BANK OF INDIA VS. S.N. GOYAL** reported in AIR 2008 Supreme Court 2594

- c. **NASIB KAUR AND OTHERS. VS. COL. SURAT SINGH (DECEASED) THROUGH L.RS AND OTHERS** reported in **2013 (2) ICC 337**
- d. **TAJENDAR SINGH GHAMBHIR AND ANOTHER VS. GURPREET SINGH AND OTHERS** reported in **(2014) 10 Supreme Court Cases 702**
- e. **SK. BHIKAN S/O SK. NOOR MOHD. VS. MEHAMOODABEE W/O SK. AFZAL AND OTHERS** reported in **AIR 2017 Supreme Court 1243**
- f. **UMA PANDEY AND ANOTHER VS. MUNNA PANDEY AND OTHERS** reported in **AIR 2018 Supreme Court 1930**
- g. **BALASUBRAMANIAN AND ANOTHER VS. M. AROCKIASAMY(DEAD) BY LRS.** reported in **AIR 2021 Supreme Court 4221**
- h. **B.B. LOHAR VS. PREM PRAKASH GOYAL** reported in **AIR 1999 SIKKIM 11**
- i. **BALKRISHAN AND ANOTHER VS. MOHSIN BHAI AND OTHERS** reported in **AIR 1999 Madhya Pradesh 86**
- j. **SITARAM LAL VS. JAMESWAR DAS** reported in **AIR 1995 Orissa 260**

8. Mr. Sourav Sen learned Advocate for the respondent on the other hand, referring to the different clauses of the said deed of settlement, argues as follows:-

- I. It was never the intention of the settlor to provide a permanent right of residence to the appellant in the suit room, such right was given to her till her marriage; the terms of the said deed of settlement clearly and unambiguously reflect the said intention of the settler, which gains more clarity when the settlor did not make any provision to give financial or residential support to his other married daughters.
- II. The Appeal Court below has agreed with the view of the learned Trial Judge on the evidence, such general agreement would ordinarily suffice, support on this point is lent from the decision of the Hon'ble Supreme Court in the case of **GIRIJANANDANI DEVI AND OTHERS VS. BIJENDRA NARAIN CHOUDHARY** reported in **AIR 1967 SC 1124**.
- III. The claim of the appellant to have interest as well as charge over the said property is misconceived inasmuch as the said two claims cannot co-exist. Furthermore, charge is only a right to make payment out of a particular fund/property, a charge is not a *jus in rem* but a *jus ad rem*, right of the appellant to receive 1/6th of the sale proceeds if she remained unmarried on the date of sale of the said property cannot said to be a charge over the said property for all times to come, particularly when it is coupled with the fact that neither the father nor the brother of the appellant is statutorily bound to maintain the appellant.
- IV. The appellant has urged various provisions of The Protection of Women from Domestic Violence Act, 2005 but unless necessary

pleadings are made in the suit, question of application of the provisions of the said Act of 2005 in this appeal does not arise.

- V. The Appeal Court below has correctly interpreted the clauses of the deed of settlement to affirm the decree passed by the learned Trial Judge, as such, no substantial question of law, as formulated at the time of admission of it under Order XLI Rule 11 of the Code, is involved in the present second appeal .

Heard learned counsel for the parties, perused the materials-on-record.

9. The appellant in the Courts below never claimed that the said deed of settlement is a testamentary disposition of the settlor, on the contrary it is her consistent case that she has acquired a right in the said property *in praesenti* in terms of the said document. Moreover, from the second paragraph at page 5 of the said deed, it would appear that the settlor on and from the date of execution of the said deed divested himself from all kinds of right, title and interest in respect of the said property and settled the same absolutely in favour of his two sons, the beneficiaries of the said deed.

The relevant clause of the said deed and the English translation thereof are quoted below:-

“অদ্য হইতে নিম্নের - “ক” তপশীলে বর্ণিত সম্পত্তিতে মালিক হিসাবে আমার যে কিছু স্বত্ব সামিহ, হক, হকিয়ৎ, দখল, দাবী, স্বার্থ, সংশ্রব প্রভৃতি যাহা কিছু ছিল ও আছে তাহার অদ্য হইতে চিরতরে অবসান ঘটিল ও লোপ হইল এবং অত্র দলিলের ট্রাষ্টি হিসাবে তাহা আমাতে যোলো আনা রূপে বর্তাইল, হস্তান্তরিত হইল এবং ভেট্ট করিল। এবং আমি নিম্ন তপশীলে বর্ণিত সম্পত্তি এই দলিলে লিখিত উদ্দেশে উক্ত সম্পত্তির আয় উপমুহুর আদায় উসুল পূর্বক উক্ত সম্পত্তিতে আমার এবং আমার স্ত্রীর জীবন কালতক এবং আমার কন্যা শ্যামলীর বিবাহ না হওয়া পর্যন্ত বসবাসের স্বত্ব ও স্বার্থ বজায় থাকার শর্তাধীনে এই দলিলের বেণীফিসিয়ারি আমার দুইপুত্র সত্য সুন্দর দত্ত ও সত্য সন্দীপ দত্তের স্বার্থে ও হিতার্থে ও

তাহাদের পক্ষে হোল্ড কৰিতে থাকিব। আমি যতকাল জীৱিত থাকিব ততকাল নিম্ন তপশীলৈ বৰ্ণিত সম্পত্তি নিজ দখলে ৰাখিয়া তাহাৰ দেখাশোনা ও তত্ত্বাবধান কৰিব। উক্ত সম্পত্তি মেৰামত কৰিব এবং উক্ত সম্পত্তিৰ ৰক্ষণাবেক্ষণ কৰিব এবং উহাৰ ট্যাক্সাদি প্রদান কৰিব। প্রয়োজনে উক্ত সম্পত্তিতে মাসিক ভাড়াটিয়া বসাইতে পাৰিব এবং তাহাদের উচ্ছেদ কৰিতে পাৰিব কিন্তু কোন অবস্থাতেই উক্ত ও নিম্ন তপশীলৈ বৰ্ণিত সম্পত্তি আমি দান , বিক্রয় , বন্ধক প্রভৃতিৰ দ্বাৰা বা অন্য কোনরূপে হস্তান্তৰ বা দায়বদ্ধ কৰিতে পাৰিবো না ।”

“ From this date my entire right, title, interest, possession, claim, connection, ownership as the owner in the property described in the schedule A below do devolve and vest on me as the trustee of this deed in sixteen annas and I am divested of the same from date. And I shall continue to hold the property described in the schedule below for the purpose of this deed by realizing the income and usufructs of the said property in the interest and benefit of my two sons Satya Sundar Dutta and Satya Sandip Dutta and on their behalf as the beneficiaries of this deed, on condition of keeping the right and interest of residence in the said property for me and my wife for our lifetime and my daughter Shyamali till her marriage. As soon as I remain alive I shall keep the property described in the schedule below in my own possession and look after and supervise it. I shall repair the said property and maintain the said property and pay its taxes. If required, I shall induct monthly tenants to the said property and to evict them but under no circumstances can I gift, sale, mortgage or in any way transfer or encumber the said property in the schedule below.”

Therefore, on careful examination of the said document, in the manner suggested by the Hon’ble Supreme Court in the case reported in **AIR 2010 SC 1725 (supra)**, it can be safely concluded that the said deed is a deed of settlement simplicitor not a will, as submitted by Mr. Ghose.

10. The learned Courts below laboured to ascertain as to whether by the said deed of settlement the settlor intended to give a permanent right of residence to the appellant, irrespective of her marital status. The Courts below, on interpretation of the clauses of the said document have come to a concurrent finding that the settlor had no such intention. The correctness of the said finding of the Courts below is required to be investigated in the present appeal within the scope of Section 100 of the Code.

11. The appellant by the said deed was granted right to reside in the suit room, which she was occupying at the time of execution of the said deed so long she was unmarried and a right to receive 1/6th share of the sale proceeds in the event of sale of the said property by the beneficiaries of the said deed after the death of the settlor and his wife was also created in her favour but such right was subject to the condition that she, on receipt of her said share, would be obliged to surrender possession of the suit room. The relevant clauses of the said deed and the English translation thereof are quoted below for ready reference:-

“আমার কন্যা শ্যামলী দত্তর এখন ও বিবাহ দিতে পারি নাই সে এখনও বিবাহ করিতে ইচ্ছুক নহে। তাহার ভবিষ্যতের কথা চিন্তা করিয়া আমি বিধান করিতেছি যে, নিম্নের “ক” তপশীলের দ্বিতলে যে ঘরে আমার কন্যা শ্যামলী বর্তমানে বসবাস করিতেছে, যতদিন তাহার বিবাহ না হইবে ততদিন সেই ঘরে অথবা দ্বিতলের যেকোন ঘরে সে বসবাস করিতে পারিবে এবং ভবিষ্যতে কোনকারণে আমার উক্ত কন্যা শ্যামলী অকর্মণ্য হইয়া পরিলে তাহার ভরনপোষণের দায়িত্ব এবং খরচা আমার দুই পুত্র তুল্যাংশে বহন করিবে”

আমার দুই পুত্রের জন্য নির্দিষ্ট অংশ যদি আমার দুই পুত্র আমার এবং আমার স্ত্রীর অবর্তমানে বিক্রয় করিতে চাহে তাহা হইলে তাহারা তাহাদের অংশে ন্যাস্ত সম্পত্তির বিক্রয় মূল্যের ১/৬ অংশ আমার কনিষ্ঠা কন্যা শ্যামলী দত্তকে প্রদান করিতে বাধ্য থাকিবে এবং শ্যামলী দত্ত উক্ত টাকা প্রাপ্ত হইবার পর বন্দোবস্তকৃত সম্পত্তিতে তাহার যে বসবাসের অধিকার আছে তাহা আমার পুত্রদ্বয়ের অনুকূলে ছাড়িয়া দিতে এবং অন্যত্র বসবাস করিতে বাধ্য থাকিবে।”

“I have not yet been able to get my daughter married. Thinking of her future I am providing that my daughter Shyamali shall be able to live in the room on the first floor of schedule A below where she is living now, as long as she is unmarried or in any other room of the first floor and if my said daughter Shyamali becomes unfit to work then my two sons shall bear the responsibility and expenses of her maintenance in equal share.

It may also be known that if both my sons wish to sell the portion demarcated to their shares after my death and that of my wife then they shall be bound to give 1/6th share of the sale proceeds to my daughter Shaymali Dutta and after receiving the said money Shyamali Dutta shall be bound to relinquish her right of residence in the settled property in favour of my two sons and be bound to live elsewhere.”

12. The above quoted paragraph of the said deed of settlement unmistakably and unambiguously indicate that the intention of the settlor was to provide a shelter to the appellant in the suit room till her marriage, as such the appellant's right to possess the suit room was extinguished on her marriage and the said right did not revive upon dissolution of her marriage. The said intention of the settlor gets amplified from the fact that the settlor did not make any provision for residence in the said property for his other married daughters.

13. A charge on an immovable property is created when either by act of the parties or by operation of law, such property is made security for payment of money to another. The right of the appellant to get 1/6th share of the sale proceeds of the said property was created subject to the condition that, on receipt of the said share, she has to surrender possession of the suit room in favour of the beneficiary of the said deed. The said condition, if read together with the condition that the appellant is entitled to hold the suit room till her marriage, sufficiently clarifies the intention of the settlor that he intended to provide the said entitlement to the appellant only if such sale of the said property occurred before her marriage, therefore, the interpretation of the said clause by the Courts below that the appellant had lost her right to get the 1/6th share in the sale proceeds of the said property upon on her marriage, cannot be faulted.

14. The right of the appellant to get a 'residence order' under the provisions of the said Act of 2005 as sought to be canvassed by Mr. Ghose is beyond the scope of the present second appeal, this Court, therefore, is not

inclined to get into the said issue, more so when a proceeding between the parties under the said Act of 2005 is pending before the competent Court, any finding on the said issue in this appeal may cause prejudice to the parties in the said proceeding. Therefore, the documents sought to be adduced by way of additional evidence being not relevant, do not deserve any consideration.

15. The argument of Mr. Ghose regarding constitutional right of the appellant is also of no relevance to decide the present second appeal, as such the decision of the Hon'ble Supreme Court reported in **AIR 1996 SC 114 (supra)** relied on by Mr. Ghose is entirely misplaced.

16. General expression of agreement with the reasons given by the learned Trial Judge is sufficient for the Appeal Court to agree with the findings of the learned Trial Judge, as has been laid down by the Hon'ble Supreme Court in the case reported in **AIR 1967 SC 1124(supra)**. In the present case, the appeal Court below has supplied sufficient reasons to agree with the findings of the learned Trial Judge. There is no dispute with regard to the proposition of law laid down in different decisions cited by Mr. Ghose regarding the scope of a second appeal under Section 100 of the Code, but those decisions are of no help to his client.

17. The helplessness of the appellant as urged by Mr. Ghose has no effect on the merit of the appeal. In this context, it is apposite to quote the following observation of the Hon'ble Supreme Court in the case of

MANAGING DIRECTOR, HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION AND OTHERS VS. HARI OM ENTERPRISES AND ANOTHER reported in **(2009) 16 SCC 208:-**

“This Court, however, also put a note of caution that no order should be passed only on sympathy or sentiment.”

Summing up the discussions made above, this Court is of the opinion that no such substantial question of law as formulated at the time of admission of the present second appeal is involved in this second appeal, consequently, S.A. 145 of 2017 and the application for reception of additional evidence in the present appeal being C.A.N. 4 of 2021 are dismissed without any order as to costs.

The department is directed to send down the Lower Court record immediately to the Court below.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)