IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 128 of 2022
CAN 2 of 2022
CAN 3 of 2023

INDRAJIT KUMAR SHAW
VS.
AJIT KUMAR SHAW

For the Appellant	: Mr. Anirban Bose, Adv. Mr. Subhadeep Sen, Adv. Mr. Satyajit Senapati, Adv.
For the repondnent	: Mr. Haradhan Banerjee, Adv.
Hearing concluded on	: 4th December, 2023
Judgement on	: 18th December, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and decree passed by learned 1st Court of Additional District Judge, 24 South Parganas, in Title Appeal No. 28 of 2017, thereby affirming the judgement and decree dated 31st January passed by learned Civil Judge, Junior Division, 2nd Court, Sealdah in Title Suit No. 117 of 2000.

2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.

3. Briefly stated, Sri Ram Gopal Shaw, the father of the parties to this appeal was the owner of 'A' schedule property. He acquired the ownership by purchase. On 3rd October, 1989 he executed a deed of family settlement in respect of the properties which he owned including the 'A'

schedule property, he divested his right title interest to a trust and appointed himself as sole trustee. He made it clear that after his demise the plaintiff would become the absolute owner of the 'A' schedule property. The defendant has been residing in the portion of the 'A' schedule property along with his family members as a licensee. After the demise of Ram Gopal Shaw, the plaintiff allowed the defendant to continue with his possession in respect of a portion of 'A' schedule property which comprises of one room on the northern side of the ground floor together with ante chamber, one small room under stairs and a room on the southern side of the first floor together with facilities of both privy, electricity, filter water which is depicted as 'B' schedule property. The plaintiff, however, being annoyed by conduct of his brother decided to revoke the licence and issued a notice to quit on 7th February, 2000 through learned Advocate calling upon the defendant to quit, vacate and deliver peaceful possession of the said property. The defendant refused to act in terms of the said notice. Hence the suit.

4. The defendant contested the suit by filing written statement denying all material allegations made in the plaint. It is the specific case of the defendant that after the demise of Ram Gopal Shaw he also acquired 'A' schedule property by inheritance along with other legal heirs of Ram Gopal Shaw. He denied that he was given licence to occupy the property as claimed by the plaintiff.

5. Learned Trial Court after considering the pleadings of the parties and evidence, both oral and documentary was pleased to pass the decree for eviction of the defendant.

6. The defendant made an unsuccessful attempt to get the judgement and decree of learned Trial Court reversed in Title Appeal No. 28 of 2017. Learned First Appellate Court did not find any reason to interfere with the judgement and decree passed by learned Trial Court. Hence this second appeal which was admitted on the following substantial question :

1. Whether both the Courts below were justified in interpreting the document styled as deed of settlement as a document creating the right in the plaintiff in praesenti ignoring the fact that such right would vest only upon the death of the settlor?
2. Whether both the Courts below were justified in going by the nomenclature of the document without looking into the language used therein in order to interpret the same and gathering the intention of the settlor?
3. Whether the interpretation of a document being a core issue can be regarded as substantial questions of law within the purview of Section 100 of the Code of Civil Procedure when admittedly neither such case was made out in the pleading nor taken before the First Appellate Court?

7. Assailing the impugned judgement Mr. Anirban Bose, learned Counsel representing the defendant submits that the deed of settlement reflects the intention and the desire of the settlor which can be appreciated only upon reading the entire document. Drawing my attention to the said instrument Exhibit-2 itself, Mr. Bose submits that

the settlor being the owner of the property decided to settle the property by creating a trust and he appointed himself as the sole trustee. The settlor reserved the right of management as well as control over the property in suit. The settlor proclaimed : "That the trustee under this presents shall hold the said property upon trust for the benefit of the settlor himself, his said son Ajit Kumar Shaw, his wife and his sons and also for the purpose aforesaid and that the said settlor, the trustee herein either alone or at his absolute discretion shall manage in all respect whatsoever the said trust, property particularly described or mentioned in the schedule here under written including all collections, rents, issues and profits thereof and shall pay all rates, taxes, cost of repair and other outgoings in respect of trust property."

8. Thereafter, the settlor proclaimed that on the death of trustee, the trust created shall come to an end and shall be dissolved and trust property shall absolutely vest in the settlor's son Ajit Kumar Shaw. The settlor indicated that the deed of settlement shall be deemed irrevocable.

9. According to Mr. Bose, upon plain reading of the instrument, it can be perceived that the settlor did not confer any right to the plaintiff of the suit, in respect of the property whatsoever during his lifetime.

10. Mr. Bose further submits that settlement has been defined in Section 2 (24) of the Indian Stamp Act, 1989 which says:

> *"Section 2 clause 24 - Settlement. "Settlement" means any non-testamentary disposition, in writing, of moveable or immoveable property made -*
>
> *(a) in consideration of marriage;*

(b) for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person depended on him, or
(c) for any religious or charitable purpose;
and includes an agreement in writing to make such a disposition [and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust of otherwise, the terms of any such disposition."

11. The parties of the deed of the settlement primarily are to make disposition for the purpose of distributing the property of the settlor among his family members or for the purpose of providing for some persons depending on the settlor. Therefore, the basic feature of deed of settlement is that all the family members must join in the same and there has to be a prior dispute and differences between the family members. A family settlement cannot be in absence of any dispute. To buttress his point, Mr. Bose relies upon the judgement of Hon'ble Punjab and Haryana High Court in ***CHETAN KAUR THROUGH LRS VS. JASPREET SINGH & ORS.*** reported in **2023(3) ICC 308** wherein it is held :

"13.4. A reference in that regard can be made to law laid down by Supreme Court in Smt. Badami case (supra). The relevant paragraph of the said judgment reads as under:

24. In Kale and others v. Deputy Director of Consolidation and others, AIR 1976 SC 807, it has been held that the object of the arrangement is to protect family from filing long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family.
Their Lordships opined that the family is to be understood in the wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have

some sort of antecedent title, a semblance of claim or even if they have a spes successionis so that future disputes are sealed forever and 11 of 15 litigation are avoided. What could be the binding effect and essentials for a family settlement were expressed thus:-

"10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary; (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the 12 of 15 court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) [(sic) (Sec.17(1)(b)?)] of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangements must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a

person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same."

12. It is submitted by Mr. Bose that in case of family settlement there has to have an agreement amongst the various members of the family intended to be generally and reasonably for the benefit of the family and secondly, the agreement should be with the object either of comprising doubtful or disputed rights or for preserving the family property or the place and security of the family. To buttress his point Mr. Bose places his reliance in the judgement of Hon'ble Apex Court in ***KALYANI (DEAD) BY LRS. VS. NARYANAN & ORS.*** reported in **1980 Supp. SCC 298** :

> *"16. ...What constitutes family arrangement has been fully examined by this Court in M.N. Aryamurthy v. M.D. Subbaraya Setty[6]. Broadly stated, it is that there must be an agreement amongst the various members of the family intended to be generally and reasonably for the benefit of the family and secondly the agreement should be with the object either of compromising doubtful or disputed rights or for preserving the family property or the place and security of the family. .....We have grave doubt whether a Hindu father can impose family arrangement sans direct evidence of consent of each of his sons, to be effective after his death. Therefore, Ext.P-1 does not furnish evidence of family arrangement."*

13. It is further contended by Mr. Bose that the trustee is the lawful owner of the trust property and the property vests in him. Ram Gopal Shaw during his lifetime by creating the trust appointed himself as trustee and held that the property which was created in the Will and the disposition of the property is not in praesenti rather after the death of

Ram Gopal Shaw. Therefore, his intention was unambiguously explicit that he intended to retain everything including right of management till his death and his intention was only to give the property to his son after his demise. Therefore, according to Mr. Bose, the plaintiff cannot be said to have acquired any title in respect of the property which is a Will by nature. According to Mr. Bose the deed of settlement Exhibit-2 unerringly indicates that it is a composite document, it is severable and in part the document is clearly testamentary and can take effect as a Will and other part if it has characteristics of settlement, that part will take effect in that way as has been decided by the settlor.

14. According to Mr. Bose when the document demonstrates that the right title interest and ownership as well as management of the property was retained by the maker of the deed and he did not give any right to his son barring liberty to live with him in the property, it cannot be said that the plaintiff has acquired right title interest in respect of the 'A' schedule property by virtue of the instrument in question. Mr. Bose in this regard relies upon the judgement of Hon'ble Supreme Court in ***MATHAI SAMUEL & ORS. VS. EAPEN EAPEN (DEAD) BY LRS. & ORS.*** reported in **(2012) 13 SCC 80**.

15. Per contra, Mr. Haradhan Banerjee, learned Counsel for the respondent, supporting the judgement of learned Courts below submits that upon plain reading of the instrument Exhibit-2, it would appear that the executor of the document Ram Gopal Shaw unequivocally indicated that the said document shall be irrevocable. This expressed proclamation of the settlor is sufficient to infer that he had no intention to create any Will. According to Mr. Banerjee, a Will is always revocable in nature. It is

further contended that while executing the document Exhibit -2, the settlor consciously appointed himself as trustee and proclaimed to hold the property for the benefit of himself, one of his sons, daughter-in-law and grandchildren. Therefore, the beneficiaries were given certain interest in the property called vested interest which was destined to be culminated into absolute interest upon the death of the trustee. Therefore, it cannot be said that the settlor being the trustee did not give any right to the beneficiaries over the property. The plaintiff acquired vested as well as contingent interest, the contingency is the death of the settlor and with his death the trust shall seize to exist and the property would vest upon his son, one of the beneficiaries.

16. According to Mr. Banerjee, the instrument is to be read between the lines to appreciate and realise the intention of the maker of the document. In interpreting the instrument to find out whether it is testamentary in nature or not or whether it speaks of vested interest, Court is to look into the substance of the matter. Mr. Banerjee relies upon the judgement of Hon'ble Apex Court in ***P.K. MOHAN RAM VS. B.N. ANANTHACHARY & ORS.*** reported in **(2010) 4 SCC 161** that says :

> *"13. Sections 19 and 21 of the Transfer of Property Act, 1882 (for short, `the 1882 Act') which elucidate the expressions "vested interest" and "contingent interest" in the context of transfer of property read as under:*
>
> *"19. Vested interest.- Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening*

of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.- An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

21. Contingent interest. - Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain even shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception. - Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent."

A reading of the plain language of the above reproduced sections makes it clear that an interest can be said to be a vested interest where there is immediate right of present enjoyment or a present right for future enjoyment. An interest can be said to be *contingent if the right of enjoyment is made dependent upon some event which may or may not happen. On the happening of the event, a contingent interest becomes a vested interest.*

19. Having noticed the distinction between vested interest and contingent interest, we shall now consider whether Ex.A-2 was a Settlement Deed or a Will. Although, no strait-jacket formula has been evolved for construction of such instruments, the consistent view of this Court and various High Courts is that while interpreting an instrument to find out whether it is of a testamentary character, which will take effect after the life time of the executant or it is an instrument creating a vested interest in praesenti in favour of a person, the Court has to very carefully examine the document as a whole, look into the substance thereof, the treatment of the subject by the settlor/executant, the intention appearing both by the expressed language employed in the instrument and by necessary implication and the prohibition, if any, contained against revocation thereof. It has also been held that form or nomenclature of the instrument is not conclusive and the Court is required to look into the substance thereof."

17. It is submitted by Mr. Banerjee that the plaintiff in this case was acquired vested interest with immediate right of enjoyment of the property as well as present right of future enjoyment. Therefore, by no stretch of imagination this document can be considered as a Will.

18. Mr. Banerjee further submits that where there is immediate right of present enjoyment or present right of future enjoyment created in the document Exhibit-2, same is required to be construed as a deed of settlement and by no stretch of imagination it can be said to be a Will. It is submitted by Mr. Banerjee that the intention of the executor or the executrix of a document is to be found out by reading entire recital of the

document; the nomenclature whether it is settlement or Will given in the document is of no consequence. The factum of registration of document and the quantum of stamp duty paid shall have to be taken into consideration. The actual disposition can be postponed till the lifetime of the settlor or though prima facie it appears that disposition consummates after his death, if there is present disposition and vesting of right in praesenti the document has to be construed as the settlement and cannot be held to be a document testamentary in nature.

19. Drawing my attention to the instrument Exhibit-2 Mr. Banerjee submits that the executant Ram Gopal Shaw after settlement, creates the trust in respect of the property and it is his proclamation in the recital of the document that he would hold the property for the benefit of himself and as well as his son, daughter-in-law and grandchildren. That apart it is irrevocable in nature. Therefore, this document Exhibit-2 could be held to be a Will.

20. Since Ram Gopal Shaw, the maker of the deed divested his right title interest and reserved the right to manage the property during his lifetime as trustee and did not reserve the right to revoke the deed, the document Exhibit-2 is to be considered as deed of settlement and nothing else. To buttress his point Mr. Banerjee further places his reliance upon the judgement of Hon'ble Apex Court in ***KOKILAMBAL & ORS. VS. N. RAMAN*** reported in **(2005) 11 SCC 234**, wherein it is held :

> *"6. Settlement is one of the recognized modes of transfer of moveable and immovable properties under Hindu law. The Courts have accepted such mode as legal and valid mode of transfer of properties. Courts have emphasized that in order to*

find out the correct intent of the settlor the settlement deed has to be read as a whole and draw their inference of its content. Therefore, it has always been emphasized that the terms of the settlement should be closely examined and the intention of the settlor should be given effect to. Sometimes there is absolute vesting and sometimes there is contingent vesting as contemplated in Sections 19 and 21 of the Transfer of Property Act, 1882. In order to ascertain the true intention of the settlor one has to closely scrutinize the settlement deed, whether the intention of the settlor was to divest the property in his life time or to divest the property contingently on the happening of certain event. In this connection, reference may be made to a decision of this Court in the case of Rajesh Kanta Roy vs. Santi Debi reported in [1957] SCR 77. Their Lordships observed that the determination of the question as to whether an interest created is vested or contingent has to be guided generally by the principles recognized under Sections 19 and 21 of the Transfer of Property Act, 1882 and Sections 119 and 120 of the Indian Succession Act, 1925. Their Lordships quoted a passage from Jarman on Wills (8th Ed. , Vol II at page 1390 which states as follows :

> *"So, where a testator clearly expressed his intention that the benefits given by his will should not vest till his debts were paid, ... the intention was carried into execution, and the vesting as well as payment was held to be postponed."*

Their Lordships in the case of Rajesh Kanta Roy (Supra) have observed as follows:

> *"Apart from any seemingly technical rules which may be gathered from English decisions and text-books on this subject, there can be no doubt that the question is really*

> *one of intention to be gathered from a comprehensive view of all the terms of a document."*
>
> *Their Lordships have clearly observed that in order to decide the issue one has to closely go through the terms of settlement and the intention of the settlor."*

21. According to Mr. Banerjee that the recitals of the deed are unambiguously clear about the mind of Ram Gopal Shaw, there is no reason to search for the intention of the settlor. The vested interest created under the document is beyond any iota of doubt. The plaintiff having acquired vested interest in the property becomes the absolute owner upon the death of the settlor and thus he has the right to initiate a proceeding for eviction for his brother, the defendant whose status is nothing but a licensee and learned Trial Court as well as learned First Appellate Court had reason to pass the order of eviction. According to Mr. Banerjee, the appeal is devoid of merit.

22. Mr. Banerjee further submits that upon plain reading of document Exhibit-2 it would appear that by executing the instrument the executor intended to transfer the property in future and such an intention cannot be said to be in the breach of Section 5 of the Transfer of Property Act, 1882. Therefore, the recital to transfer in future cannot be held to be invalid and it cannot be said to be Will. But that concept of transfer as laid down under Section 5 of the Transfer of Property Act, 1882, is not applicable in this case.

23. True it is in the instrument itself there is an indication that the document shall be irrevocable in nature. It is trite to say that the Will is always revocable at the instance of the maker of the Will. It is also settled

principle that nomenclature of the document cannot be conclusive one to determine the nature, as it is observed by Hon'ble Supreme Court in ***NAMBURI BASAVA SUBRAHMANYAM VS. ALPATI HYMAVATHI*** reported in (**1996) 9 SCC 388** wherein it is held :

> *"The nomenclature of the document is not conclusive. The recitals in the document as a whole and the intention of the executant and acknowledgment thereof by the parties are conclusive. The Court has to find whether the document confers any interest in the property in praesenti so as to take effect intra vivos and whether an irrevocable interest thereby, is created in favour of the recipient under the document, or whether the executant intended to transfer the interest in the property only on the demise of the settlor. Those could be gathered from the recitals in the document as a whole."*

24. It goes without saying that the recital imposing restriction to revoke the document is not a deciding factor with reference to the character of the document.

25. It is trite to say that judgement of Courts are not to be construed as statute, there is also peril in treating the words of judgement as though they are words in a legislative enactment, and it is to be remembered that judicial utterance are made in the settings of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between the conclusions of two cases. Unless and until the facts and circumstances in a cited case is in pari-materia in all respect with the facts and circumstances of the case in hand, it will not be proper to treat an earlier case as precedent to arrive at a definite conclusion. (2002 AIR SCW 1334/4217/ 2006 AIR SCW 6216 at 6221)

26. In *Kokilambal (supra)* no trust was created thereby deciding the interest of the owner of the property into a trust unlike the case at hand. In *P.K. Mohan Ram (supra)* the settlor executed the deed and thereby created vested interest in favour of sixteen persons by saying that "From this day onwards I and you shall only enjoy the land and house without creating any encumbrance or making any alienation whatsoever. This was an unequivocal creation of right in favour of the all sixteen persons.

27. In *P.K. Mohan Ram (supra)* it is held :

> *"29. A careful reading of Ex.A-2 shows that in the title itself the document has been described as Settlement Deed. By executing that document, Shri K. Perumal Iyer expressed his intention, in no uncertain terms, to settle the property in favour of 16 persons who were none else than his own relatives and declared that `from this day onwards I and you shall enjoy the land and house without creating any encumbrance or making any alienation whatsoever.' This was an unequivocal creation of right in favour of 16 persons in praesenti. Though, the beneficiaries were to become absolute owners of their respective shares after the death of the settlor, the language of the document clearly shows that all of them were to enjoy the property along with settlor during his lifetime and after his death, each of the beneficiaries was to get a specified share. In the concluding portion, the settlor made it clear that he will have no right to cancel the Settlement Deed for any reason whatsoever or to alter the terms thereof."*

28. In this case at hand also the author of the document made it unequivocally clear that he would hold the property for the benefit of not only his son, the plaintiff herein, but also for the benefit of himself, his daughter-in-law and grandchildren. Therefore, if any vested interest by

the instrument is created in favour of the son, the plaintiff, the same interest is created by virtue of the document Exhibit-2 in favour of the other beneficiaries as well. Section 14 of the Indian Trust Act, 1882 prohibits a trustee from doing anything detrimental to the interest of beneficiaries. It says :

> *"14. Trustee not to set up title adverse to beneficiary.—The trustee must not for himself or another set-up or aid any title to the trust-property adverse to the interest of the beneficiary."*

Therefore, beneficiaries under the trust cannot be discriminated with, the way it has been done in this case by the Settlor/Trustee.

29. Therefore, the election of one, among multiple beneficiaries to acquire the property after the demise of the trustee unerringly indicates that the document in question is a Will, albeit absence of right to revoke the document. Had it been a case that the settlor Mr. Ram Gopal Shaw made it clear that after his demise the property would go to all the beneficiaries, it could have been held to be a deed of settlement and not a Will. A person takes vested interest in property only when he acquires a proprietary right in it, but right of enjoyment is deferred till a future event happens, which is bound to happen. In case of contingent interest neither any proprietary interest nor any right of enjoyment is given at present, but both depend upon future uncertain event. Here the father being the settlor and sole trustee did not confer any right or interest to the plaintiff, during his lifetime only allowed to him to stay with the settlor, unlike Sri K. Perumal Iyer, in *P.K. Mohan Ram (supra)*. Therefore, no right, be it vested or contingent was acquired by the plaintiff.

30. It is not unusual for a composite document to get registered which has characteristic of Will as well though the Will is not required to be registered mandatorily. The fundamental difference between the Will /testamentary disposition and a settlement/gift is that in the case of a Will crucial circumstances is the existence of a provision disposing or distributing the property of the testator after his demise, unlike the demise in praesenti in case of gift. It is revocable.

31. As it is held by Hon'ble Supreme Court in *Mathai Samuel (supra)*, this document, Exhibit-2 is a composite one wherein executant Ram Gopal Shaw made his intention clear that after his demise property would go to one of his sons; which forms one part, testamentary in nature and another part is settlement. For the reasons aforesaid, the plaintiff cannot be said to have acquired the property on the strength of this document Exhibit-2, unless it withstands the test before the competent Court of law, having jurisdiction to decide testamentary succession. Till then the defendant cannot be evicted by the plaintiff.

32. Consequently, I am of the view that impugned judgement and decree passed by learned First Appellate Court thereby affirming the judgement of learned Trial Court should not be allowed to remain in force and should be set aside, which I accordingly do.

33. The appeal thus stands allowed. The impugned judgement is set aside. Liberty is given to the defendant to withdraw the occupational charges he has been depositing pursuant to the order of the Court in Title Execution Case No. 14 of 2017. Learned Court below is directed to do the needful, in this regard after the period of appeal is over. With the disposal of this appeal connected applications, if any, stand disposed of.

34. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.

35. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)