

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

**F.A. No.171 of 2024
Atasi Saha and Another
Vs.
Somnath Sarkar**

For the appellants	:	Mr. Sudipto Mitra, Mr. Kushal Paul
For the respondent	:	Mr. Sabyasachi Chowdhury, Sr. Adv., Mr. Manabendra Saha Roy, Mr. Sounak Bhattacharya, Mr. Anirban Saha Roy, Mr. Shreyan Bhattacharya, Mr. Sounak Mondal, Mr. Abhirup Halder
Heard on	:	03.12.2024, 27.02.2025, 04.03.2025
Hearing Concluded on	:	06.03.2025
Judgment on	:	18.03.2025

Sabyasachi Bhattacharyya, J.:-

1. The defendants in a suit for recovery of possession have preferred the present appeal against a judgment granting eviction against the appellants on the premise that the appellants are trespassers in respect of the suit premises.
2. The vortex of the dispute is a deed of settlement executed by the admitted original owner Kalikanta Sarkar on May 11, 1963 and the interpretation thereof. The settlor Kalikanta left two sons, namely

Nemai and Nilmani, whose wives were respectively Rekha and Sondha. The plaintiff/respondent is the son of Nilmani and Sondha whereas the defendant/appellant no.1 is the daughter of Nemai and Rekha. The plaintiff is the sole male child of his parents, having a sister as well, whereas Nemai and Rekha only had a daughter, that is, the defendant/appellant no.1 and no male heir.

3. Learned counsel for the defendants/appellants contends that the suit, as framed, being only for recovery of possession, is bad in law and in its present form, since no declaration of title of the plaintiff has been claimed, although the plaintiff's title is clouded in view of Rekha having executed a registered gift deed in favour of the appellant no.1 by virtue of her absolute title claimed through the disputed deed of settlement.
4. Secondly, it is contended that the intention of the settlor, Kalikanta, was not to exclude all the female progeny of his family but only his daughters, the reason for which was cited in the deed itself to be that the said daughters were married and living with their respective husbands.
5. It is argued that the property was vested absolutely in Rekha and Sondha, the daughters-in-law of the settlor. The subject-property was divided into Schedules "B" and "C", which were demarcated and transferred to Rekha and Sondha respectively. It is submitted that although the deed provided that the property would vest in Rekha and Sondha in respect of their respective shares, with the rider that if any of them had male heirs, the property would devolve upon such male heirs, since Sondha already had a son living at the time when the deed

was executed, whereas Rekha had none, the intention of the settlor was clear, to the effect that the devolution on male heirs of Rekha and Sondha from their respective husbands would be restricted to the respective shares of Rekha and Sondha exclusively. Thus, on the demise of Rekha, her portion of the property could not have devolved on the plaintiff Somnath, who is the son of Sondha, by a cross-devolution between the already-demarcated portions of the original property.

6. Learned counsel appearing for the appellants further argues that absolute title was vested in Rekha and Sondha in respect of their demarcated portions, which is also evidenced from the restriction of transfer of their respective portions being limited to the lifetime of the settlor, his wife and the respective husbands of Rekha and Sondha. After the demise of the said limited interest holders, there was no fetter imposed on Rekha and Sondha to transfer their properties. Thus, such absence of restraint clearly denotes that absolute title was vested in Rekha and Sondha respectively, retaining only lifetime interest of the intermediate interest-holders.
7. Learned counsel for the appellant places reliance on *Ram Gopal v. Nand Lal and others*, reported at *AIR 1951 SC 139* for the proposition that when the property is settled for absolute use, benefit and right of alienation, the settlee gets vested interest, to be devolved upon the heirs of the settlee.
8. Learned counsel also cites *Gopala Menon v. Sivaraman Nair and others*, reported at *AIR 1979 SC 1345* in support of the proposition that the

amplitude of the power of alienation as given in the instrument enures in favour of absolute vesting.

9. Citing *Nathoo Lal v. Durga Prasad*, reported at AIR 1954 SC 355, the appellants argue that the rights of the settlee by an instruction in respect of the property are absolute in nature.
10. Lastly, it is argued that an interpretation of the deed of settlement which would exclude the female heirs would be against public policy, being violative of Article 14 of the Constitution of India, and as such, no such interpretation should be adopted by a court of law.
11. Learned senior counsel for the plaintiff/respondent, on the other hand, argues that the very intention of the deed was to exclude the female heirs of the settlor and the deed ought to be interpreted in such context. Citing *Ramachandra Shenoy and another v. Mrs. Hilda Brite and others*, reported at AIR 1964 SC 1323, it is argued that if the “dominant intention” of the settlor was to have the premises vested upon the male heirs of the family, the same must be given effect to.
12. Learned senior counsel relies on *Kaivelikkal Ambunhi (dead) By LRs. and Others v. H. Ganesh Bhandary*, reported at AIR 1995 SC 2491 for the proposition that while interpreting any other instrument, in contrast to a Will, by which interest in immovable properties is created, the earlier part of the instrument will prevail over the latter. Citing *Naramadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker and others*, reported at (1997) 2 SCC 255, it is further contended that in case of ambiguity, the instrument has to be harmoniously construed. Proceeding on such premise, the intention of the settlor to exclude the

female heirs and vest the property only on the male heirs of the family, as expressed in the earlier part of the deed of settlement, has to prevail over the latter part thereof.

- 13.** It is argued by the respondent since the respondent is a male heir of Sondha Sarkar begotten by her husband Nilmani and Portion "B" of the premises has successfully vested in him as per Section 19 of the Transfer of Property Act, the respondent had the right to evict the appellant no.1 who, despite being a female heir, claims through Rekha who did not have a male heir, and appellant no. 2, the husband of appellant no. 1, from the suit property.
- 14.** Placing reliance on Sections 21 and 23 of the Transfer of Property Act, learned senior counsel for the respondent argues that the "specified uncertain event" as contemplated in the said Sections, in the context of the present case, is the birth of male heirs of Rekha and Sondha through their respective husbands. The "specified person" in whose favour the interest is created is the male heir. The appellant no.1 is the daughter and sole heir and legal representative of Rekha and Nemai. Since Nemai died on February 21, 2012 and Rekha on September 26, 2012, the "specified uncertain event" could not take place before or at the same time as the intermediate or precedent interest ceased to exist within the contemplation of the said two Sections and, thus, the interest which was created in favour of such "specified person" failed.
- 15.** It is argued that the deed did not partition the property by metes and bounds but merely allocated two portions thereof to the trustees for the use and benefit of Rekha and Sondha and their male heirs respectively.

Although a limited life interest was created in favour of Rekha and Sondha, the ultimate beneficiary of the settlement is the male heir of Sondha, in the absence of any male heir begotten by Rekha through her husband.

- 16.** It is argued that any contrary interpretation would militate against the dominant intention of the settlor since the purpose of the trust would partially become impossible to perform and the trust would get extinguished in terms of Section 77 of the Indian Succession Act, 1882, the premises then reverting back to the estate of the settlor and devolved by way of intestate succession upon all the heirs of the settlor including his daughters, who were expressly excluded under the said deed. Thus, such interpretation is patently contrary to the intention of the settlor.
- 17.** The mere lifting of embargo to alienate the premises in favour of Rekha, upon the demise of the settlor, his wife and the husband of Rekha, cannot lead to converse interpretation whereby a positive right of alienation is created in favour of Rekha, especially in the absence of such positive right being expressly stipulated in the deed.
- 18.** Rekha could not have automatically become the full owner of the premises since the claim of Rekha is through the deed of settlement, as such, covered by sub-section (2) and not sub-section (1) of Section 14 of the Hindu Succession Act, 1956. Since the deed gave Rekha a restricted interest, she would fall within the exception under Section 14(2) of the said Act. In support of such proposition, learned senior counsel cites *Kallakuri Pattabhiramaswamy (dead) by LRs. v. Kallakuri*

Kamaraju and Others, reported at 2024 SCC OnLine SC 3379. Thus, Rekha did not have any right to execute the gift deed in favour of the appellant no.1.

19. Upon hearing learned counsel for the parties, the adjudication of the disputes involved in the present appeal boils down to the interpretation of the deed of settlement dated May 11, 1963. Also, it is to be considered whether in the absence of any declaration being sought in the suit regarding title of the plaintiff/respondent and/or any declaration to avoid the gift deed executed by Rekha in favour of appellant no.1 and/or cancellation of the same, whether the suit is maintainable in its present form.
20. Thus, the consideration can be divided under two broad heads – whether the suit was maintainable in its present form and the interpretation of the deed of settlement.

Whether the suit was maintainable in its present form

21. We find from the written statement filed by the defendants/appellants that the defendants specifically claimed that pursuant to the settlement, Rekha and Sondha, the daughters-in-law of the settlor Kalikanta, mutated their respective names in the records of the Kolkata Municipal Corporation in respect of their respective demarcated shares as allocated under the deed. Moreover, the registered deed of gift was executed on May 11, 2012 by Rekha, after the demise of the settlor, his wife and the husband of Rekha, in favour of the defendants/appellant no.1 on May 11, 2012. Thus, it is clear that Rekha asserted her right,

title and interest in respect of the suit property after the embargo of alienation was lifted. Hence, the suit for recovery of possession simpliciter, without any relief having been claimed for declaration of title of the plaintiff in the suit property and/or for cancellation of the gift deed dated May 11, 2012, alternatively declaration that the said gift deed was not binding on the plaintiff, was not maintainable in its present form.

- 22.** In view of the assertion of absolute title by Rekha on the basis of the deed-in-question by mutating her name in respect of her portion as per the deed of settlement and subsequent execution of a registered deed of gift in favour of her daughter (defendant/appellant no. 1), the title of the plaintiff in the suit property was definitely clouded.
- 23.** By suppression of such fact, the suit was filed by the plaintiff simply for recovery of possession without claiming any declaration of title or cancellation of the gift deed.
- 24.** However, in view of the title of the plaintiff being clouded, as discussed above, the principal relief in the suit ought to have been a declaration of title of the plaintiff as well as a declaration for cancellation of/avoiding the deed of gift executed by Rekha in favour of the defendant no.1. Recovery of possession could only be a consequential and ancillary relief. Thus, this issue is decided in favour of the defendants/appellants. The suit was, accordingly, not maintainable in its present form in the absence of any prayer for declaration which was mandated in the facts and circumstances of the present case.

Interpretation of the deed of settlement dated May 11, 1963

- 25.** The plaintiff/respondent cites *Naramadaben Maganlal Thakker (supra)* for the proposition that the terms of a deed have to be harmoniously construed. Such principle, thus, has to be read into the ratio laid down in *Kaivelikkal Ambunhi (dead) By LRs. (supra)*, where it was held by the Supreme Court that in case of a non-testamentary instrument, the first part of the document prevails over the latter part.
- 26.** Construing the disputed deed of settlement in such context, we find that the pre-dominant intention of the settlor was only to deprive his five daughters from his legacy, and not the female heirs in the family as a whole. The specific reason for depriving the daughters was, in fact, given in the deed to be that the said daughters were married and were living with their respective husbands. We do not find within the four corners of the deed any express intention to deprive the female progeny of the settlor. Rather, absolute right and user was conferred on two females – the daughters-in-law of the settlor, in the same bracket as their male heirs, if begotten from their husbands.
- 27.** It was stated in the deed that the property may not vest in any way upon the daughters or their heirs, for which the settlor was desirous of the said premises being enjoyed by the male heirs of his sons. Read in conjunction, the said two statements indicate that the dominant intention was to deprive the daughters and to ensure that the property devolved on the male heirs of the “respective” sons. Harmoniously read with the other provisions of the deed, it becomes abundantly clear that the intention of the settlor was to overlook his daughters since they

were married and settled in life and to confer title on his daughters-in-law and their male heirs, if any. Notably, there is no express clause in the deed debarring devolution of his estate on the female progeny in the settlor's family forever to come.

28. The expression "respective", used in the deed, is also of some significance in interpreting the deed. The said term is found again in the latter part of the deed where the property is divided into two clearly demarcated portions described under Schedules "B" and "C", which are allocated to the daughters-in-law of the settlor, namely Rekha and Sondha, "respectively" (as opposed to "jointly").
29. Such devolution was expressed in the deed to be for absolute use and benefit of the property in favour of Rekha and Sondha and their respective male heirs to be begotten by their respective husbands.
30. The argument of the respondent in the context of Section 24 of the Transfer of Property Act is that where an interest by a transfer is to accrue on certain persons as shall be surviving at some period, the exact period not being specified, the interest shall go to such of them as are still alive when the *intermediate or precedent* interest ceases to exist, unless a contrary intention appears from the terms of the transfer. The vesting of title in Rekha and Sondha by the deed in the present case, however, cannot be labelled as "intermediate" or "precedent" in contradistinction with their respective sons who would be the ultimate beneficiaries. As per the language of the deed, the status of Rekha and Sondha and their respective male heirs were placed on the same footing by the use of the conjunction "and" between

Rekha and Sondha on the one hand and their respective male heirs on the other. Thus, it is not that Rekha and Sondha were to enjoy only lifetime interest and thereafter the interest would ultimately devolve upon their respective sons but that Rekha and Sondha on the one hand and their respective male heirs on the other stood on a similar footing insofar as interest in the property is concerned. The intention of devolution, as per the specific language of the deed, is not successive on point of time, creating a lifetime interest in Rekha and Sondha first and then on their male heirs, if any, but simultaneous as between the said ladies and their male heirs.

- 31.** By use of the expression “and”, the settlor makes it abundantly clear that the phrase “absolute use and benefit” applies to Rekha and Sondha and their respective male heirs equally, no distinction being drawn between the interest of Rekha and Sondha being intermediate or precedent and that of their sons being ultimate. Thus, Section 24 of the Transfer of Property Act is not attracted to the present case at all in view of contrary intention being expressed in the deed itself.
- 32.** The respondent’s reliance on *Kallakuri Pattabhiramaswamy (dead) by LRs. (supra)* is justified to the extent that if the devolution of title is through an instrument and not by virtue of a pre-existing right of maintenance, sub-section (2) and not sub-section (1) of Section 14 of the Hindu Succession Act applies. The ratio laid down in both *Ram Gopal (supra)* and *Nathoo Lal (supra)*, cited on behalf of the appellants, were of a period prior to the enactment of the Hindu Succession Act, 1956 (for short, “the 1956 Act”) and, thus, does not apply to the present

case. Rather, after coming into operation of Section 14 of the 1956 Act, it is the said provision which would be applicable. The devolution of title claimed by Rekha not being by dint of a pre-existing maintenance right but through the instrument-in-question, that is the deed of settlement in 1963, Rekha would otherwise be governed by Section 14(2) of the Hindu Succession Act.

33. However, Section 14(2) would only imply that in the event a limited right was created by the deed, the said right would not ripen into absolute title in the property by operation of law. As opposed thereto, in the present case, the terms of the deed of settlement themselves clearly denote that absolute title, and not a limited interest, was created by the deed itself in favour of Rekha and Sondha with regard to their respective demarcated allocations, thus rendering Section 14(2) academic insofar as the present case is concerned.

34. In *Gopala Menon (supra)* the Supreme Court observed that the absolute and unrestricted power to dispose of property is a necessary incident of an absolute estate and it is implicit when an absolute estate is conferred that the grantee is free to deal with and dispose of the property in any manner. Although it has been argued by the respondent that there was no express term in the deed of settlement to confer such absolute and unrestricted power to dispose of the property vested in the daughters-in-law of the settlor, namely Rekha and Sondha, fact remains that the restriction on transfer imposed upon the said two daughters-in-law was limited on point of time to the lifetime of the settlor, his wife and the respective husbands of the said daughters-

in-law. In the present case, Rekha survived the settlor, his wife Saraju, as well as her husband Nemai; as such, on the date of execution of the registered deed of gift in favour of the appellant no.1 by Rekha, the said donor had no fetter in effecting such transfer. Thus, read in appropriate context, despite there being no express conferment of absolute right to transfer, the fetter in the deed in respect of transfer, which was limited on point of time to happening of certain events, was exhausted with the demise of the last lifetime interest-holder, that is, the husband of Rekha, namely Nemai, as the settlor and his wife Saraju had predeceased Nemai.

- 35.** Read in conjunction with such right to transfer, implied by the absence of any fetter to do so after the death of Nemai, it has also to be noted that the deed itself, at the outset, vested demarcated portions of the property as described in Schedules “B” (the present suit property) and “C” thereof in favour of Rekha and Sondha respectively.
- 36.** The respondent argues that no partition was effected by the deed. However, such argument is contrary to the deed itself which, in no uncertain terms, provides in the habendum clause that the two *partitioned* equal shares as shown in Schedules “B” and “C” in the plan annexed to the deed was given for the *absolute use and benefit* of Rekha and Sondha, along with their respective male heirs to be begotten by their respective husbands. Since the word “partitioned” is used in the deed itself and there is no bar in law for the absolute and exclusive owner of a property (the settlor Kalikanta in the present case) to transfer different demarcated portions of his property to different

persons, no further partition by metes and bounds would be required in such case, since none else became co-owners with Rekha and Sondha, the transferees, with regard to their respective demarcated allocations. At best, since Sondha's son had already been born at the time of the execution of the deed, he would get equal half share with his mother in respect of Sondha's demarcated share, since the deed used the conjunction "and" in conferring absolute user and benefit between Rekha and Sondha on the one hand and their son (if any) on the other.

37. The picture which thus emerges is that the vesting of the property as intended in the deed of settlement did not discriminate between the status of Rekha and Sondha and their respective male heirs inasmuch as the property was given for absolute use and benefit both of Rekha and Sondha and their respective male heirs equally. Thus, if it is argued that the ultimate beneficiaries were the male heirs of Rekha and Sondha, the same logic would apply to Rekha and Sondha themselves as well. As per the deed, the interest given to Rekha and Sondha was equivalent to that of their male heirs and upon the lifting of the restriction as to transfer upon the demise of their respective husbands, Rekha and Sondha had unfettered right to transfer the property, thus, having absolute title in their respective demarcated portions of the property.

38. Nowhere in the deed has the expressions "life interest", "limited interest", "intermediate interest", "precedent interest" or any similar word or phrase signifying limited user or intermediate or precedent interest being given to Rekha or Sondha has been used. In tune with

Section 19 of the Transfer of Property Act, a vested interest was created in favour of Rekha and Sondha in respect of their partitioned and demarcated portions, which was to take effect in a deferred manner, after the demise of the settlor, his wife Saraju and the respective husbands of Rekha and Sondha.

- 39.** Nonetheless, the interest was vested at the inception, when the deed of settlement was executed by demarcating and partitioning the property between Rekha and Sondha respectively. Section 19 of the Transfer of Property Act further provides that a vested interest is not defeated by the death of the transferee before he obtains possession. The Explanation to Section 19 further stipulates that an intention that an interest shall not be vested is not to be intended 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.
- 40.** The said provision is squarely applicable in the present case, since the deed clearly provides that the property vests absolutely for the use and benefit of Rekha and Sondha in respect of their demarcated and partitioned portions of the property along with their respective male heirs which would merely be postponed till the exhaustion of the lifetime of the settlor, his wife Saraju and the respective husbands of Rekha and Sondha.
- 41.** It is also to be noted that the deed itself provides that the trustees shall make over possession of the premises to Rekha and Sondha according to the division shown in the plan annexed thereto on the death of the

settlor and his wife, in which event the said trustees (sons of the settlor) would have their own respective residence in the portions allotted to their respective wives, which has to be read as a life interest of the sons of the settlor (husbands of Rekha and Sondha).

42. Furthermore, as rightly contended by the appellant, the settlor never expressed any intention within the four corners of the deed of settlement that the devolution of title in the property covered thereby would not be in favour of future female heirs for generations to come, apart from a limited exclusion of his daughters, who were his first-degree successors. There is no exclusion clause regarding the female progeny of the settlor in general. Read harmoniously, the provisions of the deed clearly denote that the intention was to divest the daughters from any title, for which purpose the premises were given to the daughters-in-law of the settlor and their male heirs, if any.
43. Another facet of the matter is germane. The deed specifically envisaged that the property would vest in favour of Rekha and Sondha in respect of their *respective* two partitioned shares as depicted in Schedules “B” and “C” to the deed, for their absolute use and benefit. Thus, even if Rekha did not have any male heir from her husband, there could not be any cross-allotment devolution of Rekha’s share in favour of the plaintiff, who is the son of Sondha.
44. In the event Rekha did not have any son, the deed did not prevent devolution on her female heirs. The word “respectively” is used to qualify the sons of Rekha and Sondha respectively in the deed itself. The use of such expression clearly denotes a demarcation between the

devolution in respect of Schedule “B”, which was vested in Rekha, and Schedule “C”, which was vested in Sondha. Hence, since Sondha had a male heir, namely the plaintiff/respondent, the said male heir would exclude the other female heirs of Sondha as per the deed.

- 45.** However, since Rekha did not have a son, there would not arise any occasion of her male heir getting any interest in the property. In such case, as per the intention of the settlor as expressed in the deed of settlement, Rekha would have absolute title in the property which would devolve upon her demise to her heirs, whether male or female. Undoubtedly, if Rekha had one or more male heirs, he or they would exclude the female heirs of Rekha, if any. In the absence of any such male heir, however, it would be the surviving heirs of Rekha, whether male or female, who would get the property through Rekha.
- 46.** Thus, in any event, after the demise of Rekha, her demarcated and partitioned portion of the property as denoted in Schedule “B” of the deed of settlement, which is also the suit property herein, would devolve solely upon her heir/daughter, namely the defendant/appellant no.1, since Rekha’s husband pre-deceased her.
- 47.** In the present case, however, Rekha had executed a registered deed of gift in favour of her daughter, the appellant no. 1, after the demise of the original settlor, his wife Saraju and Rekha’s husband Nemai, when the restriction in respect of absolute transfer was lifted by virtue of the provisions in the deed. Hence, such transfer in favour of appellant no.1 was perfectly valid and the appellant no.1, the daughter of Rekha, validly got the property by virtue of the said deed of gift, although she

was even otherwise entitled to get it by virtue of succession on the demise of Rekha, if not donated to her.

- 48.** Accordingly, we are of the clear opinion, on a harmonious construction of the plain language of the deed of settlement of 1963, that the same can be interpreted only in one manner, that is, the suit property, covered by Schedule “B” of the deed of settlement, was vested absolutely in favour of Rekha with an unfettered right of transfer after the demise of the settlor, his wife and Rekha’s husband. By virtue of the deed of gift executed by Rekha after the restriction regarding transfer was lifted on the demise of her husband Nemai, the appellant no.1 acquired absolute title in the suit property.
- 49.** Accordingly, the plaintiff does not have and never had any title in the suit property, nor any consequential right of having an eviction decree against the appellants.
- 50.** The learned trial Judge, thus, committed a patent error of law in misinterpreting the deed of settlement of 1963 without applying the plain meaning and harmonious construction tests and decreeing the suit for *khas* possession simpliciter without any relief as to declaration of title of the plaintiff/respondent no. 1 and/or cancellation of the gift deed in favour of the defendant/appellant no. 1 being claimed.
- 51.** In view of the above issues being held in favour of the defendants/appellants, the present appeal succeeds.
- 52.** Accordingly, F.A. No.171 of 2024 is allowed on contest, thereby setting aside the impugned judgment and decree dated March 21, 2024 passed by the learned Judge, Second Bench, City Civil Court at Calcutta in

Title Suit No.467 of 2020 and dismissing the said suit on contest without any order as to costs.

53. A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)