

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

SA 39 of 2024
IA No: CAN 6 of 2024
Asis Mukherjee & Anr.
VS.
Krishna Mitra & Anr.

For the Appellants :Mr. Vinay Misra, Adv.

For the Respondent no. 2 :Mr. Kukteswar Maity, Adv.
Ms. Nupur Chaudhuri, Adv.

For the Respondent no. 3 :Mr. Aneek Pandit, Adv.
Mr. Ali Rizvi, Adv.
Ms. Ankita Sikdar, Adv.

Last Heard On :29.11.2024

Judgment On :08.01.2025

Bibhas Ranjan De, J. :

1. At the very outset it is pertinent to mention here that the appellants not being parties to the suit or first appeal filed this appeal along with an application (CAN no. 4 of 2024) seeking leave to file appeal. Hon'ble Division Bench, considering the caveatable interest in the subject property, granted leave to file. Hence this appeal.
2. Challenge in the present appeal is to a judgement passed by Ld. Additional District Judge, 6th Court, Alipore on 02.12.2023, in connection with Title Appeal no. 84 of 2018 wherein Ld. First Appellate Court reversed the judgment and decree passed by the Ld. Civil Judge, Junior Division, 2nd Court, Alipore in Title Suit No. 302-17 of 2006.
3. The brief facts leading to the present appeal is that the subject Land was purchased on 30.05.1947 by the joint family in the name of one Kamal Basini Majumder, grandmother of plaintiffs. Said Kamal Basini Majumder executed a deed of gift on 30.08.1967 by allotting 50% of the land to her elder son Binoy Krishna Majumder and rest 50% to her grandsons namely Surojit Majumder & Subhojit Majumder. Subhojit Majumder, plaintiff

no. 2/respondent no. 4 died as bachelor during pendency of the first appeal and his name was expunged from the cause title of this appeal.

- 4.** Plaintiff no. 1 & 2 i.e. grandson of Kamal Basini Majumdar and also Binoy Krishna Majumder executed a family arrangement and partition on 05.03.1982 (exhibit 3). By that family arrangement, executors reduced their title and interest from 50% to $1/3^{\text{rd}}$ and remaining $1/3^{\text{rd}}$ was allotted to their parental cousin uncle namely Saroj Kumar Majumder.
- 5.** Binoy Krishna Majumder executed a will in the year 1983 (exhibit 9) in respect of his share to the extent of $1/3^{\text{rd}}$ of subject property to her eldest daughter Krishna Majumder (Mitra) i.e proforma defendant/respondent no. 2. By that will Binoy Krishna Majumder also parted with other properties in name of his other two daughters. By that will Binoy Krishna Majumder also allotted other property to the plaintiffs and will was probated on 29.01.1992.
- 6.** Said Saroz Kumar Majumder bequeathed the said subject flat alone with two garages to his wife Marjorie Majumder /original defendant who also transferred the said flat to one Gita Rani

Panda (Mukherjee) by a sale deed in the year 2011 (exhibit-7). Said Gita Rani Panda (Mukherjee) died in the year 2011 and present appellant are the legal heirs of Gita Rani Panda (Mukherjee).

- 7.** Legal heirs of Gita Rani Panda (Mukherjee) filed an application along with sale deed executed by original defendant Marjorie Majumder, with a prayer for inclusion as a party to the suit. But, that was refused by the Trial Court on the ground of 'lis pendenti lite transferee'. After demise of Marjorie Majumder, her son Simon Majumder was substituted in the Trial.

Observation of the Trial Judge & First Appellate Court:-

- 8.** Ld. Trial Judge framed nine (ix) issues for adjudication of the title suit no. 302 -17 of 2006 which are as follows:-
- i. Is the present suit maintainable in its present form and in law?
 - ii. Have the plaintiffs any cause of action arisen to file the instant suit?
 - iii. Is the suit bad for non-joinder and/or defect of necessary parties ?

- iv. Have the plaintiffs any right title and interest and possession of the suit property?
- v. Was the deed of family settlement and partition dated 05.03.1982 superseded the deed of gift dated 30.08.1967?
- vi. Have the plaintiffs executed the deed of family settlement and partition?
- vii. Are the plaintiffs entitled to get any decree as prayed for ?
- viii. Are the plaintiffs entitled to get any other relief / relieves under the law and equity?
- ix. Additional Issue: Whether the deed of conveyance dated 02.05.2011 executed and registered by original defendant no.1 is void *ab initio* and not binding upon plaintiffs.

Among those issues Ld. Trial Judge set the conflict between the family arrangement and partition deed and the deed of gift at rest by holding, *inter alia*, that the family arrangement and partition deed between the plaintiffs, Binoy Krishna Majumder and Saroj Kumar Majumder, should be preceded over the deed of gift executed by Kamal Basini Majumder. Accordingly, issue no. ix was also decided against the plaintiffs on account of decision made in issue no. v.

9. Ld. Trial Judge recorded his finding that even Saroj Kumar Majumder (a relative) who had no pre-existing right, title and interest qua subject property, can be a party to a family arrangement and partition relying on a decision of ***Dulal Chandra Chatterjee and Ors. vs. Moni Mohan Mukherjee and Ors reported in 2004 (4) CHN 563.*** Thereby, Ld. Judge confirmed the right, title and interest in favour of Saroj Kumar Majumder (since deceased) pursuant to the family arrangement and partition deed. Accordingly, Ld. Trial Judge declared the deed of conveyance dated 12.05.2011 (exhibit-7) executed by widow of said Saroj Kumar Majumder, as a valid document.

10. In opposition to that, Ld. First Appellate Court reversed the judgement passed by the Ld. Trial Judge assigning, inter alia, following reasons:-

“During the life time of Kamal Basini Mazumdar, she had made a deed of gift on 30.08.1967 in favour of Binoy Krishan Mazumdar in respect of 50% share of the property and rest 50% in favour of the plaintiffs of this suit. Saroj Mazumdar is not the son of Kamal Basini Mazumdar directly. Name of father of Saroj Mazumdar was Baidyanath Mazumdar.

It is fact that by virtue of deed of gift date 30.08.1967 the plaintiffs and the Binoy Krishna Mazumdar became the owners of the suit property.

It is fact that during his life time said Kamal Basini Mazumdar has not made any deed of cancellation or deed of revocation in respect of the said deed of gift.

The original owner, Kamal Basini Mazumdar gifted the suit property to the plaintiffs and Binoy Krishna Mazumdar in the year 1967 when the plaintiffs were minor and their mother Bandana Mazumdar accented the said gift. It was an absolute gift.

The deed of family settlement arrangement and partition was made in the year 1982. after a lapse of 15 years.

Ext.3 is the impugned deed of family settlement arrangement and partition. On perusal of deed of family settlement arrangement and partition, it appears from page 3,it was decided that, and whereas, the said Kamal Basini Mazumdar without properly appreciating or understanding the import or implications of the deed which was executed on 30.08.1967 effected a deed of gift of the property being premises No. 10/1C, Swinhoe Street, Kolkata by which, she was purported to effect an absolute gift to her son Benoy Krishna Mazumdar and grandsons Surojit Mazumdar and Subhajit Mazumdar (plaintiffs) both then minor under the age of 18 years and represented by their mother Smt. Bandana Mazumdar, she having accepted along with said Benoy Krishna Mazumdar the gift made in their favour by said Kamal Basini Mazumdar though it was the intention of the said Kamal Basani Mazumdar all along that the property would continue to be the property of Saroj Kumar Mazumdar, Benoy Krishna Mazumdar and Surojit Mazumdar &

Subhajit Mazumdar being the sons of Bholanath Mazumdar, and whereas, the said mistake having been detected as to the omission of the name of Saroi Kumar Mazumdar. In the deed of gift dt. 30.08.1967, Benoy Krishna Mazumdar, one of the donee in the said deed of gift and Smt. Bandana Mazumdar mother and natural guardian of said Surojit Mazumdar and said Subhajit Mazumdar and on their behalf, effected a declaration on 27.12.1974 whereby they declared the intention as herein before mentioned and had confirmed that in pursuance of the said intention, possession of the ground floor of the premises had been delivered to Saroj Kumar Mazumdar.

That Saroi Kumar Mazumdar. since deceased was one of the co-shares in respect of said family arrangement dated 05.03.1982 (Ext- 3).

Fact that by virtue of purported deed of family settlement and arrangement, the share of themselves, plaintiffs nos. 1 and 22 have been allegedly reduced from $\frac{1}{2}$ portion to $\frac{1}{3}$ rd portion in respect of entire suit building. Fact that by virtue of said deed of family arrangement and partition.

remaining portion of the suit building had been vested in favour of Saroi Kumar Majumdar i.e. of ground floor.

Fact that as per the said WILL (Ext-9) the plaintiffs are beneficiaries, in respect of $\frac{1}{3}$ rd share of another property.

But the legality and validity of deed of family settlement and partition shall have to be considered as per law and as per materiala on record as a whole.

A deed of gift once executed and registered and accepted cannot be revoked unless the mandatory requirement of section 126 of Transfer Property Act, 1882 is fulfilled.

Such fact and position of law has not been discussed, observed and decided by Ld. Trial Court.

Section 126 of Transfer Property Act, 1882 is very clear and elaborate upon the manner in which gift can be suspended or revoked by way of mutual agreement of doner and donee or by rescissions as in the case of contract. There are two types of deed of gifts. Revocable gift deed and irrevocable gift deed. In case of revocable gift deed it can be revoked by doner at any time during her life time. In case of irrevocable gift deed, the donees legally become the owners of the gift as soon as they physically received the gift and accepted the same. Once this is done, the doner cannot revoke the gift deed unless the requirement of section 126 are fulfilled.

Here in this case, no case is made out by the defendants that there was revocable deed of gift and/or by invoking the provisions of section 126 the deed of gift was revoked.

In any deed of family settlement there must be either partition of the property amongst co-owner/co-sharers or allotment of share by way of gift to the legal heirs.

It is pleaded by the defendants that Saroj Kumar Mazumder also provided money for the purchase/construction of the property of the residential house by Kamal Basini Mazumder. At the relevant time he was aged about 17 years. So it is hardly possible for him to provide such money. Furthermore there is no any single iota of proof of the same. Mere pleading is not proof. It has to be proved by cogent and convincing evidence.

Accordingly, in view of the facts and circumstances and materials on record it is held that impugned deed of family arrangement and partition is not valid and binding upon the parties which could revoke the deed of gift validly.

So, the observations and findings of the Ld. Trial Court in respect of issue no. 5 is not proper and justifiable. Issue no. 5 is: "Was the deed of family settlement and partition dated 05.03.1982 superseded the deed of gift dated 30.08.1967?" In view of the materials on record and the observations made herein above, it is held that deed of family settlement and partition dated 05.3.1992 never superseded the deed of gift dated 30.08.1967. Thus, the impugned deed of family arrangements and partition is invalid and not binding upon the parties rather the same is void ab initio.

only rely thereon to extent of it's admitted parts by the plaintiffs but the plaintiffs shall, however, treat the same as a pan of this plaint"

It is true that plaintiffs have to seek proper relief in the prayer portion of the plaint but relief can be granted on the basis of the prayer of the plaint as well as on the basis of the pleadings of the plaint to do complete substantial justice. Even Order 41 Rule 33 of the CPC contemplates the power of court of Appeal. The Appellate Court may exercise its wide power in favour of all or any of the parties. The principles laid down in order 41 rule 33 CPC are in conformity with the rules of natural justice. The object of the same is to enable the court to do the complete justice between the parties.

It is true that there is no specific prayer for declaration upon impugned deed of family arrangement and partition but issue no. 5 is sufficient to consider such declaration. According to order 7 rule 7 CPC every plaint shall state specifically the relief which the plaintiffs claimed either simply or in the alternative and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for one same rule shall apply to any relief

claimed by the defendant in his written statement.

Keeping in view the scope and object of order 7 rule 7 CPC relating to moulding of relief, even though certain reliefs are not asked for they can be granted by the Court under the above provision when court considers it just and proper to do so on deed of family arrangements on the basis of the pleadings of the parties and the evidences and materials on record especially when Issue no. 5 is framed to the effect that "Was the deed of family settlement and partition dated 05.03.1982 superseded the deed of gift dated 30.08.1967."

Even order 41 rule 33 of CPC contemplates the power of the Court of appeal in that context. The appellate court may exercise its wide power in favour of all or any of parties.

The principles laid down in order 41 rule 33 of CPC are in conformity with the rules of nature of justice. The object of the same is to enable the court to do complete justice between the parties.

So far as point of Limitation is concerned, it has been controverted by the Ld. Advocate for the respondent is that the impugned deed of family arrangement and partition is of the year 1982 whereas the suit has been filed in the year 2006 after lapse of 24 years which is hopelessly barred by law of limitation.

It has already been observed hereinabove that impugned deed of family arrangement and partition of the year 1982 is void ab initio. The suit was filed in the year 2006 i.e. after 24 years from the date of execution of deed of family arrangement and partition. In this case there is no prayer for any declaration for such deed. It is to be distinguished from a suit for cancellation or declaration of any deed from the suit in which any such deed is null and void i.e. void ab initio. In case of void ab initio deed, it is not necessary for

the party to come to the court for getting the deed cancelled or set aside. The matter of limitation will apply when a suit is filed for cancellation or setting aside a document which is not void ab initio. If a document is a void ab initio it is an illegal document from the very inception so it does not require either to cancel or to set aside because according to law such a document does not exist. Having considered the above all and the present position of law, it appears that deed of family arrangement and partition is not required to be cancelled or set aside and as such there cannot be any question of limitation on such deed.

In view of the above, I do not find anything which debarred this court from expressing its findings and observations on the impugned deed of family arrangements and partition.

At the time of final hearing of the argument it has also been contended by the Ld. Advocate for the respondent/defendant that there is no prayer for recovery of possession in so much as admittedly the appellants/plaintiffs are not in a possession of the suit property. It is true admittedly Saroj Kumar Mazumder was in possession of the suit property.

It has already been observed herein above by the Court that deed of family arrangements and partition is void ab initio and as such on the strength of the same neither Saroj Kumar Mazumder nor his legal heirs/successors/assignees has acquired any right, title and interest over the suit property. If that be so then at best possession of the Saroj Kumar Mazumder or his legal heirs/successors/assignees be permissive possessors.

It has already been observed and decided herein above that deed of family arrangement and partition is void ab initio and possession of Saroj

Kumar Mazumdar and/or his successor/assignees is permissive possessor which is equivalent to licence ex gratia. In any case, if the appellant succeeds with the suit, they shall have their discretion to either continue the licence ex gratia granted in favour of the predecessor-in-interest of the respondents or to terminate it and seek quittance to delivery of the suit property from the respondent which is a subject matter of different cause, if at all.

Section 34 of the Specific Relief Act contemplates to settle conflicting claims with the property and also of disputes as to legal status. The Court must exercise its discretion while granting a declaratory decree only in proper and fit cases. This legal remedy should be granted so as to avoid multiplicity of the suit and to remove clouds over legal rights of a rightful person. The Civil Procedure Court enables the power of the Civil Court to try all the suits of a civil nature, excepting suits of which cognizance is barred by any enactment for the time being in force. Suit for declaration covers right and title of a party to the suit. Suit for declaratory relief is within the scope of Section 34, 1963 which enable a persons who has his right or legal character declare by a Court of Law.

In respect of maintainability of suit as per section 34 of the Specific Relief Act and its proviso the contention of the Ld. Advocate for the appellants is that the suit is for declaration and permanent injunction and that the declaration of ownership of the plaintiffs and pro-forma defendant in equal shares is the main declarative relief and the declaration on the impugned deed of family arrangement and partition is the consequential relief and as such the suit is quite maintainability in all its respect.

Having considered the nature of suit and the relief sought for and the submission of the Ld.

Advocates and the scope and object of section 34 of the Specific Relief Act and its proviso, I do not find anything to hold that the suit is not maintainable under the provision of section 34 and its proviso.

Moreover, admittedly now lispendence purchaser is in possession of the suit property. He is not a party in the suit. The plaintiffs have sought for impleading him as party but the Ld. Trial court has rejected the same. According to Section 52 of Transfer of Property Act 1882, the lispendence/pendentilite purchasers is governed by the decision of the case. It is well settled legal position that effect of Section 52 is not to render transfer effected during the pendency of the suit by a party to the suit void, but only to render such transfer subsequent to the rights of the parties to such suit, as may be eventually, determined in the suit. In other words, the transfer remains valid subject of course, to the result of the suit. So, within the meaning of section 52 any transfer of right in immovable property during pendency of the suit will be nonest in the eye of law if it will adversely effect the interest to the other parties to the suit in property concerned. Effect of section 52 is that right of successful party in litigation in regard to that property would not effected by alienation.

Having considered the above all and having considered the materials on record it is held that the main Issue no. 5 to the effect that "Was the deed of family settlement and partition dated 05.03.1982 superseded the deed of gift dated 30.08.1967?" is hereby decided in favour of the appellants/plaintiffs. Accordingly it is held that the deed of family settlement and partition dated 05.03.1982 has not superseded the deed of gift dated 30.08.1967 and the deed of family settlement and partition is void ab initio and not binding upon the parties. It is also held that deed

of gift dated 30.08.1967 is legal, valid and binding upon the parties.

At the time of final hearing of the argument the Ld. Counsel for the respondent/defendant has finally contended that prayer portion of the plaint is not proper like pleadings of the plaint and there is no prayer or relief in respect of the deed of family arrangement and partition and as such no relief can be granted to the plaintiffs in the suit.

The prayer portion of the plaint are as follows

a) Decree for declaration that the right of residence in the suit property, recognized and granted to Saroj Kumar Mazumdar, since deceased under the Deed of Partition respectively, was a "Right of Enjoyment of Immovable Property" of "Personal Nature" under the meaning of Property Act, 1881 (as amended till date) which was "Non-Transferable" and "Non-Assignable" nature.

b) Decree for declaration that the Late Saroj Kumar Mazumdar had no valid "Pre-Existing-Title", sourced from either transfer 'or "Succession" and could not have any right, title and/or interest of any nature and/or to any extent whatsoever over and in respect of the suit property, which was allotted to the aforesaid Late Saroj Kumar Mazumdar under the aforesaid Deed of Partition or any portion thereof, at all.

c) Decree of declaration that the Deed of Partition automatically terminated by operation of law with the death of the aforesaid Late Saroj Kumar Mazumdar on 5th May, 2001 and the plaintiffs and the Pro-Forma defendant has again become "owners in equal undivided shares in respect of Late Saroj Kumar Mazumdar under the Deed of Partition also.

d) Decree for Declaration that the suit property, which was allotted to Saroj Kumar Mazumdar, since deceased under the Deed of Partition, was

neither Transferable by him in his lifetime, nor Heritable by his legal heir/(a) and/or representative/(s) after his death.

e) Decree for Declaration that the Defendant did not have and could not have had any right, title and/or interest of any nature and/or interest of any nature and/or to any extent whatsoever over and in respect of the suit property, which was allotted to the Saroj Kumar Mazumdar, since deceased under the Deed of Partition.

El) For decree declaring that the purported Deed of Conveyance dated 02.05.2011 executed and registered by the defendant no. 1 in favour of stranger purchaser is voidab initio and not binding upon the plaintiffs.

1) Decree for perpetual injunction restraining the defendant, her men, servant/(s) Agent/(s) Heir/(s) Legal representative/(s) from transferring, alienating and/or Disposing off the suit property or any person thereof which was allotted to Saroj Kumar Mazumdar, since deceased under the Deed of Partition, in future.

A prayer for relief is the legal term for the part of a civil plaint on law suit in which the desire solutions to the problem are listed.

A prayer for relief in law of Civil Procedure is a portion of a plaint in which the plaintiffs describes the remedies that plaintiffs seek from the Court.

The Court should not go beyond what is pleaded in pleadings for adjudication.

When the facts necessary to make out a particular claim, or to seek a particular relief are not found in the plaint the Court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue.

No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings.

A court cannot make out a case not pleaded. The Court should confine its decision to the question raised in pleadings. Court can not grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

Civil Procedure Code is an elaborate codification of the principles of nature justice to be applied in civil litigation. The provisions are so elaborate that many a time, fulfillment of the procedural requirement of the code may itself contribute to delay and sometimes it may cause one more round of litigation. The object and purpose of pleadings and issues are to ensure that the litigants come to the trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial.

A case not specifically pleaded can be considered by the Court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence.

It is also the contention of the Ld. Counsel for the defendant that the plaint and the prayers and reliefs thereto are cleverly drafted to make camouflage.

But the main matter is that litigants should not be made to suffer because of the act of advocate in doing preparation of the case proceeding.

Having considered the above all and having considered the materials on record and the pleadings of the parties as well as evidences laid thereon and prayers for the relief specifically

prayer for decree of declaration that the plaintiffs and proforma defendant become owners in equal undivided shares in respect of the suit property and framing of issue no. 5 "Was the deed of family settlement and partition dated 05.03.1982 superseded the deed of gift dated 30.08.1967",. I find that this Appellate Court cannot be debarred from passing specific declarations and reliefs in the suit.

It has already been held by this Court herein above that Issue No.5 is decided in favour of the plaintiffs/appellants and impugned deed of family arrangement and partition is void ab initio and deed of gift is legal, valid and binding upon the parties. On the strength of deed of gift the plaintiffs have allotted jointly 50% of the suit property and Bijoy Krishna Mazumdar had allotted 50% of the suit property. If that be so, then it may be declared that they are the owners of the suit property to the extent as stated above. The deed of family arrangements and partition is declared null and void ab initio. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law as it would be a void ab initio.

Similarly it may also be declared that Saroj Kumar Mazumdar, since deceased had no valid title over the suit and as such his legal heirs/successors/assignees have no right to transfer the suit property in favour of any stranger purchaser.

If that be so then the possession of Saroj Kumar Mazumdar was permissive possession which is nothing but a license. A license is neither transferable nor heritable. So on the death of Saroj Kumar Mazumdar the permissive possession reverted back to the plaintiffs and proforma defendant. Accordingly, the legal

heirs/successors/assignees of deceased Saroj Kumar Mazumdar has no right, title and interest over the suit property by way of testamentary or intestate succession and the legal heirs of deceased Saroj Kumar Mazumdar has no right to transfer the suit property to any stranger.

Thus, undisputedly entire property has not been partitioned by mates and bounds in between the plaintiffs and the proforma defendant and as such the entire property is undivided property.

So the plaintiffs are also entitled to get the decree of declaration in respect of suit property as per law.

Plaintiffs/appellants are also entitled to get order of permanent Injunction in respect of the alienation of the suit property against the respondents/defendants.

Thus the impugned judgment and decree passed by the Ld. Trial court are not justifiable and the same is required to be interference with. Thus, I find that the Title Appeal is liable to be allowed on contest and the impugned judgement and decree passed by the Ld. Trial Court is liable to be set aside and the suit is liable to be decreed on contest.”

At the Bar :-

11. Learned Counsel, Mr. Vinay Misra appearing on behalf of the Appellants has contended as follows:-

- Ld. First Appellate Court wrongly concluded that Saroj Kumar Majumder was not the lenient descendant of Kamal Basini Mujumder in spite of observation that Saroj Kumar

Majumder was closely associated to the family in some ways. Blood relation is not necessary to be a member of the family arrangement and partition deed.

- All the parties to the deed of gift were parties to the family arrangement and partition deed which rules out possibility of causing undue influence.
- LD. First Appellate Court ignored the factum of contribution by Saroj Kumar Majumder in purchasing the land in dispute as well as construction thereon.
- Ld. First Appellate Court did not consider that the suit was filed without any prayer for recovery of possession while Saroj Kumar Majumder and subsequent purchaser were in possession of the subject flat successively.
- Ld. First Appellate Court cannot grant any relief which is not claimed.

12. In support of his contention, Mr. Mishra has relied on the following cases:-

- ***Kale & Ors. vs. Deputy Director of Consolidation & Ors.***
- ***Prem Singh & Ors. vs. Birbal*** reported in **2006 (5) SCC**

- ***Dahiben vs. Arvindbhai Kalyanji Bhanusali*** reported in ***AIR 2020 S.C. 3310***
- ***GPT Health Care Pvt. Ltd. vs. Surajmull Nagarmull & Ors.*** in ***C.O. no. 622 of 2018***

13. Now, coming to the discussion of the above referred cases following ratios have come up after due deliberation which are as follows:-

- In the case of ***Kale*** (supra) the Hon'ble Supreme Court discussed about the principles of family settlement and held that the members who may be parties to the family arrangement 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.

- In the case of ***Prem Singh*** (supra) the Hon'ble Apex Court observed that limitation period would be applicable in case of minor also and the minor would have two options in filing a suit to get the property purportedly conveyed under such a deed of sale either by filing the suit within 12 years of the deed or within 3 years of attaining majority. It was further held that if the plaintiff is in possession of the property then may sue for possession and the limitation period as under Article 65 would be applicable.
- In ***Dahiben*** (supra) the Hon'ble Apex Court interpreted the term 'cause of action' as every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It consists of a bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit.
- In ***GPT Health Care Pvt. Ltd.*** (supra) the Co-ordinate Bench of this Hon'ble Court handed down that the starting point of limitation begins to run in case of Article 59 from the date of knowledge. On the contrary, in case of Article 58, starting point of limitation is when the right to sue first

accrues. It is noteworthy that in case of Article 58, knowledge has not been made a yardstick. It can reasonably be deduced that when a person challenges the binding effect of a deed, the date of registration (when the deed legally comes into force) has to be the date when the right to sue first accrues. In the event the primary declaration sought was that of title, without reference to any deed, the date when such title was challenged openly within the knowledge of the plaintiff, could have been a relevant factor. However, when a deed is executed by an alleged stranger to the property affecting the title of the actual owner, the right to sue of the real owner accrues immediately. As such, in cases where the execution of the deeds itself is under challenge the starting point of limitation has to be fixed on the date of registration of the transfer deed.

- 14.** Ld. Counsel, Mr. Kukteswar Maity appearing on behalf of the respondent no. 2 virtually supported the argument advanced on behalf of the appellants.

15. Per-contra, Ld. Counsel Mr. Aneek Pandit appearing on behalf of the respondent no. 3 has advanced his argument as follows:-

- During pendency of the suit Marjorie Mazumder/defendant sold and alienated the suit property to the predecessor –in-interest of the present appellants. Though, application of addition of parties was moved before the Trial Court but the same was rejected since the transferee lis pendens is deemed to be in constructive notice of the suit.
- It is due to lis pendens transfer, respondent no. 1 was represented before the Trial Court by one Advocate Tripti Mukherjee/ appellant no. 2 herein. In the first appeal, respondent no. 1 contested the suit through an advocate/appellant no. 2 herein.
- Transferee lis pendens cannot resist the execution of the decree as provided in Rule 102 of Order 21 of the Code of Civil Procedure. Therefore, transferee lis pendens cannot be maintained as second appeal unless the judgment debtor under whom they claim, resist the decree by exploring legal courses.

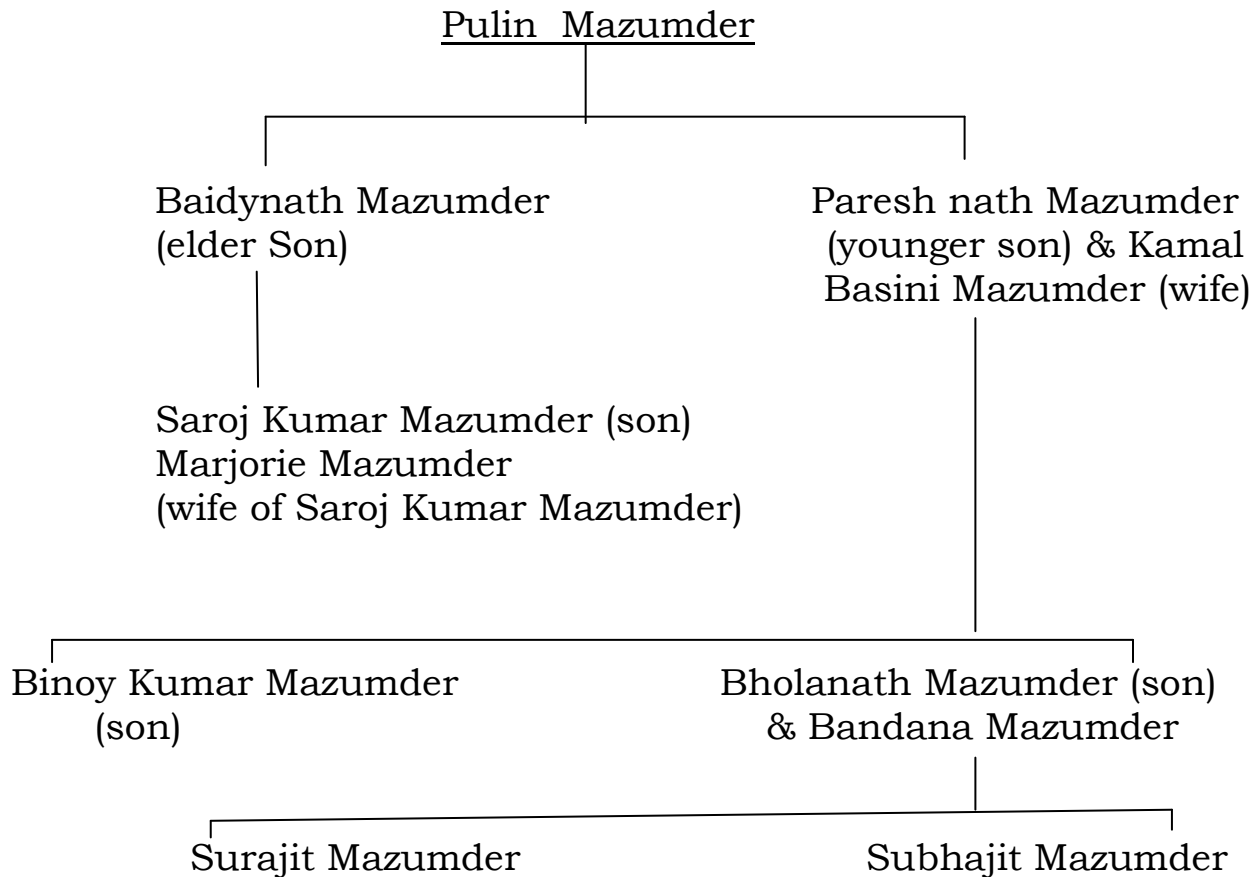
- Referring to mandates of Section 100 of the Code of Civil Procedure second appeal lies only for substantial questions of law not even mere question of law, or mixed questions of law and fact.
- Second appeal is bad for not making judgment debtor a party.

Analysis:-

16. This appeal centers on a disputed issue that stems from a set of undisputed facts which are as follows:-

- One Kamal Basini Mujumder was absolute owner of the subject property.
- That Kamal Basini Mujumder executed a deed of gift on 30.08.1967 qua subject property.
- By that deed of gift dated 30.08.1967 Kamal Basini Mujumder transferred 50% of the subject property to her grandson namely Surajit Majumder and Subhajit Majumder and rest 50% to her elder son namely Binoy Krishna Majumder.
- Both Surajit and Subhajit being minor, their mother Bandana Majumder accepted the gift.

- One Saroj Kumar Majumder being a resident of England used to visit India and would stay in the ground floor flat.
- Saroj Kumar Majumder was a paternal uncle of Sarojit and Subhajit who filed the suit.
- Saroj Kumar Mazumder is not a member of the family of the plaintiffs according to following genealogy:-



- On 27.12.1974 Binoy Krishna Majumder, Bandana Majumder being natural guardians of Sarojit and Subhajit

and Saroj Kumar Majumder executed a deed of declaration before Chief Metropolitan Magistrate declaring the ground floor flat of the Subject property to Saroj Kumar Majumder.

- Thereafter, on 05.03.1982 a deed of family arrangement and partition was executed by and between the plaintiff no.1 who attained the age of majority in the meantime, Bandana Majumder on behalf of plaintiff no.2 who was minor, Binoy Krishna Majumder since deceased and Saroj Kumar Majumder in whose favour a share was declared.
- By dint of that deed of family arrangement share of plaintiff and Binay Krishna Majumder was reduced to $1/3^{\text{rd}}$ each from 50% and rest $1/3^{\text{rd}}$ was allotted to said Saroj Kumar Majumder.
- After execution of the deed of family arrangement Binoy Krishna Majumder executed a will on 18.11.1983 in favour of his daughter (pro forma defendant of the suit) and will was probated on 29.01.1992.
- That Saroj Kumar Majumder died in England leaving behind his wife Marjorie Majumder (original defendant) who

sold 1/3rd share to the present appellants during pendency of the suit.

- Present appellants were neither parties to the suit nor parties to the first appeal. They filed this second appeal after obtaining leave.

17. Second appeal was admitted and after scrutiny following substantial questions of law are framed:-

- Whether First Appellate Court has misconstrued and misappreciated the deed of gift dated 30.08.1967 and the family arrangement deed dated 05.03.1982 in arriving at a finding that the deed of gift has superseded the family arrangement resulting substantial miscarriage of Justice?
- Whether Learned First Appellate Court has erred substantially in not appreciating, the suit filed by the plaintiffs, is barred by limitation.

18. Ld. Counsel, Mr. Vinay Misra ,on behalf of the appellants has contended that the alleged deed of gift was not acted upon as Saroj Kumar Majumder was in possession of the ground floor of the subject building.

19. Section 122 of the Transfer of Property Act, 1882 mandates completion of execution of gift by the acceptance of the same by the donee. It is nobodies case that the deed executed in the year 1967 was not accepted by the donees. It is also not the case of the appellants that Saroj Kumar Majumder was in possession of the said property on and from 30.08.1967 when gift was accepted by the donees. Rather it reveals that Saroj Kumar Majumder having no accommodation in India, was allowed to stay in the said ground floor flat.

20. Therefore, I am unable to subscribe to the view that the deed of gift was not acted upon.

21. Now, I proceed to the alleged deed of arrangement and partition. Before I delve into the deep, it would be convenient to spell out salient features of a settlement deed.

22. A Family arrangement is an arrangement between members of the same family intended to be used generally and reasonably for the benefit of the family by avoiding litigation or to maintain its reputation. A family arrangement when it is entered into bona fide and for the benefit of the family, it will be generally enforced by the Court of law. The word “family” is

to be understood in a wide sense and parties to family arrangement may not necessarily belong to the same family.

23. It is no longer *res integra* that a family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognizing the right of the others, as they had previously it, to the portions allotted to them respectively.

24. In the case at hand, Saroj Kumar Mazumder being in near relation of plaintiffs, may be considered as a member of family arrangement. But with regard to antecedent title, family arrangement deed spells out a fact that said Saroj Kumar Majumder contributed at the time of purchase of subject land and also for construction of subject building.

25. Antecedent title of a party to settlement is *sine qua non*. In this case, Ld. First Appellate Court, after appreciation of evidence, found that said Saroj Kumar Majumder was 17 years at the relevant point of time. Therefore, rightly Ld. Judge had trouble believing the fact that Saroj Kumar Mazumder, a

boy of 17 years, contributed for purchase of land and construction of building in absence of any specific evidence on record. That apart, at the time of giving declaration dated 27.12.1974 before the Chief Metropolitan Magistrate there was nothing mentioned about contribution of money by Saroj Kr. Mazumder save and except no accommodation in India. That is why, Ld. Judge of the First Appellate Court smelt a rat. Therefore, possibility of causing undue influence cannot be ruled out.

26. Admittedly one of the plaintiffs was minor at the time of execution of deed of arrangement and on his behalf his mother being natural guardian put her signature that too by reducing share of that minor which cannot be termed as for the benefit of the minor as per the provisions of Section 8 (1) of the Hindu Minority and Guardianship Act 1956 (for short Act of 1956). Besides, no permission of the Court was obtained within the meaning of Section 8 (2) of the Act of 1956.

27. It is not disputed that the appellants purchased the suit property from Marjorie Mazumder (original defendant) during pendency of the suit. Thereby appellants became transferee

pendente lite who is bound by the decree, just as much as he was a party to the suit. The principle of lis pendence embodied in Section 52 of the Transfer of Property Act, 1882 being a principle of public policy, no question of good faith or bonafide arises. Therefore, a transfer of property during pendency of a suit is not valid against the right determined by the Court's final decree.

28. In the aforesaid view of the matter, the deed of family arrangement and partition is found void *ab initio* and is illegal document from the very inception. Therefore, question of application of limitation under Article 59 of the Limitation Act does not arise.

29. I am unable to interfere with the judgment impugned and the substantial question of law is answered accordingly.

30. As a sequel, the Second Appeal being no. S.A. 39 of 2024, which is devoid of merits, stands dismissed without any order as to costs.

31. Interim Order, if there be any, stands vacated

32. Connected applications, if there be, also stand disposed of accordingly.

- 33.** Parties to act on the server copy of this order duly downloaded from the official website of this Court.
- 34.** Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]