

Civil Appeal

Present:

The Hon'ble Justice Jyotirmay Bhattacharya

S.A. No.312 of 2005

Biswanath Ghosh &amp; Ors.

-Vs-

Prafulla Kumar Ghosh &amp; Ors.

with

C.O.T. 1 of 2008

Nemai Chand Ghosh

-Vs-

Prafulla Kumar Ghosh &amp; Ors.

with

C.O.T. 207 of 2006

Gautam Ghosh

-Vs-

Prafulla Kumar Ghosh &amp; Ors.

.Judgment On : 03-02-2010.

**Point:**

RESTRICTION ON TRANSFER: Right to raise construction Whether be curtailed when transfer of the property is absolute- Transfer of Property Act, 1882, S 11

**Fact:** The appellants/defendants filed the instant Second Appeal against the judgment of reversal passed by the Id. Additional District Judge, Howrah in a Title Appeal reversing the judgment and decree dated passed by the Id. Civil Judge (Junior Division), Howrah in a title Suit.

The respondent no.1/plaintiff filed the suit against the appellants claiming his right to raise construction on the roof of the kitchen. He claimed such right by virtue of a deed of settlement of 1955 marked as Exhibit "1" executed by the admitted owner of the suit property. The defendants contested the said suit by filing written statements by challenging the plaintiff's title and/or interest over the roof of the said kitchen. The defendants have also got settlement of different portions of

the premises in which the suit premises situates, from the said owner through a subsequent deed of settlement of 1957 marked as Exhibit "A".

The dispute in the suit relates to the conflicting claims of the parties regarding their roof right on the roof of the kitchen. While admitting the instant Second Appeal, the following two substantial questions of law were formulated by the Division Bench of this Hon'ble Court:- a] Whether the learned Court of Appeal below committed substantial error of law in holding that deed of settlement, Exhibit "1", created any right in favour of the plaintiff to make construction over the roof kitchen and b] Whether the learned Court of Appeal below committed substantial error of law in misinterpreting Exhibit "1", the question of right on the said plea of construction over the kitchen of the said property.

**Held:**

When the settlor reserved his right to wall up the remaining part of the said building by separating the same from the portion settled with the plaintiff, it cannot be held that the settlor had any intention to retain the roof right over the roof of the said kitchen with him even at the time of execution of such settlement deed in 1955.

Paragraph – 18

Since the transfer was absolute, the plaintiffs right to raise construction on the roof of the said kitchen cannot be curtailed. Such right can, however, be exercised subject to Municipal and Panchayat Rules without, however, claiming any right of user of the staircase of the said building.

Paragraph – 19

Mr. Bidyut Kr. Banerjee,

Mr. Dwarika Nath,  
 Ms. Shila Sarkar,  
 Mr. Anit Kr. Rakshit  
 .....For the Appellants/Defendants.

Mr. Bhaskar Ghosh,  
 Mr. Gyodeep Basu,  
 Mr. Ram Chandra Guchhait.  
 .....For the Respondent No.1.

Mr. Aniruddha Chatterjee,  
 Mr. Prosenjit Mukherjee.  
 .....For the Respondent No.5.

Mrs. Jhumur Chakraborty,  
 Mr. Pradip Kr. Sardar.  
 .....For the Respondent Nos.6, 9 & 10.

Mr. Pinaki Ranjan Chakraborty.  
 .....For the Respondent No.8.

Mr. Sakti Nath Mukherjee,  
 Mrs. Debamita Chanda.  
 Mr. Kausik Chanda.  
 .....For the Cross-objector in C.O.T. No.1 of 2008  
 filed by Respondent No.8.

**The Court:** 1. This Second Appeal is directed against the judgment of reversal passed by the learned Additional District Judge, 2<sup>nd</sup> Court at Howrah on 28.1.2005 in Title Appeal No.49 of 2003 reversing the judgment and decree dated 24.3.2003 passed by the learned Civil Judge (Junior Division), 4<sup>th</sup> Court at Howrah in title Suit No.180 of 1987.

2. The respondent no.1/plaintiff filed a suit against the appellants as well as the proforma respondents nos.2 to 10, claiming his right to raise construction on the roof of the kitchen. He claimed such right by virtue of a deed of settlement dated 19<sup>th</sup> August, 1955 executed by one Dulal Chandra Ghosh, the admitted owner of the suit property. The defendants contested the said suit by filing written statements by challenging the plaintiff's title and/or interest over the roof of the said kitchen. The defendants have also got settlement of different portions of the premises in which the

suit premises situate, from the said Dulal Chandra Ghosh through a subsequent deed of settlement dated 27<sup>th</sup> September, 1957. Both the aforesaid deed of settlements were admitted into evidence. The settlement deed of 1955 was marked as Exhibit "1" and the other deed of settlement of 1957 was marked as Exhibit "A".

3. The title of Dulal Chandra Ghosh namely the common settlor both in the suit property as well as in the property settled with the defendants, was not disputed. The execution of those deeds by Dulal Chandra Ghosh was also not disputed. Even the grant of settlement of various properties mentioned in the said deed of settlement of 1955 excepting the roof right on the roof of the kitchen which is claimed by the plaintiff, is not disputed by the defendants. Thus, the dispute in the suit relates to the conflicting claims of the parties regarding their roof right on the roof of the kitchen. Since the plaintiff claims such roof right on the basis of said deed of settlement of 1955, this Court is required to consider the said deed for ascertaining as to whether such roof right on the roof of the said kitchen was, in fact, settled by Dulal Chandra Ghosh in favour of the plaintiff or not. The defendants have proved the subsequent deed of settlement of 1957 to show that the settlor had no intention to settle the roof right over the roof of the said kitchen with the plaintiff. The defendants claimed that the settlor himself in the subsequent deed of settlement of 1957 clarified that he had no intention to settle the roof right on the said kitchen with the plaintiff while executing the deed of settlement in 1955.

4. In fact, the parties have also led their respective evidence in the suit on the said issue. But, in my view, neither the oral evidence of the parties on the said issue nor the covenant made in the subsequent deed of settlement 1957 carries much significance in the facts of the instant case as

the covenant made by the settlor in the deed of settlement of 1955 is the real guiding factor in deciding the dispute involved in the suit. In other words, if the 1955 deed shows that such roof right was settled with the plaintiff, such right cannot be extinguished by the contrary covenants made by the settlor in the subsequent deed of settlement of 1957. Similarly oral evidence cannot override the evidentiary value of the deed of settlement of 1955. As such, oral evidence also practically cannot help the Court to resolve the dispute involved in the suit.

5. The learned Courts below differed from each other in their respective conclusions over such dispute. The learned Trial Judge dismissed the said suit by holding that the suit is not maintainable on account of bar created under Section 34 of the Specific Relief Act. The learned Trial Judge held that since the plaintiff is not in possession of the said property, the plaintiff should have sought for decree for recovery of possession instead of prohibitory injunction in the suit. Since the plaintiff did not seek any relief for recovery of possession, the said suit, according to the learned Trial Judge, is not maintainable. On interpretation of the said deed of settlement of 1955, the learned Trial Judge also held that though the right of repair was given by the settlor in favour of the plaintiff, but, no right was given to the plaintiff to raise any construction in the suit property i.e. on the roof of the said kitchen.

6. The learned first Appellate Court, however, came to a different conclusion by holding that unfettered right in the settled property was given by the settlor in favour of the plaintiff and his mother with right to dispose of the property with some privilege of purchase by the heirs of the settlor in case of transfer, together with right to raise construction in the land within the property settled without any restriction on raising construction on the single-storied kitchen room and as

such, the plaintiff's right of enjoyment of such property including his right to raise construction on the roof of the kitchen subject to Municipal or Panchayat Rules, cannot be curtailed. The learned First Appellate Court, thus, granted relief to the plaintiff by reversing the findings of the learned Trial Judge.

7. Hence, the instant Second Appeal was filed by some of the defendants herein. The other two groups of defendants who were also supporting the appellants all throughout also filed two cross-objections being C.O.T. No.1 of 2008 and C.O.T. No.207 of 2006 before this Court. While admitting the instant Second Appeal, the following two substantial questions of law were formulated by the Division Bench of this Hon'ble Court:-

- a) Whether the learned Court of Appeal below committed substantial error of law in holding that deed of settlement, Exhibit "1", created any right in favour of the plaintiff to make construction over the roof kitchen.
- b) Whether the learned Court of Appeal below committed substantial error of law in misinterpreting Exhibit "1", the question of right on the said plea of construction over the kitchen of the said property.

8. Heard, the learned Advocates of the respective parties. Considered the materials on record including the judgments and decrees passed by the learned Courts below.

9. Let me now consider the merit of the instant appeal and the cross-objections in the facts of the instant case.

10. The point of dispute between the parties, the scope of trial of the suit and the guiding factors which are required to be considered for deciding the dispute involved in the suit, have already been indicated above. As such, let me now consider the abovementioned substantial questions of law with reference to the matter in issue in the aforesaid set of facts.

11. Since I have already mentioned above that the resolution of the dispute involved in the suit primarily depends upon interpretation of the deed of settlement of 1955, this Court wants to scrutinize the said deed itself to find out the answer to the said disputed question.

12. Before doing the said exercise, let me now give a very short background under which the said deed of settlement was executed by the settlor in favour of the plaintiff. Settlor and the beneficiaries of the said settlement, were closely related to each other. In fact, such settlement was given by the settlor in favour of his stepmother namely Giribala Dasi and his stepbrother namely Prafulla Kumar Ghosh, after restoration of cordial relationship amongst them following settlement of their earlier dispute involved in the eviction suit being T.S. No.180 of 1953 filed by the settlor against those beneficiaries which ultimately ended in compromise. In fact, permission was earlier granted by the settlor in favour of his stepmother and stepbrother to reside in two west-facing bedrooms in the ground floor of two-storeyed building with adjacent dalan, roak and a south facing one-storeyed kitchen room together with roak. Subsequently a dispute cropped up amongst them causing deterioration in their relationship and as such, the aforesaid suit for eviction was filed by the settlor against his stepmother and stepbrother. The said suit ultimately ended in compromise and good relationship amongst them was restored. As such, for making a permanent residential arrangement for them, the settlor executed the said deed of settlement in favour of his stepmother

and stepbrother by settling his various properties with them. The properties which were mentioned in “kha” schedule in the said deed of settlement was given exclusively to the plaintiff subject to life interest of Giribala Dasi with restriction on transfer of the said property by her. Since there is no dispute with regard to the said property, this Court does not think it necessary to discuss the plaintiff’s right in respect thereof. There were two items of properties mentioned in schedule “ka”. The properties which were subject matter of the earlier suit were mentioned in serial no.1 under schedule “ka” of the said deed of settlement. Another plot of land comprising of two cottahs of land was mentioned in serial no.2 under schedule “ka” of the said deed of settlement. Though both the said properties were settled exclusively with the plaintiff subject to life interest of the said Giribala Dasi with restriction on her power to transfer the same during her lifetime but, still then, different covenants were made with regard to those two items of properties under schedule “ka” in the said deed of settlement. The most important part of such differences which is evident in the deed itself was that though right of construction of cowshed, kitchen, tube-wells in two cottahs of land mentioned in serial no.2 in schedule “ka” was specifically granted in favour of those beneficiaries but no such right of construction was granted specifically in favour of those beneficiaries in respect of any portion of the settled property mentioned in the serial no.1 under schedule “ka” of the said deed of settlement. Of course, right to repair the property mentioned in serial no.1 in “ka” schedule without causing any damage to other portions of the said building was specifically granted to those beneficiaries in the said deed. Though restriction was imposed on the stepmother’s power to transfer the said property during her lifetime but no such restriction was imposed on the plaintiff’s power of such transfer, however, with reservation of a preemptive right in favour of the heirs of the settlor at a fixed price of Rs.500/- only in case the plaintiff wants to sell the property which was settled with them in serial no.1 under schedule “ka” of the said deed. The



plaintiff was not given any right to use the stair and/or the staircase leading to the upper floors of the said building. The two rooms which were settled with the beneficiaries admittedly situate in the ground floor of the two-storeyed building. The rooms which are situated on the roof of those two rooms were retained with the settlor and those rooms were subsequently settled with some of the defendants by the subsequent settlement deed executed in 1957. Of course, the plaintiff is not claiming any right in respect of the rooms constructed on the roof of those two rooms which were settled with him as he accepts the extent of his right which is confined to those two rooms only. As such, there is no dispute between the parties with regard to the plaintiff's right in respect of those two rooms and the adjacent dalan and roak. Similarly no dispute was raised with regard to the plaintiff's right in respect of the south facing kitchen and the adjacent roak mentioned in serial no.1 of schedule "ka" of the said settlement. The said kitchen is situated on the ground floor of the said building. Admittedly there is no construction on the roof of the said kitchen. The plaintiff claims roof right on the said kitchen. The plaintiff claims his right to raise further construction on the roof of the said kitchen. Since the defendants were resisting him in exercise of such right by the plaintiff, the plaintiff prayed for an injunction for restraining the defendants from creating any obstruction to the plaintiff while raising construction on the roof of the said kitchen.

13. The defendants claimed that since no right of construction was explicitly given to the plaintiff in respect of any portion of the property mentioned in serial no.1 under schedule "ka" of the deed of settlement coupled with the fact that plaintiff was not given any right to use the staircase for going to the upper floors, the plaintiff's claim for his right to raise construction on the roof of the kitchen should be turned down.

14. The plaintiff also in his evidence stated that apart from the said deed of settlement he cannot produce any other document to show that right of construction was given to him on the roof of the said kitchen.

15. Of course, on scrutiny of said deed of settlement this Court finds that right of construction on the roof of the said kitchen was not explicitly given by the settlor in favour of the beneficiaries under the said deed. It is equally true that even no right to use the stair and staircase for going to the upstairs of the said building was given to the plaintiff to the said deed. However, right to repair and/or sell the property mentioned in serial no.1 under schedule "ka" in said deed of settlement was given to the plaintiff subject to the right of preemption given to the other heirs of the settlor.

16. On overall consideration of the covenants made in the said deed it is crystal clear that the said transfer by way of settlement in favour of the plaintiff became absolute after the death of the life interest holder in respect of "ka" schedule property. Thus, if the interest which was derived by the plaintiff in the said property by virtue of the deed of settlement was absolute, then this Court cannot hold that the plaintiff cannot raise construction on the roof of the kitchen simply because of the fact that such right was not given to him in the said deed of settlement explicitly. Though it is true that such right of construction was explicitly given in respect of the land mentioned in serial no.2 of schedule "ka" and such right was not explicitly given on the roof of the said kitchen but at the same time, this Court finds that no restriction was explicitly given on the plaintiff's right to raise construction on the roof of the said kitchen and/or use of the roof right thereon, though such restriction on use of stair and staircase and the upper floor rooms above the two west facing bed

rooms which were settled with the plaintiff, was categorically mentioned in the deed itself. Then again, if the right of construction which was given to the plaintiff in respect of the land mentioned in serial no.2 under schedule “ka” is examined carefully then it appears that the plaintiff’s right to raise certain specified type of construction was mentioned in the said deed. But does it mean that the plaintiff was not given any right to raise different types of construction on the land mentioned in serial no.2 under schedule “ka” of the said settlement? The answer is no, as once the transfer is absolute, the right of user and/or enjoyment of the transferee in any manner he likes, cannot be restricted by the transferrer and/or his successors. For similar reason I hold that the plaintiff’s right to raise construction on the roof of the kitchen cannot be denied particularly when the transfer is absolute and the plaintiff’s right to raise construction on the roof of the kitchen was not explicitly denied in the said deed of settlement.

17. The learned Counsel appearing for the appellant and learned Counsel appearing in support of the cross-objections, in uniform voice, submitted that since restricted right for user of those two rooms and the kitchen was conferred upon the plaintiff by the settlor in the said deed, by giving exact measurement of those two rooms and kitchen without creating any interest in the land beneath such construction and/or on the roof thereof and/or on the roof above such construction, the plaintiff cannot claim any further right in excess of those specified right given to him in the said deed. They also, in uniform voice, submitted very precisely that since no right was conferred upon the plaintiff in any portion of the said building excepting the specified portion mentioned in serial no.1 coupled with the fact that the right to use the staircase was not given to him, he cannot claim any right in respect of roof of those rooms and kitchen which was retained by the settlor.

18. This part of the submission of the learned Counsel appearing for the appellants and cross-objectors, in my view, has no substance in view of the provision made in Clause 4 of the said deed which provides that the settlor reserved his right to wall up the other portion of the said building excluding the rooms which were settled with the plaintiff in the said deed of settlement, in case the plaintiff feels any necessity to make the settled part separated from the other part of the said building. The said provision clearly indicates that the portion mentioned in serial no.1 under schedule "ka" which was settled with the plaintiff was capable of separation physically from the other portion of the said building. Thus, when the settlor reserved his right to wall up the remaining part of the said building by separating the same from the portion settled with the plaintiff, it cannot be held that the settlor had any intention to retain the roof right over the roof of the said kitchen with him even at the time of execution of such settlement deed in 1955.

19. In the facts as stated above, this Court does not have any hesitation to concur with the finding of the learned First Appellate Court to the effect that since the transfer was absolute, the plaintiffs right to raise construction on the roof of the said kitchen cannot be curtailed. Such right can, however, be exercised subject to Municipal and Panchayat Rules without, however, claiming any right of user of the staircase of the said building.

20. Thus, the appeal fails. The cross-objections also stand rejected. The substantial questions of law as mentioned above are, thus, answered hereinabove. The judgment and decree of the learned Court below stands affirmed.

21. Urgent xerox certified copy of this judgment, if applied for, be supplied expeditiously after complying with all formalities.

**( *Jyotirmay Bhattacharya, J.* )**