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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Soumen Sen
Hon'ble Justice Uday Kumar

FA 263 of 2014

Smt. Kalpana Shaw @ Saha & Ors.
Vs.
Sri Bratin Saha

For the Appellant) nos. 1(a) and 1(b)	: Mr. Debnath Ganguly, Adv., Mr. Supriyo Dutta, Adv., Ms. Aishwarya Pratihar Ganguly, Adv.
For the appellant No.1(c) (in person)	: Mr. Basab Shaw, Adv.
For the respondent	: Mr.Souradipta Banerjee, Adv., Ms Fatima Hassan, Adv.
Hearing Concluded on	: 04th April, 2023
Judgment on	: 13th April, 2023

Soumen Sen, J.: The appeal is arising out of a judgment and decree dated 12th January, 2009, in a suit for declaration, recovery of Khas possession and mesne profits.

The appellants are the legal heirs of Bilash Behari Shaw @ Saha.

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Briefly stated one Bonku Behari Shaw @ Saha was the common ancestor of the parties. Bonku Behari owned several properties both movable and immovable. During his life time Bonku Behari executed his last Will and testament on 24th November, 1925. Bonku Behari had two wives. His first wife Smt. Radha Rani predeceased Bonku Behari and before the execution of the Will. From the first wife Bonku had four daughters and one son. At the time of execution of the Will his son Bonobehari and two daughters Brojo Gopi and Nidhubala were alive.

Smt. Moharani Dasi was the second wife of Bonku Behari. From the second marriage Bonku had three sons namely, Bipin Behari, Pulin Behari and Bijoy Krishna and three daughters namely, Shayma Shakhi, Nanda Rani and Menaka Rani. At the time of execution of the Will Bonobehari, Bipin Behari and Pulin Behari were all major and Bijoy Krishna was minor.

The Will gives a list of immovable properties bequeathed in favour of his four sons as mentioned in the Schedule of the Will.

Under the Will Bonobehari, Bipin Behari and Pulin Behari became the owner of premises no.79 Narkel Danga North Road, 8 Duff Street, 38 Amherst Street respectively.

Bijoy Krishna was given five premises namely, 1A and 1B Ghosh Lane, No.85A Manicktala Street, No.18A and 18B Binod Behari Saha lane. Under the bequeath only the male heirs of his four sons would be entitled to succeed. In other words, the Will only recognized male line of succession on

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the death of his sons. They would be entitled to enjoy the properties absolutely with the right of alienation. Bonobehari obtained probate of the Will being probate case no.1681 of 1927.

By virtue of the Will and subsequent purchase in a court sale in 1935, Bonobehari became the absolute owner of the property presently known as 122-B Sisir Bhaduri Sarani, Kolkata- 700 006 containing an area of land measuring 17 Katha, 9 Chitak, 30 Square feet. Bonobehari was survived by five sons, namely, Biman Behari, Bijon Behari, Bongshi Behari, Bimal Behari and Birinchi Behari.

During his life time Bonobehari executed a deed of gift on 4th September, 1943 by which he had gifted demarcated portion of the aforesaid properties in favour of his four sons excluding Biman Behari. The deed of gift has indicated the demarcated portions in Schedule Ka, Kha, Ga and Gha respectively in different colours. The said deed, however, restrained the donees from any alienation and creating any encumbrance. It also delineates the line of succession restricted to the male line. However, it provides that his grand-sons down the male line would have the right to gift or sale etc. The said deed also made specific provisions for succession in the event of death of anyone of his sons without any issue. It mentions the devolutions of interest on the surviving male legal heirs and the order in which it would proceed. In other words, it provides that the sons of the donees shall acquire absolute right, title and interest in the property and allotment of their

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respective fathers would go to their male legal heirs absolutely and forever and if any of such sons do not have any male legal heirs, the same would go to the male legal heirs of the other lot. Biman was one of the attesting witnesses to the deed of gift executed by his father on 4th September, 1943. Biman was survived by two sons Brojo Behari and Bilash Behari. Bilash Behari died on 17th February, 2000. Bilash Behari was survived by the present appellants.

The plaintiff Bratin is the son of Bimal Behari. Bimal was one of the sons of Bonobehari and by virtue of the deed of gift became the owner of the suit property.

The plaintiff filed the suit *inter alia,* for eviction and recovery of Khas possession on the ground that the defendants have no right, title interest in respect of suit property.

The plaintiff alleged that by virtue of the gift Bimal Behari became the owner of the property with no right of alienation, however, by virtue of relevant clauses in the deed that if a son is born to him that son would have the right to inherit the said property with the absolute right of alienation, the plaintiff is entitled to sue the defendants for eviction. Bratin was born in the year 1979. He was minor until 1997. His mother predeceased his father. His father Bimal died on 12th October, 1990 leaving behind Bratin as his only legal heir. The suit property accordingly devolved upon the plaintiff by way of inheritance. The plaintiff became the sole and absolute owner of the said

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premises by operation of law and by way of inheritance. The suit property was kept by the plaintiff under his lock and key in the year 1996. At that time the plaintiff was minor and student. He used to live in Midnapore town. His maternal uncle Dipak Kumar Mondal during his visit in 1996 to the suit property found one Bilash Behari Saha since deceased had trespassed in the suit property and to be in wrongful possession of one room in the first floor, varandah and the Chileykota room (room situated on the roof) on the second floor of the suit premises. Bilash Behari was the son of late Biman Behari the eldest son of Bonobehari, the grand-father of the plaintiff along with defendant nos.1A, 1B and 1C being his wife, daughter and son.

During the period when he was minor and thereafter when he became major in 1997 the plaintiff demanded possession and ultimately issued a legal notice on 10th January, 2002 calling upon the defendants/appellants to hand over possession of the suit premises. The plaintiff contends that by virtue of the deed of gift the plaintiff is the absolute owner of the suit property. The defendants are rank trespassers.

The appellants/defendants filed a joint written statement.

In the written statement, it was alleged that the father of the plaintiff was a minor at the time of the execution of the deed of gift and as a minor he could not have accepted the deed of gift. The said deed of gift was never acted upon. The father of the plaintiff had one son and a daughter. The plaintiff has not impleaded his eldest sister Arpita in the suit. Accordingly, the suit is

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bad for non-joinder of necessary party. Bimal Bihari, at the time of his death left behind the plaintiff, his daughter Arpita and his mother Urmila (i.e. wife of Bonobihari). The defendants are is possession of the suit premises on the basis of their own right which were never extinguished. In any event the defendants have inherited the extent of shares of Urmila in the suit property. Urmila was the mother of the predeceased Bimal Bihari and claimed to have been in joint mess with the defendants.

On the basis of the pleadings the learned Trial Court has framed the following issues:

1) Has the plaintiff any cause of action against the defendant for this suit?
2) Is the suit barred by limitation?
3) Is the plaintiff owner of the suit premises?
4) Have the defendants trespassed the suit premises as alleged?
5) Is the plaintiff entitled to the relief as prayed for?
6) Is the suit property valued property? If so, are the court fees paid proper and sufficient?
7) To what other relief/reliefs, if any, is the plaintiff entitled?

The Trial Court on the basis of the pleadings and the evidence on record arrived at a finding that the plaintiff is the owner of the suit property and has decreed the suit accordingly.

This judgment is under challenge.

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On behalf of the appellants, Mr. Basab Shaw @ Saha, the appellant no. 3 has argued in person. Mr. Shaw has submitted that he has the authority to argue on behalf of the other two appellants.

Mr. Basab Shaw @ Saha has argued that the alleged deed of gift was invalid as it contains a restrictive clause against the right of alienation. It is not an absolute transfer. Moreover, the said deed is void Under Section 10 of the Transfer of the Property Act. It contains restriction with regard to alienation and only recognized a right of alienation to a male child born in future thereby giving an absolute right to an unborn male child which is clearly prohibited under the Transfer of Property Act.

The deed of gift is *void ab initio*. The plaintiff is not the owner of the property. Even if it is assumed for the time being that the deed of gift is valid the next kin of Urmila Shaw who the grandmother of the present respondent and grandmother-in-law of the appellant/defendants no.1(A) and great grandmother of the appellant/defendants no.1(B) and 1(C) would devolve upon under the deed of gift as only life interest has been created in favour of the original donee and it is hit by the principals laid down the Section 6 of the Transfer of the Property Act.

The donor died on 6th October 1949. The PW2 in cross-examination has admitted that the donees were all minors during the life time of the donor and from the deed of gift it would appear that the address of the donor and the donees are different. No minor can accept the physical khas

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possession. There is no proof of acceptance of gift by the donees. No one on behalf of the donees has accepted the gift. In absence of acceptance of the gift, the said deed is incomplete, inoperative and void. The plaintiff was also not born during the life time of the donor. The deed of gift speaks about present and future property which was not in existence at the time of execution of the gift and hence it is hit by the principles laid down in Section 124 of the transfer of Property Act, 1882.

The deed of gift contains a condition of non-transferability, restraining alienation and hence hit by principle laid down in Sections 10 and 122 of the Transfer of Property Act, 1882. If the deed of gift at all is held to be valid then the portion which Bimal Behari Shaw had received as gift would be inherited by the legal heirs of such donee under section 8 of the Hindu Succession Act, 1956 and thus the mother the donee Urmila Shaw being alive at the time of death of the donee inherited her share from her son and after the death of Urmila Shaw under sections 15 and 16 of the Hindu Succession Act, 1956, the present appellants inherited her share and thus are not a trespassers. In support his submission Mr. Basab Shaw has relied upon ***Sridhar & Ors. vs. N. Revanna & Ors.***, reported in **2020(11) SCC 221** (paragraphs 17, 19, 23 and 27).

It is further submitted that the suit is also hit by the Principles of Section 5,6,37 and 38 of the Specific Relief Act, 1963. The title of the plaintiff was under cloud. In view of the specific stand taken by the defendants that

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they have inherited the share of Urmila Shaw and are in possession the plaintiff was required to pray for declaration of his title. The Learned Trial Judge in spite of lack of pleadings to that effect framed an issue regarding the title of the plaintiff and declared the plaintiff as the sole and absolute owner of the suit property. This is not permissible in view of the decision of the Hon'ble Supreme Court in ***Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. & Ors***., reported in **2008(4)SCC 594** (paragraphs 13,14 and 15).

It is submitted that the Learned Trial Judge has failed to appreciate that the schedule to the gift deed would not show that the plaintiff was allotted the schedule property. The finding of the Trial Court that the Deed of Gift is more than 30 years old and the schedule of the gift deed would show that the property in question was gifted to the father of the plaintiff is erroneous as PW2 in his cross-examination has stated that the properties mentioned in schedule of the gift deed have been gifted sequentially and on the basis of such evidence it cannot be held that the 'Ka' Schedule does not come to the plaintiff at all.

It is further submitted that the plaintiff has failed to discharge the burden of proof in establishing his right over the schedule property. The plaintiff nor the father of the plaintiff during the lifetime of the father of the defendant No.1 nor the grand-father of the defendants had ever raised any objection regarding the factum of possession of the defendants. The

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defendants were not aware of the alleged Deed of Gift prior to the suit and accordingly raising objection to the said deed prior to the instant suit could not and does not arise and as soon as the right to sue accrued the defendants filed a suit being Title Suit No.1415 of 2008 before the Ld. 2nd Bench City Civil Court at Calcutta praying, inter alia, for partition. This plaintiff is the defendant no.5 therein.

It is submitted that in spite of a defence being raised by the appellants that the deed of gift is void and that the invalidity of the deed of gift can be raised without any prayer for cancellation, the Learned Trial Judge has clearly erred in not framing any issue to that effect. It is submitted that since, the deed of gift is *void ab initio* it can be raised even in a collateral proceeding without challenging it independently in view of the decision of the Hon'ble Supreme Court in ***Kewal Krishan v. Rajesh Kumar & Ors.,*** reported in **2021 SCC Online 1097.**

It is submitted that as soon as the appellants became aware of the existence of the probated Will of 1925 executed by Banku Bihari an application was filed under Order 41 rule 27 being CAN no. 2138 of 2012 and the said application was allowed on 6th September 2013. The said order was subsequently modified on 21st February 2014. In view of the said orders the appellants are now permitted to use the Will and the genealogical table respectively.

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It is submitted that once the said application is allowed the said documents are now required to be marked as exhibits and the matter is required to be sent down on remand for trial on the documents disclosed. In support of the aforesaid submission Mr. Shaw has relied upon the following decisions:

i) ***Amalendu Ammal & Ors. v. S. Rani & Ors.* : 2018(1) ICC 13;**

ii) ***Corporation of Madras & Anr. v. M. Parthasarathy & Ors.* : 2018(4) ICC 177** paragraphs 14 to 23;

iii) ***Union of India v. K.V. Lakshman & Ors.* : 2016(3) ICC 753** para 37, 34, 20, 22, 21;

iv) ***Akhilesh Singh v. Lal Babu Sing & Ors.* : 2018(2) ICC 694** para 13 and 16;

v) ***Balaji Singh vs. Diwakar Cole & Ors.* : 2017(3) ICC 806** para 21;

vi) ***G. Shashikala (Died) through Lrs. v. G. Kalawati Bai (Died) Through Lrs. & Ors. :* 2019(3) ICC 366 (**para 9, 13, 18).

It is submitted that deed of gift is also hit by Section 6(h) of the transfer of Property Act 1882. The donor of the gift was permitted a limited right of residence along with all his successors and accordingly gift deed executed by Bonobehari is void.

It is submitted that it is inconsequential that the said deed of gift is challenged almost after 78 years as it is well-settled that a void document

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can be challenged in any collateral proceeding without seeking an independent relief for declaration and cancellation.

Mr. Shaw accordingly submitted that the impugned judgment and decree should be set aside.

Per contra Mr. Souradipta Banarjee, Learned Counsel representing the plaintiff decree holder has submitted that the appeal is completely unmeritorious and filed with the sole intention of delaying the execution of the decree.

During the pendency of the aforesaid suit the defendant filed an application under order 6 Rule 17 of Civil Procedure Code on 13th September, 2007, seeking to add the grounds that they inherited the suit property through Urmila Saha and further Arpita Saha is a necessary party in the aforesaid suit and that since 1949 the defendants through their prodecessors in interest are in continuous and uninterrupted possession and they have acquired absolute right, title and interest of the suit premises and have adversely became the real owners thereof.

Mr. Banerjee submits that the appellants proposed to insert a fresh paragraph 7(a) and insert few lines in paragraph 3 and paragraph 25 of the written statement. For the purpose of brevity the schedule of the amendments annexed to the application for amendment is reproduced below:

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"1. To insert after paragraph no. 7 a new paragraph as follows:

"7a that suit has been framed upon the fictitious stories and suppression of material facts and misrepresentation with the malafide intention to make some wrongful gain"

2. To insert at the end of paragraph no. 3 as follows*:*

"The said Bimal Behari Saha the deceased father of the plaintiff has died intestate leaving behind him surviving only son Bratin Saha and only daughter Arpita Saha and his mother Urmila Saha as his heirs and legal representatives and therefore on the death of the said Urmila Saha her sons and heris of her pre deceased sons inherited the properties left by the said Urmila Saha and as such the said Smt. Arpital Saha and the heirs of said Urmila Saha are the necessary parties but they have not been made parties in the suit."

3. To insert after paragraph no. 25, a new paragraph as follows:

"25a that since the period of predecessor of interest of these defendants that is to say since prior to 1949 these defendants firstly through their predecessors in interest there after they being in exclusive use, occupation and possession of the said suit property unobjected, uninterrupted and unresisted, they have acquired absolute right, title and interest adversely against the real owners if any at all".

The plaintiff filed the written objection to the said application and after hearing by order no. 43 dated 4th October, 2007, the learned Judge, 2nd

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Bench, City Civil Court at Calcutta rejected the said application for amendment of written statement, challenging which, the defendants preferred an application under Article 227 of the Constitution of India being CO. no. 4258 of 2007 and after hearing both the parties, His lordship the Hon'ble Justice Jyotirmoy Bhattacharya as His Lordship then was by order dated 24th January, 2008 observed that the plaintiff's title in the suit premises along with his other co-sharers have not been called into question and even if the plaintiff fails to prove his absolute title, he can file a suit for recovery of possession from a trespasser as co-owner.

Mr. Banerjee has drawn our attention to the following observation in the aforesaid order:

> *"Though the plaintiffs claim for absolute title in the suit property has been challenged by the defendants in the original written statement, but the plaintiff's interest in the suit property along with his other co-sharers has not been called into question by the defendants in the original written statement.*
>
> *Under such circumstances, the Court is required to consider as to whether the plaintiff even if he fails to prove his absolute title in the suit property, can maintain such a suit for recovery of possession from the trespasser as a co-owner of the suit property, even without bringing the other co-owners on record.*
>
> *For consideration of such a dispute, the proposed amendment is not necessary.*

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> *Under such circumstances, this Court does not find any justification to interfere with the order impugned."* (emphasis supplied)

The plaintiff Sri Bratin Saha deposed as PW 1 in the said aforesaid suit and filed the certified copy of the deed of gift of 1943 along with the plan, tax receipt, the copy of Advocate's letter demanding possession, Postal Receipt, acknowledgement due card, letter of complaint dated 25th May, 2004 to Kolkata Municipal corporation and Burtolla P.S. and the written complaint dated 28th August, 2002 were marked as Exhibits 1 to 7.

The owner of premises no. 122/1B, Sisir Bhaduri Sarani, P.S. Burtolla, Kolkata- 700 006, Birinchi Behari had deposed as PW.2. He is the uncle of PW1. PW2 has categorically stated that the Deed of Gift was duly acted upon. All the donees as owner of their respective properties have duly mutated their names in the respective record of the Kolkata Municipal Corporation. Under the deed of gift Lot 'Ga" and 'Gha' were allotted to the said Bangshi and Brinchi Behari and were renumbered as 122/1B and 122/1C Sisir Bhaduri Sarani respectively. The plaintiff's father was allotted the lot 'Ka'. The relevant Municipal Tax Bills were filed and marked as Exbt.8. The said witness further stated that the defendants or their predecessors in interest have no right whatsoever to occupy any portion of the suit premises and are ranked trespassers.

The defendant 1(b) deposed as DW-.1 Apart from filing two letters showing possession in respect of the suit premises no other document was

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filed to assert title over the suit premises. During the cross examination of DW1 on 7th February, 2009, the DW 1 admitted Banku Behari Shaw was the original owner of the property and further admitted that Bono Behari Shaw divided the property into four parts 'Ka', 'Kha', 'Ga' and 'Gha' and also admitted that his grand-father Biman Behari Shaw did not get any portion of the property by virtue of the said deed of gift. He has also admitted that the defendants are the owners in respect of the premises no. 122D, Manicktola Street. The DW 1 further admitted that the Schedule B property is in their possession and his grandfather signed the said Deed of gift of 1943 as a witness to the said document. The said witness further deposed that his father paid tax in respect of the premises no. 122D, Manictala Street. The said DW1 completely denied that he had raised any plea of adverse possession in respect of the suit premises.

While disposing of the aforesaid suit the learned trial Court observed that although the said deed of gift was well within the knowledge of the predecessors in interest of the present defendant there was no challenge to the said deed either by Biman or by his immediate heirs or by any other branches of Bono Behari and after the expiry of almost 66 years the said deed cannot be challenged. Moreover the DW1 has admitted the said deed of gift in course of his evidence and also admitted that his grandfather had signed the said deed as witness.

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It is submitted that the evidence of PW 2 together with Exhibits nos. 9 to 13 would clearly show that the said deed of gift 1943 was duly acted upon and the property given by way of gift to the four sons are demarcated and partitioned by metes and bounds and separate premises numbers have been allotted to the respective portions of the properties gifted under the said deed of gift of 1943. The legal heirs of Bonobehari in absence of any objection and in furtherance of the allotment made in the deed were put to possession and enjoying their respective allotted portions under the deed of gift for the last several years without any interruption and objection. It is submitted that the learned Court below further observed that the defendants have miserably failed to establish their right in the suit property being premises no. 122 B, Sisir Bhaduri Sarani, P.S. Burtolla, Kolkata 700 006. Their status in the suit premises is that of the trespassers.

The appellant/defendants for the first time have thrown a challenge to the Deed of Gift of 1943 after more than 66 years in Title Suit No.1415 of 2008 inspite of the fact that their predecessors were aware of the existence of the Will of Banku Behari and deed of gift by Bonobehari. Biman Behari although was aware of the Will and the deed of gift as he was a signatory to the said Deed of Gift did not challenge it.

In the aforesaid backdrop Mr. Banerjee has submitted that the suit is *ex-facie* barred by limitations as the said document *i.e.* Deed of Gift, 1943 was acknowledged by the predecessor-in-interest of the defendants herein

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and not challenged within three years of its execution as mandated under Article 59 of the Limitation Act, 1963. The father of Sri Basab Shaw never challenged the said Deed of Gift. The knowledge of his predecessor shall be construed to be knowledge of the subsequent generations regarding the existence of the Deed of gift.

It is submitted that the date of execution of a registered document shall be the date of deemed knowledge of the said document to all as observed in **2022 SCC Online SC 258 *Padhiyar Prahladji Chenaji (deceased) through L.R.s v. Maniben Jagmalbhai (Deceased) through L.R.s & Ors.,*.** The said deed in question is the document of the family by which all the co-sharer derived their interest and was well within the knowledge of the predecessor in interest of the appellant/defendants.

It is submitted that a plain reading of Section 13 of the Transfer of Property Act, would show that if any interest is created in favour of an unborn person not in existence on the date of transfer and is subject to a prior interest created by the same transfer, the interest created for the benefit of such unborn person cannot take effect unless it extends to the whole of the remaining interest of the transferer in the property.

The instant Gift Deed has been executed in due compliance of Section 13 and Section 20 of the Transfer of Property Act wherein the donor gave life interest to his sons with the clause that the male legal heirs born to the said

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sons shall become absolute owners of the property allotted to their respective fathers. Therefore there has been no contravention of the provisions of law.

In the present Deed of Gift there is no contravention of the Rule against perpetuity. In accordance with Section 15 of the Transfer of Property Act, there is no bar on transferring of the property for the benefit of a class of persons with regard to some of whom such interest fails by reason of any rules contained in Section 13 and 14 of the Transfer of Property Act if such interest fails with regard to those persons only and not in regard to the whole class. The exact scenario is apparent in the present case in hand where some of the sons of the donor who were given life interest have male legal heirs, particularly in the case of the plaintiff/respondent herein who is the male legal heir of his father and accordingly there is no difficulty regarding the said Deed of Gift to take effect.

Mr. Banerjee submits that giving right to male legal heirs to be born to the daughters of the testator and the further restraint on alienation of the property to strangers with the stipulation that the same can be transferred to the family members have been held to be valid in ***K. Naina Mahammed (Dead) through Lrs., v. A.M. Vasudevan Chattiar (Dead) through Lrs. & Ors.,*** reported at **2010 (7) SCC 603** [paragraphs 38, 44, 45, 46 and 47].

Mr. Banerjee has submitted that the plaintiff became the owner by way of deed of gift. A party who is already in possession of a documents of title by way of deed of gift, is not required to file a suit for declaration of

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ownership in respect of the property. The argument that the suit is barred by limitation is also misconceived as it is a suit for recovery of possession against a trespasser in which cause of action arise on and from 1996 when the possession was illegally and unauthorisedly taken by the appellants. The appellants have refused to vacate the suit premises in spite of legal notice dated 15th February, 2002. Therefore, in filing a suit for recovery of the possession there cannot be any period of limitation. Therefore, there is no confusion with regard to the allotment of the various portions of the property in question which has been accepted by the parties since 1943 and it is further admitted during the course of evidence of DW1 that the forefather of the defendants were never allotted any portion by virtue of the said deed of gift. On evaluation of the aforesaid facts, it would be crystal clear that the defendants do not have any interest whatsoever in the suit property and could not set up a rival title over the same. Even for the sake of argument it is considered that the plaintiff is a co-owner in respect of the suit premises, even then the plaintiff is entitled to file the aforesaid suit for eviction of a trespasser. Moreover the concept of better title can also apply in the instant case.

It is submitted that in view of the deed of gift of 1943, there was no need for the plaintiff to claim any declaration of his status in the property. The plaintiff has produced a deed of gift which contains a plan clearly demarcating the portion allotted to each of the sons. The schedule 'ka' to the plan would show that it was allotted to Bimal Behari Shaw with "Haridra"

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colour that is yellow colour. This portion is allotted to the predecessor of the plaintiff. Accordingly there is no anomaly in the deed of gift regarding allotment and subsequently the name of the plaintiff has been mutated in the record of rights. Moreover the plan annexed to the said Deed of Gift also shows the Lot 'Ka' marked in yellow portion in the said plan has been allotted to the predecessor of the plaintiff. Hence, there is neither any misdescription of the property as alleged nor defect in the title of the plaintiff.

In accordance with the provisions of the said Will, the back portion of premises no.122, Manicktala Street (subsequently renamed as Sisir Bhaduri Sarani) was exclusively allotted in favour of Bono Behari Shaw and his three brothers.

One of the sons of Banku Behari Shaw viz. Bipin Behari Shaw who was born through the second wife of Banku Behari Shaw i.e. Maharani Devi filed a suit being suit no.436 of 1929 regarding construction and/or interpretation of the said Will, Partition etc. and by the judgment dated 24th July, 1931, the Hon'ble Justice Leonard Wilfred James Costellow, upheld the provisions of the Will and directed partition of the property in four equal parts and also appointed a Partition Commissioner with the further direction that mutual deed of conveyances to be executed amongst each other for beneficial interest of the respective shares of the parties, if required.

The property has since been partitioned in the year 1931 upon acceptance of the report filed by the Partition Commissioner. The owners of

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the four lots on the basis of the judgment and decree dated 24th July, 1931 duly mutated their respective portions and have been paying their municipal rates and taxes since then.

The Will of Banku Behari Shaw never created any interest in favour of the Appellants/Defendants herein or created any right, title and interest in respect of the suit premises i.e. Premises No.122B, Sisir Bhaduri Sarani (erstwhile Manicktala Street).

The ownership rights in respect of premises no.122B, Sisir Bhaduri Sarani (erstwhile Manicktala Street) has come to the hands of the plaintiff/respondent herein by virtue of the Deed of Gift of 1943, executed by Bono Behari Shaw.

Therefore, neither Will of Banku Behari Shaw nor the genealogical table creates any right, title and interest in respect of the suit property in favour of the appellants/defendants herein or their predecessors-in-interest.

It would be evident from the Will of Banku Behari Shaw that the appellants/defendants or their predecessor-in-interest never acquired any interest in the suit property i.e. Premises No.122B, Sisir Bhaduri Sarani (erstwhile Manicktala Street).

Moreover, under clause 9 and 10 of the Will of Banku Behari Shaw the property was bequeathed only in favour of his sons and grandsons absolutely

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and forever and there was no provision made for any of the female legal heirs on the basis of which any claim could be made by them.

Infact the wife of the said Banku Behari Shaw was given life interest and no absolute right of ownership.

Following the provision of the said Will of his father and in consonance thereof Bono Behari Shaw executed his Deed of Gift in 1943 by which a scheme was devised for distribution of the property to his four sons with life-interest and thereafter to their male legal heirs, absolutely and forever.

The sons of Bono Behari Shaw had life-interest in their respective lots and not absolute right of ownership. Accordingly, after the death of the said sons, the male legal heirs as per scheme of the Deed of Gift of 1943 became absolute owners. Therefore Urmilla Shaw, the mother of the Donees could never inherit the rights of her sons which was in the nature of life interest and the story of her inheriting share in any of the lots of the aforesaid property is absurd.

The appellants/defendants have placed multifarious self destructive claims for acquiring the ownership in the suit property.

Mr. Banerjee submits that initially the appellants/defendants challenged the deed of Gift of 1943, on the ground that nobody accepted the said Deed of Gift as the Donees were minors, but the said claim has no basis as the same was accepted by the father of the Donees i.e. Bono Behari Shaw

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himself as would be evident from the evidence of Birinchi Behari Shaw, the PW-2.

The claim of the appellants/defendants was that the Deed of Gift of 1943 was never acted upon is contrary to their pleadings and evidence where the appellants/defendants have admitted that the property has been partitioned by metes and bounds sometime in the year 1931 and moreover the predecessor-in-interest of the appellants/defendants was a signatory to the said Deed of Gift of 1943.

The claim of the appellants/defendants that the said deed of gift of 1943 is void is untenable as two generations down the line had never challenged the said deed of gift and in fact the grandfather of Basab Shaw i.e. Biman Behari Shaw was an attesting witness to the said deed of gift. The claim of the appellants/defendants is thus, *ex facie* barred by the limitation in view of the provisions of Article 59 of the Limitation Act, as knowledge of the predecessors is also construed to be the knowledge regarding existence of deed of the subsequent generations.

The appellants/defendants have also made a claim that they have acquired the property by way of succession which opened after the death of some of the donees as the mother of the donees Smt. Urmila Shaw was alive after the death of her sons and through her the appellants/defendants have acquired the ownership rights over the suit property. The aforesaid claim is untenable in view of the fact that if deed of gift of 1943, is accepted to be a

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valid document, the scheme proposed in the said document is that the sons of the donees shall acquire absolute right in the property i.e. allotment of their respective fathers would go to their male legal heirs absolutely and forever and if any of such sons do not have any male legal heirs, the same would go to the male legal heir of the other lot. If the said deed of gift is held to be a valid document, the clauses of the said deed of gift regarding devolution of right, title, interest in favour of the subsequent generations have to be held to be valid where female legal heirs do not acquire any right in the aforesaid property in question and therefore the grandmother of Sri Basab Shaw i.e. Urmila Shaw could never get any interest in the said property and as such inheritance through the said Urmila Shaw is absolutely absurd. During her life time Urmila did not claim any right over the property in question and the other female heirs of various other lots also accepted the deed of gift and never claimed any right over the suit properties.

It is further to be taken into consideration that if deed of gift of 1943, is not to be given effect in that event the heirs, successors of the various lots of various branches of the property shall all be affected and the binding effect of the said deed of gift of 1943 which has involved several generations shall fall apart without even the said owners being parties to the said suit.

The submission that Bonobehari did have the ownership in respect of 17 cottahs and odd at the time of execution of the deed of gift is factually incorrect as it would be evident from record that subsequent to the probate

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Bonobehari purchased land measuring 9 cottahs, 11 chittaks and 44 sp. ft. in a court sale which would appear from the order dated 27th July 1935 in suit no.1378 of 1929.

It is submitted that the mischievous conduct of the appellant would be evident from their pleadings in title suit no. 209 of 2019 in which they have prayed for cancellation of the deed of conveyance dated 20th August 1992 in favour of Deepak Kumar Shinghania by Birinchi Behari. In the said suit the appellants relied upon a Will of Bonku Behari Shaw and made several other admissions and ultimately entered into a compromise with Deepak Kumar Singhania which was recorded in Order no. 31 dated 19th September 2022.

In the said compromise application the appellants/plaintiffs reached a settlement with the said Dipak Kumar Singhania and proposed for execution of a Deed by which a portion of the said property of Brinchi Behari was to be given to the plaintiffs and therefore entered into a clandestine deal with the said Dipak Kumar Singhania although initially the said deed in favour of the Dipak Kumar Singhania was challenged. The aforesaid facts categorically prove that before the various Courts of law the appellants/defendants have raised multifarious pleas as per convenience. Mr. Banerjee accordingly submits that the 'decree for eviction' is required to be affirmed.

The essential question raised in this appeal is the legality and validity of the Will of Banku Behari and Deed of gift executed by Bonobehari on 4th September, 1943 only to the extent it is restricted to the male line of

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succession. If the said Deed is held to be invalid and unenforceable then the appellants may get a share in the suit property in which case they shall be treated as co-sharer and not trespasser.

During the pendency of the proceeding the following documents were admitted in evidence.

i) Will executed by Sri Banku Behari Saha on 29th November, 1929.

ii) The genealogical table.

iii) certified copy of the judgment and decree in suit no. 436 of 1929.

iv) order dated 27th July, 1935 passed in suit no.1378 of 1929.

The first two documents were admitted in terms of the order dated 21st February, 2014 and 6th September, 2013 and are marked as Exbt.H and I respectively. The certified copy of the judgment and decree in the partition suit being suit no.436 of 1929 was marked on admission and by consent on 4th April, 2023. The said document has been marked as Exbt.J. The said partition decree was passed by Justice Costello on 24th July 1931 in the aforesaid partition suit. The order dated 27th July, 1935 passed in suit no. 1378 of 1929 was marked as Exbt. 15. In fact, in our order dted 1st March, 2023 we admitted the said two documents in exercise of power under Order 41 Rule 27(1)(b) of the Code of Civil Procedure in order to enable the court to pronounce judgment on the issue raised by the parties. The order dated 27th July, 1935 was admitted by this court in exercise of the aforesaid power.

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Moreover Mr. Souraditya Banerjee learned Counsel representing the respondents on 4th April, 2023 has submitted that the said document is relevant since Mr. Basab Saha in the appeal has raised a dispute with regard to the nature and extent of the land in possession of Bonobehari at the time of execution of the deed of gift in the year 1943. We are in agreement with Mr. Banerjee and we marked the said document as Exbt. 15.

Although elaborate arguments have been made on behalf of the parties in support of their respective contention the appeal in our view is on a short and narrow compass. The locus to challenge the restrictive clause in the Will of Banku Behari and deed of gift of 1943 after it was acted upon generation after generation.

Bonobehari is the common ancestor of the parties. Bipin Behari during his lifetime filed a suit for partition being suit no. 436 of 1929. The said suit was disposed of by Justice Costello on 24th July, 1931 by which the learned Single Judge upheld the provision of the will executed by Banku Behari on 24th November, 1925 and directed partition of the properties in four equal parts. The partition commissioner was appointed with a further direction that mutual deed of conveyance shall be executed amongst four sons of Bonku Behari in respect of their respective shares for equalization if required Justice Costello while disposing of the partition suit by a final decree dated 24th July, 1931 accepted the report filed by the partition commissioner after

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recording satisfaction that the four sons of Bonku has received four respective lots in terms of the preliminary decree.

The four sons of Bonku on the basis of the preliminary decree were put to possession of their respective portion and thereafter mutated their names and were paying their municipal rates and taxes. Thereafter, their legal heirs mutated their names and deal with their respective allotted areas as owners thereof. They were and have been enjoying the four separate lots duly demarcated as exclusive owners thereof. Bonobehari was one of the sons of Bonku. He was also one of the executors of the Will of Bonku. Probate was granted in his favour before the partition suit was filed by Bipin.

By reason of the Will and the decree in the partition suit affirming the divisions Bonobehari became the absolute owner of the property presently known as 122 B Sisir Bhaduri Sarari, Kolkata 700 006 comprising of area of land measuring 17 cottah 9 chitak 30 sq. ft. Bonobehari had five sons. Bonobehari during his lifetime executed a deed of gift on 4th September, 1943 by which he had gifted demarcated portions of the property in favour of his four sons excluding Biman. The demarcated portions are mentioned in the schedule of the gift deed as Ka, Kha, Ga and Gha respectively indicating in different colours. The deed however, restrained his four sons to alienate and encumber the properties. It clearly prescribes the line of succession. The grandsons down the line would be exclusively inheriting the properties to be left behind by their father and it also laid down the line of succession in

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the event one of his sons is issueless. Biman is the attesting witness of the said Will. Biman was happy with whatever he received. The present appellants are the legal heirs of Biman. They are the grand children of Biman and legal heirs of Bilas behari. Bilas is the son of Biman. The plaintiffs alleged that considering the relationship between the parties Bilas was permitted to stay in a partition of the suit property as he was in need of an accommodation in an around Kolkata on a temporary basis Bilas however, refused to vacate when demanded. Bilas was in permissive occupation.

The appellants have taken different stands at different point of time, however, in the appeal the appellants have accepted the deed of gift. The purpose of referring to the Will of Bonku was initially to show that the Will only recognized male line of succession on the death of his sons and it is in fact the source of title to all being perfected by the final decree. The final decree in the partition suit was passed after probate was granted in favour of Bonobehari. The partition decree passed by Justice Costello on construction of the Will. By virtue of the judgment of Justice Costello on 24th July, 1931 four sons of Banku divided their properties in accordance with the preliminary decree followed by the final report of the partition commissioner culminating in a final decree. The appellant realizing that it would be well neigh impossible for the present appellants to challenge the said partition decree in the appeal they remonstrated that the area comprised in the deed of gift of Bonobehari dated 4th September, 1943 contains areas far in excess

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of what was allotted to Bonobehari under the preliminary decree. It was not an issue before the trial court. However, in the appeal for the first time a dispute is raised with regard to the area covered under the deed of gift of 1943. However, for the sake of completeness it is necessary to take into consideration the order dated 27th July, 1935 passed in suit no. 1378 of 1929 wherefrom it clearly appears that Bonobehari had purchased 9 Cottash, 11 Chittaks and 44 Sq ft. thereby he became the owner of 17 cottah 9 chitak and 30 sq ft. This property he divided amongst four sons in the manner indicated the deed of gift. The said deed of gift was executed on 4th September, 1943. Biman as we have mentioned is an attesting witness of the said deed. Biman did not challenge the deed. Bilas is the father of the present appellants. Bilas also did not dispute the said deed. Bilas died during the pendency of the suit. There is no evidence on record showing that Bilas during his lifetime had ever objected to the said deed of gift. The present appellants were substituted. They have now raised an objection that the line of succession mentioned in the Will and the deed of gift are contrary to law. In fact, the only point urged before us is that at the time of death of Bimal, his mother Urmila was alive and on her death the share of Urmila would devolve upon the present appellants even if it is miniscule and insignificant. The said submissions cannot be accepted at this stage. The evidence on record clearly shows that the partition decree dated 24th July 1931 and the gift deed were acted upon by all the parties. The Will only created a life interest in favour of Urmila. The partition decree following the

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grant of probate was accepted and acted upon. It refers to male line of succession only. If the gift deed was prejudicial to Biman's interest then Biman ought to have challenged the said deed of gift. In fact, by putting his signature in the deed of gift Biman had accepted the existence of the said deed of gift as also to the disposition made under the said deed of gift. Biman was aware of the recitals in the deed and the fact that he was excluded from the deed of gift. There could be some reason and if it is possible that he had received other benefits from his father Bonobehari but the fact remains that Biman did not challenge the deed of gift. The line of succession in the deed of gift is almost similar to what Banku, the father of Bonobehari, thought of and expressed in his Will and it must have influenced Bonobehari to make similar provisions in the deed of gift while settling the properties in favour of his four sons and their male lines. The gift was in favour of four sons living at the time of the gift. There is no bar or restriction with regard to transfer of interest in favour of an unborn person. It was not a gift in favour of unborn persons. In the present case, the donor gifted the property in favour of his four sons, then living and also stipulated that all male children born to his sons would succeed with the absolute right of alienation. Whatever nomenclature would one may ascribe to the deed of gift it is quite clear that Bonobehari was anxious about the future of the donees because of their age and decided to settle the properties in their favour with a defined line of succession. The evidence clearly shows that all the parties including the female legal heirs of Banku and thereafter his sons

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and as their branches have acted upon the said terms and have altered their position based on the final decree in the partition suit and the gift deed of Bonobehari. Even Arpita the daughter of Bimal did not come forward challenging the maintainably of the suit. Even a wrong act gets perfected and at least binding on the parties if it is sufficiently long in point of time thereby inducing a belief between the parties to be the real state of affirms and on that basis the parties have conducted themselves and altered their position believing that the wrong act, now alleged, was the correct state of affairs. In the instant case it cannot be contended that Biman or Bilas had no knowledge of the Will, partition decree on the gift of Bonobehari. They have accepted all the three instruments and allowed its terms and conditions to be implemented. It is a clear case of estoppel by conduct if not relinquishment of a known right if it is assumed for the sake of argument that the male line of succession in the deed of gift is invalid. Biman and Bilas have consciously abandoned their legal rights to challenge. It is trite law that even a statutory right may also be waived by implied conduct. The fact that the predecessors of the parties have acted on the Will, partition decree and the deed of gift of 1943 are sufficient consideration. They have completely abandoned their rights if any. It implied an intentional act not to challenge the said instruments. A right, if it is assumed to exist, when not exercised for a long time makes it non-existent. The appellants also cannot succeed as there is a clear acquiescence even if it is assumed that the restriction imposed in the deed of gift with regard to succession is invalid.

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Biman and Bilas having a right to challenge the gift deed stood by and witnessed the four brothers and their branches succeeding to the estate and deal with the respective portions allotted to them in a manner inconsistent with their right while the act was in progress and after their hope is completely shattered and after the violation is completed. This conduct would clearly reflected their ascent and accord. They did not complain when they were alive and their legal heirs cannot afterwards complain with a view to unsettle and upend things that have attained finality and acted upon by all. Moreover, the appellants cannot contend that the Will of Bonku Behari or the deed of gift is partly valid and partly invalid as they themselves have taken benefit under the said two documents. The preliminary decree in the partition suit following the Will is the source of right through which all the parties have derived interest. The plaintiffs have themselves accepted the existence of the Will, partition decree and the deed of gift and cannot blow hot and cold at the same time as it is said "It cannot be partly good and cannot be partly bad like curate's egg". When the predecessors of the appellants were estopped by conduct in challenging the recitals in the Will or the deed of gift the plaintiffs cannot in an oblique manner raised any dispute with regard to the validity of the said instruments. All the parties generation after generation have conducted themselves in accordance with the final decree of partition and the deed of gift of Bonobehari. Once Biman and Bilas have not challenge the deed of gift and have conducted themselves in a manner which gives a clear impression that they have accepted the male line

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of succession mentioned in the deed of gift as sacrosanct and final their legal heirs are bound by such conduct. The expressed intention of Bonobehari was respected and accepted by his five sons. It was not a case of misrepresentation of fact. If the parties with their eyes wide open had accepted a state of things to be correct and should exist and continue to exist and thereby inducing a belief in others as to its permanence then their successor cannot turn around, upend and challenge any right that may have accrued to the other party by reason of such non-denial. Biman and Bilas knowing fully well that the restrictive clauses in the Will and deed of gift could be prejudicial to their interest, accepted them and allowed the things to happen in accordance with the said deed of gift. It is quite evident from record that all the parties have acted on the basis of the final decree of 1931 and deed of gift of 1943 which is now attempted to be overturned by the grand children of Biman. This is clearly not permissible in law.

The right of the plaintiff qua the suit property is not under any 'cloud' and well established having regard to the Will, partition decree and the gift of 1943. It is also interesting to note that the appellants tried to make out a case of acquisition of title by adverse possession.

On such consideration we do not find any reason to interfere with the well reasoned judgment of the trial court. The judgment and decree passed by the learned trial Judge is affirmed.

The appeal stands dismissed.

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However, there shall be no order as to costs.

I agree **(Soumen Sen, J.)**

(Uday Kumar, J.)