

**(2010) 02 CAL CK 0019**

**Calcutta High Court**

**Case No:** S.A. No. 115 of 2004

Sri Dilip Kumar Dey

APPELLANT

Vs

Sri Sarathi Sundar Dey and  
Another

RESPONDENT

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**Date of Decision:** Feb. 20, 2010

**Acts Referred:**

- Trusts Act, 1882 - Section 5, 6

**Hon'ble Judges:** Tarun Kumar Gupta, J

**Bench:** Single Bench

**Advocate:** Asis Sanyal, Pradip Roy, Sanat Kr. Dutta and Nisith Mukherjee, for the Appellant; Saptangshu Basu Sumanta Basu, Supratim Laha and Sabyasachi Bhattacharya, for the Respondent

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### **Judgement**

Tarun Kumar Gupta, J.

The Second Appeal is directed against judgment and decree dated 07.12.2001 and 20.12.2001 respectively passed by Sri B. Banerjee, learned Judge, Small Causes Court, Sealdah in Title Appeal No. 114 of 1996 affirming the judgment and decree dated 25.04.1996 and 17.06.1996 respectively passed by Sri B. D. Nanda, learned Munsif, 3rd Court, Sealdah in Title Suit No. 168 of 1989 wherein learned Trial Court passed a contested decree of eviction against Defendant treating him as a licensee under the Plaintiff and that the licence was revoked by Plaintiff.

2. Being aggrieved with said judgment and decree of the learned First Appellate Court the Second Appeal has been filed alleging that impugned judgment and decree were bad in law.

3. The facts of this case may be summarized as follows:

4. The Respondent/Plaintiff filed said Title Suit No. 168 of 1989 against the Appellant/Defendant brother alleging that Plaintiff became the absolute owner of the suit property. Deed of settlement dated 25.03.1986 was executed by his father

Rash Behari Dey who became absolute owner of the suit property on the strength of a trust deed of 1947 executed by his father late B.N. Dey. It was further case of the Plaintiff that Defendant was a licensee in the suit premises under their father late Rash Behari Dey and that when Plaintiff became owner of the suit property he also permitted his brother Defendant at his request to stay in the suit premises as a licensee and that later on there were some problems in the aforesaid possession of the suit property by the Defendant and as a result Plaintiff revoked the licence by serving a notice to quit upon the Defendant and that later on filed the aforesaid suit for not vacating the suit premises by the Defendant.

5. The Appellant/Defendant contested the suit by filing written statement denying material allegations of the plaint and containing inter alia that their grandfather late B.N. Dey during his life time executed deed of trust in respect of the suit property and other properties in the year 1947 and that one of his sons namely Bana Behari Dey was made trustee and that his all four sons including father of the parties and family members became beneficiaries. According to the Defendant the deed of trust of 1947 executed by late B.N. Dey was not acted upon and the suit properties and other properties were not conveyed as per terms of said trust deed and that their father Rash Behari Dey did not get exclusive right in the suit property on the strength of said trust deed of 1947 which was not acted upon and as such the trust deed dated 25.03.1986 executed by Rash Behari Dey in favour of one of his sons namely Plaintiff had no legal sanctity and rather Plaintiff managed to obtain said trust deed dated 25.03.1986 by applying fraud and misrepresentation and that Defendant was in possession of the suit property as co-sharer and grand son of original owner late B. N. Dey and that he being a co-sharer of the suit property cannot be evicted by his brother Plaintiff considering him as a licensee either under Plaintiff or under his father Rash Behari Dey since deceased.

6. At the time of admission of the Second Appeal the following law point was formulated.

There being no proof with regard to the trust deed being acted upon, the Court could not have proceeded on the basis of the deed of trust denying the locus standi of the Defendant from challenging the same since by way of natural succession he would have been entitled to a share of which he was purported to be divested because of the deed of trust and giving him a cause of action for challenging the trust.

7. Before going into the merit of the case for deciding the law point already formulated it will be worthy to note the following admitted facts of the case.

1. Brojonath Dey, the grandfather of the parties, executed and registered a trust deed in 1947 comprising suit property and other properties.

1.

(a) In the said trust deed of 1947 Bana Behari Dey, one of the sons of B. N. Dey was made trustee.

(b) Rash Behari Dey, the father of the present parties, one of the sons of B.

N. Dey and other sons and other family members of B. N. Dey were made beneficiaries.

(c) In the trust deed the beneficiaries including the father of the present parties were allotted specified properties to be held by them as absolute owners in terms of said trust deed.

(d) The suit property was allotted to Rash Behari Dey, the father of the parties of this case in said trust deed.

(e) The trustee shall convey the earmarked properties to the beneficiaries in terms of the trust deed who thereafter will hold the concerned property absolutely was contained therein.

(f) If the trustee Bana Behari Dey refuses to act or becomes incapable of acting as a trustee then Kunja Behari Dey, another son of the settler, shall become a trustee in his place for fulfilling the wishes of the settler as per averments made in the trust deed.

2. Trustee Bana Behari Dey sent a letter dated 20.01.1971 conveying the allotted properties to Sri Rash Behari Dey in terms of the deed of settlement dated 11.03.1947 executed by late Brojonath Dey.

3. Rash Behari Dey, the father of the parties, executed deed of settlement dated 25th March, 1986 in favour of the Respondent/Plaintiff in respect of the property which he alleged to be owned in terms of deed of settlement dated 11.03.1947 executed by his father late Brojonath Dey.

4. Appellant / Defendant was in possession of the suit property being a portion of the trust property covered by the deed of settlement dated 25th March, 1986 executed by Rash Behari Dey in favour of Respondent / Plaintiff.

5. Respondent / Plaintiff sent a notice revoking alleged licence granted by him in favour of Appellant / Defendant.

8. On perusal of the materials on record both oral and documentary both the lower Courts came to the conclusion that the deed of settlement dated 11.03.1947 executed by Brojonath Dey appointing his son Bana Behari Dey as a trustee was acted upon and that Bana Behari Dey conveyed the suit property i.e., front portion of 27 Anandapalit Road to Sri Rash Behari Dey, the father of the parties in 1971 and that Rash Behari Dey became absolute owner in respect of said allotted property after said conveyance and that while he was exercising rightful ownership on said premises he executed a deed of settlement dated 25.03.1986 in favour of his one of

the sons namely Respondent/Plaintiff and that after death of Rash Behari Dey Respondent/Plaintiff became absolute owner of the said property and that Appellant/Defendant was staying there as a licensee under Rash Behari Dey and after his death as a licensee under Respondent/Plaintiff who later on revoked the same and was entitled to get a decree of eviction.

7. During hearing Mr. Asis Sanyal learned Advocate for the Appellant/Defendant has submitted that though there is no dispute about execution of a trust dated 11.03.1947 by original owner Brojonath Dey in respect of the suit property and other properties appointing his one of the sons namely Bana Behari Dey as a trustee but there was no proper conveyance of the property allotted to Rash Behari Dey by trustee Bana Behari Dey. According to him if there is no proper conveyance of allotted trust property to Sri Rash Behari Dey then he did not get any title to said allotted property as per trust deed and as a result he had also no authority to execute a further deed of settlement dated 25th March, 1986 in favour of Respondent/Plaintiff.

9. Sri Sanyal learned Advocate has further submitted that it came out from the materials on record that trustee Bana Behari sent a letter dated 20.01.1971 showing conveyance of allotted share of Rash Behari Dey as per deed of settlement dated 11.03.1947 executed by late Brojonath Dey. According to Mr. Sanyal conveyance of the said property by trustee to the beneficiary cannot be made just by a letter and should have been made by a deed of conveyance duly registered. However, he is fair enough to submit that he could not find any citation/ decision of Hon"ble Apex Court or any other High Court to show that while conveying properties by trustee to the beneficiary in terms of the deed of settlement a formal deed duly registered is required to be made. In this connection he has, however, submitted that on vesting of the property a trustee became the legal owner of the same and as such for transfer of an immovable property by a legal owner to another person (beneficiary) a registered document as per relevant provisions of Transfer of Property Act and Indian Registration Act is required. In this connection he has referred a case law reported in AIR 1931 196 (Privy Council) to impress upon this Court that on execution of a trust deed, trustee becomes legal owner of the trust property.

10. Sri Saptangshu Basu, Senior Advocate, for the Respondent/Plaintiff on the other hand has submitted that there is no law as to the manner by which the trustee will convey the earmarked trust property to the beneficiary and that execution of a deed of conveyance and / or registration of the same is not required.

11. Admittedly, the trustee becomes legal owner of the trust property after execution of the same but he not being the real owner cannot exercise all the rights available to a real owner for dealing with the property and he is bound to hold the same for benefit of the beneficiaries and he is bound to convey the same to the beneficiaries as per terms of the trust deed.

12. u/s 5 of the Indian Trusts Act, 1882 a trust in relation to immovable can only be made by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. In the case in hand the trust was made by the settler through non-testamentary instrument duly executed and registered. u/s 6 of the Indian Trusts Act a trust is created when the author of the trust indicates with reasonable certainty by any words or acts an intention on his part to create thereby a trust, the purpose of the trust, the beneficiary, and the trust property and transfers the trust property to the trustee in case trust is created by non-testamentary instrument.

13. In the case in hand all the conditions of Section 5 and Section 6 were fulfilled and the deed of settlement dated 11.03.1947 executed by the settler Brojonath Dey declaring his son Bana Behari as a trustee was valid one.

14. Learned Advocate for Respondent/Plaintiff has submitted that the trust deed is nothing but a document of deferred devolution as per desire of the settler and that trust property is required to be conveyed to the beneficiaries as per terms of the trust deed and for that no further execution of any document is required. In this connection he has referred a case law reported in Himansu Kumar Roy Chowdhury Vs. Moulvi Hasem Ali Khan and Others. In the referred case law it was held that the word "transfer" used in Section 6 of the Trust Act asking settler to transfer the trust property to the trustee has a wider meaning and it also includes vesting declarations.

15. According to Hon"ble Court in the case of immovable property only declaration is necessary.

16. Admittedly, said word "transfer" as used in Section 6 of the Indian Trusts Act, 1882 was interpreted in the referred case law. Now the question is whether the said interpretation can also be used for transfer of the trust property by trustee to the beneficiary. I have already stated that there is no legal dictum for executing a document of transfer with / without registration for transfer of trust property from trustee to the beneficiary. If that be the position of law then the letter of conveyance dated 20.01.1971 issued by trustee Bana Behari Dey in favour of Rash Behari Dey in respect of the trust property as per deed of settlement dated 11.03.1947 executed by late Brojonath Dey should be treated as valid conveyance of said trust property to beneficiary namely Rash Behari Dey.

17. Accordingly, Rash Behari Dey, the father of the parties became absolute owner of said demarcated front portion of 27 Anandapalit Road since 20.01.1971. It came out from evidence on record both oral and documentary that since then Rash Behari Dey owned and possessed suit property as absolute owner by paying taxes and by mutating his name. The Respondent/Plaintiff already proved execution of deed of settlement dated 25.03.1986 in respect of the said property by his father Rash Behari Dey in his favour. The Appellant/Defendant took the specific plea that the

said deed of settlement vitiated by fraud and / or misrepresentation. Admittedly, he failed to establish the case of fraud and / or misrepresentation in execution of said deed of settlement dated 25.03.1986 by their father Rash Behari Dey in favour of Respondent/Plaintiff. As a result, both the Courts below disbelieved said story of fraud and / or misrepresentation. Accordingly, after the death of their father Rash Behari Dey the Respondent/Plaintiff became absolute owner of said property on the strength of said deed of settlement dated 25th March, 1986. Appellant/Defendant during his evidence admitted that he was residing in the suit premises with consent of his father. It further came out from evidence on record that Respondent/Plaintiff permitted Appellant/Defendant to reside in the suit premises even after their father/s death and ultimately revoked the said licence by a notice and filed the specific suit for ejectment of Appellant/Defendant as a licensee.

18. In view of the facts and circumstances as stated above I am of the opinion that the concurrent judgments of learned Lower Courts cannot be said to be perverse in perspective of the evidence on record both oral and documentary. If that be the position then there is no ground for interfering with the aforesaid concurrent findings of both the Lower Courts regarding passing of such ejectment decree against the Appellant/Defendant. As a result, the appeal fails.

19. Let Lower Court's records along with a copy of the judgment be returned forthwith by a special messenger for information and necessary action.

10. Urgent xerox certified copy of the judgment be supplied to the learned Counsels of the party parties, if applied for.