**(2013) 05 CAL CK 0043**

**Calcutta High Court**

**Case No:** S.A. No. 244 of 2010

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| Sunil Baran Dutta | | APPELLANT |
| | Vs | |
| Kamala Bala Dutta | | RESPONDENT |

**Date of Decision:** May 17, 2013

**Citation:** (2013) 4 CHN 281

**Hon'ble Judges:** Tapan Kumar Dutt, J

**Bench:** Single Bench

**Advocate:** Rudra Jyoti Bhattacharjee and Debjani Ghosal, for the Appellant;Probal Mukherjee, Sukanta Chakraborty, Priyonko Banerjee for the Respondent Nos. 1, 2 and 7 in S.A. 244 of 2010 and S.A. 245 of 2010, Md. Mansoor Alam, L.R. Verma for the Respondent No. 8 in S.A 244 of 2010 and Respondent No. 1 in S.A. 245 of 2010, for the Respondent

**Judgement**

Tapan Kumar Dutt, J.
This Court has hoard the learned Advocates for the respective parties. The facts of the case, briefly, are as follows:

One Durga Bala Dutta (wife of Panchanan Dutta) and the present appellant, namely. Sunil Baran Dutta (son of Panchanan Dutta) brought a suit against the respondent No. 1 in S.A. 245 of 2010, namely, Jyoti Prasad Laha and in such suit the other respondents in the present appeals were added as parties. The said suit was filed for a decree for declaration that the plaintiffs are the absolute owners of the suit property and also for a decree of permanent injunction restraining the defendants from disturbing the plaintiff''s peaceful possession of the suit property. The suit property is U.S. plot No. 203 measuring .63 acre recorded in Khatian No. 131 of Sheet No. 17 of Mouza and P.S. Chandernagore, District Hooghly. The said suit was numbered as Title Suit No. 35 of 1984 and was placed before the Court of learned First Court of Civil Judge (Junior Division) at Chandannagar. During the pendency of the case the said Durga-Bala Dutta died, and Sunil Baran Dutta, the present appellant, continued with the suit as the sole plaintiff. The case of the plaintiff/appellant was that the suit property originally belonged to one Krishna Das

Dutta who executed a deed of settlement dated 09.09.1957 and gave the suit property to the husband of the original plaintiff No. 1 and father of the plaintiff No. 2, that is, Panchanan Dutta, since deceased, and delivered possession to the said Panchanan Dutta who died in the year 1969. It was the further case of the plaintiffs that the plaintiffs continued to be in possession of the suit property as owners thereof but on 26.02.1994 the present appellant found that the defendant No. 1 was taking steps for selling the suit property after having purchased the same from Ajit Tosh. The plaintiffs'' further case was that Krishna Das Dutta, after having executed the deed of settlement, had no right to make any deed of gift, and, accordingly, all the deeds executed subsequent to the deed of settlement are void, illegal and sham transactions. The plaintiffs'' further case was that the said Krishna Das Dutta, after execution of the said deed of settlement, was compelled by one Prafulla Kumar Dutta who is the predecessor-in-interest of some of the defendants in the suit to execute a deed of gift after revoking the deed of settlement when Krishna Das Dutta did not have any right to revoke the said deed of settlement. The plaintiffs'' case was that neither the said Prafulla Kumar Dutta nor his transferee, Ajit Tosh, nor Joyti Prasad Laha nor any of the defendants in the suit had and/or have any right, title, interest or possession in the suit property. The plaintiffs'' case was that the plaintiffs were compelled to file the suit as the defendant No. 1, Jyoti Prasad Laha, had denied the plaintiffs title in the suit property.

2. The said defendant No. 1 contested the said suit by filing written statement denying all the material allegations made in the plaint and contended that the said defendant No. 1 is a bona fide purchaser for valuable consideration without knowledge and notice of the so-called hidden rights of the plaintiffs. The defendant No. 1 contended that the plaintiffs cannot acquire any right, title and/or interest in the suit property on the basis of the cancelled deed of settlement and the said deed of settlement was nothing but a Will which could be revoked at any time. According to the said defendant No. 1, Krishna Das Dutta executed a deed of gift in favour of Prafulla Kumar Dutta in respect of the suit property and on 20.11.1965 the said Prafulla Kumar Dutta executed a sale deed in favour of Ajit Tosh. It is the further case of the defendant No. 1 that Ajit Tosh sold the suit property in favour of the defendant No. 1 on 19.03.1968 and since then the defendant No. 1 is in possession of the same.

3. The suit was dismissed on contest and the plaintiff moved the learned First Appellate Court which had sent back the suit on remand with a direction to frame additional issues and also to allow the parties to adduce evidence. After the said suit was sent back on remand the said Prafulla Kumar Dutta was added as defendant No. 2, and subsequently, he died and as such his legal heirs were substituted. These legal heirs of the deceased defendant No. 2 filed written statement denying all the material allegations made against them and alleged that the deed of settlement was revoked by Krishna Das Dutta himself and two deeds of gift being No. 2160 and 2161 dated 03.08.1964 were executed in favour of the said Prafulla Kumar Dutta

who was put into possession of the suit property and subsequently said Prafulla Kumar Dutta sold the suit property to one Ajit Tosh on 20.11.1965, and Ajit Tosh again transferred the suit property to the defendant No. 1 on 19.03.1968 by registered deed of sale. The defendants'' further case was that Prafulla Kumar Dutta got these properties mutated in his name in L.R.R.O.R., and the plots concerned have been recorded in the name of Prafulla Kumar Dutta in the records of Chandernagore Municipal Corporation. The defendants alleged that Prafulla Kumar Dutta had filed Title Suit No. 68 of 1968 for partition admitting that Krishna Das Dutta was owner and possessor of half share of plot No. 536 and this shows that the alleged deed of settlement did not vest any right over settled property during the life-time of the settlor in favour of the settlees. According to the defendants, the suit filed by the plaintiff is barred by the law of limitation and since the suit property is in possession of the defendant No. 1 and there is no prayer for recovery of possession the declaration as sought for by the plaintiffs cannot be granted. It is the case of the defendants that the deed of settlement on 09.09.1957 was not acted upon and the same was validly revoked.

4. The said suit ultimately came up for hearing when the learned Trial Court by judgment and decree dated 30th August, 2000 decreed the said suit by declaring that the plaintiff/appellant is the owner of the suit property to the exclusion of the defendants and the defendants were restrained from interfering with the plaintiffs peaceful possession over the suit property.

5. Challenging the said judgment and decree passed by the learned Trial Court two title appeals were filed by two sets of defendants. Jyoti Prasad Laha filed title appeal No. 174 of 2000, and Kamala Bala Dutta and others filed title appeal No. 165 of 2000, and both the appeals were placed before the learned Additional District Judge, Second Fast Track Court, Chandernagore and both the appeals came up for analogous hearing and the learned First Appellate Court by judgment and decrees dated 21st August, 2004 allowed both the title appeals and the judgment and decree passed by the learned Trial Court were set aside and the suit was dismissed.

6. Challenging the judgment and decrees passed by the learned First Appellate Court, the plaintiff/appellant has filed the present two second appeals being S.A. No. 244 of 2010 and S.A. No. 245 of 2010. It appears that a Division Bench of this Court was pleased to formulate the following substantial questions of law and pleased to direct that the two appeals should be heard analogously:

(I) Whether the Learned Court of appeal below committed substantial error of law in setting aside the judgment and decree passed by the learned Trial Judge by totally overlooking the fact that in view of the deed of settlement executed by the father of the plaintiff of the year 1957, the deed of gift executed in the year 1961 in favour of the defendants or their predecessor-in-interest would not create any title in their favour,

(II) Whether the Learned Courts below committed substantial error of law in treating the deed of settlement of 1957 as a deed of gift;

(III) In the absence of any finding that title to the property of the father of the plaintiff was extinguished for adverse possession of the defendant, whether the Learned Court of appeal below committed substantial error of law in dismissing the suit.

7. The learned Advocate for the appellant submitted that in the instant case the interpretation of the deed of settlement is necessary and according to the said learned Advocate the said deed of settlement of the year 1957 covered the suit property as well as other properties but in so far as the suit property is concerned the right, title and interest in the suit property was transferred by the settlor in favour of the settlee, that is, Panchanan Dutta as and when the said settlement deed was executed and registered. The said learned Advocate submitted that the settlor Krishna Das Dutta transferred 16 annas right, title and interest in favour of Panchanan Dutta in respect of the suit property through the deed of settlement and possession was handed over to the said Panchanan Dutta. The said learned Advocate cited some part of the evidence in support of his contention that the predecessor-in-interest of the plaintiff and thereafter the plaintiff had been in possession of the suit property. According to the said learned Advocate, since the settlor divested himself of the right, title and interest in the suit property and that vesting of such right, title and interest in the suit property in favour of the settlee Panchanan Dutta took place immediately on the execution and the registration of the said deed of settlement the settlor Krishna Das Dutta could not have revoked the said deed of settlement in 1964 in so far as the suit property is concerned. The said learned Advocate submitted that all the deeds executed in favour of the predecessor-in-interest of the defendant No. 1 and the deed which was executed in favour of the defendant No. 1 are bad in law since Krishna Das Dutta did not have any right, title and/or interest in the suit property after executing the said deed of settlement. The said learned Advocate placed reliance on that part of the said settlement deed wherein the said Krishna Das Dutta settled the suit property in favour of Panchanan Dutta. The said learned Advocate submitted that the said Ajit Tosh was not a bona fide purchaser and the defendant No. 1 did not do proper search before purchasing the suit property. The said learned Advocate cited several reported decisions of various Courts in support of his contention that the said deed of settlement of the year 1957 contemplates an immediate transfer of right, title and interest in the suit property in favour of the settlee and such deed of settlement cannot be treated to be in the nature of the Will. The said learned Advocate cited a decision reported at Namburi Basava Subrahmanyam Vs. Alapati Hymavathi and others, Duraisami Reddiar and Another Vs. Saroja Ammal and Others, A. Sreenivasa Pai and Another Vs. Saraswathi Ammal alias G. Kamala Bai, . The learned Advocate for the appellant cited the aforesaid decisions in support of his contention that the deed of settlement of the year 1957 created an immediate transfer of right, title and

interest in the suit property by the said Krishna Das Dutta in favour of Panchanan Dutta. The said learned Advocate cited another decision reported at Delhi Development Authority Vs. Durga Chand Kaushish, and relied upon the principles laid down therein for the purpose of properly construing a document. The said learned Advocate submitted that it will appear from the said reports that the interpretation favouring the grantee as against the grantor should be accepted. Even though the learned Advocate for the appellant has cited the aforesaid decisions, it will not be necessary to discuss in details with regard to the said reports for reasons which have been stated later in this judgment. The learned First Appellate Court being the last Court of facts found in its judgment that it is clear that Krishna Das Dutta was in possession of the property when the deed of settlement was executed and he retained the possession with him even after executing the deed of settlement and all the surrounding circumstances clearly suggest that Panchanan Dutta did not get possession of the property during his life time and the plaintiffs also never entered into the possession of the suit property. The learned First Appellate Court further found that Krishna Das Dutta was in possession of the property even after the execution of the deed of settlement and he delivered possession of the suit property to Prafulla and thereafter Prafulla transferred the suit property to Ajit Tosh and ultimately possession was delivered to the defendant No. 1, Jyoti Prosad Laha. The learned First Appellate Court found that the plaintiffs who are out of possession were under the obligation to file a suit for recovery of possession on the basis of their alleged title but, the plaintiffs were aware that their claim would be barred by the law of limitation and thus the plaintiffs omitted to make a prayer for recovery of possession and only prayed for declaration of title. The learned First Appellate Court took into consideration the evidence of P. W. 1 namely, the appellant herein, that the record-of-right stands in the name of the defendant No. 1. It appears that the P.W. 1. also stated that he has filed an objection before the authorities concerned against such record-of-right but it does not appear from the records that the plaintiff/appellant has obtained any order in his favour in this regard. The learned First Appellate Court has recorded in its judgment that the said P.W. 1 has admitted in evidence that he never filed any application to get his name recorded in the record-of-right in respect of the suit property and he never paid any rent and/or taxes in respect of the suit property either to the Government or to the Municipal Corporation concerned. The learned First Appellate Court has come to a finding that there is no evidence on record regarding the manner of possession of the suit property by the plaintiff/appellant and there was, admittedly, no actual user of the land by the plaintiffs. The learned First Appellate Court found that there was absolutely no evidence as to how the plaintiff used to possess the land in question and no importance can be attached to the evidence of the persons who said that the plaintiff is in possession of the property. The learned First Appellate Court as the last Court of facts has found that Panchanan Dutta had no scope to take possession of the suit property during the life time of Krishna Das Dutta and the plaintiffs never entered into possession of the disputed property.

Even though the learned Trial Court came to the conclusion that it thinks that the plaintiffs'' predecessor and, thereafter, the plaintiff is in possession of the suit land such conclusion was not arrived at on the basis of any evidence that the plaintiff was actually in possession of the suit property but on the basis of the learned Trial Court''s conclusion that the plaintiffs had title to the suit property. The learned Trial Court also noted the fact that the defendant No. 1 had produced the documentary evidence for the purpose of proving that the defendant No. 1 has been possessing the suit property. The learned Trial Court, however, found that such documents like rent receipts, tax receipts, record of rights do not conclusively prove that the defendant No. 1 has satisfied the necessary ingredients of possession.

8. The learned Advocate appearing on behalf of the appellant cited a decision reported at Mangal Singh and Others Vs. Shrimati Rattno and Another, ) in support of his contention that there may be a case where a person may not be in actual, physical or constructive possession and, yet, the person still possesses the right to recover actual physical possession or constructive possession and such a case would be covered by the expression "the state of owning". The learned Advocate further submitted that even if a person is out of actual possession or constructive possession of a property for the time being and if he is owner of such property it can still be said that such property is possessed by that person. The said learned Advocate submitted that as the suit land is lying vacant according to the evidence it can be said to be possessed by the plaintiff if he has control over such suit land. The said learned Advocate cited another decision reported at Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others, wherein the meaning of the word ''possession'' has been explained.

9. The said learned Advocate cited another decision reported at Kazi Mohammad Hossain Vs. Sibram Bondopadhyaya, in support of his contention that the entry in the record-of-right does not create any title but only raises a presumption which can be rebutted by evidence. In the instant case, the plaintiff/appellant has not brought on record any rebuttal evidence. The said learned Advocate cited another decision reported at 1976 CHN 42 (Tarak Nath Das v. Ramesh Chandra Ghosh & Ors.) in support of his contention that the defendants have an obligation to prove the foundation of the entries in their favour in the records-of-right. It appears from the facts that the defendants relied upon the title deeds for the purpose of proving their ownership in the property. The said learned Advocate for the appellant cited another decision reported at Debendra Kumar Dutta Vs. Pramada Kanta Lahiry and Others, in support of his contention that if the foundation of the entries in the record-of-right is proved to be rotten then the presumption arising from the record-of-rights would be more than rebutted. It is difficult to appreciate as to how in the instant case it can be said that the foundation of the entries in the records-of-right which are the subject matter of the present suit can be said to be rotten without there being a declaration that the title deeds executed in favour of the respective defendants and/or their predecessor-in-interest are bad in law. Thus,

the question of maintainability of the suit and the question as to whether the suit was barred by the law of limitation is of utmost importance. The said learned Advocate cited another decision reported at XXXI CWN 135 (Rai Kiran Chandra Roy Bahadur & Ors. v. Srinath Chakravarti & Ors.) in support of his contention that an entry in the records-of-right must be presumed unless the contrary is proved but when the matter is investigated in a Civil Court and the parties adduce their evidence on the point in controversy, the entry loses its weight when the evidence discloses no foundation for it. This Court is of the view that it cannot be said that in the present case the evidence on record does not disclose any foundation for the entries in the records-of-right since the respective title deeds of the defendants and/or their predecessor-in-interest are already on record and the plaintiff/appellant has not made any prayer for setting aside such title deeds as bad in law and illegal, and, that apart, the question of maintainability of the suit as being barred by the law of limitation has also been raised in the instant appeal on behalf of the defendants/respondents. For the same reason, the decision reported at Mangal Singh and Others Vs. Shrimati Rattno and Another, cannot be of any assistance to the plaintiff/appellant.

10. The learned Advocate for the plaintiff/appellant further submitted that the defendant No. 1 cannot take advantage of the provisions of section 41 of the Transfer of Property Act, 1882 inasmuch as he did not take reasonable care to ascertain if the transferor had power to make the transfer and he has not acted in good faith. The learned Advocate cited a decision reported at Krishna Kishore Mukherjee and Another Vs. Sarat Kumar DRBI and Others in support of his contention that since the defendant No. 1 did not take reasonable care to ascertain whether his transferor had authority to make the transfer and since the defendant No. 1 did not make proper inquiry into the title, he is not entitled to the benefit of section 41 of the said Act of 1882. The said learned Advocate cited another decision reported at Motimul Sowcar Vs. Visalakshi Ammal and Others, ) in support of his contention that since the defendant No. 1 did not act in good faith and did not make a proper inquiry the provisions of section 41 of the said Act of 1882 cannot be of any assistance to the defendant No. 1. The said learned cited another decision reported Gurbinder Singh and Others Vs. Lal Singh and Others, ) in support of his contention that mere inactivity on the part of the real owner even with the knowledge of the transfer cannot amount to implied consent within section 41 and such inactivity cannot prevent the real owner from claiming back his property from the transferee subject to the law of limitation unless the real owner had induced to the transferee to believe that his transferor was competent to make the transfer.

11. The learned Advocate for the appellant submitted that even if the relationship between the Krishna Das Dutta and the said Panchanan Dutta and/or his successor become subsequently strained the deed of settlement could not have been revoked as there was a transfer in praesenti by the said deed of settlement. He cited a decision reported at Kashmir Singh and Others Vs. Panchayat Samiti, Ferozpur and

Others, ) in support of his contention that the defendant No. 1 was not entitled to any protection u/s 41 of the Transfer of Property Act. The said learned Advocate cited another decision reported a Prem Singh and Others Vs. Birbal and Others, in support of his contention that 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 nullity.

12. The said learned Advocate cited another decision reported at XXXVII CLJ 482 (Ramkamal Banik Saha v. Syam Sundar Banik Saha) while making his submission in respect of section 34 of the Specific Relief Act. Citing the aforesaid reports the said learned Advocate submitted that the proviso to section 34 does not compel the plaintiff to sue for all the reliefs which could possibly be granted and a suit for a declaratory decree should not be dismissed on the ground that it is barred by the said proviso unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The said learned Advocate cited another decision reported at XXXVII CLJ 499 (Umarannessa Bibi v. Janurannessa Bibi & Another) in support of his contention that there may be cases in which a declaration may be sufficient for the plaintiffs protection. The said learned Advocate cited a decision reported at Jyotirmoyee Debi Vs. Durgadas Banerjee and Others, s) in support his contention that since the purported mutation by the defendants was not done with the knowledge or consent of the plaintiffs and/or predecessor-in-interest the said entries in the record-of-rights are not binding upon the plaintiffs. The said learned Advocate for the appellant cited a decision reported at Smt. Shefali Roy Vs. Hero Jaswant Dass and others, while submitting that the suit filed by the plaintiffs is not hit by the proviso to section 34 of the Specific Relief Act, 1963.

13. The learned Advocate appearing on behalf of the respondent Nos. 1, 2 and 7 in S.A. 244 of 2010 and for the respondent Nos. 2, 3 and 8 in S.A. 245 of 2010 submitted that all the transactions that had taken place from the deed of settlement of the year 1957 upto the sale deed of the year 1968 by which Ajit Tosh sold the suit property to Jyoti Prasad Laha were during the lifetime of Panchanan Dutta who died in the year 1969. He submitted that the learned Trial Court held that the deed of revocation dated 27.07.1964 is void ab initio but there was no prayer in the plaint for granting such relief. He submitted that the learned Trial Court did not consider the recitals of the deed of revocation before declaring the deed to be void ab initio. The said learned Advocate pointed out that at one point of time the plaintiff filed an application for amendment of the plaint praying, inter alia, for a declaration that the deed of revocation dated 27.07.1964, deed of gift dated 03.08.1964 and the deed of sale dated 29.03.1968 should be declared as void ab initio and sham transactions but such prayer for amendment of the plaint was ultimately not allowed on the ground that before such application came up for hearing Prafulla Kumar Dutta had died and the application for amendment of the plaint was pending against a dead person and as such the application became infructuous. Accordingly, the learned

Trial Court dismissed the said application. The learned Advocate for the said respondents argued that the plaintiff could have filed fresh application for amendment of the plaint after the heirs and legal representatives of the said Prafulla Kumar Dutta were brought on record by way of substitution but the plaintiff did not do so and thus there was no prayer in the plaint for declaring the said documents and/or deeds as void ab initio and/or invalid. The said learned Advocate submitted that the plaintiff did not avail of the provisions of section 31 of the Specific Relief Act, 1963 and the learned Trial Court could not have declared those documents as void ab initio. The learned Advocate for the said respondents further submitted that in the absence of any prayer by the plaintiff for declaring the aforesaid documents as void and/or voidable, the learned Trial Court could not have declared the deed of revocation as a void one. The said learned Advocate further submitted that the recital part of the settlement deed discloses the intention of the settlor as to when the settlement will take effect and the later portion of the said settlement deed contains direction as to how the property will be administrated after full title is obtained by the settlees on the happening of the contingency contained in the said deed. According to the said learned Advocate, it will be clear from the settlement deed that the settlees will become the owners only after the settlor''s death. The said learned Advocate submitted that whatever is stated in the later part of the deed should be read as subject to what has been stated in the recital part of the deed.

14. The said learned Advocate further submitted that from deed of revocation it will appear that the possession remained with Krishna Das Dutta and evidence shows that neither Panchanan nor his legal heirs were ever in possession. According to the said learned Advocate, the learned Trial Court erroneously held that plaintiff''s predecessor and thereafter the plaintiff is in possession of the suit property. The said learned Advocate contended that the plaintiffs did not produce any documentary evidence to show that either their predecessor-in-interest or the plaintiffs themselves were ever in possession of the suit property and there is nothing on record to suggest that the plaintiffs were possessing the suit property at any point of time. According to the said learned Advocate, the proviso to section 34 of the Specific Relief Act, 1963 is attracted in the instant case as the plaintiffs omitted to seek further relief and only made a prayer for a mere declaration of title. The said learned Advocate submitted that the defendants concerned and/or their predecessor-in-interest had been in possession of the suit property at all material points of time and the learned First Appellate Court rightly held that the plaintiffs never got possession of the suit property and it cannot grant a declaration of title when there is no prayer for recovery of possession on the basis of title.

15. The said learned Advocate further submitted that from Ext. 3, which happens to be a certified copy of the deed of revocation dated 27.07.1964, it will appear that the stamp papers were purchased in the name of Panchanan Dutta on 05.05.1965 and, therefore, Panchanan Dutta was aware of the revocation deed in 1965 itself but the

suit was filed in the year 1984. The said learned Advocate submitted that the suit was barred by the law of limitation and he referred to the provisions of Articles 59, 65 and 113 of the Limitation Act and submitted that in any event, even if the plaintiff had made a prayer for declaration of the deeds concerned as void and/or voidable such prayer would have been barred by the law of limitation and even if the plaintiffs had made a prayer for recovery of possession of the suit property such prayer would also have been barred by the law of limitation. The said learned Advocate submitted that in the absence of any prayer for recovery of possession of the suit property the suit filed by the plaintiffs is not maintainable in terms of section 34 of the Specific Relief Act.

16. The said learned Advocate cited a decision reported at Pannalal Biswas Vs. Dilip Kumar Mondal and Others, in support of his contention that even if a document is described as settlement deed it may be in the nature of Will.

17. The said learned Advocate cited a decision reported at P.K. Mohan Ram Vs. B.N. Ananthachary and Others, ) in connection with his submission regarding the interpretation of the deed of settlement but it is not necessary to discuss such matter in further details in view of the reasons given below. The said learned Advocate cited another decision reported at Naramadaben Maganlal Thakker Vs. Pranjivandas Maganlal Thakker and Others, . The said reports deals with the interpretation of gift deed and its subsequent cancellation. It is also not necessary to discuss in further details such reports for reasons stated below. The said learned Advocate cited another decision reported at Prem Singh and Others Vs. Birbal and Others, while making his submission with regard to the documents in question. It is not necessary to discuss in further details the said reports in view of the reasons stated below.

18. The said learned Advocate cited a decision reported at Md. Noorul Hoda Vs. Bibi Raifunnisa and Others, and referred to Paragraph 6 of the said reports wherein it has been observed by the Hon''ble Court "As stated earlier, Article 59 is a general provision. In a suit to set aside or cancel an instrument, a contract or a decree on the ground of fraud, Article 59 is attracted. The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the Court may in its discretion so adjudge it and order it to be delivered or cancelled. It would thus be clear that the word ''person'' in section 31 of

the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancel led he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him."

19. The said learned Advocate cited another decision reported at Ram Saran and Another Vs. Smt. Ganga Devi, in support of his contention that by mere claiming a declaration in the plaint, the plaintiff cannot succeed in the suit and as such the suit is not maintainable in the facts and circumstances of the case. The learned Advocate submitted that the suit filed by the plaintiffs is barred by the law of limitation and it is also hit by the provisions of section 34 of the Specific Relief Act.

20. The learned Advocate appearing on behalf of the respondent Nos. 1, 2 and 7 in S.A. 244 of 2010 and Respondent Nos. 2, 3 and 8 in S.A. 245 of 2010 submitted that it will appear from Ext. H that Krishna Das Dutta had submitted in his evidence in a certain proceeding that he had gifted all his movable and immovable properties to Prafulla. He further submitted that from the records it will appear that the gift deed of the year 1964 was known to Panchanan in 1966 and the municipal tax receipts were issued in the name of Jyoti Prasad Laha and, therefore, the suit is hopelessly barred by the law of limitation.

21. The learned Advocate appearing on behalf of the respondent No. 8 in S.A. 244 of 2010 and for the respondent No. 1 in S.A. 245 of 2010 adopted the argument made on behalf of the learned Advocate for the other respondents as mentioned above and submitted that the deed of settlement will show that the division of properties will take effect only after the settlor''s death and he referred to some portions of the settlement deed in respect of his contention. The said learned Advocate also referred to some of the exhibits to show that the defendants and/or their predecessor-in-interest at all material points of time were in possession of the suit property and plaintiff were not in possession of the suit property at all. According to the said learned Advocate, the defendant No. 1 Jyoti Prasad Laha, had always acted in good faith and the name of the defendant No. 1 has been recorded in the municipal records. The said learned Advocate submitted that this Court should not interfere with the findings of the last Court of facts, namely, the learned First Appellate Court as such findings are findings of fact. He referred to a decision reported at 2011(2) CLJ (SC) 121 (Ganesh (D) Through Lrs. & Ors. v. Ashok & Anr.) in support of his contention that this Court in second appeal cannot interfere with the findings of fact of the learned First Appellate Court. He further submitted that the said Jyoti Prasad Laha had seen the record of right of the previous owners and, therefore, the said Jyoti Prasad Laha had acted in good faith and took reasonable care before purchase of the property. He also argued that the said Panchanan Dutta was aware of the deed of revocation as early as in the year 1965 and, thus, the suit

filed by the plaintiffs is barred by the law of limitation. The said learned Advocate cited a decision reported at Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, in connection with his submission that the suit filed by the plaintiffs is not maintainable. The said learned Advocate also cited a decision reported at Mathai Samuel and Others Vs. Eapen Eapen (dead) by LRs. and Others, while making submissions in connection with the interpretation of the deed of settlement but it is not necessary to discuss in further details such reports for reasons stated below.

22. Having heard the learned Advocates for the respective parties and having considered the materials on record, this Court is of the view that the question as to whether or not the suit was barred by the law of limitation and as to whether or not the suit was maintainable assumes immense importance and such question has to be decided first. The learned Advocate appearing on behalf of the respondent Nos. 1, 2 and 7 in S.A. 244 of 2010 and for the respondent Nos. 2, 3 and 8 in S.A. 245 of 2010 has rightly submitted that it will appear from Ext. 3 which happens to be a certified copy of the deed of revocation dated 27.07.1964 that the stamp papers were purchased in the name of Panchanan Dutta on 05.05.1965 and, therefore, Panchanan Dutta had knowledge of the existence of such revocation deed in 1965 itself but the suit was filed in the year 1984. The learned Advocate appearing on behalf of the appellant could not give any effective reply to such submission. Article 59 of the Limitation Act stipulates that to cancel or set aside an instrument or decree or for the rescission of a contract the period of limitation is three years and the time from which such period begins is when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first became known to him. Article 65 of the Limitation Act stipulates that for possession of immovable property or any interest therein based on title a suit may be filed within a period of 12 years and the time from which such period begins is when the possession of the defendant becomes adverse to the plaintiff. In the instant case, the learned First Appellate Court has found that the plaintiffs had never got possession of the suit property. Article 113 of the Limitation Act provides that any suit for which no period of limitation is provided elsewhere in the schedule to the said Act may be filed within three years and the time from which such period begins is when the right to sue accrues. In the instant case, the said Panchanan Dutta became aware of the revocation deed of the year 1964 in 1965 itself and the suit was filed in the year 1984. The suit was clearly barred by the law of limitation. The learned Advocate for the said respondents had submitted that in the plaint there is no prayer for recovery of possession and there is also no prayer for setting aside any of the deeds subsequent to the deed of settlement. It appears that the learned Lower Appellate Court has rightly held that the consequential relief which the plaintiffs could have prayed for had become barred by the law of limitation. Even though, at one stage an attempt was made by the plaintiff for amendment of the plaint to include the prayer for a declaration that the aforesaid deed of revocation of the year 1964, deed of gift of the year 1964 and the sale deed of the year 1968

should be declared as void ah initio and sham transactions, the application for amendment of the plaint was dismissed as having become infructuous on the death of Prafulla Kumar Dutta, as aforesaid. However, the plaintiffs did not make any further attempt to amend the plaint. Thus, the plaintiffs did not avail of the provisions of section 31 of the Specific Relief Act, 1963, and, as rightly submitted by the learned Advocate for the said respondents, the learned Trial Court could not have declared such documents as void ab initio.

23. The learned Advocate for the said respondents has also rightly submitted that in absence of any prayer for consequential relief the suit is hit by the proviso to the provisions of section 34 of the Specific Relief Act, 1963 and, thus, the learned Trial Court could not have granted the decree of declaration. The learned Advocate for the appellant could not give any effective answer to the submissions made by the learned Advocate for the said respondents on the question of the suit being barred by the law of limitation and the suit being not maintainable. This Court is of the view that the suit is barred by the law of limitation and the suit was not maintainable in view of the discussions made above. This Court is of the further view that it is not necessary to discuss the other points argued by the learned Advocate for the appellant including the point regarding the interpretation of the document, namely, the deed of settlement of the year 1957. This Court is of the view that the learned Trial Court could not have entertained the suit itself as it was barred by the law of limitation and it was not maintainable, as discussed above. The learned First Appellate Court, being the last Court of facts, has already found that the plaintiffs and/or their predecessor-in-interest were never in possession of the suit property and the plaintiffs did not make any prayer for recovery of possession of the suit property in the plaint. The plaintiffs also did not make any prayer for setting aside and/or canceling the documents which came into existence after the deed of settlement of the year 1957. This Court is of the view that the learned First Appellate Court was right in dismissing the suit.

24. This Court is of the view that there is no merit in the present second appeals which are, accordingly, dismissed on the basis of the reasons recorded above.

25. There will, however, be no order as to costs.

26. Let the Lower Court records be sent back to the learned Court concerned. Urgent certified Xerox copy of this judgement, if applied for, be given to the parties as expeditiously as possible, on compliance of all necessary formalities.