

Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINATING SUMMONS NO. 1252 OF 2017**

Sudhir Kulkarni	...Plaintiff
<i>Versus</i>	
Jayashree Sattigeri	...Defendant

Mr Nikhil Mengde, *with Robin Nazareth, for the Plaintiff.*
Mr BG Saraf, *for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 9th April 2019

PC:-

1. The Originating Summons is by one of the two children of the deceased Pandit Ramchandra Kulkarni. The Plaintiff and the Defendant are the deceased's children. The Defendant is the Plaintiff's sister.

2. The Originating Summons seeks an interpretation of two clauses of the deceased's Will dated 26th February 1998. Specifically, in Clause 4 the deceased left to the Plaintiff his ownership right, title and interest in Flat No. 4 of the Suman Cooperative Housing Society Limited at Suman Nagar, VN Purav Marg, Chembur, Mumbai 400 071. There is no dispute about this. Clause 6 then gave the Defendant, Jayashree, what the deceased described as "his right" to the proportionate balance FSI in the land

of the society and to which he claimed to be entitled as one of the society's members, and also the FSI benefits in the event of a redevelopment or reconstruction of the building.

3. The question raised in the Originating Summons is whether this bequest in clause 6 is valid or enforceable or, in other words, whether it is void for uncertainty.

4. I would imagine the Plaintiff is correct because this is a bequest of something that does not exist, and may never exist. There is no computation of any additional FSI. There is no declaration of any individual member having a right, let alone an alienable right, in that FSI. Certainly there is no method by which that FSI can be de-linked from the flat in the manner in which the Will seeks to do. Reading the two clauses conjointly would mean that a member could retain his flat but sell conceivably to an outsider or third party the FSI, something that would result in a complete absurdity for the society would then have a member in occupation and an outsider holding the FSI. That can never be.

5. In any case, the building belongs to the Society, and it is the Society that is entitled to the whole of the FSI. It may distribute this in the manner set out by its rules, or as society members agree. There is no pre-determined right in any member to any FSI at all. If there is a sharing of the FSI, then the share of every member goes with the flat. Any additional FSI entitlement is attached to the flat.

6. Membership of the society is the right to occupy, use, possess and enjoy the benefits of an allotted flat and this is well settled in law. In this context, a FSI entitlement is perhaps conceptually distinguishable from, say a parking space or a covered garage. Such an identified separate space could possibly be separated from the use, occupation and ownership of the flat. In a given case a society's rules may permit a member to sell a garage to another member of the society but it is inconceivable that a member could continue to hold a flat but sell or dispose of the FSI to another party, even if that other party is another member.

7. The Originating Summons is thus answered accordingly.

8. The Defendant is present in Court. At this stage, she instructs Mr Saraf on her behalf to state that she has no interest in continuing to act as an executor of the estate. She desires that her renunciation be noted by the Court. Ordinarily this would involve service on her a special citation to appear before the Court to express her intentions. This is, of course, a formality but it is required when the executor is not otherwise coming forward. The Defendant is the executor and she is present in Court, albeit in another proceeding, viz., this Originating Summons. It is she who makes this request and I see no conceivable reason to deny it. I, therefore, note her renunciation, one that she could have expressed by simply writing a letter to the Plaintiff, the other beneficiary.

9. It will thus be open to the Plaintiff to apply for Letters of Administration with Will annexed. Mr Saraf, on instructions, also states that the Defendant has no challenge to the Will.

10. The Originating Summons is disposed of in these terms. There will be no order as to costs.

(G. S. PATEL, J)