IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

Present : **Hon'ble Justice Rajasekhar Mantha**
And
Hon'ble Justice Ajay Kumar Gupta

F.A. No. 261 of 1997
With
CAN 12 of 2023

Smt. Lipika Das & Ors. LRs of

(Dhirendra Nath Chandra since deceased)

Versus

Kakali Dasgupta & Ors. LRs of

(Jitendra Nath Dutta since deceased)

For the Appellant : Mr. Sanjib Bandyopadhyay
Mr. Manoj Kumar Mondal

For the Respondent : Mr. Aniruddha Chatterjee
Mr. Rahul Karmakar
Ms. Gargi Goswami

Hearing concluded on : 24th September, 2024

Judgement on : 30th September, 2024

Rajasekhar Mantha, J.

1. The appeal is directed against the judgment and decree passed in T.S. No. 92 of 1983, dated 28th August, 1995, by the 4th Assistant District Judge, Alipore.

I. <u>FACTS OF THE CASE</u>

2. The appellants are the legal heirs of the original defendants and the respondents are the legal heirs of the original plaintiff, in the suit before the learned Trial Court. They are all decendants of one Late Prafulla Chandra Dutta.

3. Prafulla Chandra Dutta owned two plots of land- one at 86/3/1, Beltala Road, P.S. Bhowanipore, District 24 Parganas and another, at the Northern and Southern parts of the premises no. 7/2/1, Garcha Second Lane, Dover Terrace P.S. Gariahat, District- 24 Parganas. He was a clerk at the P&T department. It is therefore unlikely that he had enough income to buy the aforesaid properties. In a Trust deed of the year 1961 he stated and acknowledged that his wife contributed substantially from her Stridhan in the purchase of the said properties.

4. Prafulla's wife was Uma Rani. They had 6 daughters namely Roma Rani, Sushama Rani, Bela Rani, Maya Rani, Rina Rani and Deepa Rani. They also had 2 sons Jitendra Nath and Rabindra Nath.

5. For the effective management and administration of the two properties during his lifetime and thereafter, he drew up a family management dated 31st May, 1961 and settled the same into a trust called the "Prafulla Chandra Family Trust" (the said Trust or family arrangement).

6. Curiously, in the Paper-books prepared by the plaintiff/respondents, a distorted and incomplete typed copy of the said family arrangement of 1961 has been annexed. Clause 3 of the said document is incomplete.

Even more curiously the said original family settlement that was initially available, has gone missing, from the Trial Court records, in course of final hearing.

7. The table below indicates the scheme of the said trust/family arrangement:-

The Settlor	**The Trustees**	**The Primary Beneficiaries**	**Contingent Beneficiary**
Prafulla Chandra Dutta	<u>FIRST TRUSTEE-</u> Settlor: Prafulla <u>JOINT TRUSTEES AFTER PRAFULLA'S DEMISE-</u> • Uma Rani and Rabindra Nath. • In case any of the two die during the lifetime of the settlor, the survivor would become and continue to act as Trustee.	i. The Settlor ii. Uma Rani (Wife) iii. Rabindra Nath (Younger Son) iv. (Daughters) Roma Rani, Rina Rani, and, Dipa Rani (to the extent the expenses of their education, marriage and well being).	• Rabindra Nath of what would remain of the Estate after fulfillment of the objects of the Trusts and the interest of the primary beneficiaries. • If Randindra Nath dies then Jitendra Nath would get whatever remains of the Trust properties.

8. It transpires from the evidence on record that Jitendra Nath fell out bitterly with his father and mother, when he married the daughter of a tenant in the properties against the latter's wishes. He was working as a

group C employee in the ZSI and was transferred to Jodhpur in Rajasthan immediately after his marriage, in the year 1960.

9. The Settlor did not trust Jitendra Nath, the elder son/plaintiff, to take care of his wife or his daughters or the younger son. Clauses 4 and 6 clearly specify that Jitendra Nath was well settled. Prafulla did not want Jitendra Nath to have any right in the properties. Jitendra Nath lived with his family, separately from his father's family. Prafulla ensured that Jitendra could not ever be a Trustee. It is only after the fulfillment of the objects of the Trust, and the demise of Rabindra Nath that any residual estate was to go to Jitendra Nath. If Rabindra Nath survived, he was to become the absolute owner of the trust properties, to the complete exclusion of Jitendra Nath.

10. Unfortunately for Prafulla, his younger son Rabindra Nath predeceased him in 1965. Prafulla was still the sole trustee. The Family Trust of 1961 would therefore not have "joint trustees" after his death. His wife Uma Rani would remain sole trustee. Due to the expression Joint Trustees in the Trust Deed Prafulla thought that his wife would be unable to function as Trustee. This was clearly a misconception. Clause no. 3 of the 1961 deed stipulated that Uma Rani would become the Sole Trustee in case Rabindra Nath died.

11. To purportedly remedy the above, he executed a rectification deed to the parent Trust deed on 17th September, 1965. The rectification deed clarified and declared that the word "trustees", in the deed of 1961 be read as

"Trustee" to enable Uma Rani to act as sole trustee to carry on the objects and purposes of the Trust. The amendment was quite unnecessary.

12. During his lifetime, Prafulla got four of his daughters Rama, Sushama, Bela and Maya married. After his death, Uma Rani performed Rina Rani's marriage in 1969-70 and Dipa Rani's wedding in 1980.

13. After Prafulla's death on 15th December, 1965, Uma Rani continued to act as sole trustee and fulfill and give effect to the objects of the Trust. The elder son, Jitendra Nath, accepted and acted upon the same.

14. Jitendra Nath had severed ties with the family for all intents and purposes after his marriage. He came back to Calcutta from Jodhpur and occupied a room in the ground floor of the Garcha property. He thereafter forcibly occupied another room in the house. He resisted his mother Uma Rani letting out a portion of the Garcha property and threatened and intimidated a tenant inducted by his mother. Uma Rani initiated Criminal proceedings against her son which resulted in orders under Section 107 of the CrPC.

15. The evidence on record indicates that Jitendra stayed with his family separately at Gobindopur. He did not send any money for his father's treatment. He did not ever contribute to the maintenance of his mother and sisters. After the death of his father, Uma Rani and the remaining two daughters eked out a living out of the rental income from the trust properties.

16. Jitendra Nath did not contribute to the marriage of a sister, performed 11 days prior to the death of Prafulla. He did not pay for the treatment of his father. He did not contribute to the joint mess in the family after his father's death. His mother Uma Rani educated and got two other daughters, Rina and Dipa, married with the help of Ornaments gifted by two previously married daughters. She also stated that she took loans for the 2 marriages and incurred huge debts.

17. For maintaining herself and for meeting the debts incurred Uma Rani had to sell the Trust properties in exercise of the power conferred by Clauses 8 and 10 of the Family arrangement of the deed of 1961, read with the deed of 1965. The first sale occurred on 12th May 1972 and the second one was sold on 30th March 1983. For the said purpose Uma Rani applied for and obtained permission of the District Judge under Section 34 of the Trusts Act 1893 in Misc Case No. 167 of 1982. The District Judge not only permitted Uma Rani to sell the properties but also approved the draft sale deeds, by orders dated 8th February 1983 and19th March 1983.

18. Uma Rani and Prafulla were at all material times, after 1965, assisted by the 2nd defendant/4th son-in-law, Dhirendra, husband of Maya Rani. Dhirendra came to live with the Duttas, as a domesticated son-in-law, in the back portion of the Garcha property which was a CI Shed. Prafulla, during his lifetime and thereafter, and Uma Rani, until her death, trusted Dhirendra for all intents and purposes. She did not have any other trusted male advisor in the family. In fact Uma Rani sold the back portion of the

Garcha property to Dhirendra. Her daughter consequently enjoyed the property and Uma Rani got money to maintain herself.

19. Upon coming to know of the sale of the 2nd property in 1983, Jitendra Nath, plaintiff, challenged the sales of all properties, before the Trial Court by filing the subject suit T.S. no. 92 of 1983 praying for the following reliefs:-

> (a) Declaration that the purported sale deed executed by the defendant no. 1 on 12.05.1972 in favour of the defendant no. 2 in respect of the property described in schedule "C" hereto, sale deed dated 20.05.1983 in favour of the defendant no. 4 in respect of the property described in schedule "D" hereto and the sale deed executed on 30.03.1983 in favour of the defendant no. 3 in respect of the property described in schedule "B" hereto are fraudulent illegal invalid inoperative and void documents and cancellation thereof.
>
> (b) Decree for recovery of possession against the defendant no. 4 in respect of the first floor portion of premises no. 7/2/1, Garcha Second Lane, P.S. Gariahat, District- 24 parganas, as fully described in schedule "D" below directing delivery of vacant possession thereof to the plaintiff by evicting the defendant no. 4 his agent and servants therefrom.
>
> (bb) Recovery of possession against D2.
>
> © Decree for damage against the defendant no. 4 at the rate of Rs. 100/- per month being the fair letting value of the property described in the schedule "B" in his wrongful occupation with effect from 20.07.83 until delivery of vacant possession to the plaintiff.
> (d) Decree for removal of the defendant no. 1 from the office of the trustee in respect of the said disputed properties and appointment of the plaintiff or such other person as the court may deem proper as trustee in place of the defendant no. 1.
>
> (e) Permanent injunction
>
> (f) Receiver
>
> (g) All costs of the suit
>
> (h) Such further or other relief as the nature of the case requires.

20. Jitendra's targets were his mother/Defendant no. 1, Uma Rani and his brother-in-law/Defendant no. 2 Dhirendra Nath Chandra.

21. In the suit, Uma Rani and Dhirendra were defendant Nos. 1 and 2. Defendants 3 & 4 were the two 3rd party purchasers. Defendants Nos. 5 to 7 were his 2 sisters and another brother-in-law. The other sisters were proforma defendants. Written Statements were filed by Defendant nos. 1-7, vehemently opposing and denying the plaint case. The Trial Court framed the following issues:-

    1) Is the suit maintainable in its present form?
    2) Is the plaintiff entitled to a decree for declaration of title and cancellation of the fraudulent sale deed?
    3) Is the plaintiff entitled, to a decree for recovery of possession in respect of D schedule property as prayed for?
    4) Is the plaintiff entitled to a decree for mesne profit as prayed for?
    5) To what other reliefs, if any, is the plaintiff entitled to?

22. Jitendra the plaintiff was PW1, the sole witness. On behalf of the defendants the following persons deposed: Uma Rani deposed as DW1; Dhirendra Nath Chandra, her son-in-law and husband of Maya Rani, deposed as DW2; DW3 and DW4 were the third party purchasers; DW5 was Rama Rani, the oldest daughter. Each of the DWs deposed against the plaintiff, Jitendra Nath.

II. FINDINGS OF THE TRIAL COURT

23. The Trial court found that Uma Rani had failed to prove that she had sold the trust properties for the welfare of the trust or its beneficiaries. The

plaintiff was found having proven that he is the sole beneficiary of the Family Trust. Hence the said sale of the two properties by Uma Rani has deprived the plaintiff, Jitendra Nath. It was further held that defendant No. 2, Dhirendra, son-in-law of Uma Rani, was the mastermind and actual beneficiary of the said sale of the trust properties.

24. The Trial court found that the settlor/Prafulla never ousted the plaintiff from the Trust Properties since the plaintiff used to live on the ground floor of one of the Trust Properties. Therefore, the Court held that Prafulla never intended to deprive the plaintiff of the Trust Properties.

25. The Trial Court observed that there is no evidence on record to show that Uma Rani has encashed her stridhan to purchase and/or develop the Trust Properties. Hence, it was held that she could not claim any absolute right to the trust properties to the exclusion of the plaintiff. The Trial Court cancelled the two sale deeds. Hence the defendant/mother, Uma Rani through LRs filed the above appeal against her elder son in this first appeal.

III. <u>ANALYSIS AND FINDINGS OF THIS COURT</u>

26. The appeal would have to address the following issues –

    i) Whether the sales by Uma Rani sole trustee could be questioned by Jitendra, given his status under the family arrangement of 1961?

    ii) Whether Uma Rani's decision with regard to the necessity of the Sale of the property can be inferred from the evidence on record?

27. A coordinate bench in an order dated 3.01.2023 observed that the following question arises for consideration.

> After hearing extensively learned Counsel for the appellants, the question that arises for consideration is whether Exhibits 1 and 1/A had given authority to Uma Rani, deceased mother of the deceased plaintiff to sell the property and whether said Uma Rani had any salable right.'

28. The full Terms and Conditions of the First Family Arrangement/Trust deed of 1961 as translated in English from Bengali are as follows:-

> “1. The property included in this family arrangement shall be known as Sri Prafulla Chandra Family Trust Estate.
>
> 2. I hereby appoint myself as the first trustee as Settlor of this family arrangement.
>
> 3. After my death, my wife Smt. Uma Rani Dutta and my second son namely Shriman Rabindra Nath shall jointly be considered as the next trustees. In the event of the death of any of the two, the survivor would act as Sole Trustee.
>
> 4. From the income of my estate, the money of the Calcutta Corporation and the expenses of repair words will be the first to be spent. After the said expenditure, from the remaining (amount), my own maintenance as well as the maintenance of my wife Uma Rani and the maintenance of my wife Uma Rani and the maintenance of my Second Son and the said three unmarried daughters and their expenses of their education and marrying them off to suitable grooms will be carried out.
>
> 5. After my death, for my Shraddh (ceremony), one thousand rupees will be spent by the next trustee and after my wife’s death, for her s Shraddh and afterlife rituals an amount of Rs. 500(five hundred) will be spent from this estate.
>
> 6. After the said expenditures and the death of my wife whatever remains, that shall be received by the said second son of mine with an absolute right. God forbid if the said Rabindra Nath predeceases my wife as a bachelor, then my first son namely Shriman Jitendra Nath or his heirs shall receive the said property with absolute right.

> 7. If the said property or any part of it is taken by the government or (any) public body, then from the award price, purchase any other income-generating property or invest in any gilt-edged securities.
>
> 8. If it is deemed necessary to add or transfer any property for meeting the said aforesaid expenses and liabilities, the same may be done by my subsequent trustees.
>
> 9. I have divested myself, reserving all right to transfer any property in any other way at the cost of cancellation are required by the deed.
>
> 10. The heirs shall not be able to raise any kind of objection to the integrity or reasonableness of this document.
>
> 11. Whatever meaning I or my successor trustees may have regarding the construction of this family Settlement shall be final."

29. Clearly therefore the plaintiff, Jitendra Nath was neither a Trustee nor the first beneficiary of the family Trust. The intention of the settlor is clear from the statement made by him in the deed of 1961 as follows:-

> "First son Sri Jitendra Nath Dutta is currently working and is self-reliant and living happily elsewhere. I do not feel the need to worry about his future."

30. Jitendra Nath was to get any leftovers as a contingent beneficiary after the death of Uma Rani and fulfilment of all the purposes of the Trust and after the death of Rabindra Nath was not alive, in terms of Clause no. 6 of the deed of 1961

IV. <u>THE RECTIFICATION DEED OF 1965</u>

31. The Rectification deed dated 17th September 1965 stated as follows:-

> <u>Deed of Rectification of one Deed of Family Settlement</u>
>
> Executed by Sri Prafulla Chandra Dutta, S/O late Sarada Prasad Dutta, Cast- Hindu, Occupation- , resident of 7/2/1, Garcha Second Lane, Police Station Ballygunge, district 24 Parganas on 31-06-1961 at

Garcha Second Lane and 86/3/1 Bokul premises, relation to two immoveable properties one deed of family settlement was executed . The said Deed of Family settlement we had executed and registered of Sub-Registry office Behala and recorded in Book no. 1 Volume no. 41, Deed no. 2261. Pages from 230-233, in the said Deed first trustee in the said trust and after my death my wife Smt. Uma Rani Dutta and my son Rabindra Nath, since deceased would become joint trustees on direction was there that whoever out of the two would be there shall become the next trustee. But due to bad luck and due to untimely death of my second son and as (my daughters) were unmarried my wife as the next trustee as mentioned clause 8 at page 4 of the Deed of Settlement with the right is to charge on encumber or transfer according to the language as "trustees" together" is mentioned which could mean that it will be mine in future in this apprehension for the trustees thereafter or to transfer to make it clear I hereby executing this Deed of Rectification promise that, at page 4 last line after the restrictions at clause 8 it is hereby rectified by putting 'gon' separately in place of "Trusteegon" together in the Deed of Family Settlement.

This instant Deed will be considered as a part of the main Deed.

To this import in sound health in simple frame of mine, out of my own accord, without being requested by anyone having understood the purport and consequences without alternation the terms of the said Deed of Family Settlement I hereby execute this instant deed.

First

Bhadra, 1372 B.S

Corresponding to 17/9/65 A.D

Witnesses

Kumar Rupa Dutta

17/2/1, Garcha Second Lane

Kolkata- 700019

32. The rectification deed of 1965 flows out of and was made in exercise of Clause no. 11 of the deed of 1961. Such clause used the expression "Joint trustees" to carry out the mandate under the deed of 1961. As already stated hereinabove, the rectification deed was not necessary. Clause 3 of the principal deed of 1961 had already permitted Uma Rani to act as Sole Trustee as to the survivor in case of the death of Rabindra Nath. The only

reason for executing the same, that can be inferred by this Court, is a serious apprehension in the mind of the settlor/Prafulla, of the interference by Jitendra in the Trust Estate. Prafulla was confirming the total exclusion of Jitendra Nath in the Trust Estate. The present suit and appeal confirm Prafulla's apprehension. The said two deeds need to be understood and interpreted, in light of the principles governing family arrangements.

V. PRINCIPLES GOVERNING THE INTERPRETATION OF THE FAMILY ARRANGEMENTS

33. The Supreme Court in ***Kale v. Dy. Director of Consolidation*** reported in ***(1976) 3 SCC 119***, has laid down as follows:-

> 9. By virtue of a family Arrangement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made.In this connection, Kerr in his valuable treatise Kerr on Fraud at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus:
>
> > "The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements.Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend."
> >
> > ……………
> >
> > The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family,

would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements."

13. In Sahu Madho Das v. Pandit Mukand Ram [(1955) 2 SCR 22, 42-43 : AIR 1955 SC 481] this Court appears to have amplified the doctrine of validity of the family arrangement to the farthest possible extent, where Bose, J., speaking for the Court, observed as follows:

> "It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary. But, in our opinion, the principle can be carried further and so strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid in anticipation, future disputes which might ruin them all, and we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present."

19. Thus it would appear from a review of the decisions analysed above that the courts have taken a very liberal and broad view of the validity of the family Arrangement and have always tried to uphold it and maintain it. The central idea in the approach made by the courts is that if by consent of parties a matter has been settled, it should not be allowed to be reopened by the parties to the agreement on frivolous or untenable grounds.

24. This Court has also clearly laid down that a family arrangement being binding on the parties to the arrangement clearly operates as an estoppel so as to preclude any of the parties who have taken

> advantage under the agreement from revoking or challenging the same. We shall deal with this point a little later when we consider the arguments of the respondents on the question of the estoppel. In the light of the decisions indicated above, we shall now try to apply the principles laid down by this Court and the other courts to the facts of the present case.

34. It follows from the above that regardless of the claims and assertions of the heirs of the settlor or testator, the persons made beneficiaries under a family arrangement would be entitled to thwart every attempt to unsettle the arrangement. Courts are to interpret the terms of a family arrangement to ensure peace amongst the family members and give effect to its objects. The principles of special equity must be applied to interpret and enforce family arrangements. Courts are required to take a liberal approach in giving effect to mandates under family arrangements.

35. The sustainability of Trust is dependent on the confidence reposed on the Trustees by the settlor. Therefore, the rectification deed of 1965 clearly demonstrates the confidence reposed by Prafulla in Uma Rani, his wife. The subject trust is between members of a family and not strangers.

VI. EXTINGUISHMENT OF THE TRUST AND CLAUSES NO. 4, 5 AND 6 MUST BE UNDERSTOOD IN THE LIGHT OF CLAUSE NO. 3 OF THE 1961 DEED.

36. Learned Counsel for the Plaintiff/respondent has argued that, upon the premature death of Rabindra Nath, by reason of Clause no. 6 of the deed of 1961, the Trust stood dissolved, and absolute ownership of the Trust properties vested in Jitendra Nath.

37. Section 77 of the Trust Act has been placed which sets out as to when Trusts are extinguished which is set out hereunder:-

a. Trust how extinguished.—A trust is extinguished—

i. when its purpose is completely fulfilled; or

ii. when its purpose becomes unlawful; or

iii. when the fulfilment of its purpose becomes impossible by destruction of the trust property or otherwise; or

v. when the trust, being revocable, is expressly revoked.

38. The object of the Family Trust/Arrangement of 1961 remained unfulfilled [hence section 77(a) is not attracted] when Rabindra Nath died, as would be evident from the Rectification deed of 1965 itself. The reasons set out were that Prafulla was ageing. The upbringing, maintenance and education and marriage of three of his daughters was yet to be completed. Hence, the Trust must and should survive even after the death of Prafulla with Uma Rani as trustee. This was, stipulated in Clause 3 of the Trust deed of 1961. Such clause required the trust to continue to function by the joint trusteeship of Uma Rani and Rabindra Nath after the death of Prafulla, and in case one of them is not alive, the trust be run by the survivor as the sole trustee.

39. The rectification deed only confirmed the above by reading the word 'Trustees' as 'Trustee.', In fact the fear and apprehension of Prafulla likely claims of Jitendra in the trust property, were sought to be completely negated, by the rectification deed. As already stated above, Prafulla fears came to be confirmed, by reason of the suit filed by Jitendra.

40. In this regard, the decision in ***J.K. Trust v. CIT*** reported in ***1957 SCC OnLine SC 63*** may be referred to:-

> "14… Thus, if the property is a leasehold interest, it must cease on the termination of the lease. Likewise, if trust property is alienated under circumstances binding on the trust, it will go out of the trust. But that does not operate as an extinction of the trust, unless there is nopropertyatall left, with which the trust could be carried out. Thatisthe principle enacted in Section 77 (c) of the Indian TrustsAct,1882, which in terms, however, applies only to private trusts. We must therefore hold that the fact that the trustees have the option at any time to throw up the managing agency is no legal impediment to its being property which could be held on trust."

41. It is nobody's case that there was no property left on the death of Rabindra Nath, hence Section 77(c) is not attracted. It is nobody's case that the purpose of the trust has been revoked, hence Sections 77(b) and 77(d) are not attracted. Hence none of the circumstances which could have extinguished the Trust existed in 1965, and also at the time of the execution of the two sale deeds.

42. Therefore, it was also necessary and unavoidable that Uma Rani became the sole trustee to fulfill the objects of the Trust of 1961 after the untimely death of Rabindra Nath and the demise of Prafulla.

43. Clause no. 6 which is relied upon by the plaintiff Jitendra Nath, elder son, has to be understood in the light of the dominant Clauses 4 and 5 of the 1961 deed, Clause no. 3 being supreme.

44. Clause no. 4 underlined the areas of expenditure/liability to be discharged under the trust. It included the maintenance and personal expenses, maintenance and upkeep of Uma Rani and the education and marriage expenses and wellbeing of the three unmarried daughters. Clause no. 5 fixed the sum of money that may be expended for the last rites of Prafulla

and Uma Rani. By virtue of Clause 3 Uma Rani was to continue as sole Trustee and apply the Trust properties to meet the aforesaid liabilities. This implies that she would continue to be Trustee till her death and have all rights under Clauses 4 and 5 of the deed of 1961.

45. Clause no. 6 prescribed that it is only after carrying out the expenditure prescribed in clauses 4 and 5, and after the death of Uma Rani, if any trust property remained then the same would vest in Rabindra Nath. Therefore the trust was to extinguish was upon the death of Uma Rani but not Rabindra Nath. Uma Rani was the last of the beneficiaries, after the marriages of the 3 remaining daughters. The objects of the Trust would stand fulfilled only upon the death of Uma Rani.

46. Clause no. 6 cannot therefore be invoked by Jitendra to extinguish the Trust, ignoring Clauses 3,4 and 5. Hence Jitendra Nath was required to wait till Uma Rani departed from this world to benefit from any residual and remaining Trust properties. To argue that the Trust would stand extinguished upon the death of Rabindra Nath, renders Clause 3 of the 1961 deed nugatory.

47. The argument of the plaintiff/respondent is even otherwise ridiculous as Prafulla the settlor and Uma Rani were alive when Rabindra Nath died. The contention of Ld. Counsel for the respondent would imply that the Trust properties would vest exclusively in Jiterndra Nath to the exclusion of the Settlor and his wife on the death of Rabindra Nath. Interestingly

this argument is raised for the first time in course of the appeal, probably in acceptance of the flawed views of the Trial Court.

48. It is essentially in this light the that omission of the last part of Clause 3 in the paper books for this appeal, prepared by the Respondent plaintiff raises serious doubts in the mind of this Court as regards the bona fides of the Respondent Plaintiff.

VII. THE DIFFERENCE BETWEEN A CONTINGENT AND VESTED INTEREST

49. It is relevant at this juncture to see the nature of interest created under the Trust in favour of Jitendra Nath. In this regard, reference is made to the decision of the Supreme Court in ***Usha Subbarao v. B.N. Vishveswaraiah*** reported in ***(1996) 5 SCC 201*** as regards the distinction between *"contingent"* and *"vested interest"* is set out hereunder:-

> 8. For the purpose of determining the date of vesting of the interest in the bequest it is necessary to bear in mind the distinction between a vested interest and a contingent interest. An interest is said to be avested interest when there is immediate right of present enjoyment or a present right for future enjoyment. An interest is said to be contingent if the right of enjoyment is made dependent upon some event or condition which may or may not happen. On the happening of the event or condition a contingent interest becomes a vested interest. The Transfer of Property Act, 1882 as well as the Indian Succession Act, 1925 recognise this distinction between a vested interest and a contingent interest. Vested interest has been thus defined in Section 19 of the Transfer of Property Act, 1882

50. The death of Rabindra Nath during the lifetime of Prafulla and Uma Rani was unforeseen. However the situation that may arise upon the death of any of the proposed joint trustees was duly addressed under the deed of 1961 in view of Clause no. 3 that, inter alia, provided for the sole trusteeship.

51. Hence the interest of Jitendra Nath qualifies as a mere residual contingent interest. It also implies that while dealing with the trust properties, Uma Rani was not obliged to leave anything for Rabindra Nath or Jitendra Nath. Instead, she was obliged to sell the Trust properties to meet the expenditure for which the Trust had been created, i.e. for the upkeep of the properties and the principal beneficiaries, including herself.

52. Jitendra Nath was at best a 2nd contingent beneficiary under the Trust. He had no vested right in the trust estate. As such his right to the residue of property is overridden by the beneficial interest of Uma Rani and her 3 daughters of the Trust Properties. Rabindra Nath would have been the 1st contingent beneficiary, had he been alive. In other words, the interest of Jitendra Nath was secondary to the vested rights of Uma Rani and the 3 daughters and Rabindra Nath. For that matter, even Rabindra Nath only had a contingent interest in the residual Trust estate after the interests of the beneficiaries i.e. the 3 daughters and Uma Rani.

VIII. UMA RANI'S RIGHT TO SELL THE PROPERTY AND THE NECESSITY THEREOF

53. In terms of clause 8 read with clause 10 of the deed of 1961, an exclusive discretion was vested in Uma Rani to sell the property after the death of Prafulla in the absence of Rabindra Nath to any person. Such discretion and decision cannot be questioned by Jitendra much less by a Court of law.

54. The only persons who could question such discretion were the 3 daughters beneficiaries and Rabindra Nath, the other named Trustee if he were alive. The Trial judge completely failed to appreciate the same and went on an irrelevant roving enquiry as regards the necessity for Uma Rani to sell the Trust properties.

55. There has been an argument at the bar that this Court should sit in appeal or make a value judgment over the discretion exercised by Uma Rani in selling out the trust properties.

56. The Supreme Court in the case of ***Beereddy Dasaratharami Reddy v. V. Manjunath*** reported in ***(2021) 19 SCC 263*** discussed the contours of the existence of legal necessity in the following terms:-

> "6. Right of the Karta to execute agreement to sell or sale deed of a joint Hindu family property is settled and is beyond cavil vide several judgments of this Court including Sri Narayan Bal v. Sridhar Sutar [Sri Narayan Bal v. Sridhar Sutar, (1996) 8 SCC 54] , wherein it has been held that a joint Hindu family is capable of acting through its Karta or adult member of the family in management of the joint Hindu family property. A coparcener who has right to claim a share in the joint Hindu family estate cannot seek injunction against the Karta restraining him from dealing with or entering into a transaction from sale of the joint Hindu family property, albeit post alienation has a right to challenge the alienation if the same is not for legal necessity or for betterment of the estate. Where a Karta has alienated a joint Hindu family property for value either for legal necessity or benefit of the estate it would bind the interest of all undivided members of the family even when they are minors or widows. There are no specific grounds that establish the existence of legal necessity and the existence of legal necessity depends upon facts of each case. The Karta enjoys wide discretion in his decision over existence of legal necessity and as to in what way such necessity can be fulfilled. The exercise of powers given the rights of the Karta on fulfilling the requirement of legal necessity or betterment of the estate is valid and binding on other coparceners.

57. Their basic principle also applies to Trusts which confers unquestionable discretion on the Trustee has been explained by the Apex court in ***M.V. Ramasubbiar v. Manicka Narasimachari*** reported in ***(1979) 2 SCC 65***, set out below:-

> "3. It is not in dispute before us that the Indian Trusts Act, 1882, hereinafter referred to as "the Act", applied to the trust in question and that it was necessary for the plaintiffs to prove that Defendant 1 did not exercise his discretionary power of selling the suit property "reasonably and in good faith" and that he indirectly purchased it for himself, in the name of his son (Defendant 2), within the meaning of Sections 49 and 52 of the Act."

58. It follows from the above that the Karta of a Hindu family has the sole discretion to sell out or deal with the trust properties, for the benefit of the family or fulfilment of the terms of the Trust. Such decisions can very rarely be questioned.

59. In the present case the plaintiff has admitted in his deposition that Uma Rani was obliged to finance the education and marriage of her two daughters as well as for her wellbeing. The mandate of law requires the existence of legal necessity but does not define or determine its scope and parameters. The plaintiff, a second residual contingent beneficiary thus cannot call upon Uma Rani to justify or specify the legal necessity to sell the trust properties.

60. The deeds of 1961 and 1965 have made Uma Rani the decision maker but not Jitendra Nath as regards how the trust properties shall be administered for the welfare of the beneficiaries thereof.

61. The admission of Jitendra Nath in his evidence further supports the above findings :-

> I have no paper to show and no witness also to prove that I used to make regular contribution to my family. Not a fact that I did not contribute to my family. My father died in the year 1965. After the death of my father there were 2 unmarried sisters and a mother was also alive at that time. The sisters were students that time. They were reading in class VIII or IX during that period. I used to reside in a single room in the ground floor before and immediately after my marriage. Another room was there in the ground floor and that was tenanted. Not a fact that my mother.
>
> Emphasis applied

62. Clause 8 of the deed of 1961 enables the subsequent trustees namely Uma Rani and Rabindra Nath to deal with and sell out the trust properties for fulfilling the objects of the trust. Clause no. 4 codified the said objects.

63. Clause 9 of the deed of 1961 has categorically declared that Prafulla is divesting himself from the right to deal with and sell out the trust properties, meaning Prafulla did not want to exhaust the trust properties by selling them out during his lifetime. He wanted Uma Rani and Rabindra Nath to decide whether there was any need to deal with/sell the Trust Properties. The Trial Judge therefore committed grave error in entering into and questioning the need and necessity of sale of the Trust properties by Uma Rani at the instance of the plaintiff Jitendra.

64. The finding of the Trial judge that Uma Rani could not demonstrate that she had contributed to the acquisition of the Trust property, is not only baseless but also not germane to the main issues in the suit. In the Trust deed of 1961 itself the settlor, Prafulla, husband of the beneficiary sole

trustee has stated that his wife contributed to the purchase of the Trust properties from her Stridhan. Both sides have relied upon the said document. These findings of the Trial Court and unnecessary discussion on and requirements of producing purchase receipts of the said Stridhan indicate a complete digression from the main issues at hand.

IX. THE ROLE OF THE SON-IN-LAW DHIRENDRA NATH CHANDRA

65. The Trial Court laid much emphasis on the role of the Dhirendra Nath Chandra in usurping the family property and his influence on his mother-in-law Uma Rani. She was illiterate and yet her husband had faith in her running the Trust Estate. She took the help of Dhirendra in administering the Trust estate.

66. Dhirendra Nath was the only literate and male member to defend the suit on behalf of Uma Rani. The faith placed by Uma Rani on him was natural. If he had purchased the property from Uma Rani it would still benefit her daughter, the wife of Dhirendra.

67. Dhirendra Nath was brought into the house by Prafulla himself after marriage with his daughter Maya Rani. The settlor trusted him. He may have taken care of the settlor and Uma Rani. He was the only trusted male member in the house to do all work which an orthodox illiterate Hindu woman could not do. None of the other daughters of Uma Rani had any doubts on the bona fides of their son-in-law.

68. Curiously none of Jitendra's sisters supported him in the litigation. Each of them were with their mother and Dhirendra, and against Jitendra. The

latter was thus an outcast in the family who landed as a vulture on the family property. The observations of the Trial Judge against the demeanor and bona fides of Dhirendra Nath are over-enthusiastic and unnecessary.

X. SECTION 34 OF THE TRUSTS ACT 1893

69. In course of hearing of this appeal, this Court enquired from the respondent as to what is the effect of the order of permission to sell the trust properties granted to Uma Rani under Section 34 of the Trust Act. Learned counsel meticulously placed several decisions, and argued that Section 34 is an advisory jurisdiction and any order passed thereunder is not binding. The decision of the Apex court in ***Ashok Kumar Kapur v. Ashok Khanna*** reported in ***(2007) 5 SCC 189*** was an appeal carried from the judgment of a Division Bench of this Court. The Apex Court therein took note of Section 34 and other decisions cited by the learned counsel for the respondent before this Court. The relevant paragraphs of the said decision in ***Ashok Kumar Kapur (Supra)***are set out hereunder :-

> "Application of law
> 18. The jurisdiction of the court under Section 34 admittedly is confined to opinion, advice or direction. An application would be maintainable on any of the present questions. Such questions must arise "respecting the management or administration of the trust property". The questions should not be of any "detail, difficulty or importance or otherwise not proper in the opinion of the court for summary disposal".
> 20. It may be that such an application may be filed without instituting a suit but maintainability of such an application would mainly depend upon the nature and purport thereof. Merely an option has been conferred on a trustee to file either a **suit** or to move the court for its opinion, advice or direction in terms of Section 34 of the Act. Such an option can be exercised only **when recourse to both the remedies are available.**

21. We may proceed on the basis that the jurisdiction of the court is not only confined to opinion or advice but also extends to issuance of direction, but such opinion rendered, or advice given or direction issued only to a trustee. Consequence of issuance of such a direction is also stated in para 3 of Section 34 in terms whereof a legal fiction is created by reason whereof the trustee would be deemed to have discharged his obligation in regard to his own responsibility in the subject-matter of the application. **It does not envisage an adjudication. It does not ordinarily envisage determination of the right, title or interest of a member of the trust or a beneficiary in relation to the trust property, although such a question may have to be incidentally dealt with.**

39. Yet again in Krishen Kumar Khosa v. Krishen Lal [AIR 1979 J&K 13 : 1979 Kash LJ 29] it was held : (AIR pp. 16-17, para 5)

> “5. From a bare perusal of the petition it becomes obvious that the petitioner is not in possession of the trust property but is desirous of getting himself declared a trustee in opposition to Respondent 1 who according to him, has usurped his functions to which he was entitled to under the Guru Jee's alleged will. Obviously the petition was not for seeking any advice, opinion or direction from the court. It raised questions of difficulty, detail and of importance which could not be disposed of in summary proceedings as one at hand. Mr Gupta has vehemently argued that he was entitled to seek the direction from the court which would according to him include even a declaration to the effect that it was in fact the petitioner who was the trustee and not Respondent 1. He has cited some authorities such as Bhailal Jagadish v. Addl. Dy. Commr. [AIR 1953 Nag 89 : 1952 Nag LJ 613 (FB)] , ITO v. Murlidhar Bhagwan Das [AIR 1965 SC 342] and Dwarka Nath v. ITO [AIR 1966 SC 81] in support of his contention that the expression ‘direction’ means and includes an order of the court and does not merely mean an advice or opinion. On a perusal of these judgments I am however, of the view that the expression ‘direction’ as used in the Trusts Act has entirely a different meaning than the meaning that may have been given to it in various other enactments discussed in the above said judgments. Though Mr Gupta has remarked the interpretation laid down on the expression ‘opinion, advice, and direction’ appearing in Section 34 of the Trusts Act in Mohd. Hashim Gazdar Re [AIR 1945 Sind 81] and Mohd. Sadiq Ali Khan v. Kazim Ali Khan [AIR 1934 Oudh 118 (2)] being the interpretation laid down long ago and therefore not applicable to the situation prevailing in 1978, yet I am of the view

that the meaning of the expression used in Section 34 of the Trusts Act having been directly at issue in the said judgments, the interpretation placed in the said judgments, on this expression was not only appropriate and correct at the time of the passing of the said judgments but still continue to be the only interpretation that may possibly be given. In Mohd. Hashim Gazdar [AIR 1945 Sind 81] it has been laid down as follows : (AIR p. 82)

> **'The words "opinion, advice or direction" in Section 34, Trusts Act, must be read together as meaning nothing more than guidance**. Under Section 34 the court exercised what may be called its consultative jurisdiction, giving guidance to a trustee who presumably asks for it, because he wants it and intends to follow it, Section 34 is intended to enable a trustee to obtain the court's guidance in suitable matters for his protection. **The advice, opinion or direction given under Section 34 is not an order binding on parties and disobedience to it does not involve committal for contempt....' "**

70. The coordinate Bench of our Court in ***Ashok Kumar Kapur v. Ashok Khanna*** reported in ***2006 SCC OnLine Cal 56*** held as under:-

> 28. In "Muhammad Hashim Gazdar" (supra) the Hon'ble Court held that advice, opinion or direction given under section 34 of the Trusts Act is not an order binding on parties and disobedience to it does not involve committal for contempt. But the Court under section 34 of the Act exercises what may be called its consultative jurisdiction, giving guidance to a trustee who presumably asks for it, because he wants it and intends to follow it. **But it is always open to a Court, if a trustee having once applied for advice, opinion, or direction, and having ignored the guidance thus given, applies again for opinion, advice or direction to tell the petitioner that he must go elsewhere.**The said observation was made by the Full Bench in a contempt proceedings and the Hon'ble Court held that the object of section 34 is to enable a trustee to obtain the Court's guidance in suitable matters for his protection and that a direction given under the section is not an imperative order. **A trustee who fails to follow a direction does not acquire protection, but he is not liable to contempt proceedings for the failure.**
>
> 30. In our opinion, all those guidelines cannot be a help to Mr. Sarkar's client in the facts and circumstances of this case. After perusing the decisions cited by the parties before us and after taking

> into account the decisions of the Hon'ble Supreme Court held in "Shah Babulal Khimji v. Jayaben D. Kania" (supra), **we can only express ourselves that the order so passed by the Hon'ble First Court under section 34 of the Trusts Act in the instant case, in our opinion cannot be said that it decided the rights of the parties finally and thereby we have to come to the conclusion that the said order is merely an opinion and/or advice by the Hon'ble First Court on an application being filed by the appellant/petitioner.** We, therefore, hold that the order so passed by the Hon'ble First Court in the instant case, cannot come within the purview of Clause 15 of the Letters Patent and we have to hold that the said order cannot attract the proviso."

71. The ratio of the decision above is that a section 34 Court does not determine the rights of the parties and therefore the order passed thereunder is not binding. However, at paragraph number 20 of the decision of the Apex Court in ***Ashok Kumar Kapur (Supra),*** the Court said that a Trustee has two options open before him namely he can either file a suit to get a direction from the Court as to how he shall deal with the trust properties or he can file an application seeking advice.

72. Therefore if a Trustee files a suit instead of an application under section 34, there would be a binding decree amongst the parties, whereas a decision under section 34 of the Trust Act is not binding. However the Court under section 34 per se is not prohibited from issuing binding directions to the trustee in regard to how to deal with the trust properties.

73. The Division Bench of this Court at paragraph no. 28 in ***Ashok Kumar Kapur (supra)*** referred to the decision in ***Gazdar (supra)*** that although disobedience by a Trustee of an order passed under section 34 will not

attract contempt, it is open to the Court to decline another similar application, since its previous opinion has not been followed.

74. This Court is of the view that advice given under Section 34 must be binding and adhered to since judicial time is consumed in dealing with such application. It is for this reason, that the 17th Law Commission report observed recommended the following as regards Section 34 at pg. no. 15-16 and 37 of the report:-

> 46. In order to give a speedy remedy, **we think it necessary to enlarge the scope of section 34 on lines analogous to the originating summons procedure in England, which has been followed and adopted in the original side rules of the Bombay and Madras High Courts.** Many questions which arise in the course of the administration of the trust may be easily disposed of on an application instead of driving the parties to a suit. We therefore, recommend that the scope of the section may be enlarged. At the same time, we recommend a restriction to the effect that the court shall not determine questions involving charges of breach of trust unless the parties have consented for the decision of the question in the proceedings by an application under section 34. Similarly, the court would not decide claims made adversely to the trust and involving the investigation of the title of third parties. Further, if any question of importance arises for decision and the court is of opinion that it should not be disposed of in a summary manner, it may refer the parties to a suit. With these safeguards we think that the amplification of section 34 should work as a boon to the parties concerned.
>
> 47. We have provided for one appeal against the decision of the court under section 34. Orders under section 34 of the Act are not now appealable[3]. As we have now proposed to enlarge the scope of section 34 and make the jurisdiction and the procedure more or less analogous to that of the Chancery Division of the High Court in England under O. 55 (the procedure relating to originating summons), we think it is necessary to provide for an appeal against the decision of the court from an order made on the application. In England such orders are appealable under O. 55, R. 14(d). But appeal lies only with

> the leave of the Judge or the court of appeal. We think that it would suffice if the order is made appealable but without any restriction.
>
> For Section 34 of the principal Act, the following section shall be substituted:-
>
> (6) **An order made under this section shall be binding**, subject to the result of any appeal under sub-section (9), on all persons who are parties to the proceedings and on all persons on whom notice is served under sub-section (2).
>
> Emphasis applied

75. Apart from the above, we are of the considered view that the third part of Section 34 indicates a person who is aggrieved by the order passed under section 34 may need to challenge it and hence should be made binding.

> Sec.34 The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, **so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.**
>
> Emphasis applied

76. Hence, this Court requests the Central Government to consider the aforesaid Report of Law Commission and bring about a suitable amendment to section 34 of the Indian Trusts Act 1893. The Registrar General of this Court is directed to communicate a copy of this judgment to the Secretary, Ministry of Law and Justice, Central Government.

77. For the reasons stated hereinabove the sale of the Trust properties inter alia by two sale deeds dated 12th May 1972 and 30th March 1983 are held to be valid and executed by Uma Rani with due authority and power under the family arrangement cum Trust deed dated 31st May, 1961 as amended by the deed dated 17th September, 1965.

78. The Appeal succeeds. The impugned judgment and decree dated 29th August, 1995 passed by the learned 4thAssisstant District Judge, Alipore in T.S. No. 92 of 1983 is set aside.

79. The Registrar General of this Court is requested to communicate a copy of this judgment to the Trial Court for information. The TCR be sent back.

80. There will however be no order as to costs.

81. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)