

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

C.S.O.S. No. 2 of 2023

Sunita Ghosh

Versus

Ranjan Mitra & Ors.

Mr. Anuj Singh

Mr. Ratul Das

Ms. Anshumala Bansal

Mr. Richik Chowdhury

... For the plaintiff.

Mr. Deepan Kumar Sarkar

Mr. Soumalya Ganguli

Ms. Deepti Priya

... For the defendant nos. 1 and 2

Ms. Sulagna Mukherjee

Mr. Suman Dey

... For the defendant no. 3

Hearing Concluded On : 03.10.2024

Judgment on : 07.11.2024

Krishna Rao, J.:

1. The plaintiff has filed the present Originating Summons Suit seeking clarification/determination of the following questions:

- a. *Whether, in view of the fact that the Ranjan Mitra Trust Fund can neither take possession of the said premises nor get the said premises transferred in its favour, the Executor/Plaintiff can sell the said premises to an intending buyer and remit the sale proceeds thereof in favour the said Trust for the benefit of the Defendant No.1 during his lifetime, and thereafter for the benefit of the Defendant no. 2?*
- b. *Whether in order to achieve the ultimate intention of the said Will which unequivocally provides that the said premises would go to the Ranjan Mitra Trust Fund for the personal use of the Defendant no.1, the said property could be sold pursuant to the orders of this Hon'ble Court?*
- c. *Whether Clauses 11 to 13 of the said Will which provides for retention of the said premises forever with the Ranjan Mitra Trust Fund with no right of the trustees to sale the same, are void for remoteness, uncertainty and offend the rule against perpetuity?*
- d. *Whether in view of the present circumstances, the Executor/Plaintiff is entitled to enter into an agreement or execute or join in the conveyance of the said premises, for the ultimate benefit of Defendant no.1?*

2. Manjula Mitra, was the owner of Flat No. 10A, Naba Kailash, 55/4, Ballygunge Circular Road, Kolkata – 700 019. By her Last Will and Testament dated 12th October, 2002, she has bequeathed the said flat in favour of Ranjan Mitra Trust Fund. In the said Will, the plaintiff is one of the Executrixes and the defendant nos. 1 and 2 are the beneficiaries. In the said Will, it is clarified that the Trustees shall not

have power to sell the said flat. Manjula Mitra died on 18th June, 2018. After her death, the plaintiff being one of the joint executrix of the Last Will and Testament had applied for grant of probate being PLA No. 39 of 2020 and by an order dated 24th December, 2021, the Testamentary Court granted probate of the Will in favour of the plaintiff.

3. The flat constitutes within the defendant no. 3 society and after obtaining probate, the plaintiff has enquired with the defendant no. 3 for transfer of share of the Testatrix in favour of the Ranjan Mitra Trust Fund as per the said Will and probate granted by this Court but it was informed by the defendant no.3 to the plaintiff that transfer of membership of share in respect of the flat cannot be effected in favour of Ranjan Mitra Trust Fund in terms of Clause 6 of the bye-laws of the defendant no.3 society.
4. The plaintiff is settled at United States of America and the defendant nos. 1 and 2 are settled at United Kingdom and there is no immediate intent to visit Calcutta and to occupy the said flat permanently. The defendant no.1 being the nominee of the share of the Testatrix in the said flat, requested for transfer in the Ranjan Mitra Trust Fund but the bye-laws of the defendant no.3 would require him to declare that he has a requirement of residential accommodation in the said flat or that he would permanently reside in the State of West Bengal or that he would reside in the State of West Bengal for a period of one year

from the date of application for membership in the defendant no.3 society.

- 5.** Mr. Anuj Singh, Learned Advocate representing the plaintiff submits that the provisions of bye-laws of the defendant no.3 society directly impede the plaintiff from discharging her obligations as per the Last Will and Testament of the Testatrix. Mr. Singh submits that the provisions of the bye-laws of the defendant no.3 are squarely inconsistent with the intention of the Testatrix contemplated in the Last Will and Testament. He submits that the provisions of bye-laws of the society would render the said Will infructuous to the extent of discharge of obligations in respect of the flat and further deprive, the defendant no.1 being one of the sons of the Testatrix and ultimate beneficiary under the said Will with respect to the flat.
- 6.** Mr. Singh submits that inasmuch as the bye-laws restrict devolution of the flat in favour of Ranjan Mitra Trust Fund, the ultimate intention of the Will to take possession of the flat by Ranjan Mitra Trust Fund, for the personal use of the defendant no.1 shall remain unsatisfied. He submits that in view of the deadlock, unless the flat is disposed of by sale and the proceeds therefrom are deposited in the Ranjan Mitra Trust Fund, the intention of the Testatrix under the Will cannot be satisfactorily achieved.
- 7.** Mr. Singh also submits that in addition to the restriction imposed by the bye-laws of the defendant no.3 society, Clause 11 of the Will limits

the Trustees of the Ranjan Mitra Trust Fund, including the plaintiff from alienating, transferring and selling the flat to any intending purchaser, due to which the plaintiff cannot take necessary steps to sell the flat and remit the proceeds in the account of the Trust for the benefit of the Trust.

8. Mr. Singh submits that as per Clause 11 of the Will, it limits the plaintiff from selling the flat, and thus the plaintiff has filed the present Originating Summons Suit for opinion from this Court.
9. The defendant no.1 and defendant no.2 have entered appearance in the suit and have filed their separate affidavits by giving consent to the Originating Summons Suit filed by the plaintiff and also prayed for allowing the prayer made by the plaintiff in the present suit.
10. The Defendant no.3 society has also filed its affidavit-in-opposition by objecting to the prayers made by the plaintiff.
11. Ms. Sulagna Mukherjee along with Mr. Suman Dey, Learned Advocates representing defendant no.3 submits that the West Bengal Co-Operative Societies Act, 2006, is a special enactment which provides for functioning of all the Co-operative Societies including housing societies like the defendant no.3. She submits that in Chapter VIII, certain special provisions governing the functions of the housing societies. She submits that Section 87 read with Section 63 of the Act lays down the criteria to become eligible for membership of housing society.

- 12.** Ms. Mukherjee submits that the Act does not contemplate a trust to be eligible for membership of a housing co-operative society. She submits that the sale of the flat, in the manner intended by the plaintiff being contrary to the Act. She further submits that in the Will itself, the intention of the testatrix was that the trustees shall have no power to sell the flat.
- 13.** Heard the Learned Counsel for the respective parties, perused the materials on record. Manjula Mitra, the testatrix was the owner of the Flat No. 10A, Naba Kailash, 55/4, Ballygunge Circular Road, Kolkata – 700 019. The said flat constitutes within the defendant no. 3 society. The Society is having its own bye-laws registered under the West Bengal Co-Operative Societies Act, 2006.
- 14.** Manjula Mitra being the member of the defendant no. 3 society owns Flat No. 10A in the Society. During her life time had executed her Last Will and Testament dated 12th October, 2002 by appointing the plaintiff as Executrix of her Last Will. The Testatrix has bequeathed Flat No. 10A, Naba Kailash, 55/4, Ballygunge Circular Road to the “Ranjan Mitra Trust Fund” Trustees and empowered the Trust to take possession of the said flat for the personal use of Ranjan Mitra or to rent out the property and remit to him, the monthly rental for his use during his life time. In the said Will, it is clarified that the Trustees shall not have power to sell the said flat.

15. In the said Will, it is also provided that if Ranjan Mitra dies without issue, the said flat and the income therefrom will pass on and vest to her other son Protap Mitra absolutely, or if he predeceased before her to his child or children in equal share.

16. After the death of the Testatrix, the plaintiff being the Executrix has obtained probate of the Last Will and Testament dated 12th October, 2002. Now, the following difficulties arose for transfer of the flat in the name of Ranjan Mitra Trust Fund Trustees as per Will dated 12th October, 2002 and the probate granted by the Testamentary Court:

a. In the Will in Clause 11, it is mentioned that the Trustees shall not have power to sell Naba Kailash Property.

b. **Clause 6** of the Bye Laws of the Naba Kailash Co-Operative Housing Societies Ltd. reads as follows:

“Any person permanently residing in the West Bengal and intend to settle down at 55/4, Ballygunge Circular Road, permanently joining in the application for registration of the Society or subsequently admitted to membership after registration in accordance with rules and bye-laws shall be a member of the Society. Provided no person shall be admitted as member without permission of the Registrar after registration of the Society. Provided further that no money in any form shall be collected from any holding member whose membership has not been approved by the Registrar.”

c. **Clause 7** of the Bye-Laws of the Naba Kailash Co-Operative Housing Societies Ltd. reads as follows:

“No person shall be admitted as a member of the society who already owns a house/flat or a building site within the village, the municipal area or the city or town, as the case may be, in which the society has undertaken a project in his own name or in the name of any of his dependents or member of his family or whose needs of a house or a tenement or a plot in the opinion of the Managing Committee are not considered pressing or deserving or who has failed to furnish full or accurate information about the house/tenement/plot owned by him. No person shall again be admitted as a member of the society who does not permanently reside in West Bengal or who does not settle down in West Bengal permanently.

Every member and every person intending to become a member shall file an affidavit, declaring his address and the particulars of building or buildings house or houses, flat or flats, tenement or tenements and land or lands owned by him or by any member of his family in such form as may be prescribed.”

- d. Sections 63 and 87 of the West Bengal Co-operative Societies Act, 2006, reads as follows:

“63. Eligibility for membership of Co-operative society.

(1) Subject to the by-laws, the following persons shall be eligible for membership of a Co-operative society :-

(a) an individual competent to contract under section 11 of the Indian Contract Act, 1872 (9 of 1872) and a permanent resident of India;

(b)any other Co-operative society;

(c)the State Government;

(d)a self-help group;

(e)any financing bank:

Provided that a student who has not attained the age of majority according to the law shall be eligible for membership of Co-operative society formed in an education institution to which he belongs.

(2) An employee of the Co-operative society who is eligible under sub-section (1) to be its member shall on an application made by him be admitted as a member of such Co-operative society but shall have no right to vote at an election of or for being elected as a director of the board or delegate to any other Co-operative society:

Provided that an employee member of an engineers, labour, industrial, service, transport and the like Co-operative societies shall have right to vote at an election of or for being elected as a director of the board or delegate to any other Co-operative society.

(3) Notwithstanding anything to the contrary contained elsewhere in this Act, a Co-operative society may admit [an application] any person, any association or body of persons (whether incorporated or not) as a nominal member who shall not be entitled to any share in any form in the assets or profit of the Co-operative society and shall not be eligible to be elected as director of the board and shall have no right to attend the general meeting of the Co-operative society but shall have such right and privilege and shall be subject to such liabilities of a member as may be specified in the by-laws.

(4) Notwithstanding anything to the contrary contained elsewhere in this Act, a Co-operative society may admit the joint members and may issue a single share in their joint names. Such members shall, except in such cases as may be prescribed, ordinarily enjoy privilege jointly, but voting right shall be exercised by the first named member and in his/her absence by the other member.

(5) Notwithstanding anything contained in sub-section (1), no Central Co-operative society shall have right to admit individuals to its membership

otherwise than as nominal members in terms of sub-section (3) and the existing individual members shall be deemed to be nominal members for the purpose of this Act:

Provided that the existing individual members of a Central Co-operative society shall have right to withdraw, after serving three months notice on the Co-operative society concerned, the share capital contributed by such members within one month from the date of acceptance of such withdrawal and the concerned Co-operative society shall refund the same to such members after deduction of the debts, if any, due to the concerned Co-operative society from such members.

87. Eligibility for membership of housing Co-operative society.

(1) In addition to the requirements under section 63, an individual shall be eligible for membership of a housing Co-operative society, if-

(a) he is a citizen of India or a non-resident Indian;

(b) he is not a member of any other housing Co-operative society in West Bengal;

(c) he or any member of his family does not own any plot of waste land, house or flat within the local limits of any municipal corporation or municipality or town or any gram Panchayat or any notified area authority where the housing Co-operative society is situated other than the one in relation to which the membership of a housing Co-operative society is applied for by him under this section;

(d) he is a permanent resident of West Bengal or intends to reside in West Bengal permanently within a period of one year from the date of application;

(e) he has genuine need for housing or additional accommodation from Co-operative society; and

(f) he has not entered into any contract with the housing Co-operative society in the matter of any work constructional or otherwise relating to a project of the Co-operative society.

(2) No person shall be admitted as a member or function as an organiser of a housing Co-operative society until he has made a declaration to be sworn by him before an Executive Magistrate or judicial Magistrate in accordance with the requirements specified in clauses (a) to (f) of sub-section (1) :

Provided that if such declaration is subsequently found to be false in whole or in part, it shall be an offence punishable under this Act."

- 17.** The defendant no.1 has been residing at London in United Kingdom and the defendant no.1 intends to continue his residence therein, to remain close to the defendant no. 2 as his only next of kin. The defendant no.1 has not visited the said premises since the demise of the testatrix and has no intention to visit or occupy the same for his personal use.
- 18.** The Testatrix has empowered and authorized the Ranjan Mitra Trust Fund Trustees to take possession of the flat for the personal use of Ranjan Mitra, the defendant no.1 or to rent out the property and remit to him monthly rental for his use during his life time.
- 19.** The defendant nos.1 and 2 have filed their affidavit which reads as follows:

"2. The Plaintiff has filed the instant Originating Summons Suit being C.S. OS No. 2 of 2023 ("originating summons") before this Hon'ble Court seeking, inter alia, the permission of this Hon'ble Court to sell Flat no. 10A, Naba Kailash, 55/4, Ballygunge Circular Road, Kolkata 700 019 (hereinafter referred to as the "said premises"), owned and possessed by the Testatrix during her lifetime so that the proceeds thereof may be remitted to the Ranjan Mitra Trust Fund created for

my benefit. I am consenting to the said originating summons and the reliefs sought therein.

3. I say that the said premises was bequeathed to the Ranjan Mitra Trust Fund vide the last Will and Testament dated October 12, 2002, of Manjula Mitra, since deceased (hereinafter referred to as the "Testatrix") so that it could be utilized for his benefit. The said premises is part of a co-operative society, namely Naba Kailash Co-operative Housing Societies Limited, whose Bye-Laws do not permit Ranjan Mitra Trust Fund to assume membership thereof since Ranjan Mitra, my brother, does not intend to reside in the said premises permanently. It is a fact that at the material time, Ranjan Mitra used to reside in the said premises with our mother, the Testatrix during her lifetime.

4. However, in light of the change in circumstances, I believe my brother's interests will be better served if the said premises is permitted to be sold by this Hon'ble Court and the proceeds thereof remitted to any account maintained by the Ranjan Mitra Trust Fund. I believe that if the reliefs sought in the originating summons are granted, the object of the last Will and Testament dated October 12, 2002 of the Testatrix will be duly achieved. I believe that the Ranjan Mitra Trust Fund is being and shall be operated to Ranjan Mitra's benefit.

5. I humbly pray that the reliefs sought in the said originating summons may kindly be granted by this Hon'ble Court."

20. The plaintiff being the executrix and the defendant no.1 and 2 being the beneficiaries of the Last Will and Testament dated 12th October, 2002 have taken decision to sell the flat and the sale proceeds would be remitted in the account of Ranjan Mitra Trust Fund for the benefit of the Trust.

21. The testatrix has bequeathed the flat to the Ranjan Mitra Fund Trustees. The flat constitutes within the defendant no. 3 society. The

society is governed under its bye-laws. To become member of the Society, condition of bye-laws of society is to be fulfilled. The bye-laws relied by the society is registered under the West Bengal Co-operative Societies Act, 2006. To become a member of society permission of Registrar is required. It is also provided that no person shall again be admitted as a member of the society who does not permanently reside in the West Bengal or who does not settle down in West Bengal permanently.

- 22.** As per Section 87 (d) of the Act of 2006 “he is a permanent resident of West Bengal or intends to reside in the West Bengal permanently within a period of one year from the date of application”.

Sub-Section (2) of Section 87 provides that “no person shall be admitted as a member of function as an organizer of a housing co-operative society until he has made a declaration to be sworn by him before an Executive Magistrate or Judicial Magistrate in accordance with the requirement specified in clauses (a) to (f) of sub-section (1)”.

- 23.** The defendant no.1 used to reside in the said flat with his mother during her life time now neither the plaintiff, being the executrix nor the defendant nos.1 and 2 being the beneficiaries are residing in the said flat or in State of West Bengal. It is also not possible for the defendant no.1 to reside permanently in the West Bengal within a period of one year from the date of application and thus it is not possible for the defendant no.1 to affirm an affidavit in terms of sub-

section (2) of Section 87 of the West Bengal Co-Operative Societies Act, 2006.

24. In the case of **Damodar Prasad Ganeriwalla and Another Vs. Dwarka Prasad Ganeriwalla** reported in **2014 SCC Online Cal 8430**, the Coordinate Bench of this Court held that :

“I must not omit to mention that the trustees, under the Deed of trust do not have the right to sell the property. That is why they have come up before this Court to sell the property.

I am firmly of the opinion that the income from the property does not match the value of the property and that the purposes of the trust would be realized only upon sale of the property. After all, it is a private trust for the welfare of the beneficiaries, some of whom are also trustees.”

25. In the case of **Sayantana Dey and Another Vs. Ruma Ghosh and Others** reported in **2019 SCC Online Cal 9111**, another Coordinate Bench of this Court held that:

5. *The Will has created diverse interest in favour of the legal heirs of the said deceased who are beneficiaries under the Will. The wife was given the life estate and after her death to his son. The son is also having a life estate with regard to the western portion of the property. The testator under the Will did not want any of the legal heirs to sell, mortgage or charge the said property during their lifetime. It was in the nature of a trust by which the legal heirs are the beneficiaries. The said trust would automatically come to an end on the death of the legal heirs. However, if a legal necessity is made out then the beneficiaries of the Will can apply to the Court for an opinion of advice for sale and/or encumbrance of the property which would be beneficial for the beneficiaries of the Will and/or the trust as the case may be. Although in*

interpreting a restrictive clause in a trust deed of a debuttar estate in Hunooman Pershad's case reported at (1854-57) 6 Moore's LA. 393, Knight Bruce, L.J., observed that right of alienation can be exercised rightly in the case of need or for the benefit of the estate and, in another decision in Ramchandraj v. Lalji Singh reported in AIR 1959 Pat 305, the Patna High Court construed a clause against alienation of properties by the Shebait in a deed of endowment by observing that it would not be in the interest of the institution to deprive the Shebait of the power of alienation in case of necessity or benefit, the same principle can be safely applied in the instant case as an advice to the applicant in favour of alienation notwithstanding the wishes of the testator, primarily on the ground that it would benefit the beneficiaries under the Will and the original clause against alienation in the present context if construed against the beneficiary, would defeat the object and purpose of the Will.

- 26.** In the case of **Bapuji Rustomji Kerawalla Vs. Haji Esmail Haji Ahmed** reported in **1921 ILR (Bom) Vol XLVI 694**, the Bombay High Court held that:

“This particular case falls exactly between the two cases in Vesey on the one hand, and the case in 9 Simons on the other. There was a clear intention on the part of the testator that his nephew should not sell or alienate the property during his life-time. On the other hand there was an equally clear intention that the nephew should have the power to appoint by deed or writing as well as by Will, so that he donee took an absolute estate, and the restraint on alienation must be considered as having no effect so as to detract from the gift of the absolute estate. I think, therefore, in spite of these words of restraint in Clause 12, the nephew was empowered to appoint by deed or writing in his life-time to himself and therefore he has the power to convey the absolute estate.

The result must be that to the first question the answer is that the plaintiff can either convey direct to the defendant and so give him a good title or he

can first appoint to himself and then convey. The second question is unnecessary in view of the answer to the first question.”

- 27.** In the present case, the testatrix has bequeathed the flat to the Trust for the personal use of defendant no.1. The testatrix under the Will did not want any of the trustees to sell the flat. The defendant no.1 is not in a position to enjoy the property as per Will of the testatrix due to change of circumstances. The plaintiff being the executrix and the defendant no.1 and 2 being the beneficiaries are intending to sell the property and will remit the entire sale proceeds in the account of the Trust for the benefit of the Trust.
- 28.** Considering the above, this Court is of the opinion that if the beneficiaries are not in a position to utilize the property and to take the benefit of the property bequeathed to the Trust, the purpose would be served if the plaintiff being the executrix of the Will to allow to sell the property and to remit the total sale consideration in the account of the Trust for the benefit of the Trust.
- 29.** As regard to the transfer of the flat in the name of the defendant no.1 as per the Will and the provisions of bye-laws of the society and Sections 87 and 63 of the Act of 2006, the plaintiff has informed this Court that one of the proposed purchasers, namely, Kushal Patel has made an offer of Rs.1,67,50,000/- for the said flat. The plaintiff has also filed a supplementary affidavit wherein it reveals that as per circle rate the market value of the property is Rs. 1,57,89,233/- and as per surveyor report, the market value is Rs. 1,60,90,000/-.

30. At the time of hearing of the case, Learned Counsel for the defendant no.3 also submitted that if this Court allows the plaintiff to sell the property, the defendant no.3 may also be given liberty to search the proposed purchaser who may offer best price to purchase the said flat and the proposed purchaser shall also fulfill all the criteria in terms of bye laws of the Society and Act of 2006.

31. Taking into consideration all the aspect, this Court is of the opinion that:

- i. *The plaintiff shall inform the defendant no.3 with regard to the proposed purchaser of the flat with all details and on receipt of the details of the proposed purchaser, the defendant no.3 shall be at liberty to enquire whether the proposed purchaser full fills all the provisions of bye laws of the society and Act of 2006 for transfer the flat in the name of proposed purchaser.*
- ii. *If the proposed purchaser fulfills all the provisions of the bye laws and Act of 2006, the defendant no.3 shall immediately take appropriate steps for transfer of flat in the name of proposed purchaser.*
- iii. *The proposed purchaser shall cooperate with the plaintiff as well as the defendant no.3 for the purpose of transfer of flat in his/her name.*
- iv. *if any proposed purchaser offers best price to purchase the flat to the defendant no.3 then the price offered to the plaintiff by the proposed purchaser and the said proposed purchaser fulfills all the criteria, the defendant no.3 shall informed to the plaintiff and the plaintiff will offer to sell the said flat to the proposed purchaser who has approached the defendant no.3 to purchase the flat subject to payment of full amount to the plaintiff.*
- v. *The plaintiff and the defendant no.3 shall finalize the name of proposed purchaser*

within four weeks from date. On finalizing the name of purchaser, the defendant no.3 shall complete the process for transfer of flat in the name of the purchaser within four weeks thereafter.

- vi. If the transfer process is completed and the plaintiff receives the total sale consideration, the plaintiff shall remit the total sale consideration in the account of the Trust namely Ranjan Mitra Trust Fund for the benefit of the trust.”*

32. This Court answer to the questions (a), (b), (c) and (d) of paragraph 1 (supra) in affirmative.

33. C.S.O.S. No. 2 of 2023 is thus **disposed of**. Decree be drawn accordingly.

(Krishna Rao, J.)