

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 2327 of 2023

Sri Bratindra Nath Mukherjee

VERSUS

Rathindra Nath Mukherjee & Ors.

For the petitioner:

Mr. Haradhan Banerjee, Adv.

Mr. Amitava Pain, Adv.

Mr. Partha Pratom Mukherjee, Adv.

Last Heard on: December, 11, 2024

Judgment on: January 17, 2025

Biswaroop Chowdhury,J:

This application under Article 227 of the Constitution of India is directed against Orders dated 12-05-2023 and 05-07-2023 passed by Learned 4th Additional District Judge at Alipore South 24 Parganas in Misc Case No. 44 of 2009. The petitioner being aggrieved by the Order dated 12-05-2023 and 05-07-2023 passed by the Learned Judge in directing the petitioner to deposit the entire sale proceeds of Trust property alongwith list of expenses incurred by petitioner for preserving and maintaining the Trust property and Order dated 05-07-2023 directing issue of look out notice against the petitioner and to

attach the Trust property sold to the petitioner by virtue of judgment dated 31-10-2017, has come up with the instant application.

The petitioner's case in brief is that the petitioner is the sole surviving trustee of the trust Estate of Rabindra Nath Mukherjee since deceased in respect of the property situated at P-6. CIT Road, Scheme no. LV Kolkata-700014. The said property was originally owned and possessed by Rabindra Nath Mukherjee since deceased. The said Rabindra Nath Mukherjee, since deceased executed a deed of family trust on 07-06-1988 appointing the petitioner as trustee and Sri Rabindra Nath Mukherjee himself was also appointed as Trustee of the said Trust Estate. Rabindra Nath Mukherjee died on 30-10-1998 leaving behind the registered deed of family trust. As per paragraph no-2 of the trust deed the trustee was empowered to sale or transfer the trust property with the permission of Court of competent jurisdiction.

The petitioner accordingly submitted an application before the Learned District Judge South 24 Parganas which was registered as Misc Case No-35 of 2007 with a prayer for permission to buy the Trust property at the price to be fixed by Court. Although some beneficiaries entered appearance but only Ranit Mukherjee claiming to be beneficiary filed objection to the application submitted by the petitioner. It was subsequently transferred to Learned Additional District Judge 4th Court at Alipore and registered as Misc case 44/2009.

During pendency of the case opposite party no-2 Ramendra Nath Mukherjee, opposite party no-3 Soumendra Nath Mukherjee opposite party no-4 Ranit Mukherjee and opposite party no-5 Aloka Mukherjee died. Opposite party no-1 Rathindra Nath Mukherjee died on 8-10-2018. Opposite party no-1,2,3 and 5 died intestate leaving behind the petitioner as sole legal heir. However opposite party no-4 Ranit Mukherjee died intestate leaving behind his mother Nipasree Mukherjee as legal heir. Nipasree Mukherjee was substituted by Order dated 25-07-2013 as 4(a). Smt. Nepashri Mukherjee, wife of Late Ramendra Nath Mukherjee and mother of Late Ranit Mukherjee. Despite service of summons Smt. Nipashree Mukherjee did not enter appearance and contest the case.

During pendency of the case the petitioner came to know that Smt Nipasri Mukherjee along with some other beneficiaries transferred the beneficial interest of the trust property by deed of transfer dated 13-05-2010, in favour of M/S. Vibgour Infrastructure Ltd. without consent of the petitioner who is not only a surviving trustee but also a beneficiary. The petitioner pursuant to such knowledge of transfer filed a suit being T.S. No. 185 of 2010 before Learned Civil Judge Senior Division at Sealdah. Learned Judge was pleased to decree the suit by declaring the deed of transfer executed by the beneficiaries in favour of M/S. Vibgour Infrastructure Ltd. as void ab-initio. Thereafter the petitioner filed an application before the Learned District Judge under Section 68 of the Trust Act for passing an order impounding the

beneficiaries and accordingly the said application was registered as Misc Case no. 901 of 2011.

Learned District Judge upon hearing the petitioner was pleased to allow the application under Section 68 of the Indian Trust Act 1882 being Misc Case No-901 of 2011 by observing and directing as follows:

Hence

ORDERED.

that the instant application is allowed on contest but without costs. It is hereby declared that all the O.Ps as beneficiaries have committed breach of trust as envisaged under Section 68 of the Indian Trust Act by transferring/selling their proportionate beneficial interest of the trust property to the third party and have caused loss of Rs. 40, 50,000/- suffered by the Trust Estate. The beneficial interest of the O.Ps are hereby impounded to the extent of Rs. 40, 50,000/- and the OP's as delinquent beneficiaries are hereby directed to refund Rs. 40, 50,000/- to the transferee Vibgyor Allied Infrastructure Ltd, within the one month from this date, i.d. the petitioner trustee will be at liberty to impound the beneficial interests of the O.Ps to the extent of that amount and to refund the same to the transferee.

Ultimately on 31st October 2017 Learned 4th Additional District Judge at Alipore disposed Misc Case 44/2009 by observing and directing as follows:

‘considering the facts and circumstances of this case, evidence and materials on record, this Court has no hesitation to conclude that the petitioner is entitled to get an order as prayed for and the Misc case filed by him should be allowed on contest.

Hence it is

ORDERED.

That the instant Misc Case be and the same is allowed an contest against the opposite party no. 1, 4(a) and 5 but without any cost.

The petitioner/trustee, Bratindra Nath Mukherjee is permitted to sell the trust property (as a trustee) and to purchase the trust property as an individual described in the schedule of the Deed of Trust (Exhibit-1) at a proper price to be determined by the collector South 24-Parganas at Alipore.

The petitioner is further directed to administer/distribute the sale proceeds of the trust property among the living beneficiaries in strict compliance of the provision in this regard made in the deed of trust after deducting necessary expenses incurred by him for maintenance and preservation of the trust property till the date of sale.

Let a copy of this order along with a copy of the Deed of Trust be sent to the Collector South 24 Parganas at Alipore for his information and report.

The case is thus disposed of.

To 21/12/2017 for valuation report from the office of the collector South 24 Parganas at Alipore.’

Pursuant to the order of the Learned Court dated 31/10/2017 a report was submitted by the Officer-in-charge Revenue Munshikhana to the Learned Court with regard to the Valuation of the property for registration and as such the petitioner sold the trust property as a trustee and the petitioner purchased the said trust property as an individual by way of registered deed being No. I-1828 of 2018 dated 27-04-2018. After compliance of the first part of the Judgment/Order dated 31/10/2017 the petitioner filed an affidavit on 09.03.2023. stating that except the petitioner there is no other living beneficiary excepting opposite party no. 4(a). Nipashree Mukherjee who despite diligent enquiry has not been heard of for 7 years by the petitioner and also by those who would naturally have heard of her if she had been alive and as such her interest has also been devolved upon the petitioner as there is no other living beneficiary save and except the petitioner herein.

By Order dated 12/05/2023 Learned Trial Judge passed an order directing the petitioner to deposit the entire sale proceeds of the Trust property by observing as follows:

The conduct of the petitioner confirms reluctance to comply the directions and such conduct tantamount to consider that perhaps the petitioner is in the mood of non compliance regarding distribution of sale proceeds and in view to protect the said amount for the beneficiaries as per

terms of the trust deed and order passed by this Court, it is paramount to pass order directing the petitioner to deposit the entire sale proceed before the court along with the list of expenses incurred by him for maintenance and preservation of the trust property till the date of sale.

The petitioner is directed to comply the order passed today in the strict sense and deposit the amount positively by the next date fixed.

To 5.7.23 for compliance as above and further order.'

The Learned Trial Court again by Order dated 5/07/2023 was pleased to issue look out notice against the petitioner and pass order for attachment of trust property, by observing and directing as follows.

'Record reflects that on many occasions petitioner was present before the Court in person and was appraised about the direction of the judgment, but he somehow avoided to deposit the quantum of money as calculated by the collector being the sale proceeds of the trust property and it has now become obvious since admittedly there has been one beneficiary of the trust property available in this eternal world who has claim over the amount according to her share.

Since the petitioner Dr. Bratindranath Mukherjee resides in United Kingdom, it would be no use to issue W.A. against him however process may be initiated to issue look out notice against him and simultaneously to attach the

said trust property for strict compliance of the directions passed in judgment dated. 31.10.2017.

The Director General of police, Govt of West Bengal be informed accordingly.

Office is directed to prepare writs for attachment of the trust property sold to the petitioner by virtue of the judgment dtd. 31.10.2017.

To 3.8.2023 for further order.'

The petitioner being aggrieved by the Orders dated 12/05/2023 and 5/07/2023 passed by the Learned Trial Court has come up with this application under Article 227 of the Constitution of India.

Pursuant to filing of this application there was a direction to cause News paper publication with regard to service of notice upon opposite party no-4 as she is only the surviving beneficiary according to the petitioner and other beneficiaries of trust property being opposite party No-1 to 3 and 5 have died leaving behind the petitioner as legal heirs. As Smt Nipashri Mukherjee did not appear before trial Court and was not residing at the address mentioned in suit cause title and further there was no appearance on her behalf pursuant to News Paper publication the application was taken up for hearing in her absence.

Heard Learned Advocate appearing for the petitioner perused the petition filed and materials on record.

Learned Advocate for the petitioner submits that the Learned Trial Judge erred in passing direction to deposit the entire sale amount when pursuant to disposal of Misc Case No-44 of 2009 the Court became functus officio and has no power to direct deposit of entire sale proceeds of trust property. Learned Advocate further submits that in the event any defect was there in the petition submitted by the petitioner on 12/05/2023 that could have been permitted to be rectified instead of rejecting the same. Learned Advocate also submits that the impugned order is based without any evidence and materials on record.

Before proceeding to deal with the issue at the outset it is necessary to peruse the Order dated 31st October 2017 passed in Misc Case 44/2009 by the Learned Additional District Judge 4th Court Alipore South 24 Parganas. Learned Judge by Order dated 31/10/2017 was pleased to direct as follows:

‘the petitioner/trustee, Bratindra Nath Mukherjee is permitted to sell the trust property (as a trustee) and to purchase the trust property as an individual, described in the schedule of the Deed of Trust (Exhibit-1) at a proper price to be determined by the Collector South 24-Parganas at Alipore.

The Petitioner is further directed to administer/distribute the sale proceeds of the trust property among the living beneficiaries in strict compliance of the provision in this regard made in the deed of trust after deduction by him expenses for maintenance and preservation of the trust property till the date of sale.’

Hence the petitioner was under an obligation in terms of the Order of Learned Trial Court to distribute the sale proceeds among living beneficiaries after deducting expenses for maintenance. As the petitioner himself was a beneficiary he was entitled to a proportion of the sale proceeds. The petitioner by application dated 12/05/2023 intimated the Court that there was no living beneficiary and prayed for necessary orders. An affidavit was also filed in Court on 9-3-2023 stating out the facts and circumstances. The application ought to have been considered by the Learned Judge after directing the defect to be cured. Further in the event the application was considered to be defective affidavit dated 09-03-2023 could have been considered and reasoned order could have been passed.

As there was no allegation by any person claiming himself to be beneficiary against the petitioner regarding non-distribution of sale proceeds it was not open for the Court to direct full deposit of sale proceeds.

As in the instant case the Petitioner is also a beneficiary any order for deposit ought to have been made after permitting the petitioner to deduct his share from the proceeds and expenses of sale. Thus the Orders dated 12/5/2023 and 5/07/2023 passed by Learned Trial Court cannot be sustained and the same should be set aside.

The matter should be remitted to Learned Trial Court to re-consider the issue of existence of other beneficiaries and to take a decision in accordance with Law.

Hence this application under Article 227 of the Constitution stands allowed. Order dated 12/05/2023 and 05/07/2023 passed by Learned Additional District Judge 4th Court Alipore in Misc Case No-44 of 2009 are set aside. Petitioner is directed to submit a fresh application before the Learned Trial Court within 4 weeks giving out the necessary particulars about the beneficiaries of Trust property who is living and who are dead and the steps taken out by the petitioner to trace out the beneficiaries who is living. In the event application cannot be submitted within 4 weeks before Trial Court for exceptional reasons necessary order of extension may be obtained from Trial Court. On such application of the petitioners Learned Trial Court shall take a decision in accordance with Law without in any way being influenced by this Order. The petitioner is further directed to withdraw the certificate of Fixed Deposit deposited with the Registrar General High Court Calcutta and deposit the same before Registrar District Court South 24 Parganas or before the Learned Trial Court in box as per the direction which Learned Trial Court may pass. It is hereby made clear that in the event Petitioner fails to submit the application within 4 weeks or within extended time if any and does not deposit the fixed deposit certificate, this Order will stand recalled and the orders passed by Learned Trial Judge will revive, and the Trial Court will proceed in accordance with law.

Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury, J.)