

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Sugato Majumdar

CS/80/1996

IA NO: GA/5/1997(Old No:GA/2506/1997),
GA/7/1999(Old No:GA/2319/1999)

ANINDA SAHA AND ANR.

VS

AMAL SAHA AND ORS

For the Plaintiff	:	Mr. Arik Banerjee, Adv. Mr. Ayan Dutta, Adv. Mr. Rajib Mullick, Adv. Ms. Shreyashi Maity, Adv.
For the Defendant No.1	:	Ms. Sohini Bhattacharya, Adv. Ms. Ruchita Sharma, Adv.
For Defendant nos. 3(a) to 3(f)	:	Mr. Rupak Ghosh, Adv. Mr. Jayanta Sengupta, Adv. Mr. Arnab Dutt, Adv. Ms. Labani Dey, Adv. Mr. K. R. Ahmed, Adv.
Hearing concluded on	:	14/05/2024
Judgment on	:	22/05/2024

Sugato Majumdar, J.:

This is a suit for cancellation of instrument, permanent injunction along with other reliefs.

The plaint case may be summarized as follows:

- a) One Subol Chandra Saha, since deceased, left for heavenly abode on 24/02/1981, leaving behind him his widow Sonamoni Saha, two sons Ashoke Saha and Amal Saha and two grandsons Aninda Saha and Amiyo Gopal Saha, through his elder son Ashoke Saha. Aninda Saha and Amiyo Gopal Saha were original Plaintiff no.1 and 2 respectively. Sonamoni Saha, Amal Saha, Ashoke Saha and one Ashoka Biswas are the original Defendant no.1, 2, 3 and 4 respectively.
- b) Prior to death, the said Subol Chandra Saha executed his last will and testament on 17/12/1980. In terms of the said will, properties were bequeathed and devised in the following manner:
 - i) Premises No.13, Mondal Street, Kolkata (suit premises herein): Life interest was created in favour of Sonamoni Saha, the original Defendant No.1 with right of residence of his elder son Ashoke Saha being the original Defendant No.3 along with his family and two sons who were the original plaintiffs. The original Defendant No.1 Sonamoni Saha was not given any right to sell, encumber or dispose of the said property.

- ii) Premises No.22, Mondal Street, Kolkata was devised and/or bequeathed in favour of Amal Saha, the original Defendant No.2, the younger son of the said testator.
- c) Probate of the aforesaid last will and testament of Subol Chandra Saha, since deceased, was granted by this Court in exercise of testamentary jurisdiction. Amal Saha, the original Defendant No.2 was appointed as Executor.
- d) In the second week of December, 1995, the original Defendant No.2, who, by then had shifted to the premises no,13 Mondal Street, came to the premises no.22 Mondal Street along with some of the common relatives and asserted that the said property namely 13, Mondal Street had been sold by the original Defendant No.1, Sonamoni Saha, and the said persons were entitled to take possession of the premises no.13, Mondal Street.
- e) The original Plaintiffs filed a suit, on advice, in the Court of City Civil at Calcutta but was not proceeded with subsequently. A complaint was also lodged in the local police station and an order under section 144 of the Code of Criminal Procedure was obtained by the original plaintiffs.
- f) Subsequently, the original plaintiffs obtained certified copy of the deed of sale dated 15/12/1995, by and under which the premises no.13 Mondal Street was sold, conveyed and transferred by the

original Defendant No.1 Sonamoni Saha to the original Defendant No.4, Ashoka Biswas.

- g) Relationship between the original Defendant No.2 and the original Plaintiffs on the one hand and the original Defendant No.2 and the others on the other hand, were very strained. The original plaintiffs believed that the deed of sale in respect of the premises no.13, Mondal Street was executed by the original Defendant No.1 under coercion and undue influence of the original Defendant No.2.
- h) The original Defendant No.1 only had life interest in the premises no.13, Mondal Street without any power to sell the same. As such the deed of sale, dated 15/12/1995 is null and void.
- i) The original Defendant No.1,2 and 4 were about to invade the rights of the original plaintiffs in peaceful enjoyment of the property, thereby causing serious injury to them.
- j) On being constrained, in circumstances, the original plaintiffs instituted the suit praying for decree for deliver up and/or cancellation of the deed of sale dated 15/12/1995; decree for permanent injunction restraining the original Defendant No.1,2 and 4 and each of them from dealing with and/or disposing and/or alienating and/or encumbering the property located at 13, Mondal Street, Kolkata along with other prayers.

The original Defendant No.2 filed written statement in the suit. Contentions in the said written statement are that the original Defendant No.1, Sonamoni Saha had right to sell, encumber and dispose of the property located at 13, Mondal Street in terms of the last will and testament of late Subol Chandra Saha. Probate of the said will was granted on 17/12/1980. The original Defendant No.2 was appointed as Executor of the will. The original Defendant No.1 sold the premises no.13, Mondal Street on 15/12/1995. On 16/12/1995, the original Defendant No.2 shifted along with his families to premises no 22, Mondal Street. It is admitted by the original Defendant No.2 that the original Defendant No.1 executed the alleged deed of sale dated 15/12/1995 in favour of the original Defendant No.4. It is emphatically denied that the aforesaid alleged deed of sale was executed by the original Defendant No.1 under any coercion or undue influence of the original Defendant No.2. All other allegations made in the plaint were denied and disputed.

On death of the original Defendant No.1, her name was struck off since the legal heirs were already on record. On death of the other parties, their legal heirs were substituted.

One of the substituted legal heirs of the original Defendant No.4, Debashis Biswas, contested the suit by filing written statement as constituted attorney of the original Defendant No.4. On death of the original Defendant No.4, the said Debasis Biswas was arrayed as one of the defendants. The original written statement was amended and counter-claim was added. Contentions of the said written statement, as amended are as follow:

a) On or about 22/12/1995 the plaintiffs instituted Title Suit No.4116 of 1995 in the Court of City Civil at Calcutta against the original Defendant No.1 herein, Sonamoni Saha, since deceased, and Amal Saha, the original Defendant No. 2 herein, praying for declaration that the said Sonamoni Saha had no right to dispose of the properties by way of sale, transfer, gift or otherwise, being premises no.13, Mondal Street and premises no.22, Mondal Street; decree for permanent injunction restraining such sale, transfer along with other reliefs. In January, 1996, the plaintiffs filed application praying for dismissal of the suit with liberty to file the same afresh in respect of the property located at 13, Mondal Street, Kolkata. The suit was dismissed on 04/01/1996 for non-prosecution. No leave was granted by the court to the plaintiffs therein, to file a fresh suit challenging or disputing the right of the said Sonamoni Saha, since deceased. It is contended that the original plaintiffs, thereby, abandoned their claim or alleged cause of action against the said Sonamoni Saha, since deceased and are precluded from instituting a fresh suit, as the present one. According to the answering defendant, on this score only, the suit should be dismissed.

b) The said Sonamoni Saha, since deceased, left for heavenly abode on 04/12/1996 leaving behind her two sons, being the original Defendant No.2 & 3 and four daughters as legal heirs and successors. The daughters are not made parties herein

representing the estate of the deceased Sonamoni Saha. In the premises, the suit has been abated against the deceased defendant Sonamoni Saha.

- c) It is denied by the answering defendant that the said Sonamoni Saha did not derive any right to dispose of the property located at 13, Mondal Street, Kolkata. It is denied that the property located at 13, Mondal Street had been sold by Sonamoni Saha to the original Defendant No.4 wrongfully. It is also denied that undue influence or coercion had been exercised upon Sonamoni Saha, since deceased, prior to execution of the deed of sale dated 15/12/1995 transferring the suit property to the original Defendant No.4, thereby. The answering defendants are entitled to possession of the suit premises namely, 13 Mondal Street, Kolkata.
- d) By virtue of the deed of conveyance dated 15/12/1995, the original Defendant No.4 became the absolute owner of the premises no.13, Mondal Street, Kolkata – 700006. The original plaintiffs had no right, title or interest in the said premises and are in illegal and wrongful occupation of the said premises. The original plaintiffs are denying or interested to deny the right title and interest of the answering defendant. Since the answering defendant has right, title and interest in the suit premises and are entitled to possession thereof, occupation of the plaintiffs of the suit premises is wrongful. In spite of repeated demands, possession is not handed over. Therefore, the answering defendant made counterclaim for

declaration that the original Defendant No.3 is the sole and absolute owner of the suit premises; decree for vacant possession, mesne profit at a rate of Rs.100/- per diem or such other rate as may deem fit and proper, from 01/01/1996 till delivery of vacant possession as well as costs.

- e) All other allegations made in the plaint was denied by the answering defendant.

The original plaintiffs filed additional written statement against the counterclaim. Contentions of the original plaintiffs are:

- a) The original plaintiffs stated in the instant plaint that an earlier suit was filed in the Court of City Civil at Calcutta against four defendants who had been arrayed as defendants herein.
- b) On death of Sonamoni Saha, her name was deleted from the array of the parties in the cause title. Sonamoni Saha, during her life time did not file any written statement.
- c) Counter claim is barred by the law of limitation and or principles analogous thereto.
- d) In terms of the last will and testament of Subol Chandra Saha, since deceased, Sonamoni Saha, the original Defendant No.1 was given only life interest. Therefore, no legal deed of conveyance dated 15/12/1995 came into being. As such, the original Defendant No.4 did not acquire any absolute right, title and interest in the

suit premises. The said deed of conveyance was a manufactured document. The original plaintiffs are lawful owners and occupiers of the suit premises.

- e) Counter claim cannot be used to perpetuate wrong committed. In other words, the answering plaintiffs denied the claims raised through counter claim, which, according to them, is liable to be dismissed.

On the basis of rival pleadings, the following issues were recast:

1. Whether the suit maintainable in its present form?
2. Whether the suit barred by law?
3. Whether there was abatement of the suit?
4. Whether the instant suit discloses any cause of action?
5. Whether under the last will dated and testament of Subol Chandra Saha dated 17/12/1980, the original Defendant No.1 Sonamoni Saha, since deceased, got only life interest in the suit property or had the right, title or power or authority to transfer the suit property?
6. Whether the original Defendant No.1, Sonamoni Saha, since deceased, had right, title or interest or authority or was otherwise entitled to transfer the suit premises namely 13, Mondal Street, Kolkata – 700006, to the original Defendant No.4, Ashoka Biswas, since deceased?

7. Whether execution of the deed of conveyance dated 15/12/1995 in respect of 13, Mondal Street, Kolkata – 700006 was tainted with coercion or undue influence?
8. Whether the deed of conveyance dated 15/12/1995 in respect of 13, Mondal Street, Kolkata – 700006 is liable to be cancelled?
9. Whether the plaintiffs are entitled to the decree prayed for?
10. Whether the defendants are entitled to the decree prayed for in the counter claim? If so, whether the defendants are entitled to any mesne-profits? If the answer is positive, then at what rate?

Both the parties adduced oral as well as documentary evidences.

ISSUE NO.1, 2, 3 & 4:

All these issues are taken up together for the sake of convenience.

Mr. Ghosh, the Learned Counsel appearing for the defendants argued that prior to institution of the instant suit, the plaintiffs ventured to file another suit in the Court of City Civil at Calcutta in respect of the same cause of action and the same subject matter against the same parties. The said prior suit was numbered as Title Suit No.4116 of 1995. The said suit was withdrawn by the plaintiffs. While allowing withdrawal of the suit in terms of the order dated 04/01/1996, the concerned court did not grant leave to the plaintiffs to file it afresh. Referring to the provisions of Order XXIII Rule 1 of the Code of Civil Procedure, 1908 it is submitted that since liberty, as contemplated in Rule 1 of the Code is not granted, the instant suit stands barred under law.

Per contra Mr. Banerjee, appearing for the plaintiffs argued that the previous suit was instituted in different factual scenario and on different cause of action, not akin to the instant suit. The earlier suit was instituted on apprehension that the suit property might have been transferred by the original Defendant No.1. With this apprehension in order to resist the apprehended transfer, the earlier suit being Title Suit No.4116 of 1995 was filed in the City Civil Court at Calcutta. But subsequently, the plaintiffs came to learn that the apprehended transfer had already taken place. Hence the instant suit was filed for cancellation of instrument, namely the deed of transfer dated 15/12/1995. Cause of actions of both the suits are different altogether, according to the Learned Counsel for the plaintiffs. According to him, in the factual array of the instant suit, bar or rigors created by Order XXIII Rule 1 of The Code is not applicable. As such the instant suit is not barred by law, according to the Learned Counsel.

Certified copies of the order sheets as well as the certified copies of the plaint of Title Suit No. 4116 of 1995 are adduced in evidence on behalf of the defendants and are marked collectively as Ext.1. Certified copy of the Order No.4 dated 04/01/1996 shows that the Learned Judge considered the prayer of the plaintiffs for liberty to file a fresh suit. The Court allowed the prayer. But ordering portion does not reflect that liberty was granted to file a fresh suit. Be that as it may. Perusal of the plaint of Title Suit No.4116 of 1995 shows that the suit was filed on apprehension of sale of the premises no.13 Mondal Street, Kolkata – 700006 by Sonamoni Saha, since deceased. Disturbance of peaceful enjoyment of the property was also alleged. Cause of action of the suit arose on 13/12/1995 when the Defendant No.2 therein Amal Saha took away his mother Sonamoni Saha,

since deceased, the Defendant No.1 therein. From averment of the plaint, it appears that a threat of transfer was looming large at that material point of time. The instant suit was filed on 28/03/1996 alleging transfer of the suit property by the original Defendant No.1, Sonamoni Saha, since deceased. The instant suit is for cancellation of instrument, namely the deed of transfer dated 15/12/1995. By that time the original plaintiffs got the knowledge of the sale and transfer apprehended earlier. Therefore, the instant suit is instituted for setting aside/cancellation of the deed of sale. Clearly, cause of action of the instant suit is different. It makes no difference that at the time of institution of Title Suit No.4116 of 1995 on 22/12/1995, the apprehended transfer had already taken place. The plaintiffs were not aware of the actual transfer although apprehended the same. Therefore, clearly, cause of action of the two suits are different. Absence of grant of liberty in so many words, under no circumstance, is bar to filling or institution of the instant suit since cause of actions are different. I agree with the contention of the Learned Counsel for the plaintiffs, in this regard.

As such the suit is maintainable and not barred by law.

The next point argued by Mr. Ghosh, the Learned Counsel for the Defendant, is that on death of Sonamoni Saha, her daughters are not arrayed as substituted defendants. As such the suit is abated. It is further submitted that the daughters of Sonamoni Saha are necessary parties. In their absence the suit cannot be decided properly. Therefore, the suit is also bad for non-joinder of necessary party.

Per contra, Mr. Banerjee, the Learned Counsel for the Plaintiffs argued that the suit was filed against Sonamoni Saha and others. Sonmoni Saha, who is a necessary party was arrayed as the original Defendant No.1. Sonamoni Saha, since deceased, did not appear to contest the suit by filling written statement. Referring to Order XXII Rule 4(4) of the Code of Civil Procedure, 1908, it is submitted that since the original Defendant No.1, Sonamoni Saha did not contest the suit by filling written statement, it is not necessary to substitute the daughters of the deceased Sonamoni Saha. The suit is not affected as such and does not stand abated.

I have heard rival submissions.

Order XXII Rule 4 of the Code of Civil Procedure, 1908 states as follow:

“4. Procedure in case of death of one of several defendants or of sole defendant.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.”

Bare perusal of Order XXII Rule 4(3) of the Code shows that a suit will abate against a deceased defendant in case the legal heirs are not brought in record. But this is subject to exception provided in Rule 4(4) of the Code. In **Zahirul Islam Vs. Mohd. Usman, (2003) 1 SCC 476**, Three Judges’ Bench of the Supreme Court of India considered the scope of Order XXII Rule 4(4) of the Code. It was observed:

“6. A perusal of sub-rule (4), extracted above, shows that a plaintiff may be exempted from the necessity of substituting the legal representatives of a defendant who has failed to file a written statement or who, having filed it, failed to appear and contest the suit at the hearing and that, in such a case, the judgment may be pronounced against the said defendant notwithstanding the death of such defendant and it shall have the same force and effect as if the judgment has been pronounced before the death took place.”

Ratio of this case was subsequently relied upon by the Supreme Court of India in **T. Gnanavel v. T.S. Kanagaraj, [(2009) 14 SCC 294]** referred to by Mr. Banerjee, the Learned Counsel for the Plaintiffs. It was laid down:

“23. As noted herein earlier, a plain reading of Order 22 Rule 4(4) CPC would clearly show that the court is empowered to exempt a plaintiff from the necessity of substituting the heirs and legal representatives of any such defendant who has failed to file a written statement or who, having filed it, had failed to appear and contest the suit at the time of hearing of the same, but such an exemption can only be granted before the judgment is pronounced and in that case only, it can be taken against the said defendant notwithstanding the death of such defendant and such a decree shall have the same force and effect as if it was pronounced before the death had taken place.”

Words “whenever it thinks fit” appearing in Rule 4(4) are wide enough to give a court power to allow exemption, contemplated in the Rule, as aforesaid. Nothing in the record shows that any abatement of the suit was recorded earlier, on death of Sonamoni Saha. As observed by the Supreme Court of India in the abovementioned cases, exemption can be given before a judgment is pronounced. Considering long pendency of the suit, exemption, contemplated in Order XXII Rule 4(4) of the Code is hereby granted. The suit does not abate, accordingly.

The next issue is whether the suit discloses any cause of action. This point is not much debated. Bare perusal of the plaint shows that the suit has been instituted to cancel the instrument executed by Sonamoni Saha, since deceased, on allegation that she had no power to convey any title of the suit property since she had only life estate under the will of Subol Chandra Saha, since deceased. Therefore, the suit discloses cause of action.

Issue No.1, 2, 3 and 4 are decided in favour of the Plaintiffs.

Issue No. 5, 6, 7, 8 & 9:

Since all these Issues are co-related, they are taken up together.

The Learned Counsel for the Plaintiff, while arguing on the Issue No.5 and 6, referred to two Clauses of the will of late Subol Chandra Saha. Translated copy of the Bengali will is adduced in evidence. The first Clause in the will is:

“After my death, my wife Sonamoni Saha shall get all my movable and immovable properties during her life time. She shall have power to effect sale, gift and transfer.”

The second Clause is:

“ I direct that after my house at premises No.22, Mondal Street is renovated, the same after the death of my wife shall be received by my youngest son Amal Saha in absolute rights and that the residential house at premises No.13, Mondal Street shall be received by the sons of my eldest son, that is my grandsons in absolute rights after my wife’s death subject to the right of maintenance and residence of my eldest son as stated hereafter my daughter shall be competent to stay if necessary for some time (temporary) at any of my two houses in future, but they won’t have any right.”

Contention of the Learned Counsel for the Plaintiff is that Sonamoni Saha, since deceased, was given only life interest in respect of the suit premises and also in respect of the premises no.22, Mondal Street, Kolkata – 700006. The Plaintiffs

being the grandsons of the testator was given absolute right in respect of the suit premises as is evident from the Clauses of the will, abovementioned. Words “absolute right” after Sonamoni Saha’s death in favour of the grandsons implies that Sonamoni Saha, since deceased had only life interest in the suit premises. A general statement was used to express that Sonamoni Saha will get all the properties during her life time. No words like “absolute right” or absolute bequeath” was employed by the testator. Thus, it is evident, according to the Learned Counsel for the Plaintiff, that clear and unambiguous language of the will indicates that the testator only bestowed life interest to his wife Sonamoni Saha. This being so, having only life interest, Sonamoni Saha, since deceased, had no authority to sell the suit property. The sale deed in question is void ab initio, according to the Learned Counsel.

Referring to section 82 of the Indian Succession Act, 1925 it is submitted that meaning of any clause of a will is to be collected from the entire instrument and all its parts are to be read with reference to each other. Right to sell of the suit property by Sonamoni Saha cannot be read in isolation to justify her absolute right over the suit premises. The Learned Counsel also referred to section 88 of the Indian Succession Act, 1925 to argue that where there are two clauses in a will are irreconcilable and contradictory, the later clause shall prevail. In view of section 88 of the Act, the previous clause cannot be taken into consideration at all when two subsequent clauses are contradictory. In view of this the second clause giving absolute right to the grandsons of the testator shall prevail, according to him. The Learned Counsel referred to the following decisions:

Balwant Kaur & Anr. Vs. Chanan Singh & Ors. [(2000) 6 SCC 310];

Madhuri Ghosh & Anr. Vs. Debobroto Ghosh & Anr. [(2016) 10 SCC 805];

Baidyanath Dutta & Ors Vs. Radheshyam Dutta & Ors. (AIR 1979 Cal 97);

Kailvelikkal Ambuni & Ors Vs. H. Ganesh Bhandary [(1995) 5 SCC 444];

Ranvir Dewan Vs Rashmi Khanna & Anr. [(2018) 12 SCC 1].

Mr. Ghosh, the Learned Counsel appearing for the Defendant No.3(a) to 3(f), the legal heirs of the purchaser, the original Defendant No.4, submitted that the testator at his wisdom had bequeathed the absolute right, title and interest of all movable and immovable properties in favour of his wife Sonamoni Saha, since deceased, in terms of the will. Rights bequeathed to Sonamoni Saha included right to effect sale, gift or transfer of movable as well as the immovable properties. On probate being granted, Sonamoni Saha, since deceased, transferred by way of sale, the suit property, in favour of the original Defendant No.4. It is in evidence that Sonamoni Saha, since deceased, obtained legal opinion prior to such sale of the premises no.13, Mondal Street. Mr. Ghosh further stated that it is wrong to infer that only life interest was given to Sonamoni Saha by the testator. According to Mr. Ghosh, the will does not reveal any ambiguity or incongruity which invites application of section 88 of the Indian Succession Act, 1925. According to him doctrine of acceleration squarely applies in this case by operation of section 130 of the Indian Succession Act, 1925 which contemplates scenario that the second bequest shall take effect in case of failure of the first one. In the present case, as

submitted, the bequest in favour of the Plaintiffs would take effect only in the event Sonamoni Saha, since deceased, failed to exercise any right of sale, gift or transfer. According to Mr. Ghosh, neither is there any inconsistency nor is there any irreconcilability in the will inviting interpretation with aid of section 88 of the Indian Succession Act, 1925.

Before advertng to rival contentions, it is apt to look into section 88 of the Indian Succession Act, 1925:

88. The last of two inconsistent clauses prevails.—Where two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Principle of law enunciated in section 88 of the Act is based on the *maxim* “*cum du inter se pugnancia reperiuntur in testament ultimum ratum est*” which means that if in a will there are two inconsistent provisions, the later shall prevail over the former. This is possibly because the later clause is the last passing thought of the testator. This section applies when two clauses of a will is irreconcilable. In this context, certain other provisions should be looked into governing interpretation of will. Section 82 of the Indian Succession Act states:

82. Meaning or clause to be collected from entire Will. — The meaning of any clause in a Will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Then section 85 of the Act states:

85. No part rejected, if it can be reasonably construed.— No part of a Will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

Section 87 of the Act is also relevant for present consideration:

87. Testator's intention to be effectuated as far as possible.—

The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

While interpreting or construing a will all these provisions should be considered together. Application of section 88 of the Indian Succession Act, 1925 should not be followed in isolation oblivious of the settled rules on interpretation of a will. In **Rameshwar Bakhsh Singh, Kunwar Vs. Balraj Kuar, Thakurain (AIR 1935 PC 187)**, question came up before the Privy Council as to whether the testator devised life estate to his senior widow or absolute estate and whether the senior widow was competent to make testamentary disposition. Observation of Privy Council was:

“These two documents constitute the testamentary instrument, and in interpreting them it is the duty of the Court to find out the intention of the testator. It is clear that that intention is to be gathered from the language used by the testator, because it is the words used in the instrument, by which he has conveyed the expression of his wishes. The meaning to be attached to the words may, however, be affected by surrounding circumstances; and, when this is the case, those circumstances should be taken into consideration. As laid down by S. 82 of the Indian Succession Act, the meaning of any clause in a will is to be collected from the entire

instrument; and all the parts of a will are to be construed with reference to each other and so as, if possible, to form one consistent whole. Where it is not possible to reconcile all the parts, the latter must prevail.”

In this context observation of Supreme Court of India in **Pearey Lal v. Rameshwar Das (AIR 1963 SC 1703)** is relevant. In this case the question before the Supreme Court of India was whether the testator by his will bequeath life interest or absolute interest in favour of his wife. Language used by the testator was that:

“I shall remain *malik* of entire movable and immovable property and am entitled to do whatever I wish to do. When I die then Mst Kishen Dei, my wife and after the death of the said Mussammat, my adopted son Nathi Mal, will become *malik* of all my movable and immovable property without partnership with anybody.”

It was decided:

“These two bequests prima facie appear to be inconsistent with each other, for there are two absolute bequests of the same property in favour of his wife and, after her death, in favour of his son. Two constructions are possible: one is to accept the first and negative the second on the ground that it is repugnant to the first; the other is to make an attempt to reconcile both in a way legally permissible. Both can be reconciled and full meaning given to all the words used by the testator, if it be held that there was an absolute bequest in favour of the wife with a gift over to operate by way of defeasance, that is to say, if the son survived the wife, the absolute interest of the wife would be cut down and the son would take an absolute interest in the same. If that

was the construction, the statement in the will relied upon by learned counsel for the appellant could also be reconciled with such a bequest. That statement recorded a wish on the part of the testator that his wife should reside in the house, for he wanted his minor son and wife to continue to live in his house. The second part of the statement also recorded a wish on his part that his wife should keep the property intact and hand over the same to his son, who would also be a full owner like himself. Be it as it may, the said statement could not detract from the clear words used earlier. If the argument of learned counsel for the appellant be accepted, this Court would be rewriting the will for the testator and introducing words which were not there; it would be cutting down the meaning of the words which the testator designedly used to convey a larger interest to his wife. Where apparently conflicting disposition can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator.”

Principle governing interpretation of will was considered in details by Three Judges’ Bench of the Supreme Court of India in **Navneet Lal v. Gokul, [(1976) 1 SCC 630]** with reference to previous authorities. It was laid down:

“8. From the earlier decisions of this Court the following principles, inter alia, are well established:

“(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only

for the purpose of finding out the intended meaning of the words which have actually been employed. (*Ram Gopal v. Nand Lal* [1950 SCC 702 : AIR 1951 SC 139 : (1950) SCR 766, 772])

(2) In construing the language of the will the court is entitled to put itself into the testator's armchair (*Venkata Narasimha v. Parthasarathy* [41 IA 51, 72 : 21 IC 339 : 15 Bom LR 1010]) and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense... But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. (*Venkata Narasimha case* and *Gnanambal Ammal v. T. Raju Ayyar* [1950 SCC 978 : AIR 1951 SC 103 : (1950) SCR 949, 955])

(3) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. (*Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer* [AIR 1953 SC 7 : (1953) SCR 232, 240])

(4) The court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently

conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. (*Pearey Lal v. Rameshwar Das* [AIR 1963 SC 1703 : 1963 Supp (2) SCR 834, 839, 842])

(5) It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. (*Ramachandra Shenoy v. Hilda Brite Mrs* [AIR 1964 SC 1323 : (1964) 2 SCR 722, 735]).”

In **Sadaram Suryanarayana v. Kalla Surya Kantham, [(2010) 13 SCC 147]**, the Supreme Court of India examined the provisions of sections 82, 85, 86,87 and 88 of the Indian Succession Act, 1925 for interpretation of a will. Referring to the aforesaid provisions and previous authorities, it was observed:

“22. It is evident from a careful reading of the provisions referred to above that while interpreting a will, the courts would as far as possible place an interpretation that would avoid any part of a testament

becoming redundant. So also the courts will interpret a will to give effect to the intention of the testator as far as the same is possible. Having said so, we must hasten to add that the decisions rendered by the courts touching upon interpretation of the wills are seldom helpful except to the extent the same recognise or lay down a proposition of law of general application. That is so because each document has to be interpreted in the peculiar circumstances in which the same has been executed and keeping in view the language employed by the testator. That indeed is the requirement of Section 82 of the Succession Act also inasmuch as it provides that meaning of any clause in a will must be collected from the entire instrument and all parts shall be construed with reference to each other.”

In this case, the Supreme Court of India referred to and relied upon a decision of the Constitutional Bench in **Ramkishorelal v. Kamal Narayan (AIR 1963 SC 890)**. In that case the Constitutional Bench was concerned with a situation where a conflict arises between what is said in one part of the testament vis-à-vis what is stated in another part of the same document especially when in the earlier part the bequest is absolute but the latter part of the document gives a contrary direction about the very same property. The Constitution Bench held that in the event of such a conflict the absolute title conferred upon the legatee by the earlier clauses appearing in the will cannot be diluted or taken away and shall prevail over the directions contained in the latter part of the disposition. In **Madhuri Ghosh v. Debobroto Dutta [(2016) 10 SCC 805]** relied upon by the Learned Counsel for the Plaintiff, principle of law laid down in **Ramkishorelal’s case** (supra) was

considered. Relying upon the principles of law, enunciated therein, it was observed:

“11. From the decisions referred to above, the legal principle that emerges, inter alia, are:

(1) where under a will, a testator has bequeathed his absolute interest in the property in favour of his wife, any subsequent bequest which is repugnant to the first bequeath would be invalid; and

(2) where a testator has given a restricted or limited right in his property to his widow, it is open to the testator to bequeath the property after the death of his wife in the same will.”

In **Kalivelikkal Amunhi (Dead) by L.Rs & Ors. Vs. H. Ganesh Bhandary [(1995) 5 SCC 444]** while considering application of section 88 of the Indian Succession Act, 1925, the Supreme Court of India did not discarded the principles of law discussed above. Rather the case was decided on premises that there existed incongruity in different clauses of the will.

Principles of law as well as the relevant provisions of the Indian Succession Act, 1925 makes it amply clear that a will must be read as a whole to give a harmonious meaning and interpretation. No word should be spared to decipher the intention of the testator. If there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. In case conflicting parts can be reconciled, the same should be done and the will shall be interpreted accordingly.

When conflicting parts cannot be reconciled and contradictions are inevitable, the maxim "*cum du inter se pugnancia reperiuntur in testament ultimum ratum est*" enshrined in section 88 of the Act shall be resorted to.

Coming to the case in hand, the testator in terms of an earlier clause bequeathed all his movable and immovable properties to her wife Sonamoni Saha, since deceased. Translation of this Clause is quoted above. It is also mentioned that "*She shall have power to effect sale gift and transfer*". The second Clause, as quoted above states that the property located at premises no.13 Mondal Street should be received by the sons of eldest sons, that is the grandsons in absolute right after death of the wife of the testator, the wife being Sonamoni Saha. If it is understood that the first Clause confers only life estate to Sonamoni Saha, since deceased then the power conferred to sale gift or transfer would be redundant. Such a reading would exclude effectiveness of the sentence "*She shall have power to effect sale gift and transfer*". The Clause cannot be given a go by. In very clear terms the testator bestowed on his wife power to sale, gift and transfer. When the testator employed these words in a sentence, he must have intended to employ the words meaningfully with specific intention. In this context a later clause of the will may be looked into. In terms of that clause the testator bequeathed all his movable and immovable properties save and except which had been stated in the will would devolve upon his wife, Sonamoni Saha, since deceased, in absolute right. There is no mention that Sonamoni Saha should have power or authority to dispose of those properties by sale, gift or transfer. In that context specific word employed in the earlier clause empowering Sonamoni Saha, since deceased, to affect sale, gift or transfer becomes significant. It can be presumed easily that the testator intended

that Sonamoni Saha should have power and authority to sale, gift or transfer. It is not mere life estate devoid of power to transfer. This power or authority cannot be curtailed for any such exercise would be tantamount to rewriting the will or changing the intention of the testator. The second Clause mentioned above may be harmonised if it is read to mean that in case the wife of the testator did not affect any sale, gift or transfer during her life time, then the property or properties should devolve in the manner set out in the will. This will solve the apparent contradiction or ambiguity, as allegedly exist in the will. Principles laid down in **Ramkishorelal's** case, (supra), **Sadaram Suryanarayana's** case (supra) and **Madhuri Ghosh's** case (supra), as mentioned above, should be kept in mind. Construing this interpretation validates authority of Sonamoni Saha, since deceased to sale, gift or transfer the suit property. Inevitable conclusion of discussions, made above, is that Sonamoni Saha, since deceased did not have life estate but she had absolute estate with right to sale. The impugned deed of sale, challenged herein, was therefore, validly executed by Sonamoni Saha, since deceased in favour of the original Defendant No.4, Ashoka Biswas, since deceased.

It is alleged in the plaint that execution of the deed in question was tainted with undue influence and coercion. Averment made in the plaint is that the original Defendant No.2 had exercised undue influence and coercion upon her and persuaded the original Defendant No.1 to put signature upon the deed of sale. No particulars of undue influence and coercion are furnished in the plaint. P.W.1 stated in evidence that in the first week of December 1995, his uncle possibly took her away to the premises no.22, Mondal Street. In the third week of December, 1995, the original Defendant No.4 came to his residence and asked to vacate the

said house. In evidence, P.W.1 stated that the deed is forged which is not in the plaint. In evidence it is stated that signatures of Sonamoni Saha were not genuine. This proposition is beyond the scope of plaint. Evidence of fact not averred in the plaint cannot be considered. That apart, there is no evidence that the signatures of Sonamoni Saha was forged except statements. There is no evidence, far short of proof, on alleged coercion and undue influence. Therefore, plea of undue influence and coercion fails. It is not proved that the deed of sale, subject matter of the present suit, was tainted with undue influence or coercion.

In nutshell, it is concluded that the deed of sale executed by the original Defendant No.1, Sonamoni Saha, since deceased, in favour of the original Defendant No.4, Ashoka Biswas, since deceased, stands as a valid one and is not liable to be cancelled.

These Issues are decided against the Plaintiff; as such the plaint case fails and the Plaintiff is not entitled to relief claimed for.

Issue No.10:

It is concluded in the foregoing paragraphs that the sale deed in question is valid. Consequential inference is that the original Defendant No.4 became absolute owner of the suit premises namely 13, Mondal Street. All the legal incidents of ownership including possessory rights behoved on her. Occupation of the Plaintiffs are, therefore, unauthorised and the legal heirs of the original Defendant No.4, substituted herein, are entitled to possession of the premises no.13, Mondal Street, Kolkata – 700006. They are also entitled to mesne profit from 01/01/1996.

This issue is decided in favour of the Defendant No. 3(a) to 3(f).

In nutshell, the plaint case fails and stands dismissed. Counterclaims of the Defendant No.3(a) to 3(f) are allowed.

It is ordered that the original Defendant No.4, Ashoka Biswas, since deceased, was the absolute owner of the premises no.13, Mondal Street, Kolkata – 700006. The Plaintiffs shall hand over possession of the premises no.13, Mondal Street, Kolkata – 700006 within 60 (sixty) days from drawing up preliminary decree in case of failure of which the Defendant No.3(a) to 3(f) shall be entitled to put the decree in execution. Till then there shall be no execution proceeding.

The Defendant No.3(a) to 3(f) shall also be entitled to mesne profit from 01/01/1996.

Fix 25th June, 2024 for enquiry into mesne profit.

Preliminary decree be drawn up accordingly.

(Sugato Majumdar, J.)