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## **Dalim Kumar Sain and Others Vs Sm. Nandarani Dassi and Another**

**A.F.O.D. No. 221 of 1972 (Suit No. 863 of 1959)**

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**Court:** Calcutta High Court

**Date of Decision:** Dec. 8, 1982

**Acts Referred:**

Trusts Act, 1882 – Section 5, 6

**Citation:** AIR 1983 Cal 196

**Hon'ble Judges:** S.C. Ghose, C.J; R.N. Pyne, J

**Bench:** Division Bench

**Advocate:** M.M. Sen, R.L. Sinha, for the Appellant;

**Final Decision:** Dismissed

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### **Judgement**

S.C. Ghose, C.J.

This appeal is directed against a judgment and decree dated Aug. 20, 1969 passed by Bijayesb Mukherjee, J. The suit

was filed on July 3, 1959 by three sons and daughters of Motilal Sain who died on Nov. 4, 1955 for a declaration that the deed of mortgage dated

Nov. 29, 1946 for Rs. 25,000/- and the deed of further charge dated Jan. 19, 1949 for Rs. 5,000/- executed by the defendants Sm. Nandarani

Dassi in favour of India Provident Company Limited are void. The defendant No. 2 is the statutory successor of the mortgagee company. The

plaintiff prayed for two ancillary reliefs -- first the aforesaid two deeds be cancelled and delivered up and second the L. I. C. be restrained by an

injunction from enforcing the said two instruments of mortgages and further charge. The facts leading to the institution of the suit may be set out

hereunder:

January 20, 1932, Madhoo Soodan Sain created a trust on that date in respect of his undivided 4/21st share in 116, Cotton Street, Calcutta for

the benefits of Motilal Nandarani, sons and daughters as also grand-sons and grand-daughters of Motilal and Nandarani, and himself too. On June

15, 1936 the settlor executed a deed of rectification ""purporting to remove the limitation and restriction put upon the power of the trustee to sell

and mortgage the trust property irrespective of, purposes mentioned in the deed of settlement subject of course to the consent, sanction and

approval of the settlor and his son Motilal Sain"". On Dec. 21, 1939 Motilal Sain retired from trusteeship and appointed his wife Nandarani in his

place as sole trustee. In June, 1944 and thereabout in a partition suit in this Court Suit No. 1152 of 1909 in lieu of undivided 4/21st Share of 116,

Cotton Street, Nandarani was allotted Lot A delineated in the map attached to the Commissioner"s Return 2. On NOV. 29, 1946 Nandarani as

the sole trustee to the estate of Madhoo Soodan Sain with the consent in writing dated May 12, 1946 of her husband Motilal raised a loan of Rs.

25, 000/- on a mortgage of 4/21st share of 116, Cotton Street to India Provident Company Limited. On Tan. 19, 1949 Nandarani raised a further

loan of Rs. 5,000/- from the same company on execution of a deed of further charge. On Jan. 29, 1958 L. I. C. the Statutory Successor-in-

interest of India Provident Company Limited instituted a suit in this Court for enforcement of the said mortgage and further charge. The appellants

in the appeal came to know for the first time about the said deed of mortgage and deed of charge and on July 3, 1959 the present suit was filed by

the appellants for the reliefs mentioned above.

2. Before us Mr. R. L. Sinha for the appellant submitted that the trust is discretionary and the beneficiary has no interest in the trust. Their benefits

in the trust will be available as and when money will be available. Therefore, the finding of the learned trial Judge that the mortgage was created to

pay money under the trust can-not be sustained. Secondly, Mr. Sinha submitted that only settlor said that there was mistake in the deed; was it

enough to rectify the deed? Thirdly Mr. Sinha submitted that even after the rectification the deed of trust did not empower the trustee to mortgage.

3. Mr. M. M. Sen appearing on behalf of the L. I. C. submitted that the rectification was made by the settlor himself only 4 years later. Nothing

happened during the intermediate period. By the rectification the settlor conferred power to sell and mortgage on the trustee:

4. The more important duties cast upon the trustee by the deed of trust was (1) payment of municipal and other tax and outgoings payable for the

time being in regard to trust property, (2) cost of necessary repairs, if any, (3) expenses for the maintenance and residence of the settlor himself as

also for the maintenance and residence in a suitable manner of his son Motilal and his daughter-in-law Nandarani during the natural life of each, (4)

expenses for the maintenance, residence and education of the sons and grand-sons of Motilal until they respectively attain the age of 18 years, (5)

expenses for the maintenance of the daughters and grand-daughters of Motilal until they are respectively married, a sum not exceeding Rs. 3,000/-

being earmarked for the marriage of each of them; (6) expenses for the upkeep of a motor car or of a carriage so long as Motilal is not in a

position by his own earning to meet the same or in case Motilal by his own earning is capable of defraying any portion of such expenses, the

expense by the trustees for payment of the deficit amount, and (7) expenses for the "funeral and Sradh" ceremonies of the settlor at a sum not

exceeding Rs. 1,500/- or of his son Motilal at a sum not exceeding Rs. 1,500/-and his daughter-in-law Nandarani at a sum not exceeding Rs.

500/-. Thus a formidable list of duties was cast upon the trustees by the deed of trust.

5. According to the evidence the trust property yielded an income of Rs. 1,100/-or Rs. 1,200/- per month. Reading the deed of trust and the

duties cast upon the trustees, it appears to us that the settlor's true intention was that the trustee's power to deal with the trust property was to be

free and full and was not to be restricted ""for such purpose"". Thus ""for such purpose"" seems to be a mistake in the deed of trust. The true intention,

it appears to us, of the settlor at the time of the creation of the trust was to leave the power to the trustees to deal with the trust properties in an

unrestricted manner. Thus the contention of Mr. Sinha falls to the ground and we accept the contention of Mr. M. M. Sen. Reference in this

connection may be made to the Halsbury's Laws of England, 3rd Edition, Vol. 38, para 409, at page 839 which lays down that ""Whether by

mistake an instrument creating trust of property does not ex- press the intention of the disposer, it will be cancelled or rectified according as the

true intention of the disposer requires"". .

6. For all that has been stated and for the reasons stated by the learned trial Judge with which we respectfully agree, this appeal has no merit and is

dismissed with costs.

R.N. Pyne, J.

7. I agree.