KULARATNE AND ANOTHER
v.
GUNATILLEKE

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL 63/92.
C.A. NO. 589/82.
D.C. GAMPAHA NO. 21411/L.
AUGUST 20TH, 1993.

Fideicommissum – Last Will – Abolition of Fideicommissa and Entails Act, No. 20 of 1972 – Devolution of title.

One Don Abraham was married to Podinona Hamine but the couple had no children. Don Abraham made a Last Will dated 14.01.64 bequeathing his property to his nephews and nieces. Among the beneficiaries were the two plaintiffs who were the children of a brother. To the two plaintiffs the testator bequeathed the land called Gonnagahalanda in equal shares and the two buildings standing thereon exclusively to the 1st plaintiff. To the 2nd plaintiff the bequest was as follows: the property bequeathed was to vest in the beneficiary "after our deaths" or "after our deaths or after the death of any one of us who survives". It would also appear from the above terms that in the event of Podinona Hamine surviving the testator, the Will gave her an interest in the property. The testator died on 08 May 1965. By her Last Will dated 21.06.65 Podinona devised her estate to Wijepala, the defendant's husband. Podinona died on 23.02.1979. The dispute was whether Don Abraham's Will created a valid fideicommissum, whether the property passed into the absolute ownership of Podinona Hamine on the enactment of the Abolition of Fideicommissa and Entails Act, No. 20 of 1972 and whether if so the property devolved on Wijepala in terms of Podinona Hamine's Last Will and accordingly whether Wijepala's wife the defendant is in lawful possession and finally whether in any event the defendant was entitled to compensation.

Held:

(1) On a reasonable construction, the Will gave only a life interest to the testator's wife and did not give her dominium of the property as the first beneficiary. The Will did not create a fideicommissum.

(2) Accordingly the Last Will of Podinona Hamine did not pass any ownership to Wijepala as the Abolition of Fideicommissa and Entails Act, No. 20 of 1972 did not serve to give her absolute title.

(3) The plaintiff-appellants were entitled to claim the property on the death of Podinona Hamine.

(4) The defendant and her husband had been brought to the premises to attend to the testator during his last illness and been permitted to reside there after his death. Hence defendant is not entitled to compensation.

Cases referred to:

1. *Vansanden v. Mark* 1 NLR 311.
2. *Ibanu Agen v. Abeysekera* 6 NLR 344.
3. *Seneviratne v. Candappapulle* 16 NLR 150.
4. *Hendrick v. Fernando* 9 NLR 77.

APPEAL from judgment of Court of Appeal.

T. B. Dissanayake P.C. with *Bimal Rajapakse* and *T. C. Weerasinghe* for plaintiff-appellants.

P. A. D. Samarasekera P.C. with *Keerthi Sri Gunawardena* for defendant-respondent.

Cur. adv. vult.

September 14, 1993.

KULATUNGA, J.

The question for decision in this appeal is whether the last will of the late Don Abraham created a usufruct or a fideicommissum. It is common ground that if it is the former the plaintiffs are entitled to the land in dispute and to have the defendant ejected therefrom. If it is the latter, the defendant is in lawful occupation of the said land.

Abraham had no children and hence nominated his nephews and nieces to be beneficiaries under his will No. 44621 dated 14.01.64 (P2). The plaintiffs are two such beneficiaries (being the children of his brother Karolis). The testator bequeathed the land called Gonnagahalanda to them in equal shares and two buildings standing thereon exclusively to the 1st plaintiff. The bequest in favour of the 2nd plaintiff is in the following terms:

"ඉහත කී අප දෙදෙනාගේ ඇවෑමෙන්
(The reference being to the testator and his wife Podinona Hamine) එකී . . . දොන් සිරිසේනට අයිතිව මනාපයක් කර ගත හැකි ලෙසට ද"

In respect of the 1st plaintiff it states;
"ඉහත කී අප දෙදෙනාගේ නොහොත් අප දෙදෙනාගෙන් වැඩි ජීවත් වන තැනැත්තාගේ හෝ තැනැත්තියගේ ඇවැමෙන් එකී . . . චිත්සන්ට් විජයරත්න කුලරත්නට අයිතිව මනාපයක් කර ගත හැකි ලෙසට ද . . . මෙයින් නියම කර තබමි."

According to the English version of the co operative words of the will, the testator bequeathed the property to "vest" in the beneficiary "after our deaths" or "after our deaths or after the death of any one of us who survives". It would also appear from the above terms that in the event of Podinona Hamine surviving the testator, the will gave her an interest in the property.

On behalf of the plaintiffs it was contended that Podinona Hamine had only a life interest in the property. The defendant's case is that under the will Podinona Hamine was the fiduciary owner of the property subject to a fideicommissum in favour of the plaintiffs; that the testator died on 08.05.65. Thereafter, by her last will No. 176 dated 21.05.65 (V3) Podinona Hamine devised her estate to Wijepala, the defendant's husband; that in terms of the provisions of the Abolition of Fideicommissa and Entails Act. No. 20 of 1972, Podinona Hamine became the absolute owner of the property with the result that her will became effective; that upon her demise on 23.02.79, the said property devolved on Wijepala; and that the defendant is in lawful occupation thereof as the wife of Wijepala.

The learned District Judge held in favour of the defendant and dismissed the plaintiffs' action. The plaintiffs appealed to the Court of Appeal which dismissed the appeal and affirmed the judgment of the District Court. The plaintiffs now appeal to this Court.

Learned President's Counsel for the plaintiffs-appellants made the following submissions:–

1. In interpreting the will, the only true criterion is the intention of the testator to be gathered from the terms of the will and from the surrounding circumstances. *Vansanden v. Mark* [1] ; *Ibanu Agen v. Abeysekera* [2]; *Seneviratne v. Candappapulle* [3].

2. In terms of Abraham's will, the property was vested in the plaintiffs but the fulfilment of the legacy was postponed until

after the death of Podinona Hamine subject to a usufruct in her favour. Counsel cited *Hendrick v. Fernando* [4] where clause 5 of the joint will of spouses provided:

> "The remaining land of, the Kandy land is to be divided into three portions, and after the respective death of both of us two shares is to go to ..... and 1/6 of the rest of the land to our adopted sons Elias Fernando and Andiris Fernando".

It was held that the intention of the testators was that the legatees should take the property, subject to the usufruct of the surviving testator. In the opinion of the Court, the words of futurity contained in the will were not inserted for the purpose of postponing the vesting, but for merely deferring the fulfilment of the legacy.

> 3. Alternatively, the vesting (in the plaintiffs) was itself postponed until Podinona Hamine's death and dominium in the interval vested in the testator's estate. However, the presumption in favour of immediate vesting in the reversioner after a usufruct is a strong one. Fideicommissa, Prof. T. Nadaraja p. 287. On the question whether the will creates a usufruct or a fideicommissum, Nadaraja (p. 288) expresses the opinion that it is preferable in deciding that question to have regard to the nature of the interest acquired on the testator's death by the first beneficiary rather than the nature of the interest acquired by the person who is to succeed him in the enjoyment of the property.

Counsel drew our attention to the fact that in the absence of children the testator selected his brother's children as beneficiaries under his will and made no devise in favour of his wife; and that in terms of the will the devise is to the plaintiffs. On these facts he submitted that the intention was to devise the property absolutely to the plaintiffs as heirs (and not as fideicommissaries), subject to a life interest in favour of his wife. In any event, the correct inference to be drawn from the absence of a devise in favour of Podinona Hamine is, not that she was given ownership of the property but that pending the vesting of the legacy in the plaintiffs the dominium vested in the testator's estate.

Learned President's Counsel for the defendant-respondent argued that according to the plain meaning of the terms of the will, the vesting of the legacy in favour of the plaintiffs was to take place upon the death of Podinona Hamine and hence, by necessary implication, Podinona Hamine had the ownership during her life time. As such, the will created a fideicommissum and not a usufruct. Counsel submitted that even if there be doubt, this Court should not interfere with the decision of the District Court unless there is an error.

The following facts are relevant to the construction of the will:-

(a) The fact that the testator selected his nephews to bequeath his estate. This, however, was without prejudice to the interests of his wife in the event of her surviving him. He also named one of his nephews who was a beneficiary under the will to be executor.

(b) The fact that the testator refrained from making a devise in favour of his wife.

(c) The use by the testator of language employed in making joint wills of spouses whereby a usufruct is created in favour of the surviving spouse.

In effect, the submission of Counsel for the defendant-respondents is that the will should be construed as though it provided "I bequeath my estate to my wife and upon her death to 'X' and 'Y' ". If the testator intended to give his wife the dominium in the property as the first beneficiary, he might have used more specific language. This he failed to do; and the facts indicate, that he was not interested in nominating fideicommissaries with inchoate rights but heirs to take over his estate except that the fulfilment of the legacy was deferred in order to provide for the needs of his wife during her life time. On this basis, the reasonable construction is that the will gave only a life interest to the testator's wife. In fact, both the defendant-respondent and her son who gave evidence said that Podinona Hamine had a life interest in the property. That evidence by itself is not a criterion for deciding that the will created a usufruct. However, I think that the fact that the parties had so understood it throughout is of some relevance.

For the foregoing reasons, I hold that the last will P2 gave only a life interest to Podinona Hamine and that she was therefore not competent to bequeath the ownership of the property by her last will V3. Consequently, the plaintiffs-appellants were entitled to claim the property upon her death and the defendant-respondent had no right to remain in occupation thereof.

Both the Courts below have assumed that the words of futurity contained in the will were inserted for the purpose of postponing the vesting and thereby failed to consider the will as a whole, in the light of the surrounding circumstances. I therefore, allow the appeal, set aside the judgments of the Court of Appeal and the District Court. I enter judgment for the plaintiffs-appellants as prayed for except that they will not be entitled to damages. In their answer the defendant-respondent claimed compensation for improvements to the property. The defendant-respondent and her husband Wijepala had been brought there to attend to the testator during his last illness. They appear to have been permitted to reside there, after the testator's death. In all the circumstances, the defendant-respondent is not entitled to compensation.

The plaintiffs-appellants will be entitled to the costs of this appeal and the costs in both Courts below. I direct that the writ of ejectment should not issue till 31st March, 1994.

G. P. S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.