KELAART

v.

VAN TWEST

SUPREME COURT
ISMAIL, J., RATWATTE, J., &
VICTOR PERERA, J.,
S. C. 67/80
D. C. MT. LAVINIA 917/L
OCTOBER 27, 1981 AND
NOVEMBER 16 AND 17, 1981

Last Will – Option to purchase – Abolition of Fideicommissa and Entails Act No. 20 of 1972 – Executor – Trustee – S. 58 of the Trust Ordinance.

A Will must be construed as a whole and apparent contradictions must be reconciled if possible. If that cannot be done, then only will a later provision prevail. But the main thing is to get at the intention of the testator from the whole Will and when that is found on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words whether standing first or last.

From clause 8 of the Will it is clear that the testator desired that 'Ralston House' belonging to the estate should be sold by the Executor with consideration for the market value at the time and for the best advantage to the beneficiaries. For this purpose the title to the premises must necessarily vest in the Executor and continue to remain in him till he decides to exercise the powers given to him. Although the testator used the word 'desire' in this clause, in the context it had the clear effect of a peremptory direction rather than a precatory wish.

Clause 8 indicated the testator's dominant intention and by sacrificing the inconsistent words in Clause 9 it is possible to reconcile it with the testator's intention. Clause 9 could be given effect to as ancillary to clause 8. The plaintiff and defendant had elected to take "Ralston House" in terms of Clause 8 and the Executor had executed a deed of conveyance No. 570 of 4.4.39 by which Ralston House was conveyed to the plaintiff and defendant. This deed which the Executor must be regarded as having executed as trustee under s. 58 of the Trust Ordinance, did not specify shares but would vest 2/3 of Ralston House in the plaintiff and 1/3 in the defendant as provided for in cl. 8 and subject to the provisions of cl. 9 whereby the testator had provided that if the defendant died without issue the house would become the absolute property of the plaintiff and her children. In view of this *fideicommissum* the testator had clearly given the plaintiff an option to purchase 1/3 share at any time she was in a position to before the *fideicommissum* became operative and for that event valued the 1/3 at Rs. 10,000/-.

An option to buy is purely a personal right and it places no burden on the land. A breach of such a right could give rise to an action for damages only but the land cannot be pursued in the hands of strangers. But in this case in view of the *fideicommissum* the plaintiff and her children could have followed the property in the hands of a purchaser from the defendant if she died without issue.

The abolition of *Fideicommissa* and Entails Act No. 20 of 1972 came into operation on 12.5.1972. On this date by s. 4 of the Act the defendant became vested with absolute title to 1/3 share of the house and by s. 6 was granted the absolute power to dispose of her 1/3 share. Hence when plaintiff in 1974 tried to seek to enforce the right to buy,

her right had become frustrated by operation of law as by then the defendant's title to 1/3 share ceased to be referable to the title which devolved on her under and by virtue of the Last Will

Cases referred to:

(1) Fan Eyre v. The Public Trustee (1944) 46 NLR 59.
(2) In Re Morkel's Will (1938) T.P.D. 432.
(3) Menda v. Meda & Others (1938) A.D. 259.
(4) Ex Parte Estate Paley 1943 C.P.D. 181.
(5) Sinno Appu v. Dingirihamy (1912) 15 NLR 259.
(6) Appu v. Silva (1922) 24 NLR 428.

APPEAL from judgment of the Court of Appeal.

Eric Amerasinghe, S. A. A. L. with A. Sivagurunathan, Mrs. S. Kalyanasunderam, Hiran Jayawardena, J. P. Almeida and Miss D. Guniyangoda for defendant-appellant.

H. L. de Silva, S. A. A. L. with K. Shanmugalingam for plaintiff-respondent.

Cur. adv. vult.

December 11, 1981

VICTOR PERERA, J.

This is an action filed on the 10th October 1974 by the plaintiff-respondent seeking to enforce a provision in the Last Will of her adoptive father in which she alleges she had been given the option or right to purchase an undivided 1/3 share of the house and property called 'Ralston House' from the defendant-appellant, another adopted daughter of the testator at and for the price of Rs. 10,000/- which according to her the testator had placed as the price to be paid for the said 1/3 share. The defendant-appellant has resisted this claim on several grounds. She has denied that the clause which contains the alleged option does not in law give the plaintiff-respondent such a right. She further pleads that even if such a right did exist by virtue of the provisions of the Abolition of *Fideicommissa* and Entails Act No. 20 of 1972, the plaintiff-respondent had lost the alleged right which was contained in the said Last Will and Testament in view of the drastic change in the character of the interests held by her as at the date of this action.

Admittedly the late Charles Alexander Marshall, a Proctor who had practised at Avissawella, had died on the 21st February 1929 leaving a Last Will No. 367 dated 4th August 1928 which was duly admitted to probate in Testamentary Suit No. 4521/T of the District Court of Colombo. According to the documentary and oral evidence led in the case, the testator left the following immovable properties only:—

(1) lands at Debagama in Kegalla District,
(2) the house and property called 'Ralston House' bearing assessment No. 473/48, later 276, Ridgeway Place, Wellawatte Road, Colombo.

By this Last Will he made a clear and specific device of the lands at Debagama, Kegalle, to his adopted daughter Beatrice, the plaintiff-respondent, and Irene the defendant-appellant in the proportions of 2/3 and 1/3 shares respectively absolutely without any conditions attached. But in regard to the only other immovable property, namely 'Ralston House,' he by clause 8 of the Will desired that it be sold and directed that the proceeds of sale be paid to the plaintiff-respondent and the defendant-appellant in the proportion of 1/3 share each and the remaining 1/3 share was to be applied for the education, maintenance etc. of the children of Beatrice, the plaintiff-respondent. By clause 9 he made further provisions in regard to this same 'Ralston House' apparently inconsistent with the provisions in clause 8. It is significant that the testator dealt with his lands in two different ways.

It is the construction, interpretation and implementation of the two clauses 8 and 9 in the said Will that have given rise to this controversy which appears to have started only after the Abolition of *Fideicommissa* and Entails Act No. 20 of 1972 came into operation. It would appear from the pleadings in the case that the plaintiff-respondent and the defendant-appellant had right up to that time accepted that each was entitled to the premises in the proportion of 2/3 and 1/3 on the basis of a Deed No. 570 dated 4th April 1939 attested by P. D. A. Mack, Notary Public, by which the executor of the Last Will had purported to convey the said premises to them without specifying the shares but making the transfer "subject to the terms and conditions of clauses 8 and 9 of the said Last Will and testament of the late Charles James Alexander."

In paragraph 9 of the plaint filed in this case, the plaintiff-respondent specifically pleaded that she had in terms of clause 9 of the said Last Will No. 367 of 4th August 1928 regularly paid without default Rs. 30/- per month to the defendant-appellant and had paid all taxes and charges. The defendant-appellant in her answer admitted the said averments. There has thus been an acquiescence of the title created by the execution of Deed No. 570 in 1939.

In regard to the construction of clause 8, the Senior Attorneys-at-Law for the defendant-appellant and the plaintiff-respondent, at

the argument before us agreed that taken by itself clause 8 was a clear, complete and specific legacy of the proceeds of the sale with an unambiguous direction in regard to the appropriation of the proceeds of sale. In fact, Senior Attorney-at-law for the plaintiff-respondent agreed that if the executor had carried out the direction in clause 8 by the sale of the premises to a third party there would have been no room for the controversy whether the property vested in the adopted daughters of the testator and the necessity to examine the provisions in clause 9 would not have arisen.

Our Courts have in a series of judgments consistently laid down the principles to be followed in construing Wills. It would be sufficient to refer only to the case of *Fan Eyre v. The Public Trustee* (46 NLR 59)[1] in which de Kretser, J. stated as follows at page 61:—

> "The Will must be construed *as a whole and apparent contradictions must be reconciled, if possible.* If that cannot be done, then only will a later provision prevail. But the main thing is to get at the intention of the testator from the whole Will. If authority be needed for this well-known proposition, I would refer to Burrows on Interpretation of Documents, p. 71. Beale's Cardinal Rules of Legal Interpretation, p. 607, gives many interesting dicta, e.g. "the paramount rule is that before all things we must *look for the intention of the testator as we find it expressed and clearly implied* in the general terms of the Will; and when we have found that on evidence satisfactory in kind and degree, to *that we must sacrifice the inconsistent clause or words* whether standing first or last."

This is precisely what I propose to do to reconcile if possible the apparent contradiction avoiding getting enmeshed in the plethora of various decisions of other Courts enumerated in great detail by the Court of Appeal.

Senior Attorney-at-law for the defendant-appellant contended that the dominant intention of the testator in regard to 'Ralston House' was contained in clause 8 and that clause 9 should be read as ancillary to clause 8 sacrificing the inconsistent words or phrases. Senior Attorney-at-law for the plaintiff-respondent, however, contended that clause 9 evinced the dominant intention of the testator even though he frankly conceded, there was no clear expressed disposition of the said premises to either of the adopted children. Nevertheless, he agreed that for the purpose of clause 8 the premises would vest in the Executor to enable him to carry out the directions of the testator. If that be so at the date of

the death of the testator, the property could not possibly have vested simultaneously in both the Executor as well as in the adopted daughters.

The provisions in regard to 'Ralston House' contained in the Last Will and Testament read as follows:—

> *"Clause 8.* I also desire that my home known as 'Ralston House' bearing assessment No. 473/48 and now 276 Ridgeway Place, Wellawatte Road, Colombo, *be sold having consideration to the market value at the time and to the best advantage* and the proceeds thereof be allotted as follows: One third (1/3) share to Beatrice Emaline Murray Marshall nee Van Twest, One Third (1/3) share to Irene Patricia Marshall nee Kelaart and the remaining 1/3 share for the education and maintenance etc. of my adopted daughter Beatrice Evelene Marshall nee Van Twest."
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> *Clause 9.* My daughter Beatrice Emaline Murray Marshall nee Van Twest shall have the right to occupy the house known as 'Ralston House' as long as she pleases so to do, paying all the taxes and other charges etc. in respect thereof and a sum equivalent to rupees Thirty (Rs. 30/-) a month to my adopted daughter Irene Patricia Murray Marshall nee Kelaart as rent for the use of her undivided one third (1/3) share of the said bungalow until such time as she is in a position to purchase the said one third share which I value at rupees Ten Thousand (Rs. 10,000/-). If, however, the said Irene Patricia Murray Marshall nee Kelaart shall die without issue then in that case the payment of rupees thirty (Rs. 30/-) a month shall cease and the said one third (1/3) share shall become the absolute property of my adopted daughter Emaline Murray Marshall nee Van Twest and her children."

On an examination of clause 8 it is clear that the testator desired that 'Ralston House' should be sold by the Executor. The specific legacies in respect of the proceeds of sale are clear and unambiguous. There was no discretion given to the Executor in regard to the distribution or appropriation of the proceeds of sale. The only discretion which the Executor was given was the consideration of the market value at the time and the best advantage, which necessarily meant the best advantage to the beneficiaries. As I understand this clause it expresses a clear and unequivocal intention precisely worded in regard to sale and appropriation of the procceeds. For that purpose the title to the premises must necessarily vest in the Executor to carry out this exercise and will continue to remain in him till he decides to exercise the powers given to him.

It was contended that the word used, namely 'desire', in clause 8 was a mere suggestion or recommendation to the executor and could not be treated as a peremptory or mandatory direction to the executor. The testator had used the words "will and desire" in clause 2, in clause 4, in clause 10 and in clause 13. It was therefore contended that the use of the word "desire" only, in clause 8 did not have the effect of the more forceful words "will and desire." Senior Attorney-at-law for the plaintiff-respondent cited several cases from the South African Law Reports: *In Re Morkel's Will* (1938 Transvaal Provincial Division, p. 432)[2], *Mende v. Mende & others* (1938 Appellate Division, p. 259)[3] where the word "desire" had been used by testators. In those cases the word had been used to express a desire that something be done if in the opinion of persons previously *vested with an absolute* discretion should think it advisable to be done. The Courts held that in such cases the expression of a desire was precatory only and not peremptory. The situations that were considered in those cases were not analogous to the position in this case.

In the present case by the expressed desire that the premises be sold vests in the executor and he is not left with a discretion whether to sell or not according to his desire, and therefore the word in this context has the clear effect of a peremptory direction.

It was next contended that even though in clause 9 there was no expressed intention or direction that these premises do vest in the two adopted daughters or anyone of them, there were words or phrases used which amounted to an implied device of an undivided 1/3 share to Irene, the defendant-appellant. The words or phrases referred to in clause 9 are: "as rent for the use of her undivided one third (1/3) share of the said bungalow," "until such time as she is in a position to purchase the said one third share," the "said one third (1/3) share shall become the absolute property." There could be no doubt that the testator appeared to have contemplated certain situations such as Beatrice's continued occupation of the bungalow till the sale in view of his direction that it be sold and of Irene, the defendant-appellant, dying without issue. These are matters that the testator did seem to have given some thought to after making clear his intention that the premises be sold in clause 8. The question that arises is whether these expressions amount to an implied device which could be given effect to as his dominant intention or whether such an implied device could be given effect to as ancillary to the earlier direction to sell. The case of *Ex Parte Estate Paley* (1943 Cape Division, p. 181)[4] was cited in support of the contention that by

necessary implication there could be such an implied device. In that case it was held that necessary implication meant a strong probability of intention, that an intention contrary to that which is imputed cannot be supposed. However, in the present case the probability of the imputed intention must be gathered in consideration with all the provisions in the Will. If these words or expressions could be read and given effect to taking the provisions of clause 8 also into consideration then the probable intention of the testator implied in clause 9 could be ascertained, reconciled and given practical effect to as far as possible.

The Court of Appeal had been called upon to construe the Will but it had not given sufficient consideration to the intention of the testator so clearly expressed in clause 8 and to the impact it had on the legal title to 'Ralston House.' Clause 8 had the effect of vesting the legal title to the property on the Executor immediately on the death of the testator to enable him to carry out the trust imposed on him by the testator. The true wish of the testator was that the Executor should at the appropriate time and under suitable conditions obtain by sale the best value for the property for the beneficiaries of these specific legacies. The words 'having consideration to the market at the time' is an indication of what the testator had in mind, namely, that the best price should be obtained. The words having consideration to the 'best advantage' is a matter relative to the beneficiaries again. Thus if Beatrice, the plaintiff-respondent, realised that her advantage would be best served by her getting the maximum price by giving up residence, then she could have assisted the Executor to her benefit. The Court of Appeal instead of interpreting the Last Will to give effect to this intention, had embarked on an attempt to ascertain the dominant intention by ignoring clause 8 and concentrating only on the use of certain words or phrases contained in clause 9 not reconciling as far as possible the wishes not so clearly expressed with the clearly expressed intention of the testator. Clause 9 does contain certain unexpressed but implied wishes that could be gathered from the words or phrases used therein, which indicate that the testator having expressed his earlier intention and wish that 'Ralston House' be sold for the best advantage of the same beneficiaries, had given his mind to consequential situations. Had the Court of Appeal tried to expound, rather than conjecture the testator's intention, it would have come to a different finding from that of the District Court. In my view, it is reasonably possible to interpret the words or phrases used in clause 9 in a manner which best harmonises with the intention expressed in clause 8 having due regard to the context of the consideration of the

consequential circumstances that would have come into the contemplation of the testator after giving a direction to sell the property. He as a practising Lawyer would have been well aware that there would have inevitably been a considerable delay between the date of his death, the testamentary proceedings, obtaining of probate and the sale of the property by the Executor. He was very conscious of the fact that his adopted daughter Beatrice the plaintiff-respondent and her children were living in 'Ralston House' and according to clause 13 specifically mentioned that all her property was in that house and he proceeded to leave his movable property therein to her. Having taken into consideration all these circumstances he secured her continued occupation of the house during the interim period that would lapse before the sale is completed. The words "as long as she pleases so to do" read in that context does not necessarily mean that she was to live there during her lifetime. The testator had even contemplated the situation that the plaintiff-respondent may decide to buy the property if she was in a position so to do. In that event, the testator wished that the defendant-appellant should be paid a sum which he fixed at Rs. 10,000/- which she could receive in lieu of her 1/3 share of the sale proceeds. Having considered that the plaintiff-respondent had the advantage of occupying the entirety of the Bungalow till a sale was effected, he provided for the defendant-appellant to receive a sum of Rs. 30/- a month, though neither of them had any title to the property but only a vested right in the proceeds of sale in equal shares. The testator in clauses 3, 4 and 6 provided for the devolution of the interests of Irene, the defendant-appellant, on her dying without issue. Similarly in clause 9 he contemplated that eventually, for reasons best known to him, by providing that on her death without issue, her interests would devolve on the plaintiff-respondent and her children. Considered in this way, it is possible by sacrificing the inconsistent words in clause 9 to reconcile the testator's implied intention in a manner warranted by the immediate context or general scheme the testator had in mind. Thus accepting that clause 8 indicated his dominant intention, clause 9 could be given effect to as ancillary to it.

However, the necessity to ignore or bypass the provisions of clause 8 in order to give effect to the implied intentions in clause 9 does not arise in this case. The plaintiff-respondent and the defendant-appellant had elected to take the 'Ralston House' in terms of clause 8. The Executor had in the exercise of the trust or power given to him executed after the lapse of 10 years from the date of the testator's death a conveyance No. 570 dated 4th April 1939 attested by P. D. A. Mack, Notary Public, (P2) by which he had

purported to convey 'Ralston House' to Beatrice, the plaintiff-respondent and Irene, the defendant-appellant, without specifying shares but expressly 'subject to the terms and conditions of the 8th and 9th clauses of the Last Will and Testament of Charles James Alexander Marshall. This deed has been incorrectly referred to as an Executor's Conveyance, but as any experienced conveyancer knows, this deed cannot fall into such a description. It is rather as contended for the defendant-appellant and accepted on behalf of the plaintiff-respondent, a deed which the Executor as trustee could have lawfully executed in terms of section 58 of the Trust Ordinance (Chap. 87, Vol III Revised Legislative Enactments) which provides as follows:—

> "58. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest."

read along with

> *"Illustration (c)* A transfers certain property to B and directs him to sell or invest it for the benefit of C, who is competent to contract. C may elect to take the property in its original character."

Thus here we have a clear election by Beatrice the plaintiff-respondent and Irene the defendant-appellant to take the entirety of 'Ralston House' instead of the sale proceeds by a sale of it to outsiders. The parties have thereafter acted on the footing of this conveyance giving effect to the intentions of the testator as implied in clause 9. The plaintiff-respondent admittedly continued in occupation till her death which occurred during the pendency of this action. She had paid the defendant-appellant Rs. 30/- a month for the use and occupation up to a certain period prior to the action.

In regard to the shares held by the parties in 'Ralston House' though the deed is silent, the plaintiff-respondent and the defendant-appellant held the shares in the proportions of two third (2/3) and one third (1/3) respectively. Senior Attorney-at-Law for the defendant-appellant contended that each held an undivided 1/2 share as the deed was silent in regard to shares. I cannot agree with that submission. The shares have to be on the basis of the provisions in clause 8. It would be of interest to note that when persons obtain Crown Grants in respect of lands possessed by them in certain given proportions, even though the Grants are silent in regard to shares, our Courts have held that there is no irrebuttable presumption that the Grants were made in equal shares. *(vide Sinno Appu v. Dingirihamy* (15 NLR 259)[5] and *Appu v. Silva* (24 NLR 428)[6]. The same principles will apply to Deed

570 of 1939 in favour of the parties to this dispute. In regard to Beatrice the plaintiff-respondent, she gets an undivided 2/3 share as the maintenance and education of her children was the motive of the specific devise in clause 8. It is settled law that the parent who had maintained and educated the children could take that share meant for that purpose absolutely (Theobald on Wills, 12th Edn., p. 1256). The resultant position is that from 1939, the plaintiff-respondent and the defendant-appellant were the owners of 'Ralston House' in the proportion of an undivided 2/3 share and an undivided 1/3 share respectively subject to the provisions of clause 9 in the said Last Will. The pleadings in this case amply support the fact that the parties accepted this position and acted on that basis.

It is not necessary to go into the questions of whether the plaintiff-respondent was given a right of *habitatio* or not because even if she had such a right it has ceased on her death. But the rights of Irene, the defendant-appellant, in regard to her undivided 1/3 share of 'Ralston House' will have to be examined with reference to clause 9.

It was contended on behalf of the plaintiff-respondent that the phrase that Emaline the plaintiff-respondent shall pay Rs. 30/- a month to Irene, the defendant-appellant, "until such time as she is in a position to purchase the said one third share which I value at Rs. 10,000/-" gave the plaintiff-respondent an option to purchase the defendant-appellant's 1/3 share for Rs. 10,000/-. This claim was resisted on the ground that this alleged option is vague in point of time and indefinite in all other respects. But this phrase could be considered in relation to the *Fideicommissum* imposed by the testator, in clause 9 by which the testator provided that the defendant-appellant's 1/3 share would if she died without issue become the absolute property of Beatrice the plaintiff-respondent and her children. In view of this *Fideicommissum,* the testator had clearly given the plaintiff-respondent an option to purchase the 1/3 share at any time when she was in a position to do so and in that event valued the 1/3 share at Rs. 10,000/-. If she did not exercise the option on the death of Irene without issue the plaintiff-respondent would have got that share. An option to buy is purely a personal right and it placed no burden on the land. A breach of such a right could give rise to an action for damages only and not to pursue the land in the hands of strangers. But in this case in view of the *fideicommissum,* she and her children could have followed it in the hands of a purchaser from the defendant-appellant if Irene died without issue. This option gave the plaintifff-respondent the right to buy the fiduciary interests of the defendant-appellant in 'Ralston House' for the sum of Rs. 10,000/-, the value which the testator himself placed on these fiduciary

interests. The option cannot be enlarged to any other interests as the testator gave this right, being fully aware that he had granted the defendant-appellant only such a fiduciary interest fettered with certain conditions.

This then was the position that existed up to the 12th May 1972. The defendant-appellant was entitled to an undivided 1/3 share of the house and property called 'Ralston House' subject to a *fideicommissum* that in the event of her dying without issue, the share should devolve absolutely on the plaintiff-respondent and her children coupled with an option reserved to the plaintiff-respondent to buy the fiduciary interests in respect of that undivided 1/3 share at any time before the *fideicommissum* became operative for Rs. 10,000/-. The Abolition of *Fideicommissa* and Entails Act No. 20 of 1972 came into operation on the 12th May 1972. By Section 4 of this Act, the defendant-appellant became vested with an absolute title to the said 1/3 share. By operation of law, she became vested with full and complete ownership and her fiduciary right or interest ceased to exist. By virtue of Section 6 of this Act, she was granted the absolute power to dispose of the 1/3 share which she thus became vested with.

The title of the defendant-appellant to 1/3 share of 'Ralston House' ceased to be referable to the title which devolved on her under and by virtue of the Last Will. This option if any which held good up to 1972, ceased to be effective not on the basis that it was a limit or curtailment of her rights contemplated by this law, but by reason of the fundamental and drastic metamorphosis which came over the undivided one third (1/3) share held and owned by the defendant-appellant. Under these circumstances when the plaintiff-respondent alerted herself in 1974 to seek to enforce the right she claimed, her right had been frustrated by the operation of the law and the defendant-appellant had been clothed with a new absolute title to the undivided one third share. The defendant-appellant did not retain the fiduciary interest which alone the testator had in mind and valued at Rs. 10,000/- at the time he granted the option.

I therefore direct that the judgment and decree of the District Court be set aside with costs. The appeal is allowed with costs in the Court of Appeal and in this Court.

ISMAIL, J. — I agree.

RATWATTE, J. — I agree.

Appeal allowed.