

Jayasundera
vs.
Wijetilake and Others

COURT OF APPEAL,
ANDREW SOMAWANSA J. (P/CA),
EKANAYAKE J.,
CA 248/95 (F).
DC RATNAPURA 4523/L
NOVEMBER 23, 2004,
DECEMBER 17, 2004,
FEBRUARY 3, 2005.

Interpretation of Deeds – Intention paramount – Habendum clause – Operative part to be read together ? – Applicability of the English Law – Right to prospect for minerals-Personal right or Real right – Right to minerals separated from ownership-Quazi-servitude.? Sui generis - Introduction of Law of England Act, No. 5 of 1852 - Section 2 Prevention of Frauds Ordinance.

The plaintiff-respondent instituted action seeking a declaration of title to the corpus and an injunction restraining the defendant-appellant from gemming in the land. The defendant-appellant contended that, PM the plaintiff vendor in Deed 28129 (P4) has reserved to himself a ½ share of the minerals on the land in suit and the said ½ share in the minerals has now on the death of PM devolved on the defendant-appellant. The plaintiff-respondent's position was that by the reservation all that PM reserved to himself was the right to prospect for minerals, which became extinguished on the death to PM. The trial Court held with the plaintiff-respondent and observed that the rights reserved by PM does not devolve on his heirs and are extinguished on his death.

It was contended in appeal that the rights reserved by PM is a right in minerals which is an immovable property and is interest in land and that it is a right in rem and a real right, hence would devolve on the heirs of PM.

HELD:

- (1) Minerals form part of the land and in a normal transfer of land it conveys title to the minerals as well. If the title to the minerals were to be reserved in the transfer it must be stated in the instrument of transfer.

The Rule is that a meaning of the document or a particular part of it must be gathered from the document itself, one must consider the meaning of the words and not guess the intention of the parties to a deed.

Per Andrew Somawansa, J. (P/CA)

"Habendum is the part of a deed that defines the extent of the interest or rights being granted and any condition affecting the grant. When the operative part of the deed and the Habendum is read together it is very clear that the vendor – PM had no intention to sell the minerals to the vendee, and if then he has excepted the minerals from the sale then the rights interest and ownership of the minerals will devolve on his heirs under the law of intestate succession".

- (2) Words of limitation was a requirement under the Old English Law of Property rights in England and are quite different from ours. English Law of conveyance is not applicable to Sri Lanka.

Even though in P4 the rights to minerals was reserved only to PM and not to his heirs, executors etc., and words of limitation do not appear in P4, under our Law for the property to devolve on the heirs, it is not necessary to add such words of limitation.

- (3) The words 'මැනික් ගරා ගැනීමේ බලය' connotes a bundle of rights, this is really an interest in land. A right to minerals become separated

from the ownership of land when the landowner transfers the land to another but reserves the mineral rights. The mineral rights are such the surface owners cannot do anything to defeat the right of the owner of the mineral rights to prospect or mine for minerals.

- (4) A right to prospect for and take minerals may be construed as a personal servitude for a fixed term or in perpetuity, but contrary to the general nature of personal servitudes the right is alienable and passes on death to the successors of the person entitled.

Per Andrew Somawansa J. (P/CA)

"What PM reserved for himself is not a personal right which comes to an end on the death of PM, but a real right which would on his death devolve on his heirs, the right reserved by PM is a real right with full dominion of the gems".

APPEAL from the judgment of the District Court of Ratnapura.

Cases referred to :

1. *Mohamed vs. Mohamed* – 30 NLR 225
2. *Perera vs. Amarasooriya* – 12 NLR 87
3. *Laxarus and Jackson vs. Wessels, Oliver and the Coronation Freehold Estate Tower and Mines Ltd.* – 1903JS 99 510
4. *Duke of Hamilton vs. Dunlop and Another* 1885-10 APPCAS 830
5. *Travel Property & Investment Co. Ltd., and Reinhold & Co. vs. S. A. Township Mining & Financial Com. Ltd. and the Administrator* – 1938-TPD 512 1938-01-27.

R. M. D. Bandara with Lilanthi de Silva for defendant-appellant
L.C. Seneviratne PC with Anuruddha Dharmaratne for plaintiff-respondent.

cur adv. vult

July 08, 2005

ANDREW SOMAWANSA, J. (P/CA)

The plaintiffs-respondents instituted the instant action in the District Court of Ratnapura seeking a declaration of title to the land called 'Kadawathayawatte' and 'Pita Owita' as pleaded in the plaint and for a permanent injunction restraining the defendant-appellant from gemming in the aforesaid land.

The dispute in this action arises on a reservation contained in deed No. 28219 dated 28.06.1987 marked P4 which reads as follows :

“මැණික් ගරා ගැනීමේ බලය මට ඉතිරි කරගෙන”

The defendant-appellant contended that by this reservation T. M. Punchi Mahaththaya the vendor in deed No. 28219 marked P4 has reserved to himself a ½ share in the minerals on this land in suit and that the said ½ share in the minerals has now devolved on the defendant-appellant. The plaintiffs-respondents' position is that by the aforesaid reservation all that T. M. Punchi Mahaththaya reserved to himself was the right to prospect for minerals, which right became extinguished on the death of T. M. Punchi Mahaththaya.

On 18.01.2005 both parties agreed that there is only a substantial question of law to be decided and raised the following issue :

මෙම නඩුවේ ආරවුලට හේතුවී ඇති වී එම් පුංචි මහත්මයා විසින් පැමිණිලේලේ 5 වන ඡේදයේ සඳහන් 1897.06.28 දිනැති අංක 28219 දරන ඔප්පුවෙන් තමා ඉතිරි කරගෙන ඇත්තේ පුද්ගලික අයිතිවාසි කමක් පමණක් ද?

නැතහොත් ඔහුගේ මරණයෙන් පසු ඔහුගේ උරුමක්කරුවන්ට පැවරියාමට හැකි අයිතිවාසිකමක් ද යන්නය. එනම්, පොලව යට කිබෙන ඛනිජ වත්කුවල අයිතිවාසිකම් පුංචි මහත්මයාගේ උරුමක්කරුවන්ට පැවරී ඇති ද? එසේ නැතිනම් පුංචි මහත්මයාගේ මරණයෙන් පසු අහෝසි වී යන්නේ ද?

Both parties agreed that the instant action could be decided upon the answers to the aforesaid issues and that the matter could be decided on written submissions alone. Accordingly no evidence was led and both parties tendered their written submissions.

At the conclusion of the trial, the learned District Judge by his judgment dated 15.06.1995 held with the plaintiffs-respondents. It is to be seen that the learned District Judge in his judgment has come to a finding that the rights reserved by Punchi Mahaththaya does not devolve on his heirs and are extinguished on his death. It is from the aforesaid judgment that the defendant-appellants has preferred this appeal.

At the hearing of this appeal, the counsel for the defendant-appellant contended that the rights reserved by Punchi Mahaththaya is a right in minerals which is an immovable property and is an interest in land and that it is a right in rem and a real right. Hence it would devolve on the heirs of Punchi Mahaththaya and the learned District Judge erred in law when he came to a finding that the right reserved by Punchi Mahaththaya is a

personal right that extinguished on his death and did not devolve on his heirs. The President's Counsel appearing for the plaintiffs-respondents on the other hand contended that the reservation contained in the deed clearly indicates that what was reserved to himself by T. M. Punchi Mahaththaya was the right to prospect for minerals which is quite different from a reservation being made to the ownership or title to the minerals as contended by the defendant-appellant.

It is to be seen that minerals form part of the land and in a normal transfer of a land it conveys title to the minerals as well. Thus if the title to the minerals were to be reserved in the transfer it must be stated so in the instrument of transfer.

It is contended by counsel for the defendant-appellant that when Punchi Mahaththaya stated in the deed 'Manik garaganeema balaya mata ithurukragena', it is clear beyond any doubt that he had exempted minerals from sale. The words 'garaganeema' were not words that had come accidentally. It was deliberately inserted to reserve the minerals rights. He also submits that during the formation of the contract of sale there was the meeting of minds viz. *Consensus idem* that Punchi Mahaththaya will have the mineral rights and that all the income from gemming will be given to Punchi Mahaththaya and that the transaction was a pure and simple sale of land reserving the mineral rights and the vendee very well knew that he was not entitled to any profit from the gemming operations and that Punchi Mahaththaya had the full dominium of the minerals. He had the right to possess, vindicate, alienate and to destroy.

It would be useful at this stage to examine the deed in question marked P4 for it is a rule of construction that the intention has to be gathered from what is written in the deed. Thus the rule is that the meaning of the document or of a particular part of it must be gathered from the document itself. In *Mohamed vs. Mohamed*⁽¹⁾ per Garvin. J.:

"That the general principles governing the interpretation of deeds is that the deed must be considered as a whole and effect given to the intention of the party."

Thus it is not possible to assume the intention or to impute an intention based on an assumption. One must consider the meaning of the words used and not guess the intention of the parties to a deed. The court must deal with a deed according to the clear intention appearing within the four corners of the deed.

In the deed in question marked P4 the vendor has specifically excepted the minerals in the operative part of the deed. Thus it is very clear that he has not sold the mineral rights. In the habendum it is stated :

ඉහත කී ඉඩම් කොට්ඨාසය සහ පළතුරු ගැන මින් මතු වූ මගේ උරුමකාර කිසිම ආරවුලක් කරන්න බැර හැටියටද, හිදැල්ලෙක පුංචි මහත්මයා ගත් ආරවුම් එක්කො මනුෂ්‍ය උරුමකාර ඉහත කී ඉඩම් කොට්ඨාසය සහ පළතුරු නිරවුල්ව මුක්ති විඳිනවා.

Habendum is the part of a deed that defines the extent of the interest or rights being granted and any condition affecting the grant. So that Punchi Mahaththaya's intention to convey only the land, fruits and trees without minerals is evident without any ambiguity for he has excepted rights or interest to minerals in the operative part. When the operative part of the deed and the *habendum* is read together it is very clear that the vendor on deed marked P4 the aforesaid Punchi Mahaththaya had no intention to sell the minerals to the vendee. If then he has excepted the minerals from the sale then the rights, interest and ownership of minerals will devolve on his heirs, under the law of intestate succession. In the circumstances the conclusion of the learned District Judge that the intention of the vendor was not clear is erroneous.

It was also contended by counsel for the plaintiffs-respondents that in deed marked P4 the right to minerals was reserved only to Punchi Mahaththaya and not to his heirs, executors etc., and words of limitations do not appear in deed marked P4. My considered view is that it is not necessary to add such words of limitation under our law for the property to devolve on the heirs. For eg.: if 'A' conveys a property to 'B' without the words of limitation the property will not revert back to 'A' or his heirs on 'B,s' death but would devolve on B's heirs.

Words of limitation was a requirement under the old English Law of Property rights in England and are quite different from ours. Depending on whether the grantor wished to create a fee simple or a fee in tail it was necessary to use words of limitations and it is common to see these words such as heirs, executors etc., in our deeds of conveyance. This is something we have borrowed from English Law of Conveyance. However English Law of Conveyance is not applicable to Sri Lanka. Proviso to Section 03 of Introduction of Law of England (Ordinance No. 5 of 1852) provides :

"That nothing herein contained shall be taken to introduce into Sri Lanka any part of the Law of England relating to the nature of conveyance or assurance of or succession to any land or other immovable property or any estate, right or interest their".

In *Mohamed vs. Mohamed* (Supra)

"Assistance and guidance of great value is derivable from the English law relating to the interpretation of deeds, but the difficulty of applying those rules of interpretation to instruments in Ceylon lies in the fact they relate to a system of conveyancing which has been evolved to give expression to conceptions peculiar to the English law of real property to which our own law of immovable property bears hardly any resemblance".

It is to be noted that the phrase used in the deed marked P4 reserving rights to minerals read "මැණික් ගරා ගැනීමේ බලය මට ඉතුරු කරගෙන" The words "මැණික් ගරා ගැනීමේ බලය" connotes a bundle of rights. Person who has this right could enter on land to prospect for gems and work the mines and take the gems away. This is really an interest in land. In the case of *Perera vs. Amarasooriya*⁽²⁾

"An authority to enter on land and prospect for plumbago and to work the mines found there and take away plumbago is an agreement creating an interest in land, and should be notarially attested under section 2 of Ordinance No. 7 of 1840."

In the case of *Laxarus and J Jackson vs. Wessels Oliver and the Coronation Freehold Estate, Town and Mines Ltd.*⁽³⁾ Innes, CJ observed:

"Working of coals involves taking away and appropriation of portions of realty. It implies the exercise of certain privileges generally attached only to ownership".

It was held in that case :

"That the right to work the mineral rights conferred by the notarial registered contract of July 1902, was of the nature of a real right."

Per Innes, CJ on page 520 :

"I must confess to having at first experienced considerable difficulty - a difficulty which pressed me during the argument - in finding an appropriate justice niche in which to place this right. Rights of the nature are peculiar to the classes of real rights discussed by the commentators. They seem at first sight to be very much of the nature of personal servitudes : but then, they are freely assignable. On further consideration however, I am of opinion that the difficulty, I have referred to is more academic than real. After all, the right in question involves the taking away and appropriation of portions of realty; it implies the exercise of certain privileges generally attached only to ownership, and it is treated by the proclamation as a real right and is ordered to be registered against the title in my opinion; therefore this right when registered occupies the position of a real right".

Wille's Principles of South African Law page 257:

"Subject to the provisions of mining legislation, a right to prospect for and take minerals from the land of another may be constituted for a fixed period of time or in perpetuity and registered against the title-deeds of the land. Such a right to minerals is alienable and passes on the death of the holder to his successors. It should therefore be classified as a real right sui generis rather than as a quasi-servitude".

Again on page 277 ;

"A right to minerals becomes separated from the ownership of land when the landowner transfers the land to another person but reserves the mineral rights.

Although it has been held that mineral rights may be reserved and registered for the lifetime only of a person it is trite law that mineral rights are freely transferable and transmissible :

In South African Law of Property Family Relations and Succession by Lee page 40 :

"A right to prospect for and take minerals may be constituted as a personal servitude for a fixed period or in perpetuity. But contrary to the general nature of personal servitudes the right is alienable and passes on death to the successors of the person entitled. The minerals won become the property of the person in whom the right is vested; in the absence of provision to the contrary the owner of the soil has no claim to the minerals won or to their value".

Counsel for the plaintiffs-respondents in paragraph 15 of his written submissions goes on to say on the several authorities cited by the counsel for the defendant-appellant the right granted is not confined to the mere act of prospecting for minerals but also to take the minerals from the land in question. The Courts and legal writers have held that in such instances a right in real property is created since the right to take away an appropriate portion for the reality implies the exercise of certain privileges attached only to ownership and is thus treated as real right. The rights reserved in deed marked P4 are exactly the rights mentioned above. For what other interpretation can one give to the words "මැණික් ගරා ගැනීමේ බලය මට ඉතුරු කරගෙන" other than a right to prospect for minerals and to take the minerals from the land in suit and appropriate the same.

House of Lords in Duke of Hamilton vs. Dunlop and Another⁽⁴⁾ held :

"Where the owner conveys lands to a singular successor to a person, reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate of coal."

In the same case Lord Blackburn observed :

"I entirely agree that in the common sense of the thing, this privilege to work and win the whole of the coals is very much in substance the same thing as a right to property in the coals".

It is to be noted that mineral rights are such the surface owners cannot do anything to defeat the right of the owner of the mineral rights to

prospect or mine for minerals. In *Travel Property & Investment Co. Ltd., and Reinhold & Co. 5s. S. A. Townships Mining & Finance Corp., Ltd., and the Administrator 1.*

"No user of the surface of land by the surface - owner is defensible which has the effect of taking away the right of the holder of the mineral rights, if and when he decided to do so, to prospect for precious metals, and if they are found, to mine for them".

Counsel for the plaintiffs-respondents contends that the right Punchi Mahaththaya reserved was a personal right. It is to be noted that personal rights are rights available against a particular person or persons only. A real right on the other hand, is a right in a thing which entitles the holder of the right to prevent all other persons and not merely a particular individual. The right that Punchi Mahaththaya has reserved is such that not only the vendee but all other persons in the world cannot interfere with his Gemming operations. They should refrain from doing anything to defeat his rights. If the vendee or anyone else interferes with his gemming operations the remedy available to Punchi Mahaththaya is a vindicatory action. If the vendee died before Punchi Mahaththaya he could enforce his rights against the heirs of the vendee. Thus the right reserved by Punchi Mahaththaya is a real right with full dominion of the gems.

For the foregoing reasons, my considered view is that what Punchi Mahaththaya reserved for himself in deed marked P4 is not a personal right which comes to an end on the death of Punchi Mahaththaya but a real right which would on his death devolve on his heirs. Accordingly I would allow the appeal and set aside the judgment of the learned District Judge. I also make order dissolving the interim injunction issued in this case. The defendant-appellant is entitled to the costs of this appeal fixed at Rs. 5000/-.

EKANAYAKA, J. — I agree.

Appeal allowed.