

WICKREMARATNE
V
WICKREMARATNE

COURT OF APPEAL

W.N.D. PERERA, J., AND WIJEYARATNE, J.

C.A. APPLICATION NO. 243/91

WITH C.A. (L/A) NO. 35/91

D.C. MOUNT LAVINIA CASE NO. 1060/T

23 JULY, 1991

Testamentary Action - Last Will - Due administration - Accounting for rents received - Civil Procedure Code, Sections 712, 714 and 716 - Citation under S. 712.

A testator had devised a multi-storeyed building to three of his sons, one of whom having obtained probate was appointed administrator with the Will annexed and he moved for a citation under section 712 of the Civil Procedure Code against one brother (a co-heir) on the ground that he had been appropriating all the rental from this building for some time after the death of the testator. In the citation he called upon his brother to account for and deposit to the credit of the testamentary case the rental income received. The estate duty had been paid.

Held:

In the absence of proof or averment that this rental income is required for the purpose of due administration of the estate, he was not entitled to such a citation.

Cases referred to:

1. *Clare Fernando v. Rosa Fernando* 9 NLR 65, 67
2. *De Croos v Don Johannes* 9 NLR 7
3. *Cassim v. Marikkar* (1892) 2 CLR 92
4. *De Zoysa v. De Zoysa* 26 NLR 477, 475
5. *Silva v Silva* 10 NLR 234
6. *Chelliah v. Wijenathan* 54 NLR 337
7. *Public Trustee v. Karunaratne* 40 NLR 429
8. *Mohamed v. The Public Trustee* 1978 - 80 1 Sri LR 1

APPLICATION in revision of the order of the District Judge of Mount Lavinia

P.A.D. Samarasekera, P.C. with *Gamini Jayasinghe* for 4th respondent - petitioner

N.S.A. Gunatillake, P.C. with *Miss. 1 R. Rajapakse* for substituted petitioner - respondent.

Cur.adv. vult.

17 September 1991

WIJEYARATNE, J.

In this case the deceased Don Martin Wickremaratne died on 22.09.83 leaving Last Will No. 2885 dated 25.08.74 attested by V.A. Jayasinghe, Notary Public, and naming his wife, Lecamge Don Joslyn, as the executrix. She filed Case No. 1060/T in the District Court of Mount Lavinia and she died in November 1985 before

probate could be issued. The Last Will was duly proved and the estate duty has been paid as evidenced by the certificate issued by the Inland Revenue Authorities.

The substituted petitioner-respondent (Douglas Wickremaratne) applied for letters of administration with the Will annexed and accordingly such letters of administration were issued to him.

The substituted petitioner-respondent, as administrator, filed an application dated 21.5.90 consisting of a petition and affidavit seeking a citation on the 4th respondent-petitioner (Mahinda Wickremaratne).

This petition and affidavit aver that the substituted petitioner-respondent, the 4th respondent-petitioner and the 7th respondent (Sunil Wickremaratne) are the owners of premises bearing No. 148 Galle Road, Dehiwala, devised under the said Last Will and these premises consist of a multi-storeyed building having several apartments which are rented out for business purposes and the rents were collected and accounted for by the 4th respondent-petitioner up to December 1985, but that from January 1986 he has collected Rs. 978,000/- which he has failed to distribute or deposit in the case. Therefore a citation was sought to compel the 4th respondent-petitioner to declare the rents and advances received and to have them deposited in the case.

In consequence the court issued a citation dated 1.6.90.

The 4th respondent-petitioner filed objections dated 27.8.90 to the said application stating that as agreed the 4th respondent-petitioner had collected rents for a certain period and paid to the substituted respondent-petitioner and the 7th respondent their respective shares, that there is no legal duty cast on the 4th respondent-petitioner to credit the rental income to the case, that the substituted petitioner-respondent is in law not entitled to have a citation issued, and that it was contrary to section 713(2) of the Civil Procedure Code.

When the case came up for inquiry before the Additional District Judge on 30.10.90, a preliminary objection was taken that the citation had no validity as it was issued to examine the 4th respondent-petitioner in respect of income allegedly received for a period commencing after the death of the deceased and that the citation ought not to have been issued.

After both oral and written submissions, the learned Additional District Judge made order dated 18.02.91 overruling the preliminary objections and held that as the 4th respondent-petitioner had deprived the substituted petitioner-respondent and the 7th respondent of the rents appropriated by him, the substituted petitioner-respondent is entitled to recover the money under section 712 of the Civil Procedure Code and ordered that an inquiry be held under the said section.

This present application was filed on 19.3.91 to revise the said order of the learned Additional District Judge dated 18.2.91.

To this application the substituted petitioner-respondent has filed counter-objections by an affidavit dated 20.6.91. One such objection is that all parties who should have an interest in this application have not been made parties. The 7th respondent has not been made a party to this application.

The matter depends on the interpretation of sections 712, 714 and 716 of the Civil Procedure Code which have to be read together.

Section 712(1) refers to "money or other movable property which ought to be delivered to the petitioner or which ought to be included in his inventory and valuation".

Section 714(1) refers to "any money or other property of the testator or intestate, or of which the testator or intestate was in possession at the time of or within two years preceding his death".

Section 716 refers to "money or other property of the testator or intestate".

These sections begin with a chapter headed "OF AIDING, SUPERVISING AND CONTROLLING EXECUTORS AND ADMINISTRATORS".

Grenier, A.J., in the case of *Clara Fernando vs. Rosa Fernando* (1) stated as follows:-

"The sections prescribing the procedure are taken from the New York Code of Civil Procedure relating to testamentary

proceedings, and are admirably adapted for the speedy and effectual discovery and conservation, for purposes of administration, of property belonging to an intestate estate which happens to be in the hands of a third party."

A consideration of these sections shows that these relate to items of money or property of the testator or intestate that have to be inventorised and valued. The object of section 712 is to enable an executor or administrator to file a correct inventory and valuation in addition to collecting the assets of the estate (vide section 538 and Form 92 in the First Schedule to the Civil Procedure Code.)

In section 712(1) there is a two-fold description, namely, "money or other movable property that ought to be delivered to the petitioner, or which ought to be included in his inventory and valuation".

Then the question arises why property that *ought to be included in the inventory* is mentioned. The answer to this appears to be that it is conceivable there may be instances where the executor or administrator is not entitled to take immediate delivery of property belonging to the estate, as for instance property which is subject to lien or given out on hire purchase.

Section 714 brings in two categories -

- (1) any money or other property of the testator or intestate,
or
- (2) of which the testator or intestate was in possession at the time of or within two years preceding his death.

The two year period refers to the second category above and therefore it does not apply to the facts of this case.

Then the question arises as to the meaning of the words "*any money or other property of the testator or the intestate*".

The object of interpretation is to discover the intention of the legislature and this must be deduced from the language that has been used. According to the ordinary literal meaning of these words, they refer to money or other property that the testator or intestate owned or which he was entitled to at the time of his death.

In this case when the Last Will was proved and the probate issued the title to premises No. 148, Galle Road, Dehiwala, vested in the three heirs (namely, the substituted petitioner-respondent, the 4th respondent-petitioner and the 7th respondent). It has been held in *De Croos vs. Don Johannes* (2), *Cassim vs. Marikkar* (3), and *De Zoysa vs. De Zoysa* (4) that no assent on the part of the executor is necessary to pass to the devisees immovable property which has been specifically devised in the Will. It has also been held in the Full Bench decision of *Silva vs. Silva* (5) that title to immovable property belonging to a deceased does not vest in the administrator and a conveyance by an heir without the concurrence or the assent of the administrator is valid subject to the right of the administrator to deal with the property for the purposes of administration.

Similar observations have been made by Gratiaen J. in the case of *Chelliah vs. Wijenathan* (6).

Therefore, in this case, the title to this property has vested in these three heirs who have become co-owners subject to the right of the substituted petitioner-respondent as administrator to have recourse to such property for the due process of administration, as, for instance, for the payment of estate duty or debts. The heirs may deal with the property subject to the aforesaid rights of the administrator who may require the same for the purpose of administration.

Mr. N.S.A. Gunatillake, P.C., for the substituted petitioner-respondent submitted that there is nothing in these sections which prevent the issue of a citation against a devisee. A citation can certainly be issued even against a devisee provided it is in respect of money or property belonging to the deceased and owned by the deceased at the time of his death and which should be included in the inventory and valuation of which is required for the purpose of due administration of the estate. The rents from these premises do not come within this description. It is open to the substituted petitioner-respondent to file a separate action against the 4th respondent-petitioner to recover his proportionate share of the rents.

The substituted petitioner-respondent as administrator cannot file a citation under section 712 to discover rental income from these premises after the death of the deceased as this income belongs to

the co-heirs, who have now become co-owners of this building, unless he requires the same for the purpose of due administration. There is no averment that this money (rental income) is required for the purpose of due administration and hence the substituted petitioner-respondent is not entitled to obtain this citation.

In the case of *The Public Trustee vs. Karunaratne* (7) relied on by learned counsel for the respondent, Mr. Gunatillake, an heir who was entitled to one half share of a house was in occupation of the entire house without paying any rent. It was held that the administrator for the purpose of administration was entitled to recover a reasonable rent (calculated at half the rental value) from this heir for the period of his occupation. It should be noted that in this case this money was required for the purpose of administering the estate and that makes an important difference from the facts of this case.

The other case cited, namely, *Mohamed vs. The Public Trustee* (8) has no relevance to the present application.

For these reasons I allow the application and set aside the order of the learned District Judge dated 18.2.91. I uphold the preliminary objection.

I hold that the substituted petitioner-respondent is not entitled to a citation under section 712.

The substituted petitioner-respondent will pay the costs of this application to the 4th respondent-petitioner.

W.N.D. PERERA, J - I agree.

Preliminary objection upheld.

Application allowed.