

**MADAWALA
v.
RATNAYAKE**

COURT OF APPEAL
WIGNESWARAN, J., AND
TILAKAWARDANE, J.
CA NO. 39/97 F
DC KURUNEGALA NO. 3563/L
FEBRUARY 14, 2000
MARCH 30, 2000 AND
MAY 31, 2000

*Abolition of Fideicommissa and Entails Act, No. 20 of 1972 – S. 4, 6 and 7 –
Effect of Act on ownership of property.*

One M who was the original owner of the premises in suit by his Last Will gave the said property to his only son B subject to a *fidei commissum* in favour of B's children born in lawful wedlock. M died in 1937. B the fiduciary on 21. 05. 1962 transferred his life interest to his two sons.

On 26. 06. 1979 B transferred the property to the plaintiff and one S, who transferred her rights to the plaintiff.

The two sons of B amicably partitioned the land in 1962 and one son sold 4 1/2 acres to one W. who later sold same to K.

In 1972 the abolition of Fidei Commissa and Entails Act, No. 20 of 1972 passed.

The defendant-respondent contended that the property vested absolutely on K who had in 1989 sold the property to him.

The plaintiff-appellant contended that with the coming into effect of Act No. 20 of 1972, B became the absolute owner despite the transfer in 1962 of his life interest.

Held:

- (1) On the passing of Act No. 20 of 1972, once B was the living fiduciary he would have normally received the property but he had on 21. 05. 1962 transferred his life interest to his two sons on 21. 05. 1962.

There was no dominium rights left in B when Act No. 20 of 1972 came into operation.

- (3) With the execution of the Deed on 21. 05. 1962 B had ceased to be entitled to be vested with any interest or title in the property, such entitlement had passed onto third parties.
- (4) The effect of Act No. 20 of 1972 was to vest title in the ultimate transferors of life interest by B on the effective date – 12. 05. 1972.

Although section 7 proviso gave the original fiduciary interest holder a right to get back the property sold or donated within 6 months from 12. 05. 1972, this was not done.

APPEAL from the District Court of Kurunegala.

R. Y. D. Jayasekera for plaintiff-appellant.

Bimal Rajapakse for defendant-respondent.

Cur. adv. vult.

November 14, 2000

WIGNESWARAN, J.

The plaintiff-appellant filed this action on 05. 12. 1989 for declaration of title, ejectment of the defendant-respondent from the land and premises referred to in the schedule to the plaint, for damages and costs. The Additional District Judge of Kurunegala by his judgment dated 11. 12. 1996 dismissed the plaintiff-appellant's action with costs.

The learned Counsel for the plaintiff-appellant has submitted in appeal as follows:

Godfrey Ernest Madawala who was the original owner of the premises in suit wrote Last Will No. 169 dated 24. 09. 1932 in favour of his only son Bibsie *alias* Godfrey Ernest Madawala (hereinafter referred to as Bibsie) subject to a *fidei commissum* in favour of the

latter's children born in lawful wedlock. On his death the Estate of Godfrey Ernest Madawala was administered in DC Kurunegala case No. 4104/ Testamentary around 1937 and probate was obtained by Flora Evangeline Udalagama Kumarihamy *nee* Madawala.

By deed No. 4203 dated 21. 05. 1962, Bibsie, the fiduciary, transferred his life interest to his sons Gamini Edward Madawala and Nihal Madawala.

It was the contention of the learned Counsel for the plaintiff-appellant that with the coming into effect of the Abolition of Fideicommissa and Entails Act, No. 20 of 1972, Bibsie became the absolute owner of the premises in suit despite the transfer in 1962 of his life interest. ²⁰

On 26. 06. 1979 by deed of transfer No. 15014 the said Bibsie transferred the property to Ratnayake Mudiyanseelage Somadasa Madawala (the plaintiff) and Shanthi Madawala. The said Shanthi Madawala by deed of transfer No. 9963 dated 20. 07. 1989 transferred her 1/2 share to the abovesaid Ratnayake Mudiyanseelage Somadasa Madawala, the plaintiff abovenamed. ³⁰

It was the contention of the learned Counsel for the plaintiff-appellant that in or about September, 1989, the defendant had forcibly entered the premises in suit.

The defendant-respondent disputed this devolution of title as well as possession by plaintiff-appellant at any time. The learned Counsel for the defendant-respondent submitted that once Bibsie, the fiduciary, transferred his life interest to his sons Gamini and Nihal and handed over possession, there were no rights left in him. On the coming into operation of Act No. 20 of 1972 the property in question vested in his sons Gamini and Nihal. ⁴⁰

Gamini and Nihal amicably partitioned the property in question on plan No. 682 dated 10. 03. 1965 made by J. H. R. Perinpanayagam, Licensed Surveyor. By Deed No. 22346 dated 04. 06. 1965 Nihal Madawala sold out of his portion a piece of land in extent 4 1/2 acres to one D. M. Wimaladasa who was placed in possession thereof (viz lots 3C, 4, 5, 5B in Plan No. 682).

Thereafter, the said property was transferred by Wimaladasa on Deed No. 293 dated 16. 06. 1969 to E. D. M. Karunaratne. Possession was handed over to the said Karunaratne.

In 1972 the Abolition of Fideicommissa and Entails Act, No. 20⁵⁰ of 1972 came into operation. According to the learned Counsel for the defendant-respondent the property then vested absolutely on Karunaratne who by Deed No. 11547 dated 01. 01. 1989 sold the said property to the defendant-respondent in this case. The defendant-respondent therefore claimed the property absolutely free from any encumbrances. It was pointed out that no steps were taken by Bibsie within 6 months of Act No. 20 of 1972 coming into effect, to act under the proviso to section 7 of the said Act to have the property repurchased.

Thus, the question that arises for determination by this Court is the effect the passing of Act No. 20 of 1972 had on the ownership⁶⁰ of the property in question.

Section 4 of the Abolition of Fideicommissa and Entails Act, No. 20 of 1972 reads as follows:

"4. Where under the terms of any will, deed or other instrument, executed prior to the commencement of this Act, any fideicommissum, entail, settlement, restraint on alienation, limit or curtailment exists, the property in question shall from the commencement of this Act be and for all purposes be deemed to be vested absolutely, free

of any fideicommissum, entail, settlement, restraint on alienation, limit or curtailment, in the person in whom the title to such property is at the commencement of this Act vested subject to such fideicommissum, entail, settlement, restraint on alienation, limit or curtailment and no other successor, whether named or described therein or not, shall be deemed to have any right or title to such property under the terms of such disposition." 70

What this section sought to bring into effect was that a Fiduciary was to hold a property that was subject to entail or *fideicommissum* free of such encumbrances on the passing of the said Act No. 20 of 1972.

Last Will No. 169 created a *fideicommissum* in favour of the children 80 of Bibsie while gifting the property to the latter. Therefore, on the passing of Act No. 20 of 1972 since Bibsie was the living Fiduciary he would have normally received the property absolutely. But, on 21. 05. 1962 he had executed Deed No. 4203 whereby he transferred his life interest to his sons Gamini and Nihal.

Dominium or ownership is the relation protected by law in which a man stands to a thing which he may (1) possess (2) use and enjoy and (3) alienate (*vide Holland – Jurisprudence – 13th edition, page 210 and R. W. Lee – An Introduction to Roman Dutch Law – 5th edition, page 125*). Where all these rights are vested in one person 90 to the exclusion of others, he is sole owner. (*vide Grotius 2 : 3 : 10*). Clearly, Bibsie abovenamed did not have the right of alienation over the property in terms of the Last Will. He had the right of possession and the right to use and enjoy the property during his lifetime. Possession and the right to use and enjoy during his lifetime passed from Bibsie to his sons on the execution of Deed No. 4203. There was, therefore, no dominium rights left in him when Act No. 20 of 1972 came into operation. Under section 6 of the Act it is only where

the title to any property or any interest in property is or is deemed to be vested in any person by virtue of the operation of the said Act ¹⁰⁰ that such person shall have absolute power to dispose of such property or interest. With the execution of Deed No. 4203 Bibsie had ceased to be entitled to be vested with any interest or title in the property. Such entitlement had passed onto third parties.

This is brought out by the provisions of section 7 of the Act which reads as follows:

"7. (1) Where a fiduciary interest in property which was subject to fideicommissum has been transferred in pursuance of a sale or a donation prior to the commencement of this Act, the property in question shall, from the commencement of this Act, be and for ¹¹⁰ all purposes be deemed to be vested absolutely, free of the fideicommissum, in the transferee of such fiduciary interest or in any person deriving title from him to such fiduciary interest:

Provided, however, that the person who but for such transfer would have been entitled to such fiduciary interest under the terms of the fideicommissum shall have –

- (i) where the transfer was in pursuance of a sale, the right to repurchase, and obtain an execution of the conveyance of the property from the person in possession of it, upon paying to the possessor the price paid by such possessor for such ¹²⁰ interest and the cost of any necessary or useful improvements effected by such possessor; or,*
- (ii) where the transfer was in pursuance of a donation, the right to revoke the donation and recover the property from the person in possession upon paying to the possessor the cost of any necessary or useful improvements effected by him,*

such right of repurchase or of revocation being exercisable within six months of the commencement of this Act.

- (2) *The provisions of subsection (1) shall not apply where the person in possession of the property at the time of 130 commencement of this Act, derives title to any property which may have been subject to fideicommissum by a title adverse to and independent of any fiduciary under such fideicommissum, or is himself a bona fide possessor of such property without notice of the fideicommissum, or derives title from such a possessor."*

The abovesaid section recognised the transfer of fiduciary interests prior to 12. 05. 1972 (the date on which Act No. 20 of 1972 came into operation). It approved the vesting of such interests absolutely in a transferee. The proviso nevertheless gave the original fiduciary- 140 interest-holder a right to get back the property sold or donated within 6 months from 12. 05. 1972. If the law considered the transfer or gift of fiduciary interests prior to the coming into operation of Act No. 20 of 1972 illegal or ineffective, it would have so stated in the said Act and the proviso to section 7 (1) would not have been included in the Statute in that event. Despite transfer of fiduciary interests to third parties if the mere fact of having been a Fiduciary before such transfer, had given rights of absolute ownership to such Fiduciary, then again proviso to section 7 (1) would have been unnecessary because the Fiduciary would have become absolute owner despite 150 transfer of his fiduciary interests prior to 12. 05. 1972. We must, therefore, conclude that Act No. 20 of 1972 recognised the transfer of fiduciary interests (in this instance referred to as life interest) prior to 12. 05. 1972 and also allowed title to be vested absolutely in such transferees. No such retransfer took place within 6 months from 12. 05. 1972. Only on 05. 12. 1989 was the plaint in this case filed, 17 years later. Meanwhile, possession and title had passed over from Bibsie to others.

The effect of Act No. 20 of 1972 in the instant case was to vest title to the property in the ultimate transferees of life interest by 160 Bibsie, on the effective date (12. 05. 1972).

Decision in DC Kurunegala case No. 4317/L filed with the written submissions was not before parties in the original Court during trial in this case. If available the defendant-respondent may have adequately responded to it. We, therefore, disregard the said decision.

We see no reason to interfere with the judgment of the learned Additional District Judge dated 11. 12. 1996. We dismiss the appeal with taxed costs payable by the plaintiff-appellant to defendant-respondent.

TILAKAWARDANE, J. – I agree.

Appeal dismissed.