

HALANGODA
v.
MADUGALLA AND OTHERS

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND T. D. G. DE ALWIS, J.

C.A. 186/79 (F).— D. C. COLOMBO 17388 (F).

MARCH 8, 1985.

Trust created by Last Will to pay income of all properties of the testatrix to her surviving husband and after his death the properties to vest on her descendants as devised – Abolition of Fideicommissa and Entails Act No. 20 of 1972 (section 5) – Does property vest absolutely in husband of testatrix ?

By the Last Will of the testatrix admitted to Probate in this case a Trust was created whereby she left the income of all her properties movable and immovable to her husband Harry Halangoda and thereafter the properties were to go to her descendants as devised in the Will.

The trustee sold all the properties and formed a Trust Fund which was deposited with the Loan Board. On the passage of the Abolition of Fideicommissa and Entails Act No. 20 of 1972 Harry Halangoda claimed the money lying in the Trust Fund absolutely but the District Judge rejected his claim. (On the death of Harry Halangoda during the pendency of this case the present appellant was substituted in his room.)

Held –

The beneficial interest which Harry Halangoda held was only as to the income during his life from the movable and immovable property of the testatrix and not dominium over such property or the sale proceeds thereof. There was no succession by the succeeding beneficiaries to the interest of Harry Halangoda as he had no beneficial interest in the capital sum of the Trust. Hence Harry Halangoda was not entitled to the Trust Fund absolutely.

APPEAL from the judgment of the District Court of Colombo.

D. R. P. Gunatillake for substituted petitioner-appellant.

Eric Amarasinghe, P.C. with *Miss Gunigangoda* for the respondents.

Cur. adv. vult.

May 3, 1985.

H. A. G. DE SILVA, J.

One Brenda Seelawathie Delwita died leaving a Last Will the probate whereof was issued to her husband Harry Halangoda the original Petitioner in these proceedings. By Clause 4 of the said Last Will a trust was created of all her movable and immovable properties in the following terms :-

- (a) Upon trust to pay the income thereof to her husband the said Harry Halangoda during his life.

- (b) Upon trust from and after the death of her husband, both as to capital and income thereof for her descendants who attain the age of 21 years or being female marry under that age, if more than one in equal shares absolutely so that the children of any deceased child of hers shall take equally between them only the share which their parent would have taken and he or she survived the testatrix and had attained a vested interest.
- (c) If at the date of her death or at the death of her husband there shall be no descendants surviving who shall attain a vested interest, upon trust both as to the capital and income as to one half part thereof to her sister Mildred Delwita wife of Percy Mādugalla absolutely and as to the other half part to her brother Victor Delwita absolutely. Provided however that if the said Mildred Delwita or Victor Delwita shall die in the testatrix's lifetime or in the lifetime of her husband Harry Halangoda, leaving issue living at the death of the survivor of herself or of her husband, such issue shall take the residuary estate as stated for the devolution of her own children.

The Trustee sold the immovable properties in pursuance of the directions in the Last Will and the amount realised after defraying testamentary expenses, formed the Trust Fund and this amount of Rs. 89,376/40 was deposited with the Loan Board and the dividends declared thereon were drawn by Harry Halangoda, the original Petitioner and the immediate beneficiary under the said Trust. He was paid the dividends accruing till 1.1.73 but thereafter the Public Trustee, who purporting to exercise powers under the Administration of Justice Law No. 44 of 1973, refused to pay the said dividends to Harry Halangoda or his widow on the basis that they were not entitled thereto.

Upon the enactment of the Abolition of *Fideicommissa* and Entails Act No. 20 of 1972 Harry Halangoda claimed that he had become the absolute owner of the Trust Fund under Section 5 of the said Act and made an application to the Public Trustee for the payment to him of a sum of Rs. 89,376/40 being the capital and the dividends accrued thereon lying to the credit of the Trust. The Public Trustee refused the said application on the basis that Harry Halangoda was not entitled to the said monies and directed him to file separate proceedings to establish his claim thereto.

Ultimately Harry Halangoda made this present application seeking a declaration that he was the absolute owner of the monies lying to the credit of the Trust Fund by virtue of Section 5 of Act No. 20 of 1972. Harry Halangoda died during the pendency of this application and the present Petitioner-Appellant who is his widow was substituted in his place as the administratrix of his estate.

The 1st Respondent is the sister of the testatrix and the 2nd to 8th Respondents are the children of testatrix's brother Victor Delwita.

The learned District Judge by his order held that—

- (1) the late Harry Halangoda was under the terms of the Last Will and Trust entitled to a life interest and therefore the provisions of Section 5 of Act No. 20 of 1972 had no application. Hence he would not be entitled to the monies in the Trust Fund ;
- (2) the 1st Respondent and the 2nd to 8th Respondents were entitled to the sum of Rs. 89,376/40 and to the dividends accruing thereon after 3.7.76, the date of the death of Harry Halangoda ;
- (3) Harry Halangoda was entitled only to receive dividends which had accrued up to 3.7.76.

It is from this Order that the Petitioner-Appellant has appealed.

Section 5 of the Abolition of *Fideicommissa* and Entails Act No. 20 of 1972 enacts that—

"Where under the terms of any trust, whether created before or after the commencement of this Act, there is provision for the succession to the interest of a beneficiary, whether by way of remainder or reversion, upon the happening of some future event, whether such event is certain to happen or not, or upon the expiry of some period of time then, the interest of the beneficiary in whom the beneficial interest is vested shall be and for all purposes shall be deemed to be absolute, and no other succeeding beneficiary shall have any right to succeed thereto by way of remainder or reversion to such interest. . . ."

Section 9 of the Act states that—

"Nothing contained in this Act shall be construed to affect the creation or the continued validity of any trust, other than a trust of the nature referred to in section 5, or of any usufruct or other personal servitude of a like nature which a person may enjoy in property belonging to another."

The question that arises for decision is whether in terms of the Trust created by the testatrix, it is one which comes within the provision of Section 5 of Act No. 20 of 1972 or not, for if it does, then from the date which that Act came into operation the sum of Rs. 89,376/40 and the dividends accrued thereon and lying to the credit of that Trust Fund would devolve on Harry Halangoda but if it does not, he would be entitled only to the dividends up to the date of his death while the dividends that have accrued thereafter and the said sum of Rs. 89,376/40 would devolve on the 1st Respondent who would be entitled to half of that amount while the 2nd to 8th Respondents would be entitled to the balance half in equal shares.

Section 5 of the Act states that—

“Where under the terms of any trust there is provision for the succession to the interest of a beneficiary upon the happening of some future event then the interest of the beneficiary in whom the beneficial interest is vested shall be and for all purposes shall be deemed to be absolute, and no other succeeding beneficiary shall have any right to succeed.”

An examination of the terms of Clause 4 of the Trust created by the testatrix shows that the beneficial interest that her husband derived from the Trust was only as to the income during his life from her movable and immovable property and not dominium over such property or the proceeds realised from the sale of such properties, while ultimately if she died without descendants, her sister the 1st Respondent and the 2nd to 8th Respondents the children of her brother Victor Delwita received the whole of the capital and income realised by the sale of such properties. Therefore there was no succession by the succeeding beneficiaries to the interest of Harry Halangoda in that he had no beneficial interest in the capital sum of the Trust. Therefore, in my view Section 5 of the Act cannot have any application to the Trust created in this instance and the application of the original petitioner and hence of the substituted Petitioner-Appellant must necessarily fail. I agree with the Order of the Learned District Judge and I affirm it and dismiss this appeal with costs fixed at Rs. 315.

T. D. G. DE ALWIS, J.— I agree.

Appeal dismissed.