THE ARCHBISHOP OF COLOMBO
v.
THE LAND REFORM COMMISSION AND OTHERS

SUPREME COURT.
FERNANDO, J.
DHEERARATNE, J. AND
P. R. P. PERERA, J.
S.C. APPEAL NO. 101/94
C.A. NO. 156/86(F)
D.C. COLOMBO NO. 14130L
DECEMBER 09, 1994 AND JANUARY 12, 1995.

Abolition of Fideicommissa and Entails Act, No. 20 of 1972 ss. 4, 5, 9 – Exclusion of 'agricultural land' in Land Reform Law No 1 of 1972 – Sections 66(1)(d) and (e) of Land Reform Law – Charitable Trust – Fideicommissum – Trusts Ordinance, Sections 6, 99(1)(a) – Agricultural land.

The testator by his last will dated 30.12.62 left 234 acres of Goluwapokuna Estate to his wife prohibiting her from selling, mortgaging, gifting, leasing or otherwise alienating the said land and after her death the lands to go to the Roman Catholic Church.The testator died in 1964 and after his death, his widow married Arthur Leonard Dias Bandaranaike by whom she had two children Asanka Roshana and Brian Suresh. After the enactment of the Abolition of Fideicommissa and Entails Act, No. 20 of 1972 and the Land Reform Law No. 1 of 1972, the Land Reform Commission made a statutory determination (s.19 of the Land Reform Law) of 50 acres to the testator's widow and an inter family transfer of about 100 acres to two children (Section 14 of the Land Reform Law). The plaintiff (Archbishop of Colombo) instituted this action in 1981 against the Land Reform Commission and the testator's widow (original 2nd defendant) claiming a declaration that the property was subject to a charitable trust created by the last will and the determination and orders which

treated the 2nd defendant (widow of the testator) as having been the owner of the land as null and void. The 2nd defendant (widow of the testator) during the pendancy of the suit and her husband and two children were substituted in her place. In the District Court the plaintiff's case was that the last will created a usufruct in favour of the original 2nd defendant and not a fideicommissum and the Abolition of Fideicommissa Act did not apply; and the property because it was a charitable trust was excluded from the operation of the Land Reform Law. However in the Court of Appeal and Supreme Court it was common ground that the last will created a fideicommissum the original 2nd defendant being the fiduciary and the plaintiff the fideicommissary. The questions in appeal were –

1. The fideicommissum created by the last will, the fideicommissary's interest was not absolute but subject to a charitable trust.

2. The fideicommissum did not come to an end despite the Abolition of Fideicommissa Act and hence the property continued to be vested in the 2nd defendant as fiduciary.

3. Because the property was subject to a charitable trust, exclusion (d) of S. 66(1) of the Land Reform Law took it out of the definition of "agricultural land" and so the land did not vest in the Land Reform Law.

Accordingly when the fiduciary transferred part of the property in 1974 in breach of the prohibition on alienation the entirety vested in the plaintiff subject to the charitable trust.

Act No. 20 of 1972 came into operation on 12.5.72 and the Land Reform Law came into operation on 26.8.72 with retrospective effect from 29.5.71.

Held:

(1) A valid charitable trust had been established: the trust property was identified with certainty and there was a clear intention that plaintiff should hold the property for a charitable purpose falling within Section 99(1)(a) of the Trusts Ordinance. Although the trust property did not vest, immediately upon the death of the testator, in the designated trustee, that did not mean the charitable trust would be constituted or come into existence, only when, and if, the trust property vested in the plaintiff. A charitable trust will not fail for work of trustee. Despite the postponement of vesting until the happening of an event – an event which was certain to occur – a charitable trust was constituted, even though incompletely constituted.

Although Section 6 of the Trusts Ordinance makes the transfer of trust property to the trustee an essential requisite of a trust, yet this is subject to an exception where the trust is **declared by will.**

Upon the testator's death the charitable trust, declared by his last will, came into existence, or was constituted, even though the vesting of the trust property in the trustee, and the operation of the trust, were postponed until the death of the fiduciary or a breach of the prohibition on alienation.

(2) It is a settled rule of interpretation that a proviso is limited in its operation to the ambit of the section which it qualifies, unless the language plainly shows that it was intended to have an operation more extensive than that of the provision which it immediately follows.

The proviso to Section 5 of the Abolition of Fideicommissa Act, No. 20 of 1972 is neither an exception to Section 4 nor a general bar to charitable trusts being affected by the Act.

(3) On 12.5.72 by reason of Section 4 of the Abolition of Fideicommissa Act, the fiduciary interest of the original 2nd defendant enlarged into full ownership; that interest not having been previously subject to a charitable interest, the 2nd defendants ownership was not subject to a trust, and the fideicommissary interest of the plaintiff, as well as the charitable trust to which that interest was subject, was extinguished. The plaintiff's action fails.

(4) Even if the fideicommissary interest had not been extinguished, the property in suit was not excluded from vesting as agricultural land under the Land Reform Law with effect from 29.5.71.

Case referred to:

(1) *L.R.C. v. Ganegama Sangarakkita Thero* (1987) 2 Sri LR 411.

APPEAL from the judgment of the Court of Appeal.

H. L. de Silva, P.C. with *S.C. Crosette-Thambiah* for plaintiff-appellant.
P. G. Dep, S.S.C. for the 1st defendant-respondent.
E. D. Wickramanayake with *Gomin Dayasiri* for substituted respondents.

Cur. adv. vult.

January 12, 1995.
FERNANDO, J.

The questions of law which arise in this appeal relate to the meaning and effect of Sections 4, 5 and 9 of the Abolition of Fideicommissa and Entails Act, No. 20 of 1972, and exclusion (d) of the definition of "agricultural land" contained in Section 66 of the Land Reform Law, No. 1 of 1972. The relevant provisions are 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 (etc.) in the person in whom the title to such property is at the commencement of this Act vested subject to such fideicommissum (etc.) 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.

5. 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 by any other succeeding beneficiary ... 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:

Provided, however, that the preceding provisions of this section shall not apply to charitable trusts as defined in the Trusts Ordinance . . . or any trust under which the beneficiary in whom the beneficial interest is, on the commencement of this Act, vested, is –

(a) a person of unsound mind;
(b) a mentally deranged person;
(c) a mentally deficient person; or
(d) a person who is incapacitated due to old age or mental or bodily infirmity or disease.

9. 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."

66. In this Law . . ."agricultural land" means . . . but shall exclude –

(d) any such land which on May 29, 1971, constituted a charitable trust as defined in the Trusts Ordinance, so long and so long only as such land continues to be so owned or possessed as such trust;

(e) any such land held in trust on May 29, 1971, under the Buddhist Temporalities Ordinance so long and so long only as such land is held in trust under that Ordinance.

By his Last Will No. 2033 dated 30.12.62, Vernon Rajapakse, the husband of the original 2nd Defendant-Respondent ("the 2nd Defendant") devised 234 acres out of Goluwapokuna Estate, which is the subject-matter of this action, to the 2nd Defendant, "subject to the condition that she is prohibited from selling, mortgaging, gifting, leasing or otherwise alienating the said lands . . . and that she is only to possess and enjoy the income of the said lands during her lifetime and after her death the said lands . . . shall devolve [on the Plaintiff] for the use and benefit of the Roman Catholic Church in Ceylon". He further provided that any such alienation would be void, and that upon a breach of the prohibition on alienation too, the property would devolve on the Plaintiff subject to the same condition. He also directed his wife to erect, within three months of his death, a prominent granite slab on the Estate with the inscription "Goluwapokuna Estate – gifted to the Roman Catholic Church by Vernon Rajapakse in memory of his parents. . .".

The testator died in 1964, and the 2nd Defendant entered into possession. She married Arthur Leonard Dias Bandaranaike, by whom she had two children. After the enactment of the Abolition of Fideicommissa Act and the Land Reform Law, the 1st defendant, the Land Reform Commission, purported (a) to make a statutory determination under Section 19 of the Law, specifying the portion of the Estate to be retained by the 2nd Defendant, and (b) to permit the 2nd Defendant to transfer about 100 acres out of the aforesaid Estate to her two children, under Section 14. The plaintiff instituted this action in 1981 against the Land Reform Commission and the 2nd Defendant,

claiming declarations that the property was subject to a charitable trust created by the Last Will, and that determinations and orders made by the 1st Defendant (which treated the 2nd Defendant as having been the owner of the Estate) were null and void. The 2nd Defendant died while the matter was pending in the Court of Appeal; her husband and two children, the 2nd to 4th defendants-respondents-respondents ("the substituted defendants) were substituted in her place.

In the District Court the plaintiff's case was that the Last Will created a usufruct in favour of the 2nd Defendant, and not a fideicommissum; if so, the plaintiff acquired title to the property, and that title was not affected by the Abolition of Fideicommissa Act; and the property, because it was subject to a charitable trust, was excluded from the operation of the Land Reform Law. However, both in the Court of Appeal and in this Court, it was common ground that the Last Will created a fideicommissum, the 2nd Defendant being the fiduciary, and the Plaintiff the fideicommissary. It is therefore unnecessary for me to consider whether in truth, under the Last Will, the property vested in the plaintiff, whether by reason of a usufruct or otherwise – because the plaintiff had neither obtained leave to appeal, nor addressed any argument to us, on that basis.

The District Court was invited to consider four preliminary issues, which, together with the answers thereto, may be summarised as follows:

1.	Did the Last Will create a charitable trust?	NO
16.	Did the Last Will create a fideicommissum?	YES
17.	By virtue of Act, No. 20 of 1972, did the fiduciary interest of the 2nd Defendant enlarge into absolute ownership?	YES
18.	If issues 16 and 17 are answered in favour of the 2nd Defendant, can the plaintiff have and maintain the presently constituted action?	NO

Accordingly the plaintiff's action was dismissed.

The Court of Appeal dismissed the plaintiff's appeal, holding that:

> ". . . although the lands in suit constituted a charitable trust as at 29th May 1971 they cannot be excluded under Section 66(1)(d) [*sic*] of the Land Reform Law as the trust was not in operation."

Their reason for stating that the "trust was not in operation" was that –

> "the fideicommissary was to be the trustee of the charitable trust but the trust was to be operative after the death of the fiduciary or if she alienated the said properties. If not for the aforesaid Laws passed by the Parliament the charitable trust would have come into operation by reason of the said last will. But the aforesaid Laws . . . changed the legal position. The fideicommissum was abolished and the properties vested in the Land Reform Commission subject of course to the inter-family transfer and the provision regarding charitable trusts. Charitable trust property is exempt from the Land Reform Law by reason of Section 66(1)(d) [*sic*] "so long and so long only as such land continues to be owned or possessed as such trust". Here too it is common ground that the fiduciary owned or possessed the properties till 20.12.74 but in terms of the Law it was vested in the Land Reform Commission as at 29th May 1971. As the charitable trust was to be operative from a future date the land could not be regarded as **"land continues to be owned or possessed as such trust".** Therefore it cannot be excluded under Section 66(1)(d) [*sic*] of the Land Reform Law No. 1 of 1972."

Upon an oral application, the Court of Appeal granted leave to appeal on the following question:

> "Does Section 66(1)(d) [*sic*] of the Land Reform Law No. 1 of 1972 apply only to a charitable trust in operation as at 29th May 1971 or is it equally applicable to a charitable trust constituted prior to 29th May 1971 and continuing in force, but with operation thereof postponed to a future event?"

The Plaintiff's case in appeal involved three contentions: (1) that under the fideicommissum created by the Last Will, the fideicommissary's interest was not absolute but subject to a charitable trust; (2) that this fideicommissum did not come to an end despite the Abolition of Fideicommissa Act, and hence the property continued to be vested in the 2nd Defendant as fiduciary; and (3) that because the property was subject to a charitable trust, exclusion (d) took it out of the definition of "agricultural land", and so it did not vest in the Land Reform Commission. The Plaintiff therefore claims that when the fiduciary transferred part of the property in 1974, in breach of the prohibition on alienation, the entirety vested in the Plaintiff subject to the charitable trust.

The substituted Defendants contend that (1) there was no charitable trust; but even if there was a charitable trust, (2) the fiduciary's interest enlarged into full ownership by virtue of section 4, and thereupon the charitable trust, if any, came to an end; and (3) in any event that trust was not in operation on 29.5.71 or at any time thereafter, and exclusion (d) did not exempt trust property where the trust was not yet in operation, so that the interests of both the 2nd Defendant and the Plaintiff – fiduciary and fideicommissary – vested in the Land Reform Commission.

1. CHARITABLE TRUST

The Court of Appeal held that "the lands in suit constituted a charitable trust as at 29th May 1971".

A scrutiny of the relevant provisions of the Last Will confirms that a valid charitable trust had been established: the trust property was identified with certainty, and there was a clear intention that the Plaintiff should hold the property for a charitable purpose (falling within section 99(1) (a) of the Trusts Ordinance). Although the trust property did not vest, immediately upon the death of the testator, in the designated trustee, that did not mean that the charitable trust would be constituted or come into existence, only when, and if, the trust property vested in the Plaintiff. If a testator directed his executor to discharge debts and estate duty, and then to pay a certain sum of

money, or to transfer a specified property, to a named person to be held in trust for a charitable purpose, it cannot be argued that no trust would be constituted or come into existence unless and until the trust property was vested in the trustee. A charitable trust will not fail for want of a trustee. Despite the postponement of vesting until the happening of an event – an event which was certain to occur – a charitable trust was constituted, even though incompletely constituted.

Although section 6 of the Trusts Ordinance makes the transfer of trust property to the trustee an essential requisite of a trust yet this is subject to an exception where "the trust is **declared by will**". I therefore hold that upon the testator's death the charitable trust, declared by his Last Will, came into existence, or was constituted, even though the vesting of the trust property in the trustee, and the operation of the trust, were postponed until the death of the fiduciary or a breach of the prohibition on alienation.

1. THE ABOLITION OF FIDEICOMMISSA

Act, No. 20 of 1972 came into operation on 12.5.72, **before** the Land Reform Law. Mr. H. L. de Silva, P. C., contended on behalf of the Plaintiff that although section 4 provided, without any express exception, that fiduciary's interest under a fideicommissum would enlarge into full ownership, yet the legislature did not intend to affect charitable trusts. He argued that such a legislative intention was to be found in the proviso to section 5, as well as in section 9.

It is a settled rule of interpretation that a proviso is limited in its operation to the ambit of the section which it qualifies, unless its language plainly shows that it was intended to have an operation more extensive than that of the provision which it immediately follows (Maxwell, Interpretation of Statutes, 12th edition, pp 189-190). Here the proviso is expressly limited to the preceding provisions "of **this section**" – not "of this **Act**"; it cannot by a process of interpretation be applied to another section or to the whole Act. Further, sections 4 and 5 deal with two completely different subjects – the extinction of the interests of fideicommissaries, and the extinction of the interests

of succeeding beneficiaries; a proviso referring to trusts and beneficial interests cannot be assumed to apply to fideicommissary interests dealt with in another section. The proviso only prevents the extinction of a succeeding beneficiary's interest under a trust if the trust is a charitable trust (or the beneficiary is of unsound mind etc), and cannot be interpreted as preventing the extinction of a fideicommissary interest. The legislature could easily have made this proviso applicable to section 4 (and perhaps also to section 2), and its omission to do so must be presumed to be deliberate.

I therefore hold that the proviso to section 5 is neither an exception to section 4, nor a general bar to charitable trusts being affected by the Act.

Mr. de Silva then attempted to interpret section 9 as if it constituted a proviso to section 4: submitting that even a fideicommissum which falls fairly and squarely within the ambit of section 4 would survive if the fideicommissary's interests was subject to a charitable trust. If this contention is correct, since, section 9 applies not only to section 4 but to the entire Act, it would follow that a fideicommissum can be created even now, despite section 2, simply by making the fideicommissary's interest subject (wholly or perhaps even partly) to a charitable trust (or a usufruct).

It was submitted on behalf of the Plaintiff that section 9 should not be regarded as being subordinate to sections 1 to 8 simply because it appeared after those sections; since the Act should be interpreted as a whole, section 9 should be given the same meaning whether it appeared before or after those sections; therefore one should not first assume that the intention of the Act was to extinguish fidecommissa completely, and then seek to give a meaning to section 9. It was urged that section 9 set out the principles applicable to the construction of sections 1 to 8, and that one of those principles was that those sections should not be interpreted so as to extinguish a charitable trust; therefore, if a fideicommissary interest was found to be subject to a charitable trust (or a usufruct) section 4 must not be construed so as to "affect" that charitable trust (or usufruct); since that charitable trust (or usufruct) could only survive if the

fideicommissary interest continued, necessarily the fideicommissum was not extinguished.

Although this argument is not without attraction it is significant that section 9 does not provide that "nothing ... shall **affect**", but that "nothing ... shall be **construed** to affect". The former expression may well have sufficed to create an exception to the plain words of section 4 (cf. the phrase "shall not apply" appearing in the proviso to section 5) but the latter is, in my view, insufficient to create an exception or a proviso. It seems to me that "nothing shall be construed to affect" was only intended to restrain any **extended** interpretation of section 4 which sought to make section 4 applicable to other legal relationships, besides those expressly mentioned.

The object of the Act appears to be (a) to extinguish all fideicommissa (section 2 to 4), (b) to wipe out the interests of succeeding beneficiaries under a trust (section 5), except in cases coming within the proviso to section 5, and (c) to make consequential provisions (sections 6 to 8). In that context, when section 9 provides that nothing in the Act shall be "construed" to affect a (charitable) trust, it was not intended to sanction a process of interpretation which would derogate from the preceding provisions but was merely intended to declare a legislative intention that the provisions of the Act should not be given an extended construction so as to apply to legal relationships other than fideicommissa and one category of trusts. Taking the Act as a whole, there is no doubt that the "mischief" which the legislature sought to remedy was the practice of "tying-up of property" (and rendering it inalienable), by providing for the **successive** ownership of property by two or more persons – whether that ownership was *dominium* or beneficial ownership under a trust; the legislative remedy was to extinguish the right of the **successor**. Nothing in the provisions preceding section 9 applies to legal relationships involving the **distribution** of the rights of ownership, **concurrently**, among two or more persons – such as the equitable ownership of a trustee concurrently with the beneficial ownership of the beneficiary under a "simple" trust, as well as life interests, usufructs, servitudes, etc.; in all these no "succession" was involved. It seems to me that the use of the word "construed" in section 9 was only intended to preclude an extended construction being given to the Act in order to extinguish or affect rights under such other legal

relationships; and not to qualify or derogate from the preceding provisions.

Not surprisingly, Mr de Silva waxed eloquent on the "unfairness" of extinguishing a charitable trust. But that is hardly a matter for the judiciary. Section 5 allows a testator to provide for a mentally or physically disabled beneficiary to be succeeded by another beneficiary, by way of a trust; but section 4 does not permit a similar result to be achieved by means of a fideicommissum. That too seems "unfair". So also, to thwart a testator's desire to restrain a spendthrift spouse on child (e.g. by granting him only a fiduciary interest), or to provide for a minor child (e.g. by granting him a fideicommissary interest) can be considered as "unfair" as to prevent him from benefitting charity by means of a fideicommissum. The legislature cannot be presumed to have been unaware of the different forms which fideicommissa could take, and its obvious intention – insofar as that appears from the words it used – was to extinguish **all** fideicommissary interests, and to free the title of **all** fiduciaries from the rights of successors. Subjective perceptions as to "fairness" cannot distort or thwart that intention.

I therefore hold that on 12.5.72, by reason of section 4 of the Abolition of Fideicommissa Act, the fiduciary interest of the 2nd Defendant enlarged into full ownership; that interest not having previously been subject to a charitable trust, the 2nd Defendant' s ownership too was not subject to such a trust; and the fideicommissary interest of the Plaintiff, as well as the charitable trust to which that interest was subject, was extinguished. The Plaintiff's action therefore failed.

3. LAND REFORM

The substituted Defendants' alternative contention was that, even if the fideicommissum had not been extinguished on 12.5.72, yet on 26.8.72 when the Land Reform Law came into operation the interests of both fiduciary and fideicommissary vested in the Land Reform Commission, with retrospective effect from 29.5.71.

It is common ground that the property in suit was land used or capable of being used for agriculture, and thus within the definition of

"agricultural land", unless, as the Plaintiff contended, exclusion (d) applied.

Exclusion (d) is most unhappily worded. Land can neither "constitute" a charitable trust, nor be owned or possessed "**as** such trust". In sharp contrast, exclusion (e) uses clear and simple language: "any such land **held** in trust ... so long and so long only as such land is held in trust ...". If that was what was intended, it is difficult to understand why similar language was not used in exclusion (d). However, Counsel have not been able to suggest what other meaning was intended, and I will therefore assume that exclusion (d) applied to land used or capable of being used for agriculture which was "held subject to a charitable trust [or, in respect of which a charitable trust had been constituted] on May 29, 1971, so long and so long only as such land continues to be so owned or possessed **as** such trust". The meaning of "possession" was considered in *L.R.C. v. Ganegama Sangarakkita Thero* [1]. It seems to me that the phrase "**as** such trust" is narrower than "**held** in trust" or "**subject** to such trust", and requires that the land be owned or possessed "as part of" or "on behalf of" such trust, on 29.5.71 and at all material times thereafter. This the Plaintiff was unable to establish, for admittedly both dominium and possession were with the 2nd Defendant from 29.5.71 upto 26.8.72.

Mr de Silva submitted that the mere creation or "constitution" of a charitable trust was enough, urging that the second limb of exclusion (d) should be ignored. Words used by the legislature cannot lightly be disregarded. Further, in this instance, some qualification was necessary, because otherwise land which was subject to a charitable trust during the period May 1971 to August 1972 only would nevertheless be totally excluded, than and for all time. Such qualifications are found in the other exclusion clauses as well, and hence cannot be ignored selectively. The language used is certainly obscure, but even leaning in favour of ownership by the citizen and against vesting in the State, an interpretation which requires ownership or possession by or on behalf of the trust cannot be avoided.

I therefore hold that even if the fideicommissary interest had not been extinguished, the property in suit was not excluded from

vesting under the Land Reform Law with effect from 29.5.71, though not for the reasons which persuaded the Court of Appeal.

The Plaintiff's appeal is dismissed, but having regard to all the circumstances, without costs.

DHEERARATNE, J. – I agree.

PERERA, J. – I agree.

Appeal dismissed