IBRAHIM AND OTHERS

v.

FAIZER AND OTHERS

SUPREME COURT
S.N. SILVA, CJ.
BANDARANAYAKE J., AND
ISMAIL, J.
SC APPEAL No. 93/97
CA APPEAL 609/82(F)
DC PUTTALAM No. T/66
2ND SEPTEMBER 2002

Testamentary Action – Last will – Gift inter vivos or will - Intention of the testator

The deceased Segu Mohideen was the owner and proprietor of a jewellery business known as Mohideen Jewellery. He adopted the appellant as his son and nominated him to look after his business and to keep the accounts.

The will of the deceased dated 19.12.1971 (P1) in its first part conveyed to the appellant 1/2 the share of the wealth and income of the aforesaid business. The second part of the will provided that the appellant was to hold such right after the testator's death.

The District Judge held the Will as proved and issued probate to the appellant.

Held :

(1) Although the first part of the will was in the form of deed of gift, the intention of the second part was that it shall not take effect until after the testator's death. Hence P1 was a valid will

(2) The true criterion in interpreting a will is the intention of the testator to be gathered from the terms of the will and from surrounding circumstances.

APPEAL from the judgement of the Court of Appeal.

Cases referred to:

1. *Re Anziani* - (1930) 1Ch, 407.424
2. *Dias v Jansen* - (1913) 16 NLR 502
3. *Vaitty v Jaccova* - (1907) Appeal Court Reports 45
4. *Fan Eyre v The Public Trustee* - (1944) 46 NLR 59
5. *Seneviratne v Kandappapullai* - (1912) 16 NLR 151

R.K.W. Goonesekera with *F.C. Perera* and *M.F. Miskin* for appellant.

Sanjeewa Jayawardena for 4th respondent.

Cur.adv.vult

January 23,2003

ISMAIL, J.

The petitioner, Hameed Mohamed Salihu, annexing the last will dated 19th December 1971 (P1) of his elder brother Hameed Segu Mohideen, applied to the District Court, Puttalam in Testamentary case bearing No. T/66, by a petition dated 9th January 1979, to have it proved and to obtain for himself the grant of letters of administration. He averred that half the share of the income of the business called "Mohideen Jewellery" carried on by the deceased at No. 30, Main Street, Puttalam was devised to the 1st respondent. He disclosed that, besides himself and his brother the 5th respondent, three sisters named as the 2nd, 3rd, and 4th respondents were the intestate heirs to the balance estate of the deceased, the particulars of which were separately set out in a Schedule. The testator died on 9th October 1978 without revoking his last will and as no executor was named therein, the petitioner claimed to have letters of administration issued to him.

The 1st respondent himself moved to have the will proved as being duly executed and for probate to be issued to him in respect

of half the share devised to him. The 4th and 5th respondents claimed in their objections that the said will was a forged document and that it was neither a will nor an instrument known to law. Subsequently the petitioner, contrary to the averments in his original application, claimed by an affidavit dated 18th January 1980 that his elder brother Hameed Segu Mohideen died without leaving a valid last will and that the document annexed to his earlier application as the will was not the act and deed of the deceased.

The District Judge by his judgment dated 26.03.1982 accepted the evidence given by four of the five witnesses to the last will called by the 1st respondent and held that the will was proved. He made order absolute issuing probate to the 1st respondent in respect of the half share which formed the subject matter of the will.

Thereafter, pursuant to a motion filed by all the intestate heirs consenting to the grant of letters of administration to the petitioner and the 4th respondent, an order was made accordingly on 14.5.1982 in respect of the balance half share of the estate. The 4th respondent appealed to the Court of Appeal on 24.5.1982 moving to set aside the judgment of the District Court dated 26.3.1982 and sought a declaration that the last will which was a forged document was not the act and deed of the deceased who died intestate.

However, counsel for the 4th respondent submitted for the first time to the Court of Appeal as a proposition of law that the purported disposition in the impugned will was an irrevocable gift *inter vivos* taking effect immediately without reference to or being conditional upon the death of the testator Segu Mohideen. It is to be noted that as the sole challenge to the will in the District Court was that it was a forgery and in the absence of a specific issue there was no finding as to whether or not the said instrument of disposition was a valid will.

Admittedly, the deceased Segu Mohideen was the absolute owner and proprietor of a jewellery business known as Mohideen Jewellery situated at No. 30, Main Street, Puttalam. Having no children and being sick and of old age he adopted the 1st respondent as his son and nominated him to look after his business and to keep the accounts.

The will dated 19.12.1971 (P1) signed by five witnesses in the presence of the testator and in the presence of one another was read over, translated and explained to them. It was provided in the first part as follows:

> "**AND WHEREAS** in consideration of the affection and love I have on him I do hereby assign and convey unto him to hold and enjoy 1/2 the share of wealth income of the Mohideen Jewellery at No. 30, Main Street, Puttalam."

The Court of Appeal by its judgment dated 13.3.1997 found it unnecessary to examine the question as to whether the document was a forgery or not, and held that the impugned will (P1) is not a testamentary document. The judgment of the District Court was set aside and the case was remitted back "for necessary steps by way of testamentary proceedings"..

The Court of Appeal upon an examination of the instrument found in it "*ex facie* evidence of a gift *inter vivos*", that it was designed to confer an immediate right which the deceased possessed and that "the intention of the donor was to convey an irrevocable gift in *praesenti* rather than to convey his estate conditioned upon his death".

The Court of Appeal finally held that P1 cannot be construed as a testamentary document as there could be no testamentary intention when a person had "no perception of death" in the near future and when the 1st respondent was conducting business in the premises on behalf of the testator in the premises in suit.

The 1st respondent-appellant was granted special leave to appeal on 19.6.97 on the question whether the document P1 is a valid last will.

The Court of Appeal has apparently arrived at its findings by scrutinizing and laying emphasis only on the first half of the will by which the testator has assigned and conveyed to the 1st respondent-appellant half the share of the income of the business of Mohideen Jewellery. It has not referred to the further disposition therein that upon the death of the testator the appellant has been assured additionally of an absolute right to half the share of the premises itself and to occupy the same without fear of eviction. The second part of the will is as follows:

"**AND WHEREAS** I do assure that after my death the said Shahul Hameed Mohammed Ibrahim alias S.M. Ibrahim shall hold absolute right on the half share of the "Mohideen Jewellery" at No. 30 Main Street, Puttalam including the premises and enjoy, the benefits of same without any eviction or interruption and the said S.M.Ibrahim shall and will at all times thereafter my death enjoy same."

The second part of the will is clearly distinct from the first as stated in *Theobald on Wills* p.24 (14th ed). "if a deed is severable and in part clearly testamentary, such part may take effect as a will, though other parts are not testamentary". The author has in the foot-note referred to *Re Anziani* (1) in which it was held that a deed of appointment and assignment which was expressed to be intended to operate as an assignment as well as a will, could take effect as a conveyance *inter vivos* of the immovable property of the testatrix.

It has been noted already that upon the death of the testator, the 1st respondent-appellant was also assured of half the share of the premises besides the income. The submission of counsel for the 4th respondent-appellant that the reference in the will to the assurance of possession even after the death of the testator is superfluous because the gift took effect immediately, cannot be accepted because, as was held in *Dias v Jansen* (2) "no words expressed in a will should be treated as superfluous if they could be given a meaning not inconsistent with the avowed intention of the testator". The words in the second part of the will clearly express the intention of the testator to bequeath half the share of the specified immovable property to take effect after his death. Wood Renton, J. *in Vaitty v Jaccova* (3), relied on the following pas-sage in *Williams on Executors* vol. 1 p.82 (10th ed.) in interpreting an instrument, of disposition "It is undoubted law that whatever may be the form of a duly executed instrument and not withstand-ing that it may be in the form of a settlement or deed of gift, or a bond, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary".

The 1st respondent-appellant called as witnesses in the District Court, Eliathamby, Ismail, Malhamy and Selvaratnam, four

of the five witnesses to the will. Their evidence which was accepted by the District Judge was that they were present together and affixed their signatures to the document which was understood by them to be the last will and its contents were explained to them. the true intention of the testator is clear from the evidence and the surrounding circumstances. In *Fan Eyre v The Public. Trustee* (4), it was held that the paramount rule in the interpretation of a will was to look for the intention of the testator as it is expressed and clearly implied in the general terms of the will. When the intention is found on satisfactory evidence, to that must be sacrificed inconsistent clauses and words. As was also held in *Seneviratne v Kandappapullai*(5), "It is well settled that the general rules for the interpretation for wills are unsafe guides and that the only true criterion is the intention of the testator to be gathered from the terms of the will and from surrounding circumstances".

The Court of Appeal has erred in arriving at the finding that the document P1 is not a "testamentary document with a testamentary intention" without considering the last clause of the will which expressly states that the further disposition was to take effect after the death of the testator. The intention of the testator has been clearly expressed in the final clause of the will and it is clear to me that the instrument depends "for its vigour and effect" on the death of the testator.

For these I hold that the document P1 is a valid will. The judgment of the Court of Appeal is therefore set aside.

The appeal is allowed with costs fixed at Rs.10,000/-.

SILVA, CJ. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal allowed.