PEDRIS
v.
FERNANDO AND ANOTHER

SUPREME COURT.
SHARVANANDA, J., WIMALARATNE, J., AND ABDUL CADER, J.
S.C. No. 18/82. – C.A. No. 551/73 (F) – D.C. COLOMBO No. 13153 (L).
OCTOBER 12, 1983 AND FEBRUARY 24, 1984.

Fideicommissum conditionale – Prohibition of alienation by act inter vivos such as sale, donation, mortgage or lease – Does such prohibition extend to alienation by Last Will?

The plaintiff sought to vindicate title to the lands described in Schedules 1 to 10 of the plaint and to have the defendants evicted therefrom. She traced title to one Cornelis Fernando who by his Last Will P1 dated 21.6.1948 and Codicil P2 admitted to probate in D.C. Kalutara 3435/T had devised the lands in Schedules 1 to 6 and 8 to 10 to his son Lambert Cornis Fernando subject to the conditions that he shall not sell, donate, mortgage or lease for a period exceeding five years at a time or in any other way alienate the same till the 31st day of December, 1970. Cornelis Fernando by deed of gift No. 3341 of 24th October, 1947 (P3) gifted the land described in schedule 7 also to his son Lambert Cornis Fernando subject to the condition that the donee shall not on any date prior to 31st December, 1968 sell, mortgage, donate, or lease for a period exceeding five years at any time or otherwise alienate the said premises. In the event of the conditions in the Will and donation being disobeyed the premises were to pass over to the children of Cornis Fernando.

Cornis Fernando died on 27.4.1968 himself leaving Last Will No. 380 dated 21st April, 1968 (P4) by which he devised the said lands to the plaintiff. This Last Will was the subject-matter of testamentary proceedings where the two defendants claimed that the said lands were subject to a fidei commissum created by Last Will P1 and deed of gift P3 and that Cornis Fernando had no disposal interest in these lands. The plaintiff then instituted the present action in the District Court.

The District Judge held that Cornis Fernando was entitled and competent to bequeath the said lands by Last Will P4. In appeal the Court held that alienation by Last Will was *covered by the prohibitions imposed in Last Will P1* and donation P3 and that the Last Will P4 was a contravention of them.

Held–

By the documents P1 and P3 Lambert Cornis Fernando was prohibited from alienating the properties for a limited period to anybody whether within or without the family. The prohibition created a "fideicommissum conditionale," that is a fideicommissum conditioned to come into existence on the breach of the prohibition. A prohibition against alienation must be strictly interpreted and ought not to extend to modes of alienation other than those expressly mentioned. The phrase "in any other way alienate" in P1 or "otherwise alienate" in P3 does not cover alienation by Last Will because it is only when alienation of a thing *outside the family is forbidden in general terms* that a testamentary disposition is also included in such a prohibition. Alienation outside the family is not prohibited by P1 and P3 and therefore must be limited to alienation by act inter vivos.

A will is ambulatory during the lifetime of the testator and does not operate as a disposing or putting away of any estate until after the death of the person making it. It requires the death of the testator for its consummation. The Last Will P4 does not constitute a breach of the prohibition on alienation and therefore the plaintiff is entitled to be declared owner of the properties in suit.

Cases referred to :

(1) *Kanayson v. Rasiah, (1967) 69 N.L.R. 553 (P.C.).*

(2) *Doe Stevenson v. Glover, (1845) 14 L.J.C.P. (N.S) 169 ; 1 C.B. 448 ; 135 E.R. 615.*

(3) *Executor of Last Will of Rambukwella Siddhartha v. Sumana Thero, (1943) 44 N.L.R. 365.*

(4) *Ex parte Van Eeden, (1905) T.S. 151, 153 (Transvaal Law Reports – Supreme Court)*

APPEAL from a judgment of the Court of Appeal.

H. L. de Silva, P.C. with *Ifthikar Hassim* for plaintiff-appellant.

K. N. Choksy, P.C. with *L. C. Seneviratne, H. Soza* and *Miss. I. R. Rajepakse* for the defendant-respondents.

Cur. adv. vult.

May 17, 1984

SHARVANANDA, J.

The plaintiff filed this action for a declaration of title to and ejectment of the defendants from the lands described in the schedules 1-10 in the plaint. The plaintiff pleaded that one Cornelis Fernando was entitled to the said lands and that he by his Last Will P 1 dated 21.6.1948 and Codicil P 2, which were admitted to probate in D.C. Kalutara 3435/T, had devised the said lands described in the schedules 1-6 & 8-10 to his son Lambert Cornis Fernando, subject to the terms and conditions set out in the said Last Will P 1. The said Cornelis Fernando by deed No. 3341 of 24th October, 1947 (P 3) donated the lands described in schedule 7 of the plaint to the said Lambert Cornis Fernando, subject to the terms and conditions set out in the said deed. The said Lambert Cornis Fernando who thus became entitled to the said lands described in schedules 1-10 of the plaint, subject to the terms and conditions set out in P 1 and P 3 died on 27th April, 1968, leaving his Last Will No. 380 dated 21st April, 1968 (P 4) by which he devised and bequeathed the said lands to the plaintiff.

The said Last Will P 4 was the subject matter in testamentary proceedings in case No. 24126, D.C., Colombo. In the said action the 1st and 2nd defendants claimed that the said lands were subject to the fidei commissum created by the Last Will P 1 and deed of gift P 3 in favour of the first defendant and that the said Lambert Cornis Fernando had no disposable interest in the said properties to convey to the plaintiff, and that the lands had vested on the 1st defendant. The plaintiff denied that the said Last Will P 1 and the deed of gift P3 created a fidei commissum in favour of the 1st defendant and pleaded that the said Lambert Cornis Fernando was legally entitled to and competent to devise and bequeath the said properties to the plaintiff.

The plaintiff has instituted the present action for a declaration of title and ejectment of the defendants from the properties described in the schedules 1-10 of the plaint on the basis that the said Lambert Cornis Fernando was legally entitled to and competent to devise and bequeath the same to the plaintiff by his Last Will (P 4). The defendants have in their answer disputed the claim of the plaintiff and have pleaded that under and by virtue of the instruments P 1, P 2 & P 3 the said properties were subject to a fidei commissum in favour of the 1st defendant and had devolved on the 1st defendant on the death of the said Lambert Cornis Fernando, and that the said Cornis Fernando could not in law have devised and bequeathed the said properties to the plaintiff.

The contention of the parties revolve round the question whether the said Lambert Cornis Fernando was legally entitled and competent in law to make, bequeath and devise by his Last Will (P 4) the said properties to the plaintiff, in view of the conditions and prohibitions contained in P 1 and P 3.

The conditions contained in P 1 & P 3 read as follows :

"P 1" I devise and donate unto my beloved son Lambert Cornis the following properties subject to the conditions that he shall not sell, donate, mortgage or lease for a period exceeding five years at a time or in any other way alienate the same till the 31st day of December, 1970, but shall possess the same during the said period and in the event of his contravening or violating the aforesaid condition the same shall pass to his children as if there was no such sale or alienation. That after the 31st day of December, 1970, he shall be able to do whatever he likes with the said properties as if no such condition or prohibition existed."

"P 3" That the said donee shall not on any date prior to 31st December, 1968, sell, mortgage, donate, lease for a period exceeding five years at any time or otherwise alienate the said premises but shall possess the same till the aforesaid date.

In the event of the said Donee in disobedience to the condition mentioned above were to sell, mortgage, donate, lease or otherwise alienate on any date prior to 31st December, 1968, the said premises shall not pass to the person or persons in whose favour such transfer, encumbrances or other alienation shall have been made but shall pass over to the lawful children

of the said donee in equal shares if there be any and on failure of such children the same shall pass over to my remaining children and their descendants in equal shares.

The said Donee shall have full power and authority from and after 1st January, 1969, to deal with the said premises as if there were no such restrictions and prohibitions against alienation whatsoever."

After trial the District Judge gave judgment for the plaintiff on the ground that the prohibitions contained in P 1 and P 3 could not be construed to prohibit an alienation by Last Will and that hence Lambert Cornis Fernando was entitled and competent to bequeath by the Last Will (P 4) the properties referred to in the schedules to the plaintiff who is his sister and that he had not by executing the Last Will (P 4) committed any breach of the conditions imposed by the documents P 1 and P 3.

On appeal by the defendants the Court of Appeal disagreed with the view of the District Judge and held that Lambert Cornis Fernando was not competent to deal with the properties by his Last Will (P 4) and that the alienation by Last Will (P 4) contravened the conditions set out in P 1 and P 3 and that such contravention operated to vest the title to the properties in question on the 1st defendant who was the only child of Lambert Cornis Fernando, the fiduciary on P 1 and P 3. The Court of Appeal therefore set aside the judgment of the District Judge and dismissed the plaintiff's action with costs in both courts. From the said judgment of the Court of Appeal the plaintiff-appellant has preferred this appeal to this court.

The decision of the appeal turns on the answer to the question whether alienation by Last Will within the period specified in the Last Will (P 1) and deed of gift (P 3) constituted a breach of the prohibition prescribed therein.

Counsel for defendant-respondents submitted that the terms in P 1 which provide that Lambert Cornis Fernando, the devisee, shall not sell, donate, mortgage or lease for a period exceeding five years at a time or in any other way alienate the same till 31.12.70, but shall possess the same during the said period ; and the terms in P 3 which provide "that the said Lambert Cornis Fernando the donee shall not prior to 31.12.68, sell, mortgage, donate, or lease for a period exceeding five years at any time or otherwise alienate the said premises but shall possess the same till the aforesaid date," prohibit all alienation, including alienation by Last Will till the expiry of the

dates mentioned in P 1 and P 3 and that hence Cornis Fernando who died on 27th April, 1968, could not have validly bequeathed the said properties to the plaintiff by his Last Will dated 21.4.68, prior to the dates referred to in P 1 & P 3. He contended that the Last Will P 4 took effect within the prohibited period mentioned in P 1 and P 3 and hence contravened the conditions set out in P 1 and P 3 and that such contravention operated in terms of P 1 and P 3, to vest the title to the properties on the 1st defendant-respondent, the only child of the said Lambert Cornis Fernando, and that the testator on P 4 had no disposable interest in the properties to convey to the plaintiff-appellant and that the latter had no title to the said properties

It was submitted on the other hand by Counsel for the plaintiff-appellant that the alienation that was prohibited by P 1 & P 3 was alienation by act inter vivos, such as sale, donation, mortgage or lease and did not extend to alienation by Last Will. The intention of Cornis Fernando, testator of P 1 and donor on P 3 was that his son Lambert Cornis Fernando should possess the properties without alienating them prior to the dates mentioned in P 1 & P 3 and that by the execution of his Last Will (P 4), Lambert Cornis Fernando did not himself alienate the properties. His contention was that the bequest by Lambert Cornis Fernando was not alienation by an act inter vivos.

The ultimate question is whether the restrictions set out in P 1 and P 3 are wide enough to imply a prohibition against alienation by Last Will. Since there is no such express prohibition, having regard to the language of P 1 and P 3 does the phrase "in any other way alienate" in P 1 or "otherwise alienate" in P 3 catch up the execution of a Last Will which comes into effect within the prohibited period set out in P 1 and P 3.

A fidei commissum being essentially the divesting to some extent of an absolute gift, so as to cut down that absolute gift is regarded with disfavour by the court. It is a fundamental principle that where there is doubt whether a fidei commissum has been created, that construction should be approved which will pass the properties unburdened. When making a testamentary disposition a testator is presumed to place as few burdens as possible upon the affected property. If he institutes an heir he is presumed to have intended the heir to be dominus of all the property acquired with the full and unrestricted right of alienating and bequeathing the same and where he makes a bequest it will require clear words, not equivocal language to diminish the legatee's interest.

In keeping with this principle a prohibition against alienation must be strictly interpreted and ought not to extend to modes of alienation other than those expressly mentioned by the testator or donor (Voet 36 : 1 : 27). A prohibition against any alienation by act inter vivos must not be intended to include a testamentary disposition. (McGregor's Voet : page 68) A prohibition must be interpreted to impose the least possible restraint consistent with the testator's intention and the construction is favoured whereunder the burdened legatee is left with the free and unfettered possession of the bequest which he acquired from the testator or donor.

By the documents P1 and P3 though Lambert Cornis Fernando had become the owner of the properties in question he was prohibited for a limited period from alienating them to anybody, whether within or without his family. The prohibition created what is termed "fidei commissum conditionale". That is to say a fidei commissum conditioned or to come into existence on a breach of the prohibition.

Sande who is the accepted authority on the subject of "Restraints upon alienation," in Chapter I of his treatise defines "alienation" to be "any course of dealing by which dominium is transferred". He catalogues the various species of alienation covered by the term. According to him the following transactions come under the head of 'Prohibited Alienation' –

1. Sale,
2. Barter or Exchange,
3. Donation,
4. A datio in solutum (the immovable property of minors cannot be so bestowed without an order of court),
5. The Settlement of a law Suit,
6. Division,
7. Repudiation of immovable property, acquired as a legacy, or in any other way by a pupil,
8. Usucaption (Prescription),
9. A creation of a servitude,
10. Granting of a Usufruct,
11. Granting an Emphyteusis (leasing),
12. Finally under the term "Prohibited alienation" comes every course of action from which alienation can follow . . . . . When alienation is prohibited, therefore, pledging or an agreement of hypothecation is also prohibited."

Sande enumerates thus twelve ways in which breach of a prohibited alienation can take place. (Sande 1 : 3 : 16 – 49). It is significant that in this exhaustive enumeration of the different kinds of alienation he does not include or mention alienation by Last Will. According to the ordinary acceptation of the term "alienation," only transfers by act inter vivos appear to be embraced in that concept.

In Part 3, Chapter 3 of his book Sande, dealing with *"When is a thing considered to be done in breach of a prohibition and what is included under the term prohibition?"* states the rules of construction : "In order to decide whether anything has been done contrary to a prohibition against alienation, the chief point we should consider is whether the testator has prohibited only a special kind of alienation or has prohibited alienation in general. As if only some special form of alienation has been prohibited the kinds of alienation with the exception of that one special form are allowed. For, he who forbids only one thing out of many is considered to countenance the remaining things" (3 : 3 :1).

"Therefore a prohibition to sell does not prohibit the making of a donation, unless a sale is mentioned only as an example of the class of alienation which is prohibited" (3 : 3 :2 – 3).

"Moreover, when a sale, donation and a pledge are prohibited, alienation by Last Will is considered to be permitted" (3 : 3 : 6).

"Words used as a recommendation are inoperative and do not extend the provisions, nor do they give rise to any right; unless the words are used to express the motive, or final reason ; as if the testator, after he has said 'I forbid the properties to be sold' adds as his motive and reason,' 'Because I desire it to be kept in my family'. In this case the said property is considered to be prohibited from being transferred to a stranger by Last Will, because the expression of the motive explains and widens the provision" (3 : 3 : 7 – 8).

"But if the general term 'alienation' is placed in the midst of special terms – for instance, if it is said, "I prohibit a sale, a donation, an alienation or pledge" – then the general term 'alienation' is limited by the special terms by reason of the alternative article "or". If however the general term 'alienation' is placed last – for instance, if the testator has said, "I prohibit my property to be sold, donated, pledged, alienated" – then the generic term being placed last, includes every class of alienation." (3 : 3 : 9 – 10).

to the school etc. as set out in A3 and being satisfied with the genuineness of the residence of the applicants was by any standards a most exacting and formidable one and that in this anxious scramble for a meagre available number of 70 vacancies by 725 applicants much frustration and discontent would be caused in the minds of unsuccessful parents, for, to every parent the admission of his child to one of the best schools is a matter that concerns him very dearly. This problem is compounded by the Principal and Admission Committee having to be satisfied with genuineness of the residence of persons who occupied annexes for 18 months prior to the making of the application and that they were not mere ad hoc residences for the purpose of conforming to the proximity of residence qualification set out in A3. The petitioner being outside the category of chief householder had to reside within 18 chains of the school – (vide para II (j) of the 1st respondent's affidavit) whereas the petitioner in fact resided a distance of 22 chains away from the school – (vide his own declaration in the application form 1R1, cage 9). Thus initially his application did not have the requisite residence qualification of proximity to the school. This court will not lightly interfere with the administration of the Principal of the school and with the determination of the Admission Committee and Appellate Board unless for very compelling reason as to do so will disorganize the scheme of admission and will be detrimental to the proper administration of the school. Indeed S. A. de Smith in his treatise on Judicial Review of Administrative Action, 4th edition at p. 163 has stated that–

> "The allocation of government contracts and university places may cause much hardship to the unsuccessful contender, but it has not yet been held in this country that they have any common law right to go to the courts on the ground that their applications have been summarily rejected, even if the rejection has been based on an adverse undisclosed report".

In the instant case the petitioner has been given a hearing and the documents produced by him have been considered before his application has been refused. I am of the view that in the context of the scramble for admission to 70 vacancies in the Kindergarten of Visakha Vidyalaya by 725 applicants, a person cannot insist as of right that his child must be admitted to that particular school of his choice, however anxious or desirous he may be. Indeed section 8 of the Circular A3 stipulates that the C.E.O. should take action to find places for all rejected cases by 30th November and expressly ensures that

every effort will be made to see that every child will be found some school and not left "languishing at home" as alleged by the petitioner. Manifestly the petitioner's residence being not within 18 chains but being 22 chains away from the school as declared by him does not qualify him and the writ cannot lie. The court will also take notice of the fact that the child is now already attending school in Bishop's College, Colombo.

The learned Deputy Solicitor General strongly contended that all these facts pertaining to residence at Dehiwela proved by 1R5 were withheld from this court in the petitioner's application for Writ which is thus lacking in uberrima fides and that on this ground too the application must fail. I am inclined to agree with this submission. A petitioner who seeks relief by Writ which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised. In the instant case the fact that the petitioner had a residence at Dehiwela is indeed a material fact which has an important bearing on the question of the genuineness of the residence of the petitioner at the annexe and on whether this court should exercise its discretion to quash the order complained of as unjust and discriminatory. On this ground too the application must be dismissed for lack of uberrima fides.

The application of the petitioner thus having failed on the above grounds, it is hardly necessary to consider the alleged ground of discrimination against the petitioner's child on the ground that after the refusal of his application some other children with less qualification have gained admission. Discrimination and denial of equal rights cannot be agitated in an application for Writ of Certiorari and must form the subject of an action for fundamental rights which cannot be canvassed in this court. I see no merit in this application for Writ of Certiorari for the reasons set out and dismiss this application with costs fixed at Rs. 315.

T. D. G. DE ALWIS, J. – I agree.

Application dismissed.