ASYLIN PERERA

v.

NICHOLAS PERERA AND OTHERS

SUPREME COURT
SAMARAWICKREMA, J.
WEERARATNE J AND WANASUNDERA J.
S. C. NO. 14/80
D. C. CHILAW NO. 18563/F
JANUARY 20, 1981.

Evidence – Expert evidence – Conflicting translations of deed – Interpretation – Construction of deed – Fideicommissum.

In the construction of deeds and documents, ordinary words should be given their plain and ordinary meaning. What matters is the sense in which the words are generally understood, which *prima facie* would be the meaning intended by the parties. Often it may be unnecessary to go by the etymological or strict dictionary sense.

In interpreting the prohibition clause in a deed purporting to create a fideicommissum in order to ascertain if the beneficiaries were designated with certainty the trial court rightly preferred the construction giving the words their commonly understood meaning rather than a strictly grammatical construction.

Cases referred to:–

(1) Jayatunga v. Ramasamy Chettiar 52 NLR 171
(2) Mary v. Kurera 74 NLR 5

APPEAL from judgment of Court of Appeal.

Walter Jayewardene Q.C. with M.S.M. Nazeem for plaintiff-respondent.
T. B. Dissanayake with Bimal Rajepakse for defendant-respondents.

April 7, 1981

WANASUNDERA, J.

The question for decision in this case is whether or not the wording in deed No. 15738 dated 23rd November 1907 is adequate to create a *fidei commissum.* By this deed, Mariya Perera had gifted the land, which is now the subject-matter of this partition action, to her six grand-children in equal shares, namely, Hugo, Theresia, Eugine, Ana, Silvestry and Mariya. It is unnecessary for the purpose of this judgment to set out the further devolution of title except to state that Silvestry, during his lifetime, purported to transfer all his interests to the 6th and 7th defendants. This transfer has been challenged on the ground that, since deed No. 15738 constituted a *fidei commissum* and prohibited alienation, Silvestry was incapable of transferring title to the 6th and 7th defendants.

The deed which is in Sinhala imposes a prohibition against alienation on the donee fiduciaries and contains the following statement, which is the subject of controversy before us –

".....සහ ඔවුන්ගෙන් පැවත එන දරු උරුමක්කාර පොල්මඃ අද්මිනිස්ත්‍රාසි භාරකාරාදී අයවලට බුක්ති විඳ ඕනෑ මනාපයක් කර ගැනීමට පුළුවන් හැටියටත් මෙයින් නියමකර අයිතිකර හිමිකර සඳහකල් අයිති වීමට බලය දෙනු ලැබේ."

These words and language are common and have been used in many such documents. Similar words have come to the courts for interpretation in numerous cases. Since these decisions turned on the particular words used in the deeds concerned, both parties in the case have sought to place expert opinion as to the exact translation of the above passage. Mr. U. A. S. Perera, a practitioner in these courts and a well-known scholar of Sinhala, was called on behalf of the plaintiff. He graduated with honours from the London University in Pali and Sanskrit and also holds a Master's degree. Although his opinion was not accepted, the Court of Appeal was constrained to say that "this witness is learned not only in the law, but also in the Sinhala language."

The expert called by the defendants is Mr Newton Pinto Moragoda. He is also qualified as a lawyer, but at present holds the office of Superintendent of Translation in Law in the Department of Educational Publications. He has graduated in Sinhala, Pali and History. As the trial Judge remarked, Mr. Pinto Moragoda did not have the experience of Mr. Perera and he had given his evidence "with some degree of diffidence." Nevertheless, his opinion has been accepted both by the trial Judge and the Court of Appeal.

According to Mr. Perera, the words "ඔවුන්ගෙන් පැවත එන" (descending from them) qualify the word "දරු" (children) and the word "උරුමක්කාර" is an adjectival phrase. He translates the material words as "that their children descending from them who are their heirs and their executors, administrators and assigns can deal with it in any way whatsoever as they please." Mr. Pinto Moragoda on the other hand stated that the words "ඔවුන්ගෙන් පැවත එන" qualify all the words. "දරු ..... අයවලට." According to Mr. Pinto Moragoda, the excerpt means "their children, heirs, executors, administrators and assigns." One reason he gave for this translation is that the expression "දරු උරුමක්කාර" are two words and mean children and heirs as against Mr. Perera's view that it was an adjectival compound meaning "heirs who are children." In regard to the functionaries referred to Mr. Perera has said that

they cannot be said to descend from the donor or donee. Mr. Pinto Moragoda has however stated that this collocation of words is incomplete since they are stems and the word supplies the necessary case ending. That is why he is of the view that this statement refers to four classes of persons as beneficiaries.

The learned trial Judge has accepted Mr. Pinto Moragoda's opinion and held that the words mean "that after the six grandchildren mentioned in the deed, the beneficiaries are children, heirs, executors, administrators and assigns of the six donees." This the learned trial Judge states has created an uncertainty as regards the beneficiaries, meaning the *fidei commissarii.* The trial Judge purported to apply the decision of Nagalingam, J., in *Jayatunga v. Ramasamy Chettiar* (52 N.L.R. 171) in coming to this conclusion. In *Jayatunga's* case, the language in the relevant deed reads as follows –

> . "Albina Hamy. . . . . shall possess only the said properties . . . . . and on the death of her the said donee the children from her and their heirs, executors, administrators and assigns shall have the right to possess the said properties or to do whatever they please with the same."

Justice Nagalingam held that the *fidei-commissaries* were clearly and adequately designated and that the words "heirs, executors, administrators and assigns" used in apposition to the fiduciary or *fidei commissari* can be considered as a mere intention to vest the *plena proprietas* in the property in such heirs and cannot cause uncertainty about the beneficiaries. He accordingly held that the use of such words does not derogate from the valid creation of a *fidei commissum.* On the other hand he accepted the principle that where the executors, administrators or assigns of the donee are indicated as the *fidei commissaries,* an uncertain class of persons are referred to as beneficiaries and due to this uncertainty the effect to create a *fidei commissum* would be rendered nugatory.

Mr. Jayewardene has referred us to certain authorities containing the main principles governing the construction of deeds and documents of this nature. Generally, in the construction of deeds and documents, ordinary words should be given their plain and ordinary meaning. What matters is the sense in which the words are generally understood, which *prima facie* would be the meaning intended by the parties. Often it may be unnecessary to go by the etymological or strict dictionary sense. He also referred to instances where our courts, even when Sinhala was not the language of the courts, had examined the document concerned and arrived at its true meaning.

The words in dispute are commonly used in documents of this nature and upon a consideration of the document as a whole, their ordinary meaning appears to me to approximate to the meaning Mr. U. A. S. Perera has assigned to them rather than to the one suggested by Mr. Pinto Moragoda. As the learned trial Judge himself states in the judgment, Mr. Perera admitted that he was seeking to give these words their commonly understood meaning rather than give them a strictly grammatical construction. Mr. Pinto Moragoda on the other hand chose to do the latter and the meaning he has given to these words seems too technical and grammatical. It is unlikely that in the context of a legal document like the deed P2, the words "ඔවුන් ගෙන් පැවත එන" or "descending from them" would be used with reference to executors, administrators and assigns. It is also improbable that the donor who has, in the part of the provision immediately prior, clearly stated that the donees would not be at liberty to sell or to alienate their life interest or to alienate in any manner, would, in this part of the provision which follows immediately after, refer to assigns of the donees. In this view of the matter there is a considerable doubt about the correctness of Mr. Pinto Moragoda's translation. If we accept Mr. U. A. S. Perera's translation as the correct one, then on the basis of the reasoning in *Jayatunge v. Ramasamy Chettiar (supra)* which has been followed by Tennekoon, J., in *Mary v. Kurera* (74 N.L.R. 5), the objection that the *fidei-commissaries* have not been designated with sufficient clarity fails.

I would therefore set aside the judgment of the Court of Appeal and send the case back for further proceedings on this basis. The plaintiff will be entitled to costs both here and in the Court of Appeal. The plaintiff will also be entitled to payment of Rs. 210/- from the 6th and 7th defendants jointly as costs of contest in the trial court.

SAMARAWICKREME, J. — I agree

WEERARATNE, J — I agree

Appeal allowed