STELLA PERERA
v
SILVA

SUPREME COURT
DR. AMERASINGHE, J.
WADUGODAPITIYA, J.
BANDARANAYAKE, J.
SC 166/97
SC SPL LA 223/97
CA 280/91 (F)
DC NEGOMBO 339/L
NOVEMBER 1, 2001

Revocation of Gift – Ingratitude – Best evidence rule – Prescription Ordinance section 3 – Right of Conjugal 'Nest' – Right to eject husband/wife ? – Does it depend on ownership ? – Occupation of husband/wife is it by license of husband/wife ? Actio personalis moritur cum persona – litis contestatio ?

The plaintiff-respondent and the 1st defendant, wife and husband had no children of their own and they adopted one S-2nd defendant as their child. The 3rd defendant is the husband of the 2nd defendant. The 1st defendant gifted the matrimonial house to his wife the plaintiff in 1963 and following a breakdown of the relationship with her husband – 1st defendant the plaintiff left the matrimonial house in 1982. As the plaintiff was displeased that the 2nd defendant had refused to marry the plaintiff's nephew she gifted the property to her nephews. Later, the plaintiff obtained a retransfer and sought to evict her husband, adopted daughter and her family.

The 1st defendant husband sought an order to revoke the gift made to his wife on the ground of ingratitude. The District Court revoked the Deed, and dismissed the plaintiff's action. The Court of Appeal set aside the judgment of the District Court.

Held:

(1) A deed could be revoked on the ground of ingratitude.

(2) There was sufficient evidence of misconduct on the part of the plaintiff manifesting ingratitude.

(3) In the present day, it is not true that the best evidence must or even may always be given. All admissible evidence is generally equally accepted.

(4) Adverse possession- between spouses in relation to their matrimonial home-could not have commenced till the complete breakdown of the relationship between the plaintiff and the 1st defendant husband- and that took place only in 1982. After making the gift of the matrimonial home to the plaintiff in 1963 the 1st defendant not only continued to live in that house but also effected substantial extensions etc. at his own expense.

Per Amerasinghe, J.

> "In my view the District Judge was quite right in refusing to eject the 1st defendant for as a matter of law the right of occupation of the conjugal nest did not depend on ownership, where the husband is the owner of the property occupied by the couple he has no right, while the marriage is in existence to eject his wife from or without providing her with suitable alternative accommodation. Her occupation is not by licence of her husband but is sui generic. Similarly the wife too has no right to eject her husband from the matrimonial house because the property belongs to her".

(5) The husband has rights flowing from the marriage which in relation to that property put him in a category differing 'toto coeli' from that of a stranger.

(6) The 1st defendant died, pending appeal however by this time he had a judgment in his favour in respect of his claim to have the donation to his wife revoked and for possession. The stage of 'litis contestatio' having being reached the 1st defendant's action did not die with him. The maxim *actio personalis moritur cum persona* had no application.

APPEAL from the judgment of the District Court of Negombo

Cases referred to :

(1) *Dona Podi Nona Ranaweera Menike* v *Rohini Senanayake* – 1992 2 Sri LR 180.

(2) *Krishnaswamy* v *Thillaiyampalam* – 59 NLR 265

(3) *Manuelpillai* v *Nallamma* – 51 NLR 221

(4) *Barnes* v *Trompowsky* – 1797 – 7 TR 265

(5) *Badenhorst* v *Badenhorst* – 1964 – 2 SA 676

(6) *Buck* v *Buck* 1974 – 1 SA 609

(7) *N. J. Canekaratne* v *R. M. D. Canekaratne* – 61 NLR 522

(8) *Mrs. A. E. Alwis* v *D. S. Kulatunga* – 73 NLR 337

(9) *Fernando* v *Livera* – 29 NLR 246

(10) *Dheerananda Thero* v *Ratnasara Thero* – 60 NLR 7

(11) *Krishnasamy Vengadasalam* v *Adika Pundagam* – 79 NLR 150

P. A. D. Samarasekera PC with *Yasa Jayasekara* for petitioner.

W. Dayaratne with *Rajika Jayawardane* for respondent.

Cur.adv.vult.

November 9, 2001

AMERASINGHE, J.

Dewadura Margret Silva, hereinafter referred to as the plaintiff, was the wife of Lewisdura Jeramias Solomon, hereinafter referred to as the first defendant. The plaintiff and first defendant had no children of their own and they adopted Lewisdura Maureen Stella Perera, hereinafter referred to as the second defendant, as their child under the Adoption of Children Ordinance. Mirihana Aratchige Nihal Pedrick Perera, the third defendant, is the husband of the second defendant.

The premises in suit, No. 124, Weliamuna Road, Hekitta, Wattala, was the matrimonial home of the plaintiff and the first defendant. After the marriage of the second and third defendants in 1978 they lived in the premises in suit until 1979 when they moved into a house situated opposite the premises in suit. The plaintiff and the first defendant continued to live at the premises in suit until, following a breakdown of the relationship with her husband, the plaintiff left her matrimonial home sometime in January 1982. There is uncertainty with regard to the exact date. The plaintiff became a 'sil matha' and went to reside in an 'aramaya'. The first defendant become unwell and the second and third defendants moved back into the premises in suit to look after the ailing first defendant who became paralysed.

The premises in suit belonged to the first defendant. Nine years after his marriage, the first defendant, by Deed No. 216 dated 2nd May 1963, gifted the premises to his wife, the plaintiff. The relationship between the plaintiff and first defendant were cordial and the plaintiff in her evidence did say that there was nothing wrong with the first defendant. Indeed not, for he was so a dutiful husband that he handed over all his earnings every month to his

wife. The deterioration in family relationships seems to have commenced when the second defendant, with the blessings of the first defendant, married the third defendant. The plaintiff was displeased that the second defendant had refused to marry the plaintiff's nephew, Benedict Milton de Silva. The second and third defendants moved out of the premises in suit in 1979 after the unpleasantness reached a less than tolerable level. When the plaintiff decided to leave home, instead of transferring the premises in suit to the second defendant, her adopted daughter, she by Deed No. 930 dated 30th January 1982 gifted it to her two nephews, one of whom was Benedict Milton de Silva. Later, by Deed No. 163 dated 1st August 1984, the plaintiff obtained a retransfer of the premises and proceeded to file an action in the District Court of Negombo for a declaration of title in her favour and for the eviction of her own husband, adopted daughter and the adopted daughter's husband from the premises in suit.

The first defendant responded by seeking an order of revocation of the gift made by Deed No. 216 dated 2nd May 1963 on the ground of ingratitude and a declaration that the gift made by the plaintiff to her nephews by Deed No. 930 was null and void.

The learned District Judge, after hearing and duly weighing the evidence, in a principled and carefully reasoned judgment, made order dismissing the plaintiff's action and revoked Deed No. 216 as prayed for by the first defendant.

The Court of Appeal, however, set aside the orders of the learned District Judge.

There is no doubt that a gift could be revoked on the ground of ingratitude. (1) Voet, *Pandects,* 39.5.23; *Dona Podi Nona Ranaweera Menike* v *Rohini Senanayake*(1), *Krishnaswamy* v *Thillaiyampalam*(2), *Manuelpillai* v *Nallamma*(3).

The learned Judge of the Court of Appeal however had difficulty with regard to the proof of ingratitude. He said:

"The 1st defendant being bed-ridden was unable to give evidence. He being the person who would have offered the best evidence on the acts of ingratitude on the part of the plaintiff has not applied to Court to have his evidence recorded on a

commission under section 420 of the Civil Procedure Code. His daughter the 2nd defendant has spoken of certain alleged acts of ingratitude of the plaintiff which are insufficient for a Court to base an order of revocation."

The maxim that 'the best evidence must be given of which the nature of the case permits', was once regarded as expressing the great fundamental principle upon which the law of evidence depends. Today, however, the rule is of little practical importance, and indeed J. D. Heydon and M. Ockeleton (Evidence – Laws and Materials 4th ed. 1996 p. 9) refer to it as an 'evidentiary ghost'. Phipson on Evidence (15th ed. 2000) p. 127 succinctly states the current position : "In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be a matter for comment or affect the weight of that which is produced. All admissible evidence is generally equally accepted." In the instant case, the daughter of the first defendant, who lived for a time under the same roof as the first defendant and later short distance across the street, had personal knowledge of the facts she spoke to and the learned District Judge unhesitatingly accepted her evidence. Admittedly, the provision of section 420 may have been availed of. However, there was, in the opinion of the District Judge, sufficient evidence of misconduct on the part of the plaintiff manifesting ingratitude. It is a finding of fact that should not be interfered with on the basis that the first defendant's evidence might have been obtained by issuing a commission for the examination of the ailing first defendant since there was other cogent evidence to support the finding. The old 'best evidence' rule in that regard had been relaxed as far back as 1797 when Lord Kenyon allowed proof of the handwriting of the attesting witness resident abroad, instead of sending out a commission to examine him. *Barnes* v *Trompowsk*[4]. In any event, how should one characterize the act of a wife who donates her matrimonial home (gifted to her by her generous and caring husband) to her nephews at the time when her husband lay grievously unwell in that home, and then herself attempts to have him ejected after obtaining a retransfer of the home when her nephews refuse to have the man ejected ?

The learned Judge of the Court if Appeal had a second ground for setting aside the order of the District Court. He said :

"In any event, this relief is sought ten years after the execution of Deed P3 and is prescribed under Section 3 of the Prescription Ordinance. Therefore the judgment of the District Judge granting that relief to the 1st defendant is set aside, as it is clear the plaintiff has possessed the property as her own and dealt with it as such without recognizing the title thereto in any other."

This, with due respect, is untenable, for any adverse possession - if that were possible at all between spouses in relation to their matrimonial home - could not have commenced till the complete breakdown of the relationship between the plaintiff and the first defendant and that took place only in 1982. After making a gift of the matrimonial home to the plaintiff in 1963, the first defendant not only continued to live in that house but also effected substantial extensions and improvements to the premises at his own expense.

Finally, the learned Judge of the Court of Appeal said :

"The 1st defendant had died pending appeal. The learned District Judge has held that the plaintiff will not be entitled to recover possession or damages from the defendants as the 1st defendant had a right to remain in occupation of the premises as the lawful husband of the plaintiff. Counsel conceded that the appeal from that finding of the District Judge is of academic interest now."

The learned District Judge, in my view, was quite right in refusing to eject the first defendant for, as a matter of law the right of occupation of the conjugal 'nest' did not depend on ownership. Where the husband is the owner of the property occupied by the couple, he has no right, while the marriage is in existence, to eject his wife from it without providing her with suitable alternative accommodation. Her occupation is not by licence of her husband but is *sui generis*. Similarly, the wife has no right to eject her husband from the matrimonial home merely because the property belongs to her. Because he is her husband he has rights flowing from the marriage which in relation to that property put him in a category differing *toto coeli* from that of a stranger. All this is subject to the forfeiture of the right in certain circumstances; but forfeiture

was not an issue in this case. H. R. Hahlo, *The South African Law of Husband and Wife, 5th* ed. (1985) pp. 143-144; Bromley's *Family Law, 7th* ed. 547 *Badenhorst* v *Badenhorst*[5], *Buck* v *Buck*[6], *Cf. N. J. Canekeratne* v *R. M. D.Canekeratne* [7], *Mrs. A. E. Alwis* v *D. S. Kulatunge* [8]. Admittedly, the 1st defendant died pending the appeal in the Court of Appeal. However by that time he had a judgment in his favour in respect of his claim to have the donation to his wife revoked and for possession. The stage of litis contestatio having been reached, the first defendant's action did not die with him. The maxim *actio personalis moritur cum persona* had no application. *Cf. Fernando* v *Livera* [9], *Dheerananda Thero* v *Ratnasara Thero*,[10] *Krishnasamy Vengadasalam* v *Adika Pundagam Karuppam*.[11]

For the reasons set out in my judgment, I set aside the judgment of the Court of Appeal with costs and affirm the Order of the District Court.

WADUGODAPITIYA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal allowed.