DE SILVA
v.
DE CROOS

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 723/90 (F)
DC NEGOMBO NO. 3399/L
NOVEMBER 29, 2000

Revocation of a donation – Ingredients – Required standard of proof? Test of balance of probability in evaluating evidence – Gross ingratitude – Substitution in the Court of Appeal – SC Rules of 1990, CA (Appellate Procedure) Rules of 1990.

The original plaintiff sought the revocation of a donation effected by a deed of gift; on the grounds of gross ingratitude and violation of conditions in the deed to wit preventing her from enjoying her life interest of the house and premises. The defendant-respondent denied the averments and prayed for the dismissal of the action. While the appeal was pending, the original plaintiff died and her nephew, the executor named in her purported Last Will had been substituted. In No. 952/T, the District Court however had dismissed the application for probate of the substituted plaintiff on the ground that there was no legal validity of the last will.

A preliminary objection was taken by the defendant-respondent that there was no proper substitution.

Held:

(1) The original plaintiff was a divorcee, and she had died issueless. Both the substituted plaintiff and the defendant-respondent are heirs of intestacy of the original plaintiff; although the Last Will has not been proved, he still remains an heir.

(2) In the Court of Appeal on the death of a party substitution is under the rules provided for in the SC Rules 1990 read with CA (Appellate Rules) of 1990.

(3) Therefore, there is no legal impediment for the nephew who is also an heir of the original plaintiff to continue this case in the capacity of the substituted plaintiff.

Preliminary objections stand overruled.

It was contended that the trial Judge misdirected himself on the standard of proof, by applying a too strict a standard of proof and not applying the rules of balance of probability.

HELD further –

(1) It appears that the trial Judge applied too strict a standard of proof. He has not applied correctly the test of balance of probabilities in evaluating the evidence.

(2) On a careful examination of the facts it is clear that the original plaintiff has established gross ingratitude on the part of the defendant.

Ingratitude which a Court does not regard as trifling would give rise to a Court to order a revocation of a gift.

'Slighter causes of ingratitude are by no means enough to bring about a revocation, although both the law and right reason entirely condemn every blot and blemish of ingratitude, albeit somewhat slight, nevertheless they have not intended that for that reason it should be forthwith penalised by revocation of the gift.'

The ways in which a donee may show that he is ungrateful being legion, it is not possible to state what is 'slight ingratitude' and what is not, except in regard to the facts of a given case.

APPEAL from the judgment of the District Court of Negombo.

Cases referred to :

1. *Manuelpillai v. Nallamma* – 52 NLR 221.
2. *Thilliapalam v. Krishnaswamy* – 59 NLR 265.
3. *De Silva and Others v. Seneviratne and Another* – 1981 2 Sri LR 7.

P. A. D. Samarasekera, PC with *R. Y. D. Jayasekara* for substituted plaintiff-appellant.

A. H. G. Ameen with *R. R. Ossen* for defendant-respondent.

Cur. adv. vult.

June 01, 2001

DISSANAYAKE, J.

The original plaintiff by her plaint dated 28. 02. 1985 filed this action seeking *inter alia* a revocation of a donation of 1/2 schare of the house and premises described in the schedule to the plaint, effected by deed of gift bearing No. 946 attested by E. B. K. Soysa dated 29. 03. 1974, on the grounds of :

(*a*) gross ingratitude

(*b*) violation of conditions of the said deed, to wit, in preventing her from enjoying her life interest of the said house and premises.

The defendant-respondent by her answer dated 21. 01. 1986 whilst denying the averments in the plaint, prayed for dismissal of the plaintiff's action.

The case proceeded to trial on 9 issues and at the conclusion of the trial the learned District Judge by his judgment dated 08. 05. 1990, dismissed the original plaintiff's action with costs.

It is from the aforesaid judgment that this appeal is preferred.

While this appeal was pending before this Court, the original plaintiff died and her nephew who was the executor named in her purported last will has been substituted as the substituted plaintiff.

A preliminary objection was taken by Counsel for the defendant-respondent that there was no proper substitution and that therefore the appeal should abate.

On a perusal of the docket of this case it appears that this Court has already made order on 8th January, 1996, to substitute Anessly Michael Paul De Silva as the substituted plaintiff. According to the petition and affidavit filed by the substituted-plaintiff he had been named as the executor of the purported last will of the original plaintiff which was the subject-matter of District Court, Negombo, case No. 952/T.

However, the learned District Judge of Negombo in case No. 952/T by his judgment dated 28. 06. 2000 has dismissed the application for probate of the substituted plaintiff on the ground that there was no legal validity of the Last Will No. 2061 dated 22. 11. 1983.

It was revealed in the evidence led in this case that the original plaintiff was a divorcee and she had died issueless. Therefore, it appears that on her death the property shall devolve on her ascendants and collaterals.

The substituted plaintiff is the brother's son of the original plaintiff. The defendant-respondent is her sister's daughter. Thus, both the substituted plaintiff and the defendant- respondent are heirs of intestacy of the original plaintiff. Although the last will in which the substituted plaintiff was appointed executor has not been proved, he remains an heir of the original plaintiff and is capable of being substituted as the substituted plaintiff.

In this Court on the death of a party substitution of a party is made under the rules provided for in the Supreme Court Rules of 1990 read with the Court of Appeal (Appellate Procedure) Rules of 1990.

Therefore, it appears that there is no legal impediment for the nephew of the original plaintiff who is also an heir of the original plaintiff to continue this case in the capacity of the substiutted plaintiff.

For the aforesaid reasons the preliminary objection of the defendant-respondent is untenable and it stands dismissed.

Learned President's Counsel appearing for the plaintiff-appellant contended that the learned District Judge misdirected himself on the standard of proof in this case –

(*a*) by applying a too strict a standard of proof and

(*b*) by not applying the rules of balance of probabilities.

To examine the question of standard of proof in this case it is necessary to examine the evidence led in this case.

(*a*) The plaintiff-appellant by deed of gift bearing No. 946 of 29. 03. 74 donated the house and premises described in the schedule to the plaint in equal shares to her niece the defendant-respondent and her nephew Peter Austin Michael Fonseka.

(*b*) The original plaintiff obtained a District Court decree in DC, Negombo case No. 2224/L revoking her gift of the 1/2 share donated to the said Peter Austin Michael Fonseka on the ground of gross ingratitude. The judgment of the District Court in that case had been affirmed in appeal by this Court, in case No. CA 578/88 (F) decided on 18. 12. 1992.

(*c*) The original plaintiff was working as a Matron in the Department of Health and was attached to the General Hospital, Colombo.

She was married for a few months and her marriage ended up in a divorce. She was living in a boarding house, in Colombo.

(*d*) Some household articles of the original plaintiff were given to the defendant-respondent for safe-keeping.

(*e*) When the original-plaintiff went to the house of the defendant-respondent with Donald Rose to remove the household articles, she was abused in filth. She was called a "whore", a "bitch" etc . . . She was pushed by the defendant-respondent.

It was found that the defendant-respondent had returned some used articles in place of her new articles and not returned some others.

The original-plaintiff made a complaint to the Negombo Police on 14. 02. 83 (P3).

(*f*) When the original-plaintiff went to see a relative by the name of Sarath Patuwathawitana who was warded at the General Hospital, Colombo, she met the defendant-respondent there. On the original plaintiff requesting the return of her balance articles, she was abused in filthy language.

A complaint was made at the Negombo Police station on 25. 03. 1983 (P4).

(*g*) After the judgment in case No. 2224/L was given in favour of the original plaintiff against the defendant-respondent's brother Peter Austin Michael Fonseka he left the house and premises taking their mother too along with him.

Subsequently, the defendant-appellant brought her back and left her in the house thereby preventing the original plaintiff from enjoying her life interest in the property.

The position of the defendant-respondent was that all the household articles that were handed over for safe keeping were returned to the original plaintiff in November or December, 1982, when she came to her house at Kiribathgoda with Donald Rosa. She denied that she abused the original plaintiff or having pushed her.

The defendant-respondent led the evidence of the Colombo General Hospital authorities with reference to the employees attendance register whereby it was revealed that the defendant-respondent was on duty at the hospital from 14. 02. 1983 to 25. 03. 1983, to establish that the alleged incident of abuse at Kiribathgoda on 14. 02. 1983 and the subsequent incident of alleged abuse at the General Hospital were improbable.

However, since the defendant-respondent in her evidence had admitted to the original respondent coming to her house with Donald Rosa in November or December, 1982, to remove the goods, it appears that the contentious issue between the two parties is as to the date of the said visit and as to what transpired there.

The evidence that the defendant-respondent was on duty at the General Hospital on 25. 03. 1983 will not have any bearing on the 2nd incident of abuse which was alleged to have occurred on 25. 03. 1983 at the General Hospital, because as a dietician attached to the General Hospital the defendant-respondent's presence in the wards and being found in the hospital premises and meeting the original plaintiff in the hospital premises is not an improbability. Therefore, the fact that the defendant-respondent was on duty on 25. 03. 1983 has no bearing on the 2nd incident of abuse.

The learned District Judge in his judgment had stated that the original plaintiff had not stated in the complaint dated 25. 03. 1983 (P4) the fact that she was pushed when she went to collect her household articles.

It is to be observed that the complaint dated 25. 05. 1983 (P4) was made with regard to the 2nd incident of abuse that happened at the General Hospital. Therefore, it is obvious that she did not mention what happened at Kiribathgoda in her complaint made on 25. 03. 1983 (P4).

However, the original plaintiff in her complaint made on 14. 02. 1983 (P3) has stated that she was abused in filth by the defendant-respondent. Although she has not stated in the complaint dated 14. 02. 1983 (P3) that she was pushed she has stated that when she wanted her articles back she was abused and harassed by the defendant-respondent.

The learned District Judge has considered the contradiction with regard to the date on which the said 1st incident is said to have occurred as vital which is not very material in view of the admission by the defendant-respondent that the original plaintiff visited her defendant-respondent that the original plaintiff visited her house with Donald Rosa to remove the articles handed over for safe-keeping.

The learned District Judge has disbelieved the testimony of the original plaintiff with regard to the incident of abuse and pushing of the original plaintiff solely because of witness Donald Rosa's assertion to seeing the incident in the examination in chief and later under cross-examination stating that he did not see it.

With regard to the 2nd incident of abuse of the original plaintiff at the General Hospital the learned District Judge did not believe the

original plaintiff on the ground that the no corroborative evidence was forthcoming. The learned District Judge did not take into account the fact that the defendant-respondent was a dietician in the General Hospital and her admission in the evidence that their relative Sarath Patuwathavithana was warded at the General Hospital, Colombo.

The learned District Judge has not considered the admission in evidence by the defendant-respondent that after her brother Peter Austin Paul Fonseka lost his case relating to his 1/2 share of the corpus his leaving the house removing their mother too along with him. The learned District Judge has failed to consider the admission by the defendant-respondent in her evidence that their mother had a house at Base Line Road at Seeduwa where she used to live off and on, and the testimony of the original plaintiff that it was the defendant-respondent who brought her back, after their relationship became sour.

Therefore, it appears that the learned District Judge applied too strict a standard of proof. He has not applied correctly the test of balance of probabilities in evaluating the evidence.

It seems to me that there is sufficient material to establish the following facts on a balance of probabilities :

(1) That when the original plaintiff and Donald Rosa went to Kiribathgoda to remove her articles she was abused in filthy language using the words 'whore' and 'Bitch', etc.

(2) That the original plaintiff was pushed on that occasion by the defendant-respondent.

(3) That the original plaintiff was abused in filth for the 2nd time by the defendant-respondent at the General Hospital.

(4) That the defendant-respondent's brother Peter Austin Michael Fonseka, removed their mother when she left the house after he lost case No. 2224/L relating to the other 1/2 share of the property.

(5) That the defendant respondent brought her mother who left with Peter Austin Michael Fonseka, back into the premises in suit, thereby preventing the original plaintiff enjoying her life interest after her relationship with the original plaintiff deteriorated, in violation of a condition that was attached to the deed of gift.

Now, I shall consider the law relating to the rights of the donor to revoke a gift under our law. According to the judgment of Basnayake, J. (as His Lordship then was) in the case of *Manuelpillai v. Nallamma*[1] at 224 the donee failing to fulfil the conditions annexed to the gift was held to be a ground to revoke the deed of gift.

In the case of *Thillaimpalam v. Krishnaswamy*[2] at 267 Basnayake, CJ., quoting Wickramanayake's translations of Perezius statement *(Praelectiones Codicis Justiniani,* Book VIII, Tit. LVI, Section 5) has stated thus: "the causes of ingratitude are five in number, namely: If the donee outrageously insults the donor, or lays *impius* hands on him or squanders his property, or plots against his life, or is unwilling to fulfil a part which was annexed to the gift."

In the same case of *Thillaimpalam v. Krishnaswamy (supra)* Basnayake, CJ. at page 269 has stated thus: It would appear from what has been cited above that even Perezius acknowledges that the general opinion of the Doctors is that a donation can be revoked for other causes besides the 5 causes of ingratitude specified by him; provided that they are graver than or as graver than or as those. But, Perezius himself prefers the view that a donation cannot be set

aside except on any of the grounds specially mentioned. His reasons for his view are unconvincing and I prefer to follow the other view which Perezius says is the general opinion of the doctors and which is also the opinion of Voet, and Van Leeuwen . . .

"It would be unwise to lay down a hard and fast rule as to what conduct on the part of a donee may be regarded as ingratitude for which a donor may ask for revocation of his gift. 'Voet's view is that ingratitude for which a donor may ask for revocation of his gift is that ingratitude for which a Court does not regard as trifling. He says "of course slighter causes of ingratitude are by no means enough to bring about a revocation. Although both the laws and right reason entirely condemn every blot and blemish of ingratitude, albeit somewhat slight, nevertheless, they have not intended that for that reason it should be forthwith penalized by revocation of the gift. The ways in which a donee may show that he is ungrateful being legion, it is not possible to state what is "slight ingratitude", and what is not, except in regard to the facts of a given case".

Thus, it would appear ingratitude which a Court does not regard as trifling would give rise to a Court to order a revocation of a gift.

On a careful examination of the facts of this case, it is clear that the original plaintiff has established gross ingratitude on the part of the defendant-respondent, that would enable a Court to order the revocation of the gift.

Therefore, I am of the view that the learned District Judge has not brought to bear in his mind on the facts that constitute standard of proof. Furthermore, he has not objectively assessed the facts as to their probability keeping in mind the law relating to gross ingratitude.

This Court is not unmindful of the principle that the finding of the trial Judge is entitled to great weight and the Appellate Court will not normally interfere with such findings, but however, where the findings are based upon the trial Judge's evaluation of facts the Appellate Court is then in as good a position as the trial Judge to evaluate such findings and no sanctity attaches to such findings. Where it appears to an Appellate Court that on either of those grounds; the findings of fact by a trial Judge should be reversed then the Appellate Court "ought not to shrink from that task". *(vide – De Silva and Others v. Seneviratne and Another).*[3]

Therefore, I set aside the judgment of the learned District Judge dated 08. 05. 1990 and direct the District Judge to enter judgment and decree for the plaintiff-appellant as prayed for in the plaint.

The appeal is allowed with costs.

WEERASURIYA, J. – I agree

Appeal allowed.