

1948

Present : Gratiaen J.

KANAGALINGAM, Appellant, and KAMALAWATHIE *et al.*,
Respondents.

S. C. 3—C. R. Jaffna, 16,689.

*Servitude—Right to draw water from well—Created by grant—Personal or
praedial—Can it be assigned ?*

A personal servitude created by grant, unless it is expressly stated to be
assignable, terminates on the death of the individual in whose favour it was
created.

APPEAL from a judgment of the Commissioner of Requests, Jaffna.

H. W. Tambiah, with *S. Sharvananda*, for the added-defendant,
appellant.

C. Chellappah, for the plaintiffs, respondents.

Cur. adv. vult.

¹ (1931) 145 L. T. 20.

² (1932) 2 K. B. 247.

May 18, 1948. GRATIAEN J.—

By deed No: 6905 dated June 30, 1943, the co-owners of a property including a woman named Ratnam gifted the property to Pooranam on the occasion of her marriage to Eliatamby Panchadcharam. The gift was absolute except in one respect, namely, that Ratnam reserved to herself "the right to use the well (on the gifted property) until the grantee fills the same". This somewhat cryptic reference to the filling of the well is explained in the evidence. Pooranam had apparently intended to erect a house on the property which would have involved the well in question being filled up so as to comply with certain housing regulations. The proposed building operation did not materialise, and the well is still in existence.

The appeal turns on the interpretation of this clause in the deed of gift in terms of which Ratnam reserved to herself certain rights in respect of this well. It is common ground that Ratnam, who owned the adjoining premises in her own right, continued to use the well until she died in April, 1945. The plaintiffs, who are her heirs, claim that Ratnam's right in respect of the well in question was a praedial servitude and as such transmissible to them on their mother's death. The defendants contend on the other hand that the right was at best a personal servitude which terminated on the death of Ratnam.

I do not think that the language of the deed justifies the construction that it created a praedial servitude attaching to Ratnam's adjoining land as the dominant tenement. If this was the intention of the parties—and their intention must be gathered from the language of the document—nothing would have been easier than to say so in precise words. There is nothing in the deed, either expressly or by implication, from which it can be gathered that a servitude *in favour of Ratnam's adjoining land* was intended to be created. It is not suggested that such a servitude previously existed and was intended to be preserved beyond the date of the grant. "Servitudes are onerous in their nature, and clear evidence is required, either of grant" (as is alleged in the present case) "or of some other mode in which they are created before a Court will allow any such right over another's property." (*Maasdorp's Institutes, Vol. 2 (5th Ed.) p. 168*). In cases of doubt, freedom from a servitude must be presumed. (*Schorer's Note 206*.) Another principle of construction also operates against the contention of the plaintiffs. In the deed under consideration the grantor Ratnam had reserved a right for her own benefit. "Where there is a grant and an exception out of it, the exception is to be construed as far as the language permits in favour of the grantee." *Saville Bros. v. Bothell*¹. For these reasons I am of the opinion that the deed conferred on Ratnam a personal servitude only—and not a praedial servitude which is more onerous.

Unless a personal servitude conferred by grant is expressly stated to be assignable, it generally terminates on the death of the individual in whose favour it is created. (*Maasdorp (ibid) p. 169—Voet 7. 1. 1*). "From the very nature of a personal servitude," says Innes J. in the South African case of *Willoughby v. Cophall*² "the right which it confers is

¹ (1902) 6 L. J. Ch. 652 C. A. at 657. ² S.A.L.R. (1913) A.D. 267 at page 282.

inseparably attached to the beneficiary. He cannot transmit it to his heirs nor can he alienate it ; when he dies it perishes with him." There are indications in *Hall and Kellaway's Treatise on Servitudes* (p. 148) that this principle may possibly not apply in respect of the servitude of usufruct, but it does not appear to have ever been challenged in regard to a personal servitude which merely confers a personal right to draw water from a well.

In the result, I would hold that Ratnam's rights which were reserved to her by the deed under consideration did not pass to her heirs on her death. The appeal must be allowed, and the plaintiffs' action dismissed with costs in both courts.

Appeal allowed.
