SAYORIS AND OTHERS
VS
GITANJALI AND OTHERS

COURT OF APPEAL.
BALAPATABENDI, J.
WIMALACHANDRA, J.
CA 851/95(F).
DC MATUGAMA 997/P.
MARCH 9, 2005.
JULY 25, 2005.
SEPTEMBER 13, 2005.

Partition Action- Deed reserving rights to the male children of the donees- No point of contest raised regarding fidei commisum – Can it be taken up in appeal? – Modes of determination of fidei commissa?–Prohibition against alternation?.

The plaintiff–respondent instituted action to partition the land in question. Babun Singho and Menchihamy the original owners had gifted the land to J and L by deed 5027 with only the male children of J and L to get rights in the corpus. L who owned ½ share died leaving his widow, and he had no children. J died leaving behind male children. The widow of L transferred her ¼ share to the plaintiff.

The contesting 6th defendant–appellant contended that as L did not have male children, L's share devolved on the male children of J, and on this basis claimed the entirety of the corpus. The trial Judge accepted the position of the plaintiff–respondent.

In appeal it was contended by the 6th defendant–appellant that the said deed 5027 created a fidei commissum in favour of the male children of J. The plaintiff respondent objected to the raising of the issue of fidei commissum at the appeal.

HELD:

(1) The issue of fidei commissum has been dealt with by the trial Judge even though this question was not raised as an issue.

It appears that the question of fidei commissum has been indirectly brought up in points of contest No. 9-12 and the specific point was raised in the course of the trial.

Per Wimalachandra, J.

"I am of the view, a matter which had not been specifically raised as an issue but where it has been raised in the course of the trial and the trial Judge has dealt with the point in the judgment and more so, when the Court of Appeal has before it the necessary material to decide that matter it can be raised in appeal.

(2) Fidei commissary is the person on whom the fidei commissum was intended to devolve and if there is no fidei commissary a fidecommissum cannot be created. In this regard, the fidei commissaries who were contemplated in respect of L's 1/2 share were the male children of L who never came into existence.

(3) Since L died without children the fidei commissum failed for two reasons. It failed because *(a)* of the non existence of fidei commissaries and (b) also due to the failure of the condition of the fide commissum that there were no fidei commissaries having the capacity and willing to succeed at the time of the death of L who was the fideicommissary.

(4) It is good law that when fideicommissaries fail, the last holders fiduciary interest is enlarged into full ownership and that any disposition by him by act intervivos or by last will is operative.

(5) Prohibition against alienation is under our law strictly construed and is not extended to modes of alienation other that that expressly mentioned in the instrument.

Held Further :

(6) The 6th defendant–appellant had on deed 6V1 got the rights of S who is a child of J. Hence when J had acted on the basis that deed No. 5027 has not created a fidei commissum the 6th defendant appellant who purchased interests of S who was a child of J cannot now say that deed 5027 created a fideicommissum.

(7) A decree operates as *res judicata* as between the parties only or those claiming through them.

APPEAL from the District Court of Matugama.

Cases referred to :

1. *Perera vs. Mariano* 21 NLR 62
2. *Francisco vs. Swadeshi Industrial Works* 53 NLR 179
3. *Mohamadu Cassim vs. Mohamaddu Lebbe* 53 NLR 1
4. *Banda vs. Karohamy* 50 NLR 369 at 373

Athula Perera for 6th defendant–appellant.

Upali de Z. Gunawardena for substituted plaintiff–respondent.

Cur. adv. vult.

July 3, 2006.

WIMALACHANDRA, J.

This is an appeal from the judgment of the learned District Judge of Matugama in the above mentioned partition action allowing the partition of the land described in the schedule to the plaint as prayed for by the plaint.

It was the contention of the learned counsel for the 1st, 2A, and 6th defendants-appellants that the entire corpus belongs to the contesting defendants on the basis that the deed of gift bearing No. 5027 dated 12.11.1916–is in favour of the male children of *Joronis and Lihinis.* However, the learned District Judge rejected this contention of the said defendants and held that the said deed did not create a *fideicommissum* in favour of the male children of the donees.

Admittedly, the only dispute in this case is whether the deed No. 5027 dated 11.12.1916 creates a *fideicommissum.* By that deed only the male children of *Joronis and Lihinis* should get rights in the land sought to be partitioned. It is common ground that by the said deed No. 5027 this land was gifted to the aforesaid *Joronis and Lihinis,* and each got 1/2 share of the land. The said *Lihinis* who owned 1/2 share of the land died leaving his widow *P. D. Rosalin Nona.* Admittedly, *Lihinis* had no children. It is the position of the contesting defendants that P. D. Rosalin, the widow of Lihinis, became entitled to only 1/2 share of the corpus and the balance

1/2 devolved on Joronis's male children. The learned counsel for the appellant submitted that the said deed No. 5027 has the effect of a *fideicommissum*. Accordingly, only the male children of Joronis and Lihinis were entitled to the rights in the land. The learned counsel submitted that, since Lihinis who married Rosalin died issueless, in terms of the deed No. 5027 Lihinis's rights devolved on Joronis's male children.

However, it appears that the contesting defendants have not raised an issue (point of contest) at the trial suggesting that the said deed No. 5027 creates a *fideicommissum*. The questions which arise for determination in this appeal are as follows:

(i) whether the deed No. 5027 dated 11.12.1916 creates a *fideicommissum*.

(ii) Can the contesting defendants (appellants) be permitted to argue in this appeal in the absence of an issue framed at the trial suggesting that the said deed No. 5027 created a *fideicommissum*.

(iii) Whether the said deed No. 5027 had been acted upon as a deed that created a *fideicommissum*.

(iv) Whether the plaintiff and his predecessor in title had possessed 1/4 share of the land and acquired a prescriptive title thereto.

The contesting defendants in their statement of claim have pleaded the said deed No. 5027. In the statement of claim it was stated that Babun Singho and his wife Manchohamy were the original owners and both of them together transferred the land, which is the subject matter of this action, to the male children of Joronis and Lihinis by deed of gift No. 5027 subject to the life interest of said Joronis and Lihinis. Even though, the contesting defendants have not raised points of contest at the trial on the basis that the deed No. 5027 creates a *fideicommissum*, they have raised the following points of contest based on the said deed No. 5027. They are as follows:

No.9 - එකී අංක 5027 දරන කැඟි ඔප්පුව මත මෙම ඉඩම එකී ජොරානිස් සිංඤෝ සහ ලිහිනිස් සිංඤෝගේ පිරිමි දරුවන්ට පමනක් හිමිවිය යුතුද?

No.10 - ඉහත කී ජොරානිස් සංඝෝ පිරිමි දරුවන් වන සරනෝරිස් 1 වන විත්තිකාර සයෝරිස් රොමානිස් වේලිස් සිටියදී මිය ගියේ ද?

No.11 - ඉහත ලිහිනිස් රොසලින් තෝනා සමග විවාහ වී දරුවන් නොමැතිව මිය ගියේ ද?

No.12 - එසේ නම් එකී ලිහිනිස්ගේ අයිතිවාසිකම් ජොරානිස්ගේ දරුවන් හතර දෙනාට පමණක් හිමිවිය යුතු ද?

The learned counsel for the contesting defendants submitted that the said deed No. 5027 has the effect of a *fideicommissum* and in terms of the said deed points of contest Nos. 9 to 12 had been framed.

The learned counsel for the respondent strongly contended that since no issue had been raised at the trial suggesting that the deed No. 5027 creates a *fideicommissum*, the contesting defendants are now precluded from arguing that the deed No. 5027 creates a *fideicommissum*. The learned counsel submitted that the Court of Appeal should not decide a matter on which no issue has been raised. The learned counsel cited *AIR Commentaries on Civil Procedure Code by Chitaley and Annaji Rao (1944)* 4th edition, page 1827-88, which reads thus: "the Court should not decide a suit on a matter on which no issue has been raised. If the case goes in appeal it must be dealt with by the Appellate Court on the issues settled for trial and not on a point on which there is no issue". The learned counsel submitted that since no point of contest had been raised at the trial that the deed No. 5027 creates a *fideicommissum*, the contesting defendant has no right to raise it in the appeal.

However, the question whether the deed in effect creates a *fideicommissum* had been raised in the course of the trial and the learned District Judge had dealt with this question, in the judgment (vide-page 143 of the appeal brief) The learned Judge has stated as follows:

> "1,2,6 විත්තිකරුවන් වෙනුවෙන් තවත් තර්කයක් ඉදිරිපත් කරමින් කියා සිටින්නේ, පැමිණිලිකරුවන් අංක 5027 දරන ඔප්පුව පිළිගෙන ඇති නිසා එහි පීතකොමිස් ස්වරූපය ඉවත් නොවන බවයි. මෙයද මා හට පිළිගත නොහැක. මන්ද, පැමිණිල්ලෙන් කියා සිටින්නේ ඉහත කී අංක 5027 ඔප්පුව වලංගු ඔප්පුවක් නොවන බව නොවේ. ඔවුන් කියා සිටින්නේ එහි පීතකොමිස් සීමාවන් ක්‍රියාත්මක නොවූ බවයි."

This point had been dealt with by the learned Judge even though this question was not raised in the form of an issue. It appears to me that this matter had been indirectly brought up in points of contest No. 9 to 12. Moreover this point was raised in the course of the trial. In the circumstances, I am of the view, a matter which had not been specifically raised as an issue, but where it has been raised in the course of the trial and the learned Judge has dealt with that point in the judgment and more so, when the Court of Appeal has before it all the necessary material to decide that matter, it can be raised in appeal, even though no specific issue had been raised on that point at the trial. It is my further view that this matter does not require the ascertainment of new facts at this stage.

In the circumstances, I am of the view that the appellant is entitled to argue in the appeal that deed No. 5027 has created a fideicommissum.

I shall next proceed to consider whether the deed No. 5027 is effective in law to create a fideicommissum. We have had the benefit of well considered arguments from the learned counsel for the respondent on the issue of fideicommissum.

The learned counsel for the respondent submitted that deed No. 5027 never came into existence because Lihinis had no children. The fideicommissaries contemplated by deed No. 5027 in respect of the 1/2 share of Lihinis were the male children of Lihinis. Admittedly Lihinis had no children. Hence, in the absence of fideicommissaries there is no valid fideicommissum. Fideicommissary is the person on whom the fideicommissum was intended to devolve and if there is no fideicommissary, a fideicommissum cannot be created. In this regard, the fideicommissaries, who were contemplated, in respect of the Lihinis Singho's 1/2 share were the male children of Lihinis who never came into existence.

Professor T. Nadarajah in his book, "*Roman Dutch Law of fideicommissa*" as regards the modes of determination of fideicommissa, at page 208 states thus:

> **"Under this same second head of modes of determination of fideicommissa, Voet also mentions cases where "there is a failure of the condition, express or implied, on which (the testator) wished the fideicommissum to depend; or**

where there is any failure of the person on whom he wished the fideicommissum to devolve" One variety of the latter class of cases of failure of fideicommissaries- namely, failure by the death of the fideicommissaries before the fiduciary is, as we shall see, treated by Voet under the third head of determination of fideicommissa; but failure of fideicommissaries is no doubt mentioned under the second head also as being an illustration of failure of fideicommissa by failure of the condition of the fideicommissum, on the view that it is a tacit condition of all fideicommissa that there should be fideicommissaries in existence and having the capacity and willingness to succeed at the time of the maturing of the fideicommissum"

Then at page 217, notes to chapter ten, Professor Nadarajah states as follows:

"for failure of *fideicommissaries* may occur not only where fideicommissaries once in existence have subsequently died before the fiduciary-this is considered at page 289 supra-but also where no fideicommissaries ever came into existence (emphasis added)"

In the instant case, before the maturity of the *fideicommissum* the fiduciary (Lihinis) died. He died without children the *(fideicommissaries).* As Professor Nadarajah clarified, a fideicommissum will fail where no fideicommissaries ever came into existence. Since Lihinis had died without children, fideicommissaries never came into existence.

In the circumstances I am inclined to agree with the submissions made by the learned counsel for the respondent that since Lihinis died without children the fideicommissum failed for two reasons. That is, it failed because of the non existence of fideicommissaries and also due to the failure of the condition of the fideicommissum that there were no fideicommissaries having the capacity and willing to succeed at the time of the death of the said Lihinis who was the fiduciary. **This principle was explained in the case of *Perera vs. Mariano*[1] where de Sampayo, J. held, it is good law that when fideicommissaries fail, the last holder's fiduciary interest is enlarged into full ownership, and that any disposition by him by act *inter vivos* or by last will is operative.**

In deed No. 5027 it is the male children of Lihinis who would be the fideicommissaries in respect of Lihinis 1/2 share. Lihinis who was the fiduciary died without any children. As he had no children, his fiduciary interest extended into full ownership. When Lihinis died, his interest

according to law passed on to his widow, Rosalin, who became the owner of 1/4 share of the land. That is upon the death of Lihinis 1/2 of his half share of the land, that is 1/4 share devolved on Rosalin. Rosalin on deed No. 666 dated 12.10.1968, marked "P2" at the trial, had transferred exactly 1/4th share to Dimitius who was the original plaintiff.

The learned counsel for the respondent also submitted that the deed No. 5027 is ineffective to create a *fideicommissum* because although it prohibits a transfer, a mortgage, or a lease for a period exceeding five years, the deed No. 5027 does not prevent the donees donating or disposing of the property by last will. The learned counsel cited the case of *Francisco vs. Swadeshi Industrial Works*[2] in support of his argument, wherein Basnayake, C. J. held that a donee was prohibited only from selling or mortgaging the property and was therefore, in law, free to donate the property or dispose of it by last will. In the circumstances there could be no fideicommissum.

Basnayake, C. J. made the following observation at p. 182 ;

> **"..... Moreover when a sale, a donation and a pledge are prohibited, alienation by last will is considered to be permitted. The donee Adonis was therefore in law free to donate the property or dispose of it by last will. In those circumstances, there cannot be a fideicommissum."**

When we turn to the deed No. 5027 we find that this deed is subject to the same infirmity. In this deed too, donees (fiduciary) are prohibited only from selling, mortgaging or keeping as a security or leasing the property for a period of five years. However, it does not expressly prohibit disposal by last will. In the aforesaid case at 182, Basnayake C. J., stated that a prohibition against alienation is under our Law strictly construed and is not extended to modes of alienation other than those expressly mentioned in the instrument.

Basnayake, C. J. in *Francisco vs. Swadeshi Industrial Workers (supra)* also made the following observation at p. 182 :

> **"The deed is subject to a further infirmity. It does not contain a stipulation restoring the property to a third person in case the property is sold or pledged contrary to the prohibition therein."**

It appears that to construe whether a deed has created a fideicommissum it must contain in addition to all forms of express and specific prohibitions against all forms of alienation, a penalty clause restoring or giving the property to a third person in the event of alienation. However, deed No. 5027 does not have such a condition in the event of alienation. In deed No. 5027 a gift or disposal of property by last will is not expressly prohibited. For these reasons I am of the view that the deed No. 5027 is not effective in law to create a valid fideicommissum.

The next matter to be considered is the submissions made by the learned counsel for the respondent that no right would pass in terms of deed No. 5027 as the said deed was not acted upon as a fideicommissum. It is to be observed that the deed No. 5027 deals with several lands. The land described in item No. 10 in the schedule to deed No. 5027 is Godaporagahawatte.

The 1st defendant Sayoris gave evidence on behalf of himself, the 1st, 2A, and 6th defendants at the trial. He admitted that there was a partition case No. 30883 in the District Court of Kalutara to partition the land called Godaporagahawatte which is a land described in the schedule to the deed No. 5027. In that case Joronis and Rosalin (widow of Lihinis) had filed a joint statement of claim admitting the correctness of shares given to them in the plaint (maked P6). In paragraph 4 of the plaint in case No. 30883, it was stated that Babun Singho and Menchihamy gifted the land Godaporagahawatte to Joronis and Lihinis by deed No. 5027 dated 11.12.1916 it was further stated that the said Lihinis died without issue leaving his widow Rosalin as his heir, who was the 2nd defendant in that case. The said Joronis's son Sayoris, who is the 1st defendant-appellant in the instant partition action (No. 995/P), in his answer states that deed No. 5027 creates a fideicommissum in favour of the children of Joronis and since Lihinis died without children, Rosalin is not entitled to any rights. However Joronis himself who was the father of Sayoris, filed a joint statement of claim with Rosalin in case No. 30883, conceding that Lihinis' rights devolved on his widow Rosalin. In their joint statement of claim Joronis and Rosalin admitted the devolution of title shown in the plaint in case No. 30883. In that case the devolution of rights given in the plaint was that when Lihinis died issueless his rights devolved on his widow, Rosalin.

Moreover, Joronis in case No. 30883 not only admitted the correctness of the devolution given in the plaint marked 'P3' but also the correctness of shares shown in the plaint 'P3'. The shares were shown on the basis that Lihinis died without children, and his interests devolved on his widow Rosalin which is also the position set out in the plaint in the instant case No. 997/P.

Aforesaid Joronis's son Sayoris, the 1st defendant who gave evidence on behalf of the contesting defendants, the 1st, 2A, and 6th defendants, admitted that Lihinis died in the year 1945 and that Lihinis's widow had been there in the land even in the year 1960, (*vide* pages 117, 118 of the Appeal brief). It is to be noted that Rosalin had sold her rights on 10.02.1968 by deed No. 666 marked 'P2'. In these circumstances it is proved that Rosalin was in possession of the land even after the death of Lihinis in 1945. She had been in possession of the land until she sold it by deed No. 660 in the year 1968. In the recital of the said deed, it states, "held and possessed by material inheritance from her late husband Senadheera Lihinis".

It is to be observed that Joronis in case No. 30883 did not seek that deed No. 5027 created a fideicommissum and in fact he had filed a joint statement of claim along with the widow of Lihinis on the basis that deed No. 5027 has not created a fideicommissum. Joronis did not deny that Lihinis' widow, Rosalin was not entitled to inherit the rights of her husband (Lihinis') upon his death. The 6th defendant-appellant had on deed No. 1089 (marked 6 — 1 at the trial) got the rights of Saraneris who is a child of Joranis. Hence, when Joronis had acted on the basis that deed No. 5027 had not created a fideicommissum, the 6th defendant-appellant who purchased interests from Saraneris, who was a child of Joronis, cannot now say that deed 5027 creates a fideicommissum.

It has been held in *Mohammadu Cassim vs. Mohammadu Lebbe* [3] that a decree operates as *res-judicata* as between the parties only or those claiming through them. Gratiaen, J. who delivered the judgment in this case, at page 3 observed that ;

> **"The general principle that, if parties litigate a question in a Court of competent jurisdiction, such parties or those claiming through them, cannot afterwards reopen the same question in another Court."**

In the circumstances, the decree in case No. 30883 not only binds Joronis, but also his son Sayoris who is the 1st defendant-appellant in this case. The decree in case No. 30883 will bind the 6th defendant-appellant as well, since he bought rights in this land from Saraneris who is a child of Joronis.

In *Banda vs. Karohamy*[4] Nagalingam, J. at 373 said,

> **"I am inclined to think that the doctrine of *res-judicata* applies to all matters which existed at the time of giving the judgment and the party had an opportunity of bringing before Court".**

In the partition action No. 30883, deed No. 5027 was pleaded in the plaint, but Joronis who was the predecessor in title of the appellants in this case, did not raise that deed No. 5027 created a fideicommissum. In any event it was the position of Joronis that deed No. 5027 was not acted upon as a fideicommissum. In that case, Joronis and Rosalin, the widow of Lihinis, had acted on the basis that deed No. 5027 is not effective in law to create a fideicommissum, in favour of the children of Joronis.

I will now come to the final point that has to be considered in this appeal, which is how the parties have possessed the land. According to the surveyor's report the old plantation which is found in Lot 2 are possessed in common by the plaintiff and the other defendants. A permanent house which is 30-40 years old is also owned in common (house No. 5). Accordingly, it is most probable that the plaintiff who bought the rights of Rosalin, the widow of Lihinis, is also a co-owner of the land, as the old plantation on the land had been claimed in common by the plaintiff and other defendants, so also the old house which is more that 30 years old.

In the circumstances, I am unable to agree with the argument of the counsel for the 6th defendant-appellant that deed No. 5027 creates a fideicommissum. In any event as Lihinis had no children, a fideicommissum was not constituted in respect of the ½ share of Lihinis as the male children of Lihinis who were the fideicommissaries contemplated by deed No. 5027 never came into existence.

For the reasons I have given I dismiss the appeal with costs.

BALAPATABENDI, J. – *I agree.*

Appeal dismissed.