

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
10 MAY 1973  
25 RUSSELL SQUARE  
LONDON W.C.1

1.

IN THE PRIVY COUNCIL

No. 41 of 1970

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

BETWEEN :

JOSEPHINE MARY ALOYSIA MORAIS (Widow)  
(Defendant-Appellant)

- and -

FRANCESCA VICTORIA (Married Woman)  
(Plaintiff-Respondent)

10

CASE FOR THE APPELLANT

Record

20

30

1. This is an Appeal by Leave of the Supreme Court of Ceylon from a Judgment and Decree of the Supreme Court given and dated respectively the 11th July 1968, which dismissed the Appeal of the present Appellant from a Judgment and Decree of the District Court of Colombo given and dated respectively the 17th March 1965 whereby the District Court gave judgment for the present Respondent-Plaintiff in suit No. 10207/L instituted on the 13th May 1963 and it was decreed that she was entitled to the lands and premises at Colombo described in 13 schedules thereto, that the Appellant Defendant be ejected therefrom and the Plaintiff placed in quiet possession and the Appellant-Defendant pay to the Respondent-Plaintiff accrued damages from the 1st June 1960 up to the 30th April 1963 at the rates specified in the Decree as to each property and also continuing damages at the same rates until Plaintiff placed in possession of the

p.172

p.157

p.165

p.137

p.146

Record

lands and premises.

2. There are two questions of law for decision in the present Appeal. They are stated in paragraph 12 of this case. The relevant facts necessary for the purpose are shortly stated in paragraphs 3 to 11 inclusive of this case.

p.175

3. By his last Will P10(a) dated 8th September 1917 Marianu Morais appointed his three sons-in-law as "executors and trustees" thereunder. By

10

p.177 1.17

to

p.179 1.43

p.178 1.7

to

p.179 1.6

this last Will, the testator devised and bequeathed certain properties (being the rest and residue of his estate) to the three trustees referred to above. The terms of the trust are contained in the last Will P.10(a). For the purpose of this appeal it is sufficient to note that these trustees were directed in subparagraphs 5 and 6 of paragraph 7 of the Will to convey the properties belonging to the "Trust estate" to the testator's son Lewis Anthony Morais on his attaining the age of 35 years subject to

20

p.179 1.7

certain conditions. The last Will empowered the trustees to sell and convert into money "such of the said immovable properties belonging to my Trust estate as my said Trustees shall in their absolute discretion think advisable or expedient to sell by reason of the said properties not giving a fair or reasonable rent income or return therefrom and from the proceeds sale thereof to purchase other immovable property or properties and any such property or properties purchased as aforesaid shall form part of my trust estate and be subject to the same trusts as are herein expressed and contained".

30

p.184 1.23

p.181

4. The testator died on the 3rd February 1918. The last Will was duly admitted to Probate (P22) on the 10th June 1918.

p.186

5. In terms of the last Will, the Trustees sold a few properties devised and bought other immovable properties with proceeds of sale.

p.184

6. By Deed P6(a) in September 1933, the Trustees conveyed the properties to Lewis Anthony

40

- 10 Morais stated to be subject to the conditions specified in the Last Will. Under the deed of conveyance F6(a), properties described in schedules "A" and "C" thereto were transferred. The Schedule "A" consisted of 11 lands, all of which belonged to the testator at the time of his death, while the Schedule "C" dealt with 5 lands which were purchased by the trustees out of proceeds sale in terms of the last will referred to above. pp.187-191  
pp.193-195
7. By his first marriage, Lewis Anthony Morais had two children, namely the plaintiff and another who predeceased the father a few months after the birth. After the death of the first wife in 1923, Anthony Morais married in 1927 the defendant, the sister of Sir Donatus Victoria. p.79  
p.80
8. By the joint last Will, D1, dated 4th July 1947, of Lewis Anthony Morais and the defendant, the survivor was nominated and appointed:-  
20 "to be the heir and heiress of the first dying of us and entitled to all property movable and immovable including business, shares of business, jewellery, furniture, insurance policies, cash in bank and securities cash in hand and of whatever nature or description whatsoever lying or situate both in India and Ceylon which shall or may be left by such dying whether the same shall be in possession reversion remainder or expectancy". p.215
9. Lewis Anthony Morais died on the 2nd  
30 September 1958 leaving the plaintiff, his only child, (who was married to a son of Sir Donatus) and the defendant, (his widow). Both the plaintiff and the Defendant claim adversely to each other all the properties conveyed by F6(a). The plaintiff asserted Title on the basis that Lewis Anthony Morais held the properties subject to a fideicommissum in her favour while the Defendant's contention was that Lewis Anthony was free to devise the properties by his last Will. p.243 1.26  
and  
p.246 1.29  
  
p.33 1.12  
  
p.64 11.10-19
- 40 10. In asserting her claim, the plaintiff has filed two actions against the Defendant:
- (1) The first action is D.C. Colombo case No.

Record

- p.255 9929/L D.13 filed on the 15th July 1962.  
 p.187 Therein the plaintiff set out two causes of  
 action. Under the first, the plaintiff asserted  
 title to the 1st. allotment of land in  
 Schedule "A" to P6(a) while, under the second,  
 p.193 to the 2nd allotment of land in the Schedule "C"  
 p.131 to P6(a). This action is not disposed of yet.  
 (2) The second action is the present one, namely  
 D.C. Colombo case No. 10207/L., filed about 10  
 months after the first on the 13th May 1963. 10  
 Therein the plaintiff sets out 13 causes of  
 action asserting title to the various allotments  
 of lands described in the Schedules "A" and "C"  
 in P6(a) other than the two lands caught up in  
 p.255 the earlier action No. 9929/L. D13; It will be  
 observed that the claims made in both actions are  
 based on identically the same grounds. Both  
 cases were on the trial roll of the 23rd November  
 1964. On the invitation of the Plaintiff's  
 p.70 Counsel, the present action, the later case, was  
 taken up for hearing and disposal first. 20
- pp.76-81 11. Sir Donatus, the father-in-law of the  
 pp.82-95 plaintiff, gave evidence for the plaintiff and  
 and p.102 his sister, the defendant, gave evidence on her  
 own behalf. A number of facts other than those  
 p.103-122 mentioned above were in dispute between the  
 parties. The trial Judge's findings on them,  
 adverse to the defendant-appellant, are not  
 canvassed in this Appeal.
12. The two questions that arise for decision 30  
 in this Appeal are:-
- (i) Firstly: Whether the present action is  
 barred as the plaintiff had filed prior  
 action for two other lands on the same  
 cause of action? and
- (ii) Secondly: Whether the last Will failed to  
 create a fidei commissum under which the  
 Plaintiff could make a claim?
13. On the first of these questions, it is 40  
 submitted that sections 33 and 34 of the Ceylon  
 Civil Procedure Code conclude it in favour of

the Defendant-appellant and in the result the present action must fail. It is further submitted that the decision of the Judicial Committee of the Privy Council in the case of Mohamed Khalil Khan and others vs. Mahbub Ali Mial and others (Privy Council Appeal No. 12 of 1945) reported in A.I.R. (1949) P.C. 78 supports the contention of the Defendant-appellant.

10 At the hearing of the Appeal in the Supreme Court a short resumé of the relevant facts in the above Privy Council case was handed over to their Lordships. A similar resumé is respectfully appended hereto.

At the argument, reference will also be made to the following cases, among others, from Ceylon, which support the contention of the Defendant-appellant:-

20 13 New Law Reports 58.  
16 New Law Reports 259.  
3 Court of Appeal Cases 94.  
17 New Law Reports 410.  
39 New Law Reports 5.

Indian cases too support this contention. Reference may be made, among the others, to the following:-

A.I.R. (1915) Madras 732 and  
A.I.R. (1917) Calcutta 841.

30 14. On the second question it is submitted that the terms of the last Will (P10(a)) were ineffective to constitute a fidei commissum.

p.175

Under the last Will the properties were vested in the first instance in the Trustees named therein. In a fidei commissum the properties should vest in the first taker being the fiduciary as heir or legatee by title of inheritance or legacy. If there be no vesting in the first instance in the fiduciary there can be no fidei commissum.

The last Will indicates that the testator

pleadings in Suit No. 8 (the action filed by Khalil Khan in respect of Oudh properties) for bringing in, into the ambit of this action, the Agra property also; Mahbub brothers objected and

21.2.1929 The application to amend was refused.

15.4.1929 Judgment in Suits Nos. 5 and 8:-

Rani B. was a Sunni and not a Shiah.

Khalil Khans were declared entitled to the Oudh properties.

28.6.1934 above judgment was affirmed in appeal by the Privy Council.

29.1.1938 Suit No. 2 of 1938

By Khalil Khan and others against Mahbub brothers asserting Title to Agra property.

Issue 1:

"Is the Suit barred by O.2, R.2, as this property was not included in Suit No. 8 of 1928 in the Oudh Chief Court?"

This issue was answered in the affirmative and the claim of Khalil Khan and others asserting title to Agra was dismissed in the Courts in India and by Your Lordships Court in Appeal.

V. ARULAMBALAM

(V. Arulambalam)  
Counsel for defendant-  
appellant.

No. 41 of 197

IN THE PRIVY COUNCIL

---

---

O N A P P E A L  
FROM THE SUPREME COURT OF

---

---

B E T W E E N :

JOSEPHINE MARY ALOYSIA MOR  
(Widow)

(Defendant-Appel

- and -

FRANCESCA VICTORIA (Marrie  
(Plaintiff-Respo

---

---

C A S E FOR THE APPELLA

---

---

A.L. BRYDEN & WILLIAMS,  
20 Old Queen Street,  
S.W.1.

Solicitors and Agents for A

Record

p.179 1.7

left it to the discretion of the persons (namely the trustees) sought to be charged and did not in clear and unambiguous terms impose an obligation upon them to hand the properties over to Lewis Anthony Morais. The trustees had the right "to sell and convert into money such of the immovable property belonging to the testator as the said trustees "shall in their absolute discretion think advisable".

In a fidei Commissum the rights of both the fiduciary and the fideicommissary vest independently of the act of a third party. 10

Once a trust in respect of immovable property is created by the last Will with power to the trustees to sell such property, no effective provision is possible for the creation of a fideicommissum in respect of such property.

Reference will be made to the following among others:-

Lee on Roman Dutch Law (5th Edition) pages 374 & 380. 20

Voet 36.1.10 and 36.1.29

6 New Law Reports (Ceylon) 344 at 346

8 New Law Reports (Ceylon) 361 at 365

68 New Law Reports (Ceylon) 324 at 327 and

South African Reports 1932 Cape Provincial Division 39.

p.157

15. It is submitted that for the reasons stated above the judgment of the Supreme Court of Ceylon was wrong on both questions referred to in paragraph 12 above. 30

p.255

(a) It is respectfully submitted that as the properties, the subject matter of this action, were not included in the earlier action No. 9929/L. D13 filed on 15th July 1962, the present suit is barred by



sections 33 and 34 of the Ceylon Civil Procedure Code read with Section 207 also of the said Code. In both actions the causes of action are the same. It is a paramount policy of the law that a party should not be vexed twice over in respect of the same cause of action.

- 10 (b) The Ceylon Supreme Court was in error in holding that the last Will created a valid fideicommissum on the immovable properties in the hands of Lewis Anthony Morais. All that the last Will did was to create a valid trust.

p.162 11.9-11

p.165 11.18-19

16. In the result the appellant respectfully submits that this Appeal should be allowed with costs.

V. ARULAMBALAM

ANNEXURE

A.I.R. (1949) P.C.78

PRIVY COUNCIL CASE NO. 12 of 1945

Raja Shamser Bahadur died on the 18th April 1888 leaving last Will dated the 28th March 1888 devising his properties to his third wife Rani Barkatunnissa (Rani B).

13.4.1927 Rani B. died intestate leaving properties:-

1. Shahjahanpur in Agra and
2. Sitapur and Hardoi in Oudh, 10

Claimants:

1. Khalil Khan and others being cousins on Rani B's paternal side claimed on the basis that Rani B. was a Sunni and they were entitled to inherit.

2. Mahhub brothers and others, being the children of Rani B's sister, claimed on the basis that Rani B. was a Shiah and they were entitled to inherit. They were in possession of the Agra property. 20

3. Abadi Begum and Abdul Latif, asserting title against each other, claimed on the basis referred to as a "sanad" under Act No. 1 of 1869. Abadi Begum was in possession of the Oudh properties.

28.3.1928 Mutation proceedings in respect of Oudh properties:

(Revenue proceedings enabling the person in possession to be registered as owner for the purpose of revenue; but not based on title). They were registered in the name of Abadi Begum. 30

12.5.1928 Suit No. 5 of 1928.

By Mahhub brothers asserting title to

Oudh properties against:

1. Khalil Khan and others.
2. Abadi Begum, and
3. Abdul Latiff.

12.5.1928 Mutation proceedings in respect of Agra property:-

10 Assistant Collector ordered that it be registered in the names of Khalil Khan and others on the ground that Rani B. was a Sunni and not Shiah - thus depriving Mahbub brothers of possession.

20.6.1928 The above order of 12.5.1928 was reversed by the Collector on an Appeal by Mahbub brothers, on the ground that the determining factor is possession and not title, which should be established in a Civil Court. Khalil Khan appealed against this to the Commissioner.

20 14.9.1928. Suit No. 8 of 1928.

By Khalil Khan asserting title to Oudh properties against:

1. Mahbub brothers,
2. Abadi Begum and
3. Abdul Latif.

29.10.1928 Mutation proceedings:

Khalil Khan's appeal against the order of the Collector dated the 28th June 1928 was dismissed by the Commissioner.

30 Suit Nos. 5 and 8 of 1928 were heard together. Entire evidence had been led. After several Counsel of the various parties had addressed Court, Counsel for Khalil Khan in the Course of his address made an application to amend the