1906.
July 27.

Present: Mr. Justice Middleton and Mr. Justice Wood Renton.

ATCHY KANNU *et al.* *v.* NAGAMMA *et al.*

D. C., Colombo, 21,870.

Action quia timet—When maintainable—Conveyance of corpus by person entitled only to a life-interest.

Where a person who is entitled to the life-interest only of a property, executes a deed conveying the *corpus*, those in whom the *dominium* is vested are entitled to maintain an action to have such conveyance set aside to the extent of their interests.

THE material facts are stated in the following judgment (2nd April, 1906) of the District Judge (F. R. Dias, Esq.):—

"The facts material to this action are these. One Sarawana Chetty and his wife Nagamma (the first defendant), who were married in community of property, made a joint last will in 1862, under which the testator and one Muttu Carpen Chetty were appointed executors. Their property consisted of several houses in New Bazaar, Silversmith street and lane, and Grandpass, and an estate called Hunumullekurunduwatta in the Negombo District. The will made provision for several contingencies, and, *inter alia*, it provided that if the husband died first the widow should be entitled, by way of an annuity during her natural life, to all the rents, income, and produce of the houses, lands, and gardens at New Bazaar, but not of any of the other properties. In the event of both of them dying without any issue all the properties were to go to the children of the aforesaid Muttu Carpen Chetty as the lawful heirs of the testator and testatrix. The testator died in 1867 without issue, and the will was duly proved in the following year by the executor Muttu Carpen, who administered the estate till his death in 1896. The widow (first defendant) accepted benefits under the will, and adiated the same, and is still alive and in the enjoyment of the New Bazaar properties specially allocated to her. The will made no provision for the disposal of the rents and profits of the other properties between the death of the testator and the death of his widow, but the Supreme Court, in interpreting this will in *Nagamma v. Sathappa Chetty* (1), held that we must regard it as a case of intestacy in respect of those other properties, so that the widow would be entitled to take half the income of all of them during her natural life. That position is now conceded by the plaintiffs, who were the opponents in the other case, and the widow admits the rights of the plaintiffs to the other half. Muttu Carpen

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Chetty left four children, viz., Toondy Chetty, Kaliamma, Weerathal, and Suppramaniam (the eighth plaintiff). The three first-named are all dead now, and the first, third, fourth, fifth, sixth, seventh, and ninth plaintiffs are their children. These are therefore the parties who in terms of the will would succeed to the whole estate on the death of the widow.

"The trouble that has now arisen is this. On the 9th May, 1904, the widow, as sole owner, purported to lease the entirety of Hunumullekurunduwatta for five years to the third and fourth defendants, and on the 31st of the same month she, by a deed No. 5,650 (P2), conveyed the whole of that property by way of gift to her nephew, the second defendant, and by another deed assigned her rights under the lease also to him.

"The plaintiffs aver that in February, 1905, they entered into a verbal agreement with the widow (first defendant), whereby for the sake of convenience they were to enjoy the income of the Colombo properties detailed in Schedule A during the lifetime of the widow, as and for their half-share of the intestacy, and the widow was to enjoy during her life the whole of the Negombo estate described in Schedule B for her half-share. They complain that the first defendant and the second defendant, acting in collusion and bad faith, and in contravention of the plaintiff's rights, executed the deed P2, and pray that the first and second defendants be compelled to execute a deed embodying the terms of the alleged verbal agreement as to possession of the several lands, and that the deed P2 be declared null and void except as regards half the income during the first defendant's life.

"It seems to me that the plaintiffs are anticipating things in too great a hurry, and that none of the averments in their plaint affords a ground for the relief they seek. The first prayer is entirely out of the question, as they are seeking to enforce an alleged parol agreement with regard to lands.

"As for the other part of the case, I fail to see what injury or fraud the first defendant or second defendant has committed to entitle the plaintiffs to have this deed rescinded. It is not pretended for a moment that the first defendant was in February, 1905, or at any time, the absolute owner of the estate in question, and her conveyance in favour of the second defendant could not possibly pass to him a greater interest than she herself had. It is true that a layman reading this deed might at the first blush suppose that it was an out and out conveyance by an absolute owner, but that is no reason why a Court should interfere and set it aside. The legal effect of this deed is to convey no more than all the right,

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title, and interest (present and future) of the donor to the second defendant, and it is impossible at the present moment to say what that interest will be by the time the first defendant dies. As has been argued by Mr. Walter Pereira, who appeared for the defendants, it was not a mere life estate that was conveyed to the second defendant. That was the least extent of it, but it may amount to something more, as it is not an impossibility for the widow to be yet invested with *dominium* by a failure of the *fidei commissarii* before her own death.

"In my opinion the plaint discloses no cause of action against any of the defendants, and it must be dismissed with costs."

The plaintiffs appealed.

Sampayo, K.C. (with him *Bawa*), for the appellants.—The learned District Judge's view, that a *dominium* in the property in question was vested in the surviving testatrix Nagamma subject to a *fidei commissum* in favour of the appellants, and that therefore her deed of gift to the second defendant is to that extent valid, is erroneous. Under the joint will the property vested in the appellants on the death of the testator Sarawana Chetty, and all that was decided in the previous case, *Nagamma v. Sathappa Chetty* (1), was that there was an intestacy with regard to rents and profits until Nagamma's death. See the case of *Criellaart v. Van Valen*, reported at page 168 of MacGregor's translation of Voet's title on *Fidei commissa*. This being so, her deed of gift, in which she declares herself to be owner of the property and proposes to transfer it to second defendant, is an act prejudicial to the appellants, and constitutes a wrong for the prevention of which an action may be brought. Even if this is in the nature of a *quia timet* action, the circumstances bring it within the exceptions mentioned in *Fernando v. Silva* (2). The tendency of our Courts at present is not to insist on a strict cause of action, as in the days of technical pleadings, and the definition of "cause of action" in section 5 of the Civil Procedure Code is wide enough to embrace the relief sought for in this case. See also *Kadija Umma v. Marikar Hadjiar* (3). Moreover, the appellants' right to possession was actually interfered with, as, but for the arrangement as to possession between the parties, the appellants would be entitled to be in possession and take half-share of the rents and profits. It is submitted that the action was rightly brought.

Walter Pereira, K.C., S.-G., for respondent.—It is submitted that this is a *quia timet* action of the worst type. The bare act of

(1) (1903) 9 *N. L. R.* 246. (2) (1878) 1 *S. C. C.* 27.
(3) (1901) 1 *Browne* 417.

alienation by the first defendant is no invasion at all of the rights, whatever they may be, of the plaintiffs. The remarks of Sir John Budd Phear in *Fernando v. Silva* (1) apply. There it was held that a *quia timet* action could not be supported, unless there was prospect of evidence available at the time of action being lost by delay until a cause of action arose. In the present case there was no such fear at all, as the whole case depended upon no more than the construction of a document. Then it is clear that, under the will, the plaintiffs were to become entitled to the property after the death of both the testator and testatrix. The words used are: "In the event of us both dying without issue." Until then the *corpus* remained in Nagamma and the heirs of her husband. She had thus title to at least one-half, which would be absolute and pass to her heirs if there were no children of Sarawana Chetty living at her death. So, she had a substantial interest to convey, and the deed is good to the extent of that interest.

Sampayo, K.C., in reply.

27th July, 1906. MIDDLETON J.—

On the hearing of the appeal in *Nagamma v. Sathappa Chetty* (2) the question to be decided was whether there was an intestacy as to the rents and profits of a portion of the *corpus* of the estate, and the Court held that there was. The question as to the vesting of the *corpus* was not raised or argued.

I do not remember that my attention in that case was called to *Criellaart v. Van Valen*, 1740 A.D., reported at page 168 of Mac Gregor's translation of *Voet* 36, 1 and 2. Looking at that case and considering the wording of the will I concur in the conclusion arrived at by my brother that the first defendant takes no property or interest in any part of the *corpus* of the immovable estate. The first defendant, however, denies the plaintiff's right to be deemed the owners of the *corpus* of the estate at Negombo, and assumes that title to herself and purports to convey it to the second defendant. It is true she has no right to do so, and her action in doing it may be a mere nullity; at the same time, if it is to be permitted to pass unchallenged by the plaintiffs, it will inevitably lead to costly litigation in the future.

I am of opinion therefore that the plaintiffs should have an opportunity of proving that this deed interferes with their present enjoyment of the property which would, I take it, give them a cause of action.

(1) (1878) 1 *S. C. C.* 27.

(2) (1903) 9 *N. L. R.* 246.

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I agree therefore that the judgment should be set aside on the declaration of title set out by my brother and that the case should be sent back for trial.

The respondent must pay the costs of the appellants in the Court below, and in this Court up to date.

WOOD RENTON J.—

The material facts in this case are these:—One Sarawana Chetty and his wife, Nagamma, who is the first defendant-respondent, made a joint will on 2nd July, 1862. The will provided that if Sarawana Chetty should die first, Nagamma should be entitled by way of annuity to the income of certain lands, houses, and gardens in Colombo, " but not from any other lands, houses, and gardens;" should also retain in the possession all the jewels, furniture, and apparels which " she now uses," and should occupy half the family house and premises during her life. The joint estate contained also land situated in the District of Negombo. But as to whether or not the widow was to have any interest in the rents and profits of this immovable property the will was silent. It dealt next with the contingency of Sarawana Chetty surviving his wife. In that case he was to be " the sole and universal heir of all and singular the movable and immovable properties left behind." Then follow provisions which must be set out *in extenso*:—

" If the said Sarawana Chetty should procreate any child or children either by the said Nagamma, or by another marriage according to our customs, rites, and ceremonies, then such child or children shall be the sole and universal heirs or heiresses to our estate. That in the event of us both dying without any issue all our properties shall go to the children of Muttu Caruppen Chetty as our lawful heirs. But under any circumstances after our death our said heirs or issues or their heirs or issues shall not sell, mortgage, or alienate any of the lands or immovable properties belonging to our estate, but they shall be held and possessed for ten generations under the said restrictions and in the form of *fidei commissum*."

In order to clear the ground at once for a consideration of the real point at issue in the present appeal, I may say that, in my opinion, (i.) it is only issue of Sarawana Chetty by Nagamma or by another marriage who are contemplated by the words above cited, " in the event of us both dying without issue; " no right of succession is given to any issue of Nagamma by a second marriage; (ii.) a *fidei commissum* is created not only as regards the heirs of Muttu Caruppen Chetty, but as regards the issue, if any, of Sarawana Chetty by Nagamma or by another wife.

Sarawana Chetty died in 1867 without leaving any such issue; the joint will was duly proved, and his widow Nagamma adiated the interests in the inheritance which it conferred upon her. After some time, however, a question arose as to the position under the will of the rents and profits of the Negombo land. The Supreme Court held [D. C., Colombo, No. 13,004 (1)] that, as to these, Sarawana Chetty had died intestate, and that consequently his widow was entitled to a moiety of them under the common law of succession. The present appellants are the heirs of Muttu Caruppen Chetty. They alleged that in February, 1904, subsequently to the decision just mentioned of the Supreme Court, it was orally agreed between themselves and Nagamma that as a matter of convenience they should during her lifetime enjoy the entirety of the rents and profits of the Colombo properties, leaving to her the entirety of the rents and profits of the Negombo land. Nagamma denies the existence of any such agreement. No evidence on the point was taken in the Court below. It is admitted, however, in the answer that the appellants did enter on the possession of the Colombo properties on or about the date of the alleged agreement, and that Nagamma, on her side was in similar possession of the land in the District of Negombo. On 9th February, 1904, Nagamma purported to lease the entirety of this land for a period of five years to the third and fourth defendants-appellants (P3). On the 31st of May in the same year, by deed No. 5,650 (P2), she conveyed as owner and proprietor the whole of the Negombo property to her nephew, the second defendant-respondent, by way of gift. The appellants now seek, by proceedings in the nature of a *quia timet* action, to have (i.) the alleged oral agreement of February, 1904, specifically enforced by a decree directing the first and second defendants-respondents to execute a deed embodying its terms; (ii.) the deed of 31st May, 1904, cancelled, or at least rectified so as to bring it into accordance with the provisions of the agreement above-mentioned; (iii.) the first defendant-respondent restrained by injunction from disposing of the property in question.

At the hearing of the appeal two points were argued, with which in the view that I take of this case it is not necessary to deal in detail. It was argued for the respondents—and the learned District Judge has taken the same view—first, that the appellants are in no way prejudiced by the disposition of the property made by Nagamma, the first defendant-respondent, and that therefore, on the principle that *quia timet* actions should be discouraged, no present interference on the part of the Court was necessary for their

(1) (1903) 9 *N. L. R.* 246.

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protection, *Fernando v. Silva* (1); and secondly that although the terms of Nagamma's conveyance to the second defendant-respondent might be too wide in describing her as "owner and proprietor" of the Negombo land, she had yet, as *fiduciarius* under the joint will, a real, though restricted, *dominium* in the property (*Voet*, 7, 1, 13), and was entitled to transfer her right, title, and interest therein for what it was worth. After a careful consideration of the terms of the joint will it appears to me that Nagamma took no interest thereunder in any part of the *corpus* of the property. She gets the specified rents and profits and nothing more; the object of her husband—an object in which she must be taken to have acquiesced by subsequent adiation—seems to have been to secure to her a life-interest only. Even the *corpus* out of which that interest is to be derived is strictly defined. It consists of specified "lands, houses, and gardens, but not of any other lands, houses, or gardens." She is to occupy "only a half part of the house and premises in which we now live and reside." If her husband survive her, he is to be the sole and universal heir of the whole estate. Her children by any other husband take no interest in it. It appears to me that on the death of Sarawana Chetty without issue by Nagamma or by any other wife, or, at any rate, immediately on her acceptance of the benefit given to her by will [*Voet*, 36, 1 and 2, *MacGregor's translation*, *p.* 156; cp. the case of *Crielaart v. Van Valen* (1740) *ib. p.* 168] the entire *corpus* of the property vested in the appellants, subject to the *fidei commissum*, and that when the *fidei commissum* is exhausted the heirs of the appellants, and not Nagamma or any one claiming through her, will be its unfettered owners. I am confirmed in the conclusion by the circumstances mentioned by Wendt J. in his judgment in the previous case *Nagamma v. Sathappa Chetty* (2), and before us in this appeal, that Nagamma had only brought to her husband a dowry of Rs. 1,000, and that all the lands forming the estate were purchased from time to time by him. If my view of the construction of the joint will be sound, I think that the appellants are entitled to maintain a *quia timet* action. The remarks of Sir John Phear C.J. in *Fernando v. Silva* (*ubi sup.*) cannot surely apply to a case like the present, where the first defendant-respondent has no title to possess any part of the *corpus* of the property, except by virtue of an alleged informal agreement which she repudiates. Whether such an agreement was entered into or is capable of being specifically enforced, we cannot in the meanwhile say. Neither of these issues was investigated in the Court below. But if the appellants so desire,

(1) (1878) 1 *S. C. C.* 27.

(2) (1903) 9 *N. L. R.* 246, *at p.* 248.

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they are, I think, entitled to have them determined. I would (*a*) set aside the judgment and decree appealed against; (*b*) declare that, in addition to the rights *ab intestato* secured to her by the decree in *Nagamma v. Sathappa Chetty*, (1) the first defendant-respondent under the joint will has only the rents and profits, the possession of the jewels, furniture, and movables, and the right to occupy one-half part of the house and premises, thereby severally and specifically allotted to her, and takes no property or interest in any part of the *corpus* of the immovable estate disposed of by the will; and (*c*) send the case back to the District Court for trial and adjudication in the light of the above declaration of title. I would give the appellants the costs of this appeal and of the proceedings already had in the Court below.