Present: Garvin A.C.J. and Lyall Grant J. 1926

SILVA *v.* JAYEWARDENE.

324—D. C. Colombo, 12,859.

Joint will—Mutual disposition between husband and wife—Interest of survivor—Life interest—Vesting and transmission of rights.

Ramlal Maharajah and his wife Seypatchy (*alias* Sivappiragasa Ammal), by their joint will dated December 22, 1892, after making certain mutual dispositions devised the property in dispute to their nephew Sivapoonian, and in the event of his death without issue to the children of C. S. Perera living at the time.

The material provisions of the will are as follows:—

"*Secondly*.—We give and devise and bequeath unto the survivor of us, all and singular our joint estate and property, immovable and movable, real and personal of whatsoever nature and wheresoever situate in manner following, that is to say: In the event of me, the said Ramlal Maharajah, being the survivor, it is our will and desire that I, the said Ramlal Maharajah, shall become absolutely entitled to all our joint estate . . . . and that I, the said testator, shall have the full, free, and unreserved and absolute disposal of all our said property; but in the event of me, the said Sivappiragasa Ammal, being the survivor, it is our will and desire that I shall not sell, mortgage, gift, dispose of by will or in any other manner alienate or encumber our immovable property, but shall hold and possess the said property and receive and enjoy the rents, profits, and income thereof during my lifetime, and after my death the same shall devolve on the devisees and legatees hereinafter mentioned.

"*Thirdly*.—To Sivapoonian, the nephew of me, the testator, we give and devise the following properties . . . : provided however, we the testator and testatrix hereby expressly will and declare that the said Sivapoonian shall not sell, mortgage, gift, dispose of by will, or in any other manner alienate or encumber the said premises, but shall hold and possess the said premises and enjoy the rents and profits and income thereof during his life, and after his death the said premises shall devolve on his lawful child, children, or issue; and provided further that . . . . in the event of the said Sivapoonian dying without leaving any lawful child, children, or issue the benefit of the devises hereinafter made to him shall immediately cease and determine, and the premises hereinafter devised to him shall devolve absolutely on the person hereinafter named in the manner following: the house and ground Nos. 108, 109, 110, situate in Main Street, Colombo, on the children of C. S. Perera, diseased, nephew of me, the said testator, or on such of the children as may be living at the time."

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Ramlal died in 1892. Seypatchy, who survived her husband, died in August, 1920. Sivapoonian died in 1896 without leaving any children.

Held, that on the death of the testator the interest obtained by the survivor under the will was a usufructuary one and that the property vested in Sivapoonian; on the death of Sivapoonian without issue, his rights devolved on the children of C. S. Perera living at the time of his death.

IN this action plaintiff claimed to be the sole owner of premises Nos. 108, 109, 110, Main Street, Colombo. The defendant asserted title to one-third share as the executor of C. E. Perera. Both parties claimed title under the last will of Ramlal Maharajah and his wife Seypatchy (*alias* Sivappiragasa Amma) dated December 22, 1892. Ramlal died shortly after the execution of this joint will, which was admitted to probate in case No. 326 of the District Court of Colombo. The material provisions of the last will are set out in the headnote. The plaintiff contended that by the last will these premises were bequeathed to Seypatchy, the surviving testatrix, subject to a *fidei commissum in favour* of his nephew Sivapoonian and his children; and in the event of his dying without lawful issue in favour of the children of C. S. Perera who may be alive at the time of Seypatchy's death. It was admitted that Sivapoonian died in 1896 without leaving any children, and that all the children of C. S. Perera, with the sole exception of the plaintiff, were dead at the time of Seypatchy's demise in August, 1920. On the other hand, it was urged on behalf of the defendant that the premises were devised to Sivapoonian subject to a usufruct in favour of Seypatchy, and that upon his death without issue, these devolved on the three children of C. S. Perera who were living at the time of Sivapoonian's death, of whom the defendant's testator was one.

The learned District Judge upheld the plaintiff's contention, but held that the judgments in certain actions to which the plaintiff was a party barred his claim.

J. S. Jayewardene (with *Canekeratne* and *James Joseph*), for plaintiff, appellant.—The learned District Judge has erred on the question of *res judicata*. The property, which formed the subject matter of the actions referred to, was not claimed by the parties under the will. Besides, the parties were all plaintiffs, and they could not be said to be at issue. *Senaratne v. Perera.*[1]

Allan Drieberg, K.C. (with *Hayley, Cooray*, and *H. V. Perera*), for defendant, respondent, conceded that the judgment cannot be supported on the ground of *res judicata*.

[1] *(1924) 26 N. L. R. 225.*

The question is, whether the interest of Seypatchy is usufructuary or fiduciary. The parties have acted on the basis that Seypatchy had only a life-interest and the Court will not disturb the arrangement. *Vansanden v. Mack.*[1]

As regards the language of the will, the words are " We give the bequeath in manner following." The gift and bequest is qualified by the expression used. Now the testator keeps the " dominium " to himself, as contrasted with the nature of the interest given to the wife.

Then the will proceeds " after my death the property shall devolve on the devisees. " Subject to the life-interest of me, the said Seypatchy. We make the following devises.

The use of the word " life-interest " indicates the intention. The usual presumption is in favour of the wife having only a life interest. We contend that this is a direct bequest to Sivapoonian. If he dies his children would take. Failing his children, the property would go to the children of C. S. Perera. If Seypatchy got the dominium, the death of Sivapoonian before her would put an end to the *fidei commissum* (*Mohamed Bhai v. Silva* [2]). If Sivapoonian dies and there is a transmission, the beneficiaries would be the children of C. S. Perera alive at the death of Sivapoonian.

The will construed by Schneider J. in *Gunawardene v. Viswanathan* [3] was not a joint will. There is no description of the interest as " life-interest." There is no direct devise to the legatees. The presumption is in favour of a usufruct (*Lee's Roman-Dutch Law. 348*). In the case of a joint will the interest of the widow may fairly be presumed to be usufructuary. *Juta on Wills 102.*

J. S. Jayewardene (in reply).—The conduct of the parties in the construction of a will is valueless. *Jayatileke v. Abraham.*[4] There is a dictum of the Privy Council to the following effect: " The construction should not be coloured by the after behaviour of the parties. *Brito v. Muttunayagam.*[5]

The words " subject to a life interest " are used loosely. They are used with reference to the devise as " aforesaid. "

The second clause runs " We and bequeath to the survivor." The effect of the words is to give dominium.

We contend that the children of C. S. Perera are substituted in the event of Sivapoonian not taking. It amounts to a substitution of the heirs of Perera to Sivapoonian. *Galliers v. Rycroft.*[6] The words " benefit of such devise shall devolve on " clearly indicate such an intention. *McGregor's Voet, pp. 144 and 145 ; Kotze's Van Leeuwen, p. 372.*

[1] *(1893) 1 N. L. R. 311.*
[2] *(1911) 14 N. L. R. 193.*
[3] *(1922) 24 N. L. R. 225.*
[4] *4 C. W. R. 31.*
[5] *(1918) 20 N. L. R. 327.*
[6] *3 Bal. 72.*

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As an authority for the proposition that on the death of Sivapoonian the *fidei commissum* does not lapse, *see Thyagaraja* v. *Thyagaraja.*[1]

Cur. adv. vult.

August 31, 1926. GARVIN A.C.J.—

This appeal arises out of a contest as to title. The plaintiff claimed to be the sole owner of premises Nos. 108, 109, and 110 in Main Street, Colombo. The defendant, who is the executor of the last will of one C. E. Perera, admits that he is in possession of the premises as to a one-third share and denies the right of the plaintiff to anything more than an equal share with his testator.

Both parties claim under the joint last will of Ramlal Maharajah and his wife Seypatchy dated December 22, 1892. Ramlal Maharajah died in 1892 shortly after the execution of this joint last will, which was duly admitted to probate in case No. 326 of the District Court of Colombo. Seypatchy, who survived her husband, died in August, 1920.

The plaintiff's contention is that by this last will these premises were bequeathed to Seypatchy, the surviving testatrix, subject to a *fidei commissum* in favour of her nephew Sivapoonian and his children, and in the event of his dying without lawful issue in favour of the children of C. S. Perera who may be alive at the time of Seypatchy's death.

It being admitted that Sivapoonian died 1896 without leaving any lawful children, and that all the children of C. S. Perera, with the sole exception of the plaintiff, were also dead at the time of Seypatchy's demise, the plaintiff claims that the whole of these premises devolved on her to the exclusion of the heirs of her deceased brother and sisters.

On the other hand, it is contended by the defendant that these premises were by the last will devised to Sivapoonian subject to a usufruct in favour of Seypatchy, and that upon his death without lawful issue the premises devolved upon the four children of C. S. Perera, who acquired a good and transmissible title thereto, subject only to the usufruct reserved to Seypatchy. One of the children of C. S. Perera, a daughter, Eugene, died intestate and unmarried after her interest had vested, leaving as her sole heirs two sisters and a brother, C. E. Perera, the testator of the defendant executor. The defendant thus claims a one-third share for his testator and assigns a one-third to the plaintiff. The remaining one-third has passed to others who are not parties to this action.

The learned District Judge upheld the plaintiff's contention, but he held that the judgments in certain actions to which the plaintiff was a party operated as a bar to the present claim and amounted to an estoppel.

[1] *(1921) 22 N. L. R. 433.*

The judgment cannot be sustained on these grounds. Cases Nos. 29,642 and 25,856 were both proceedings under the Partition Ordinance at the instance of the present plaintiff and others. They do not, however, relate to any of the premises which form the subject-matter of this action. The title claimed, so far as the plaintiffs were concerned, was in each case an independent title which was not based on this joint will. They did not, and could not, raise any issue as to whether Seypatchy's interest under this last will was that of a fiduciary or merely that of a usufructuary.

Nor do I think the District Judge is right in his view that the proceedings in the two testamentary cases he refers to can be held to estop the plaintiff from maintaining the contention that she is under this joint will solely entitled to these premises. These proceedings indicate that the plaintiff's view of her own rights has been that she took equally with her brother and sister from Sivapoonian on the footing that he was vested with the title to these premises of which Seypatchy was only usufructuary, but that does not of itself constitute an estoppel.

The question for decision is whether the District Judge was right in holding that under this joint will Seypatchy took a title to these premises burdened with a *fidei commissum* and not a mere usufruct. If he is right, it will still remain for us to consider whether even in that view the plaintiff's claim to take the premises exclusively is sustainable.

The material provisions of this will are as follows:—

> *Secondly.*—We give and devise and bequeath unto the survivor of us all and singular our joint estate and property, immovable and movable, real and personal of whatsoever nature and wheresoever situate, in manner following, that is to say: In the event of me, the said Sivilal Maharajah Ramlal Maharajah, being the survivor, it is our will and desire that I, the said Sivilal Maharajah Ramlal Maharajah, shall become absolutely entitled to all our joint estate and property, immovable and movable, real and personal of whatsoever nature and wheresoever situate, nothing excepted, and that I, the said testator, shall have the full, free, unreserved, and absolute disposal of all our said property, but in the event of me, the said Sivappiragasa Ammal, being the survivor, it is our will and desire that I, the said Sivappiragasa Ammal, shall not, save as is in the sixth clause hereinafter mentioned, sell, mortgage, gift, dispose of by will or in any other manner alienate or encumber our immovable property or any of them or any part or portion thereof, but shall hold and possess the said immovable property and receive and enjoy the rents,

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profits, and income thereof during my lifetime, and after my death the same shall devolve on the devisees and legatees hereinafter mentioned.

"*Thirdly*.—Subject to the life-interest of me, the said Sivappiragasa Ammal, as aforesaid, we make the following devises, viz:—

"(*a*) . . . . .

"(*b*) . . . . .

"(*c*) To Deyereno Maharajah Sivapoonian Maharajah, nephew of me, the testator, we give and devise the following properties, to wit:—(1) All that house and ground bearing assessment No. 115 situate at Sea street in Colombo; (2) all that house and ground and all the buildings forming part thereof bearing assessment No. 123, situate at Sea street in Colombo; (3) all that house and ground bearing assessment No. 90, situate at Fourth Cross street in Colombo; and (4) all that house and ground bearing assessment Nos. 108, 109, and 110, situate at Main Street in Colombo. Provided however and we, the said testator and testatrix hereby expressly will and declare that the said Deyereno Maharajah Sivapoonian Maharajah shall not on any account whatsoever sell, mortgage, gift, dispose of by will, or in any other manner alienate or encumber the said several premises or any of them or any portion thereof, or the rents, issues, profits, or income thereof, or of any portion thereof, but shall hold and possess the said premises and enjoy the rents, profits, and income thereof during his life, and after his death the said several premises shall devolve on his lawful child, children, or issue, the child or children of any deceased child or children taking the share or shares to which his, her, or their parents would have been entitled if living. And provided further and we, the said testator and testatrix, hereby expressly will and declare that in the event of the said Deyereno Maharajah Sivapoonian Maharajah selling, mortgaging, gifting, or in any other manner alienating the said premises hereinbefore devised to him or any of them or any portion thereof, or the rents, profits, or income thereof or of any portion thereof, or in the event of his signing or executing any deed or writing for any of the purposes aforesaid, or in the event of the said premises or any of them or any portion thereof or the rents, profits, or income

thereof or of any part thereof being seized or sold in execution for any debt or default of the said Deyereno Maharajah Sivapoonian Maharajah, or in the event of the said Deyereno Maharajah Sivapoonian Maharajah dying without leaving any lawful child, children, or issue, then and in any such case the benefit of the devises hereinbefore made to him shall immediately cease and determine, and the said several premises hereinbefore devised to him shall devolve absolutely on the persons hereinafter named in manner following, to wit: The houses and ground No. 115, situate at Sea street in Colombo, and No. 90, situate at Fourth Cross street in Colombo, on Charlotte Agnes Perera, wife of Charles Abraham Perera Sameresekere, and niece of me, the said testator, or if she be dead at the time, then on her lawful child, children, or issue; the house and ground No. 123, situate at Sea street in Colombo, on George Perera, nephew of me, the testator, or if he be dead at the time, then on his lawful child, children, or issue; and the house and ground Nos. 108, 109, and 110, situate at Main street in Colombo, on the children of Charles Stephen Perera, deceased, nephew of me, the said testator, or on such of the children as may be living at the time."

The opening words of the second clause, " We give and bequeath to the survivor all and singular our joint estate . . . . " are controlled by the words " in manner following."

The clause then proceeds to define the nature of the devise according as the husband or the wife is the survivor. If the husband survived, he was to have " full, free, unreserved, and absolute disposal " of all the property. But if the wife survived her husband, she was not to alienate or encumber the immovable property, but was to hold and possess the same and receive the rents and profits, issues and income thereof during her lifetime, and after her death the " same " was to devolve upon the legatees and devisees.

The interest she took was clearly not absolute. Was it a mere usufruct, or was it the dominium with full rights of enjoyment burdened with a *fidei commissum?*

We are invited to construe the clause " secondly " as involving a transfer of the dominium of all the immovable property to the surviving testatrix burdened as to each item with a *fidei commissum* in favour of the particular legatee to whom that property is assigned by clause " thirdly." If clause " thirdly " is merely a catalogue of the particular individuals who were to take the different premises

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which together comprised the immovable property dealt with in clause secondly in succession to Seypatchy after her death, there would be much force in the contention that Seypatchy's was a fiduciary interest. But does this help the plaintiff? In this view Seypatchy had a fiduciary interest in the premises which form the subject matter of this action, and Sivapoonian's interests were those of a *fidei commissary*. Sivapoonian having predeceased Seypatchy *the fidei commissum* is at an end, if as is contended Sivapoonian under this will took neither the dominium nor any transmissiable interest.

> " The *fidei commissum* fails by the happening of a fortuitous event if the *fidei commissary* heir die during the pendency of the conditions on which the *fidei commissum* depends; for he does not transmit the expectation of the *fidei commissum* to his heirs, unless there be some evidence of a contrary intention on the part of the testator whether that be express, in that he ordered that on the *fidei commissary* dying before the fulfilment of the condition his heirs should succeed him in respect of the expectation of the *fidei commissum* . . . . " *Voet 36.1.67.*

The presumption is that the testator did not intend that *fidei commissary* legatee to have any transmissible right unless he survived the fiduciary (*vide Samaradiwakara v. de Saram* [1]).

The ordinary rule is that in the case of a *fidei commissum* the fiduciary retains the dominium until his death and there is no vested interest in the remainder nor during that interval. Where the *fidei commissary* dies before the fiduciary the latter takes the property.

It is argued that by reason of the provisions of the third clause the *fidei commissum* does not fail. Now by that clause the testator gives a legacy to Sivapoonian and burdens it in his hands with a *fidei commissum* upon condition that in the event of his death without issue the premises which are to form the legacy are to pass to the children of C. S. Perera who may then be alive. The *fidei commissum* thus imposed can only operate when the premises vest in Sivapoonian. If the second clause does create a true *fidei commissum* the legacy to Sivapoonian is conditional on his surviving the testatrix Seypatchy and failed by reason of his predecease.

There can be no doubt that if Sivapoonian lived to take his legacy, it would by operation of this clause have been immediately burdened with a *fidei commissum* upon condition that at his death it should pass to his children, or failing children to the children of C. S. Perera who were alive at the time. But he did not survive Seypatchy, and if her interests were those of a fiduciarius he died pending the condition on which that *fidei commissum* depended.

I am quite unable to see anything in the language of the third clause to suggest that it was the intention of the testator to substitute Sivapoonian's children or alternatively C. S. Perera's children

[1] *(1911) 14 N. L. R. 321.*

as legatees in the place of Sivapoonian. In relation to the *fidei commissum* imposed on Sivapoonian the children of C. S. Perera are substituted in the event of Sivapoonian dying without children. But there is no similar substitution of either Sivapoonian's children or C. S. Perera's children as *fidei commissary* legatees under the *fidei commissum* said to be imposed on Seypatchy. Nowhere in this will is there an express direction or a clear indication that the premises said to be vested in Seypatchy subject to a *fidei commissum* are to devolve at her death in the event of Sivapoonian having predeceased her to his children, or failing them to the children of C. S. Perera who may be alive at her death. On the contrary, those who are to take the premises in substitution for the children of Sivapoonian are those children of C. S. Perera who were alive at Sivapoonian's death.

In the absence of such a substitution, the *fidei commissum*, if indeed Seypatchy's interests were fiduciary, failed, and she transmitted to her intestate heirs a free and unfettered title to the premises.

Counsel for the defendant suggests two possible views which may be taken of this will:—

(*a*) That it gave to the surviving testatrix a usufruct with the dominium to Sivapoonian.

(*b*) That though the testators have used language which creates a prior interest in the nature of a *fidei commissum*, they did not intend to postpone the vesting of the interest of the legatee until the termination of such prior interest (*vide Strydom v. Strydom*,[1] *Juta on Wills*, p. 101).

If the clause "secondly" stood alone it would be difficult to resist the conclusion that the testators having massed their joint estate intended that if the husband survived he was to take the whole absolutely and without any condition or limitation, whereas if the wife proved to be the survivor she was to take the movables absolutely and the immovable property subject to a *fidei commissum* in favour of certain specified persons.

But it is followed immediately by the words—

"Subject to the life-interest of me, the said Sivappiragasa Ammal (*i.e.*, Seypatchy) as aforesaid, we make the following devises, viz:—

"(*a*) To the trustees and wardens of the temple called . . . . we give and bequeath the following properties, to wit:— . . . .

"(*b*) To our son Ramlal Maharajah Canagasabay Maharajah we give and devise the following properties, to wit:— . . . . (A *fidei commissum* is imposed on the legacy.)

[1] 11 S. C. R. 423.

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"(c) To Deyereno Maharajah Sivapoonian Maharajah we give and devise the following:— . . . . (A *fidei commissum* is imposed on the legacy.)

"(d) To Charlotte Agnes Perera, George Perera, and the children of C. S. Perera we give and devise all the estate called 'Markuwathura estate.'

"(e) To Muthiahpulle Sinnathamby we give and devise the following properties, to with:— . . . . (The legacy is charged with a *fidei commissum*.)

"(f) To Kalubovillage Selestian Perera we give and devise absolutely all that small piece of land . . . . ."

All these dispositions, some of them burdened with *fidei commissa*, are made " subject to the life interest of me, the said Sivappiragasa Ammal as aforesaid." It is urged for the defendant that these words are the testators' declaration that the interest created by the second clause is a life interest only, a mere usufruct, and that these dispositions are only consistent with that view. For the plaintiff it is submitted that the words " life interest as aforesaid " mean the fiduciary estate for life created by the preceding clause.

The use of the expression " life interest " followed by such elaborate dispositions of the property subject to this " life interest " is the foundation for the contention that the intention of the testators was to give a vested interest to the legatees and in that manner definitely assure that the property thus devised will follow in the line of devolution so carefully and so clearly indicated.

" All construction must yield to the intention of the testators and even where the intermediate interest is a fiduciary one, there may be a vesting in the heir or legatee." *Juta on Wills, pp. 62 and 63.*

It does not matter to the defendant whether the interest of Seypatchy be fiduciary in nature or only usufructuary so long as an intention to give a vested and transmissible interest to Sivapoonian sufficiently appears.

The argument for the defendant is reinforced by evidence which shows that Seypatchy, the testatrix, had construed her rights to be those of usufructuary and nothing more.

In the two partition cases Nos. 25,856 and 29,642 earlier referred to Seypatchy was in each case the first defendant. Her interests were defined in the plaint filed in each case as a life interest—the term being used in the sense of a usufruct. She assented to this in her answer, and in each case permitted a decree to be entered declaring the defendants—who claimed title under clause " thirdly " of this joint will—entitled to the interests claimed by them subject to her life interest. These decrees were entered on August 3, 1908, and March 19, 1917, respectively.

Moreover, there is ample evidence to show that the surviving executor of this joint will and the children of C. S. Perera had consistently acted in the matter of the lands devised by this last will on the footing that Seypatchy's interests were usufructuary.

The clause "fourthly" in contrast to those provisions of the second clause which have been hereinbefore specially referred to vests all movables in Seypatchy absolutely in the event of her being the survivor.

The intention of the testators as to the devolution of their movable property in the event of Seypatchy being the survivor is clearly that it should vest in her absolutely. In the event of the husband being the survivor both movable and immovables were to vest in him absolutely. As regards the immovable property of the testators in the event of Seypatchy being the survivor, it is clear that she was only to have the enjoyment for life. Nowhere in this will, which contains such elaborate provisions, is there any clause which suggests that it was the intention of the testators that upon the happening of any event the immovable property was to vest absolutely in Seypatchy.

On the other hand, there is every indication in the third clause of the intention of the testators that their immovable property was to pass to their legatees and those in whose favour that property was burdened with *fidei commissa* in the hands of the legatees.

If that intention is to have effect, the language chosen by the testators and used by them when making the legacies—language which is appropriately employed to vest an interest in property—must be taken to mean that an interest was vested in the legatees on the death of the first dying testator. Such an interpretation is consistent with the use of the term "life interest" in that very clause in the sense of usufruct.

If the will be construed as vesting no transmissible interest, then in the case of this, and possibly other dispositions, the legatees and those to whom the subject of the legacies was to pass from them took nothing, and the intention of the testators as to the devolution of this property is frustrated.

Since 1923 the testatrix Seypatchy, the children of C. S. Perera, and many of those who would have taken interests in this estate if the original legatees had a transmissible interest have dealt with their respective interests in the view that Seypatchy had only a usufructuary interest for life.

That appears to me to be in accordance with the intention of both the testators.

For these reasons I would affirm the judgment of the District Judge dismissing plaintiff's action, and dismiss this appeal with costs.

LYALL GRANT J.—I agree.

Appeal dismissed.