

Present : Garvin and Driberg JJ.

1928.

VEERAPILLAI v. KANTAR *et al.*

135—D. C. (Inq.) Jaffna, 5,709.

Fidei commissum residui—Last will—Devise to husband—Right of alienation.

Where a last will contained the following clause " I bequeath to my husband all the immovable and movable property belonging to me to be possessed and enjoyed by him as sole owner thereof with full right of donating, transferring, or otherwise alienating the same And on the death of my husband the properties should devolve on my elder brother as sole owner."

Held, that the devise to the husband was subject to a *fidei commissum residui* in favour of the brother.

*Weerasinghe v. Rubeyat Umma*¹ followed.

A PPEAL from an order of the District Judge of Jaffna. The facts appear from the judgment.

Hayley, K.C. (with *Ramachandram*), for administrator, appellant.

H. V. Perera (with *H. E. Garvin* and *Nadarajuh*), for respondents.

October 2, 1928. GARVIN J.—

The appellant is the administrator of the estate of his deceased wife Sinnatangam. He applied to the Court as administrator for permission to sell the immovable property of the estate to enable him to pay the debts of the estate. His application was opposed by Murugupillai Kanapathipillai, the brother of the deceased. The learned District Judge made order authorizing the sale of 2 allotments of land "in the first instance." There can be no great objection to this order in itself; but the appellant's real grievance is that it proceeds upon a determination that his rights under the last will of his wife are limited to a life interest.

The objections to the application were—

- (1) That in terms of the last will the appellant was required to pay the debts of his wife's estate out of his own funds or surrender the benefits of the devise in his favour.
- (2) That the last will gave to the appellant only a life interest in his wife's estate which was to pass at his death to her brothers, the respondents to this appeal.

The first of these objections is manifestly untenable and was rightly rejected by the District Judge.

¹ (1913) 16 N. L. R. 369.

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The second is not a ground of objection to the sale of the property of an estate to liquidate the debts of the estate and should not have been entertained.

Inasmuch, however, as it has been entertained and determined in favour of the respondent the appellant is entitled to ask that it be reviewed. The material portion of Sinnatamgam's last will is as follows :—

“ I do bequeath to my husband Veerappapillai, son of Arasappapillai, presently of Porto Novo, all the immovable and movable properties belonging to me and situated at Karadive to be possessed and enjoyed by him as sole owner thereof with full right of donating, transferring, or otherwise alienating the same And on the death of my said husband Veerappapillai the properties should devolve on my elder brother Kanapathipillai as sole owner thereof.”

It is urged that this must be construed as the devise of a life interest to the appellant with the reversion to the respondent. To do so would be to give no effect to the very emphatic expression of the intention of the testator that her husband was to have “ full right of donating, transferring, or otherwise alienating the same.”

It is quite possible to give this disposition as a whole an effect in accordance with what appears to have been the testator's intention. The language implies an intention that the devise to the husband should be subject to a *fidei commissum residui*. It is urged, however, that the direction that on the death of her husband “ the properties ” shall devolve on her brother implies all her property and excludes the notion of the residue alone passing. The language is extremely inartistic, but I do not think that these words create any insuperable difficulty. Had the words “ the residue ” or equivalent words been used the matter would necessarily have been too clear for argument. The language of the will renders the point raised by counsel for the respondent arguable, but it is not sufficient to prevent effect being given to what appears to be the intention of the testator that what is to devolve on her brother is the property or so much of it as is left undisposed of at the death of her husband.

The language of the disposition and the facts in the case of *Weerasinghe v. Rubeyat Umma*¹ are on all material points indistinguishable from the one now before us and the judgment is binding on us.

The determination of the learned District Judge on this point is set aside, and the rights of the contestants are declared to be those to which each is entitled on the footing that the last will creates a *fidei commissum residui*.

¹ (1913) 16 N. L. R. 369.

The order made by the District Judge does not need to be modified since it will be competent to the administrator to apply for leave to sell further property should it be necessary to do so.

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The appellant will have the costs of this appeal and of the contest in the Court below which will be paid by the objector, respondent.

DEIBERG J.—I agree.

Judgment varied.

