1948 *Present:* **Wijeyewardene A.C.J. and Jayetileke S.P.J.**

THE ARCHBISHOP OF COLOMBO, Appellant, *and* VEERAPATHIRAPILLAI, Respondent

S. C. 200 — D. C. Colombo, 5,445

Will—Devise of property—Description in clause at variance with reference in schedule—Construction.

Where the relevant Clause of a Will described one of the properties devised as " the allotment of land bearing assessment No. 50 . . . . mentioned in the Schedule " but the Schedule referred to the property as " the undivided half share of the land bearing assessment No. 50 "—

Held, that the phrase " mentioned in the Schedule " qualified but did not reduce the property. The phrase brought in the Schedule for the elucidation of the clause by giving the boundaries and extent of the property and not for the purpose of subordinating the Clause to the Schedule by reducing the extent of the devise.

APPEAL from a judgment of the District Judge, Colombo.

H. V. Perera, K.C., with *A. H. E. Molamure*, for the defendant, appellant.

S. J. V. Chelvanayagam, K.C., with *P. Navaratnarajah*, for the plaintiff, respondent.

Cur. adv. vult.

July 6, 1948. WIJEYEWARDENE A.C.J.—

The subject matter of this action is a property bearing Municipal assessment No. 50, Silversmith Street, Colombo. It consists of a house and a small garden appurtenant to it. One W. P. de Silva was the original owner of that property. By deed No. 814 of October 31, 1924, (D 1) W. P. de Silva conveyed a half share to Mary Josephine Perera, and by deed No. 815 (D 2) of the same date W. P. de Silva conveyed the remaining half share to Jane de Silva who conveyed that half share to Mary Josephine Perera by deed D 3 of 1928. Mary Josephine Perera who was thus entitled to the entirety of the premises died leaving a last will which was duly proved in D. C. (Testy.) Colombo 2,208. By that last will the testatrix made a devise in respect of No. 50, Silversmith Street, directing that the property devised " shall devolve on the Church of St. Joseph, Grandpass, Colombo, and the Parish Priest of the said church shall utilise the income thereof for the charities of the Society of St. Vincent de Paul ". The defendant-appellant makes his claim on that devise. The question that arises for determination is whether the defendant-appellant became entitled to the entirety of the property or only an undivided half share of it. The residuary legatees who appear to have taken up the position that the devise in favour of the defendant was in respect of only a half share claimed the other share under the residuary clause of the last will and mortgaged that half share by P3 in 1935 with one Visalatchi. That bond was put in suit, and at a sale held in satisfaction of the hypothecary decree entered in that case, the plaintiff purchased that half share and obtained a Fiscal's conveyance P4 of 1942.

1—J. N. A 84756—1,044 (12/48)

The last will is in Sinhalese. The relevant clause transliterated into English reads as follows :—

" Maṭa dānaṭa ayitiva tibennāvū niścala dēpala-valin Koḷaṁba nagaraya tula Baḍal-vīdiyē tibena ihata kī upa-lēkhanayē pas vännaṭa saṅdahan äsäsmanṭ nommara 50 darana iḍam-koṭasa saha ehi pihiṭi gē-t magē maraṇayen pasu Koḷaṁba Toṭa-laṅga suddhavū Jusē Munīndrayānan vahansēgē nāmayen sthāpita kara tibena dēvasthānayaṭa himiva eyin läbena ādāyama e-kī dēvasthānayē mīsama bhārava siṭina pūjāprasādīn vahansē visin śuddhavū Visenti de Pāvulā Asaraṇa Saraṇa Samitiyē puṇya-karma-valaṭa yedīma magē āśāva hā balāporottuvayi ".

The points in dispute between the parties with regard to the translation of this clause are the meanings to be given to the words " iḍam koṭasa " and " saṅdahan " underlined by me with double lines. I have also underlined some other words which have to be considered in deciding these points.

The plaintiff contended that while the words, " idam kotasa " could generally mean " a share of land " or " a portion of land " they meant " a share of land " in the clause in question. Of course, the word " share " must mean " undivided share " in this context, as the land is not possessed in divided blocks, and as the plaintiff's case is that the clause dealt with an undivided half share of the land and the house. On the other hand, the contention of the defendant was that those words in the clause should be translated as " an allotment of land ". I agree that generally these words may mean (*a*) a share of land or (*b*) a portion or an allotment of land, but I am unable to agree that, in the clause we are considering, the words could be given the meaning " a share of land ". This is made clear when we consider the phrases " äsäsmant nommara 50 darana iḍam koṭasa " and " ehi pihiṭi gē-t ". In the phrase " äsäsmant nommara 50 darana iḍam koṭasa " the first four words qualify the noun " koṭasa " and not the word " iḍam " which is used as an adjective here. If, therefore, the meaning " share " is accepted for the word " koṭasa ", the phrase referred to would mean " the share of land bearing assessment No. 50 ", the words, " bearing assessment No. 50 " qualifying the word " share " and not the word " land ". It is not possible to accept a translation which results in giving an assessment number to an undivided share. The interpretation favoured by the defendant would not give rise to this difficulty as according to that it would be an " allotment " that would be given the assessment number. I shall now consider the phrase " ehi pihiṭi gē-t ". In this phrase the word " ehi " which means " on it " or " thereon " refers to the earlier word " koṭasa ". If the plaintiff's meaning of " koṭasa " is accepted, this phrase would be rendered as " and the house situated on it (the undivided share)." If, on the other hand, the defendant's translation is accepted, the phrase would mean " and the house situated on it (the allotment of land) ". It is difficult to believe that the Notary would have spoken of a house standing on an undivided share of land. If the Notary intended to refer to an undivided share of land and an undivided share of the house, he would have used different words such as " iḍamen saha ehi pihiṭi geyin koṭasak ".

The other word whose meaning is in dispute is " saňdahan ". The plaintiff's witness, Mr. Haturusinghe, gives it the meaning " described " while the defendant's witness, Mudaliyar Waidyaratne, gives the meaning " mentioned ". The translation given by Mr. Haturusinghe is clearly wrong and I have no hesitation in accepting the translation of Mudaliyar Waidyaratne. The last will itself shows that where the testatrix wanted to use the Sinhalese equivalent of " describe ", she adopted the correct words " vistara karaṇu labana ".

It is interesting to note that in the translation P1 of the last will filed by the plaintiff in this action the words " iḍam koṭasa " were translated as " portion of land " and the word " saňdahan " as " mentioned ". That translation has been made by Mr. Hathurusinghe who gave different meanings to those words in the document P1A produced by him at the time he gave evidence when he was called as a witness by the plaintiff.

I would, therefore, adopt the meanings given to " iḍam koṭasa " and " sandahan " by Mudaliyar Waidyaratne and give the following literal translation of the clause in the will :—

> " It is my will (desire) and pleasure (expectation) that out of the immovable properties owned by me at present the allotment of land bearing assessment No. 50 situated at Silversmith Street within the town of Colombo and the house standing thereon fifthly mentioned in the aforesaid schedule shall devolve after my death on St. Joseph's Church, Grandpass, Colombo, and that the income thereof shall be utilised by the Parish Priest of the said church for the charities of St. Vincent de Paul Society ".

If the words " fifthly mentioned in the aforesaid schedule " are ignored, there can be no doubt whatever that the testatrix devised the entirety of the property by this clause. But the plaintiff's Counsel contended that those words " fifthly mentioned in the Schedule " made it clear that the devise was only of an undivided half share of the property. That contention was based on the fact that the fifth paragraph in the Schedule read as follows :—

> " The undivided half share of the land bearing assessment No. 50 situated at Silversmith Street in the town of Colombo, bounded on the North by Silversmith Street, east by the land belonging to Ana Sampayo and south and west by the land belonging to J. L. Perera ; containing in extent twenty seven decimal sixty four perches (A 0. R 0. P 27.64) together with the trees, plantations and the buildings belonging thereto ".

The description given in the Schedule has been copied, most probably, from one of the deeds, D1, D2, and D3, each of which dealt with an undivided half share of the property bearing assessment No. 50, situated in Silversmith Street, Colombo. It is interesting to note that the deed D3 appears to have been attested by the Notary attesting the last will.

It was argued by the plaintiff's Counsel that the description of the property given in the clause was subordinate to the statement in the Schedule which referred to an undivided half share of the property. I am unable to accept that contention. The testatrix described in the clause the property devised by giving its assessment number and situation,

That description shows clearly that what was devised was the entire property. That description, however, was insufficient for the exact delimitation of the property in the absence of any reference to boundaries and extent. It is for that purpose that reference was made to the Schedule. It is true that the Schedule refers to an undivided half share, but it cannot be gainsaid that the property No. 50 is " mentioned " in the Schedule. I do not think that in speaking of the property " mentioned " in the Schedule the testatrix intended to reduce the extent of her devise. To adopt the words of Lord Sumner in *Eastwood v. Ashton*[1] to the facts of the case, the phrase " mentioned in the Schedule " qualifies but does not reduce the property. That phrase brought in the Schedule for the elucidation of the clause by giving the boundaries and the extent of the property and not for the purpose of subordinating the clause to the Schedule by reducing the extent of the devise.

I would allow the appeal and dismiss the plaintiff's action with costs here and in the Court below.

JAYETILEKE S.P.J.—I agree.

Appeal allowed.