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Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

SILVA *v.* PHILIPPS *et al.*

D. C., Galle, 8,278.

Last will—Prohibition against alienation outside the family—Validity.

A joint last will contained the following clause:—

"After the death of the survivor of us, we give and bequeath to Charles Samuel, George Martinus, William Nathaniel, and Peter, our four sons, and the said Priscilla Caroline, our daughter, all that house No. 2, and all that house in which we at present reside, and all that land situate in the Quarter Lr. K. within the Fort of Galle, and bounded on the north by military ground, on the west by the house and premises of Wackwelle Ommegilliyege Singho Appu de Silva, on the east by the Moderbay street, and on the west by the property of Mr. Loret, to be held and possessed in common (by them in equal shares, share and share alike), but neither the whole of the said house and premises nor any share or part thereof shall any of the said shareholders sell or mortgage to any other person or persons, save to and amongst the joint shareholders, nor shall the same be liable to the debts of any of the shareholders thereof; and in case any of the said shareholders should die without lawful marriage or legitimate issue, then and in such case the share of the person or persons dying to revert to and become vested in the surviving shareholder or shareholders, to be by him, her, or them, or by his or her or their heirs, held and possessed according to the law of succession."

After the death of the testators and after probate had been granted, Peter, one of the devisees, sold and conveyed his share to the plaintiff.

Held, that the above clause gave the devisees a right of ownership, subject to the right of pre-emption on the part of the other shareholders, and that therefore the conveyance by Peter to the plaintiff was bad.

APPEAL from a judgment of the District Judge of Galle (K. W. B. Macleod, Esq.).

The following is the judgment of the District Judge (October 3, 1907):—

"Plaintiff seeks sale of premises depicted in plan 823 filed in case, claiming one-fifth of land and one-fifth of house No. 2 and old house on deed 289, dated December 5, 1901, executed by Peter, one of the five children of Arnoldus Hendricks and Somalia Hendricks, original owners. Plaintiff desires sale and not partition, in view of the small extent of the property—32 perches—rendering partition impracticable.

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" The contesting defendants argue that the premises are subject to a *fidei commissum* in view of paragraph 2 of the joint will of Arnoldus and Somalia Hendricks. This paragraph bequeaths the premises in question to the testator's five children, ' to be held and possessed in common (by them in equal shares, share and share alike), but neither the whole of the said house and premises nor any share or part thereof shall any of the said shareholders sell or mortgage to any other person or persons, save to and amongst the joint shareholders, nor shall the same be liable to the debts of any of the shareholders thereof; and in case any of the said shareholders should die without lawful marriage or legitimate issue, then and in such case the share of the person or persons dying to revert to and become vested in the surviving shareholder or shareholders, to be by him, her, or them held and possessed according to the law of succession.'

" Peter, plaintiff's vendor, has admittedly contracted a lawful marriage, and has had legitimate issue. On the other hand, he did not offer his share for sale to his co-shareholders.

" The question is, What is the effect of the clause under these circumstances?

" Mr. Jayewardene contends that it renders void the transfer to plaintiff. I agree with his contention.

" There is an express prohibition of alienation to a stranger, which plaintiff admittedly is. Following *Ibanu Agen v. Abeysekere*,[1] and construing the clause as a whole, I think it is clear—

" (1) Peter was not given the share absolutely;

" (2) Who is to take after him, and in what event, for if he dies unmarried or without legitimate issue the share devolves on surviving shareholders, and if he dies leaving legitimate issue then his share devolves on such legitimate issue.

" I therefore must give effect to the testator's intention. I think Peter's transfer to plaintiff is void. I dismiss plaintiff's case with costs."

The plaintiff appealed.

Walter Pereira, *K.C.*, *S.-G.*, for the plaintiff, appellant.

A. St. V. Jayewardene, for the defendants, respondents.

Cur. adv. vult.

June 4, 1908. HUTCHINSON C.J.—

This is an appeal by the plaintiff against a decree dismissing his action. The action was brought under the Partition Ordinance, the plaintiff claiming to be entitled to an undivided share of some land and houses in the Fort of Galle, the remaining shares of which he allots to the defendants, and asking that, as a partition would be impracticable, the property may be sold.

[1] *(1903) 6 N. L. R. 344.*

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The property belonged to Arnoldus Hendricks and his wife Somalia; they devised it to their four children, one of whom was Peter; and Peter by deed of December 5, 1901, sold and conveyed his share to the plaintiff. The defendants are the representatives of the other children, and say that under the terms of the will Peter had no power to convey his share to a stranger without their consent.

The will is in English. The devise on which the decision of this case turns is in the following words:—

"2. After the death of the survivor of us, we give and bequeath to Charles Samuel, George Martinus, William Nathaniel, and Peter, our four sons, and the said Priscilla Caroline, our daughter, all that house" (describing the property) "to be held and possessed in common (by them in equal shares, share and share alike), but neither the whole of the said house and premises nor any share or part thereof shall any of the said shareholders sell or mortgage to any other person or persons, save to and amongst the joint shareholders. nor shall the same be liable to the debts of any of the shareholders thereof; and in case any of the said shareholders should die without lawful marriage or legitimate issue, then and in such case the share of the person or persons dying to revert to and become vested in the surviving shareholder or shareholders, to be by him, her, or them, or by his, her, or their heirs, held and possessed according to the law of succession."

After the death of the testators and probate of the will, Peter executed the deed of conveyance to the plaintiff. Peter was married and had issue; there is no evidence whether he is now living or not. The defendants in their answer said that the conveyance by Peter was of no effect, and that they always were and still are willing to buy Peter's share.

The District Judge held that there was an express prohibition of alienation to a stranger, which the plaintiff admittedly is, and that the conveyance was void.

The appellant's counsel contends that the last part of the devise gives each devisee the absolute ownership of his share in the event of his marrying and having issue, which event happened in Peter's case. That may perhaps be so; but if it is so, the ownership is coupled with the proviso against alienation to any one except his brothers and sisters; that is to say, it gives them a right of pre-emption. That seems to me to be the plain meaning of the testators; and I can see no reason for holding the proviso to be unlawful or impracticable. I think the appeal should be dismissed with costs.

WOOD RENTON J.—

I agree. I think that the intention of the testators was, as far as possible, to preserve the property in the family. To effectuate that intention they (1) bequeathed it to their children, the shareholders:

" to be held and possessed in common;" (2) specifically prohibited the sale or mortgage of any part of it except to a shareholder; (3) attempted to protect it from seizure for a shareholder's debts; and (4) provided that if a shareholder died " without lawful marriage or legitimate issue," his share should vest in the surviving shareholder or shareholders, to be held and possessed according to the law of succession. The lawful marriage of, or birth of legitimate issue to, Peter defeated any right of survivorship as regards his share. It may also have vested the ownership of that share in himself (see De Vos' *Translation of Dutch Consultation, Part II., Consultation 181; 5 Ceylon Law Review 117*). But if so, it was a right of ownership subject to the right of pre-emption conferred by clear implication in the will on the other shareholders (*cf. Josef v. Mulder*[1]), a right enforceable against the appellant, who purchased from Peter with notice of the will (see *Pl. Bill of Sale, December 9, 1901*, schedule).

Appeal dismissed.