1942 *Present :* **Howard C.J. and Hearne J.**

CHINNIAH *v.* FERNANDO.

64—D. C. Colombo, 2,390.

Trust—Power given by wife to husband to invest or reinvest proceeds of sale of property for the benefit of children—And to distribute or redistribute moneys in terms of last will—Conveyance of property and money in court to children subject to conditions—Right of children to draw the money.

Mrs. Chinniah in anticipation of the sale of certain property she had inherited appointed her husband Chinniah trustee over the proceeds of sale for the benefit of her children. The powers given to the trustee by the document (P 1) included (*a*) to receive all the proceeds of the sale of the property and to hold the same in trust for the children, (*b*) to invest or re-invest the said moneys in any manner he thinks proper, (c) to distribute or redistribute the said moneys in terms of the last will and testament already executed, among the said children. By (P 2) Chinniah conveyed three allotments of land to three children and also the money lying in the District Court of Jaffna.

The *habendum* clause states that the premises conveyed or intended to be are to be held, subject to three conditions (1) that the properties are subject to a life-interest in the author of the trust, (2) that the money lying in the District Court of Jaffna should after meeting certain claims of R (one of the children) be used in completing the buildings on the immovable property or redeeming the mortgage of an estate purchased with moneys belonging to the trust fund, (3) that the author of the trust fund shall have the power to redistribute the property.

Held, that there had been no distribution of the money in the District Court of Jaffna among the three children absolutely or for their exclusive benefit by P 2 nor was such a distribution intended at the time it was executed.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *M. M. K. Subramaniam*), for respondent, appellant.

M. T. de S. Amarasekere, K.C. (with him *N. Nadarajah* and *F. C. W. VanGeyzel*), for applicant, respondent.

Cur. adv. vult.

January 26, 1942. HEARNE J.—

This appeal involves the interpretation of certain documents.

Mrs. Chinniah, acting in anticipation of the sale by her of property she had inherited, appointed her husband, Dr. Chinniah, trustee over the proceeds of sale for the benefit of her children of whom there were, at that time, five. (P 1 dated February 15, 1920).

Immovable property at Greenpath was purchased out of the trust funds and a mortgage was taken of another property. The money due under the latter was paid, by the legal representative of the mortgagor who died, to the credit of D. C. Testamentary, Jaffna No. 5,426.

In July, 1927, by deed P 2, after reciting that two of the children had been adequately provided for, Dr. Chinniah "conveyed" to the remaining three children the Greenpath property which had been divided into lots. With that conveyance this appeal is not concerned. In the same deed he also dealt with the money "lying in the District Court of Jaffna in testamentary case 5,426". He "gave, conveyed and transferred the money to the three children but elsewhere in the deed earmarked it for certain specific purposes including the redemption of the mortgage of another estate purchased out of the trust funds".

In 1930 Dr. Chinniah on an application made to the District Court of Colombo was appointed curator of the property of the three minor children. In 1935 he applied to the court for permission to purchase immovable property with the money on deposit in the Jaffna testamentary case but on June 28 of that year, when his application was before the court, it was found that the three minors had attained their majority.

On July 13, 1935, Dr. Chinniah, after reciting that he had overlooked a child, Kumarasamy, who had been born after the execution of P 1, "revoked" the conveyance of the Greenpath properties. In referring to the money on deposit in the Court at Jaffna he stated that no distribution had in fact taken place and that there was pending before the Court an application to buy another property with it. This document is marked R 2.

Thereafter Dr. Chinniah had himself appointed curator over the minor Kumarasamy, and in May, 1938, renewed his application for the investment of the money on deposit in immovable property. That application was withdrawn and, as soon as it was, Mrs. Fernando, one of the three children referred to in P 2, moved for an order for payment to her of one-third of the money on deposit which had now been transferred from Jaffna to the credit of the curator proceedings. The court made an *ex parte* order that the money was subject to a trust and could not be paid out. Mrs. Fernando then made an application for a notice on the trustee to show cause why the application (which had been refused) should not be allowed. This application met with the same fate as the earlier one. Undeterred by her failures she came into Court again on June 18, 1940, renewing her original application, this time supported by a consent in writing from her mother, the author of the trust, authorising the payment to her of a half share of the money in Court. On this application an order was made directing the payment to her of one-third of the money. Dr. Chinniah, the respondent to the application, has appealed.

Counsel for the appellant submitted that the applicant's proper course was to institute a regular action against her father. He conceded that in such action the *ex parte* dismissal of her application would not operate as *res judicata* of the subject-matter of the application but in his submission finality having been reached in the curator proceedings by the

disposal of the application, it could not be reopened in the same proceedings. I have no comment to make on this, as I propose to allow the appeal on another ground.

On the merits of the appeal Counsel argued that if one read P 2 as a whole and noted, in particular, the limitations contained in the *habendum*, it is clear that "*no distribution*" had taken place. It was further argued that even if there had been a distribution the appellant was entitled to revoke it and make a "redistribution".

The powers given to the trustee were very wide indeed. He was given the power (*a*) to receive all the proceeds of the sale of "Hopewell" (the property Mrs. Chinniah had inherited) and hold the same in trust for our children (the names of five children are mentioned) collectively and for their common use with the right of survivorship unto them; if any of them should predecease the other without any child or children; (*b*) to invest or reinvest the said moneys in any manner he thinks proper . . . .; (*c*) to distribute or redistribute the said moneys in terms of the last will and testament already executed by me among the said children whenever the same may be found necessary or to distribute in any other proportion when dowry has to be given to any one or more of our daughters.

The last will referred to in (*c*) is R 1. Its main clauses are these:—

"I do hereby nominate constitute and appoint our children and any child or children which shall or may be begotten by me and my husband the said Arunasalam Chinniah during our marriage to be the sole heirs of all the estate and effects which shall be left by me after my death, whether movable or immovable and of what nature or kindsoever and wheresoever situate or whether the same be in possession reversion remainder or expectancy nothing excepted."

"I do hereby nominate and appoint my husband the said Arunasalam Chinniah to be the executor of this my last will and testament hereby giving and granting unto him all such power and authority as are required or allowed in law."

"I do hereby also nominate and appoint my said husband the said Arunasalam Chinniah to be the trustee for and on behalf of my child or children hereby giving and granting unto him full power and authority to sell or mortgage all my landed and other properties and invest the proceeds in any manner he thinks fit and proper and thereafter to convert the same in any manner he thinks fit and proper and in short with full power to deal with my properties in any manner he thinks fit and proper, for the benefit of our said child or children."

The arguments addressed to us by Counsel for the respondent to this appeal were (1) that the appellant had transferred or "distributed" the money referred to in P 2, that the restriction he had imposed on the use of the money so distributed was an arrogation to himself of a power that P 1 did not confer upon him and was therefore bad and (2) that as P 2 was, on the face of it, an outright distribution of money with no reservation in the deed of a power to revoke such distribution, it was final and no redistribution could thereafter take place.

The learned trial Judge upheld both these arguments. He held that the condition imposed was "no condition at all" and concluded that the "fund in Court had been transferred to the three children". On the second point he said "Counsel for the applicant granted that the powers of redistribution would have also included the right of the trustee to redistribute even if he had distributed the assets among the beneficiaries in a particular way had he reserved to himself the power to redistribute by deed". "I am of opinion that distribution was made by the trustee by virtue of the powers vested in him by clause (*c*) of P 1 by means of the instrument P 2 of July 15, 1927, without reserving to himself any power of redistribution and that the rights of the applicant that became vested in her under the said deed of distribution cannot be subsequently altered or varied so as to take away or diminish those rights".

Assuming there was a valid and effective distribution, it is certainly in accordance with English law that "a power once executed, cannot be revoked unless a power of revocation is reserved by the instrument executing the power, although the instrument creating the power authorises revocation expressly". Counsel for the appellant did not argue that the principle that a deed once executed cannot be revoked unless it reserves a power of revocation is foreign to Roman-Dutch law, as I would have expected Mr. Perera to do if this were the case. His argument was that the deed confers powers of "distribution" and of "redistribution" and that even if the powers of distribution had been exhausted, the powers of redistribution remained in the trustee and could, therefore, be exercised by him. There can be no doubt, and it was virtually conceded in the argument, that a redistribution can follow a distribution. But the point is whether the trustee had put it beyond his power to redistribute what he had already distributed. I think he had. Redistribution implies, and is also conditioned by, a power to revoke. If in making a distribution the power to revoke is reserved, a redistribution can take place; but if such power is not reserved, the conveyance is irrevocable and the powers of redistribution which could otherwise have been exercised cannot be exercised. The Judge's view of this matter appears to be right.

There remains the question of whether "the fund in Court had been transferred to the three children". If so, then the respondent would be entitled to a one-third share.

P 2 is an unusual document. In the premises there is a conveyance of the three lots into which the Greenpath property had been divided and also the money lying in the District Court of Jaffna. The *habendum* clause states that the premises (the Greenpath property) conveyed or "intended so to be" are to be had and held subject to three conditions—(1) that the properties are subject to a life-interest in the author of the trust, (2) that the money lying in the District Court of Jaffna should after meeting certain claims of Rasamany be used in completing the buildings on the immovable property or redeeming the mortgage of Kanadaluwa estate purchased with monies belonging to the trust fund and (3) that the author of the trust shall have power to redistribute the property.

Is there in that document an unequivocal transfer of the fund to the three children ? The Judge deals with the matter by holding that there was a complete execution of the power of transfer and that something was added (he refers to (2) above) which was in excess of the trustee's powers and, therefore, bad.

Whatever may be said in regard to the inoperativeness of (2) as a *condition* attached to the vesting of the immovable property, it was not in excess of the trustee's powers in the sense that it was something he could not do. It cannot be said that he had no power to make provision for Rasamany. one of the children or that he could not improve a property or redeem the mortgage of a property purchased with trust money. That being the case the question that arises is what is the effect of a deed which, on the one hand, "conveys" the fund to the three children and, on the other, says that it is not conveyed to them for their exclusive benefit but for the benefit of Rasamany, for the improvement of trust property and for the redemption of a mortgage of part of the trust property, all these being matters which the trustee could properly and legitimately perform in terms of the trust? It is not a question which involves the determination of the estate, as in the case of immovable property which passes when the grant in the premises is controlled by words of limitation in the *habendum*. Rather it is to which of two mutually repugnant clauses effect is to be given.

In old cases the rule was laid down that "if there be two clauses in a deed repugnant the one to the other the first part shall be received and the latter rejected." but in *Cope v. Cope* [1] the construction turned upon the whole tenor of the deed. This view of the nature of the rule was followed in *Walker v. Giles* [2]. At page 702 Wilde C.J. said "As the different parts of the deed are inconsistent with each other the question is to which part effect ought to be given. There is no doubt that, applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention . . . ." In that case the first part, for the reason given, was preferred, while in *Doran v. Ross* [3] the latter of two inconsistent clauses was, on the construction of the whole settlement, allowed to prevail, though the Lord Chancellor thought that to do so was contrary to what the parties had meant to do.

In my opinion on a construction of P 2 it states no more than that the money in Court shall be placed in the control of the three children for the purpose of carrying out what was within the competence of the trustee to carry out himself. I find it impossible to hold that there had been any distribution amongst the three children absolutely and for their exclusive benefit or that, at the time P 2 was executed, such a distribution was intended.

Now, on coming to Court, the applicant asserted that 1/3 of the money had already been distributed to her for her own exclusive benefit and this position, in the view I take of the matter, cannot be maintained.

[1] *(1846) 15 Sim. 118.* [2] *(1848) 6 C. B. 662.*

[3] *(1789) 1 Ves. Jr. 57.*

For the purpose of determining this appeal, it has not been necessary to deal with the Judge's view that the power of distribution conferred on the trustee was a power to distribute the monies in equal shares amongst only those children who are named in the instrument of trust or " to distribute in any other proportion whenever a dowry has to be given to one of the daughters ".

The appeal is allowed with costs and the application in the lower court must be dismissed with costs.

HOWARD C.J.—I agree.

Appeal allowed.