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Present: Dalton and Akbar JJ.

PALIPANE *v.* TALDENA *et al.*

425—D. C. Kurunegala, 12,562.

Fidei commissum—*Prohibition against alienation to an outsider—Personal prohibition—Alienation by descendant acquiring interest by purchase.*

Where a last will bequeathed property to the children of the testator and the grandchildren (issue of a deceased child) and provided as follows:—

"It is my express will and desire that my said children and grandchildren shall not sell, mortgage, lease for more than a year, gift or otherwise make over the said property to any outsider, *i.e.*, to any one who is not a descendant of mine."

"If any of my said heirs, or in failure, their lawful issue, shall contravene the provisions contained in the clause hereof, such heir, or lawful issue, shall forfeit all claims to any share whatsoever in my estate."

Held, that the prohibition against alienation was personal to the immediate devisees and that it did not bind a descendant of the testator, who had acquired an interest by purchase from one of the devisees.

THE plaintiff, as the executor and as a devisee under the last will of his father, P. B. Palipane, sued for a declaration that the first defendant, his sister had contravened the provisions of the last will by selling a land called Yakkala estate left to her under the will. The material parts of the will are set out in the head note. The three children and the grandchildren mentioned in the will survived the testator, who died in 1923. It was the plaintiff's case that the first defendant sold a share of the estate in question to her two sons, Aelian and Neville. Thereafter Aelian instituted a partition action and the parties got divided shares in the land. The first defendant then conveyed her divided lot to Aelian and Neville, who sold all their interest to the second defendant, who was an outsider. The learned District Judge dismissed the plaintiffs' action on the ground that the prohibition against alienation was imposed on the immediate devisees only.

H. V. Perera, for plaintiff, appellant.—Our position is that the first defendant has forfeited her rights to her share and that this share has devolved on the other heirs, of whom the plaintiff is one.

There is a prohibition against alienation to outsiders and she has resorted to a devise to get over these conditions by transferring to her sons (mere nominees), who transferred to second defendant. We say deeds in favour of Aelian and Neville were merely deeds to get over the prohibition.

We have a *real* prohibition, not a *personal* prohibition. It is a recurring prohibition therefore *real*. The prohibition applies to *lawful issue*, whether, they inherit or whether they take on purchase or transfer.

There is a *fidei commissum* in favour of the family.

357, D. C. Galle, 23,160, S.C.M., December 21, 1928, the intention to keep the property within his descendants is indicated by the definition of " outsider."

R. L. Pereira (with *H. H. Bartholomeusz* and *Ranawake*), for second defendant, respondent, cited *Sande, p. 177, McGregor's Voet, pp. 71, 72.*

Croos Da Brera, for first defendant, respondent, cited *Hadjiar v. Meyappa* [1] and *Hettiaratchi v. Suriaaratchi et al.* [2]

H. V. Perera, in reply, cited *Robert v. Abeywardane et al.*[3]

July 9, 1929. DALTON J.—

The question arising in this case is as to the interpretation of the will of plaintiff's father, P. B. Palipane. The testator left considerable property, and plaintiff who is executor, trustee, and also a beneficiary under the will, contends that the first defendant, his sister, Eugene Frances Taldena Kumarihamy, has contravened the provisions of the will, selling land called Yakkala estate and fields left to her by the will outside the family. The property, the subject of this action, is some of it in Schedule A and some in Schedule B attached to the will. The material parts of the will may shortly be set out as follows:—

> 4. I hereby give, devise, and bequeath the property . . . . described in Schedule A . . . . unto my trustee, Phillip Bertram Palipane, Proctor, in trust for my children, (1) Phillip Clarence Palipane, (2) Eugene Frances Taldena Kumarihamy, and (3) Phillip Bertram Palipane, Proctor, share and share alike upon the trust hereinafter provided.
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> 5. I hereby give, devise, and bequeath the property, ... described in Schedule B . . . . to my aforesaid trustee in trust for my children and grandchildren (3 children and 4 grandchildren named and shares set out) upon the trust hereinafter provided.

[1] *23 N. L. R. 333, 464.* [2] *24 N. L. R. 140.*

[3] *15 N. L. R. 323.*

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> Provided always and it is my express will and desire that my said children and grandchildren shall not sell, mortgage, lease for more than a year, gift or otherwise make over the said property in the said schedules to any outsider, *i.e.*, any one who is not a descendant of mine . . . . .
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> 8. If any of my said heirs or in failure their lawful issue shall contravene the provisions contained in the clauses hereof . . . . such heir or lawful issue shall forfeit all claims to any share whatsoever in my estate, and the share which shall be so forfeited shall merge in the inheritance of and be divided equally among my other heirs, in which case the said property shall not be sold, mortgaged, leased or otherwise alienated to any outsider as aforesaid.

The testator died on May 5, 1923. His three children and the four grandchildren mentioned in the will survived him. He also left other grandchildren not mentioned in his will. At the end of 1924 and beginning of 1925 the first defendant conveyed (P2 and P 17) undivided shares in the Yakkala estate and fields inherited by her under her father's will to her two sons, Aelian and Neville, the consideration being stated to be Rs. 2,000 and Rs. 6,000 respectively. Thereafter Neville brought a partition action in respect of this undivided property and the parties by the decree got divided blocks. At the instance of the present plaintiff the provisos and prohibitions contained in the will were embodied in the partition decree, by which Aelian received lot D of Yakkala estate, and Neville received lot E of the estate and lot A of the fields, whilst their mother received lot A3 of the fields. She subsequently conveyed lot A3 to her two sons (P19 of 20.12.1926). Then Aelian and Neville conveyed lots D and E by deed P18 on December 31, 1926, and lots A and A3 by deed P20 on January 1, 1927, to the second defendant. The second defendant is an outsider and no member of the testator's family. Plaintiff in this action now claims that owing to this alienation his sister's interests in these lands "and in all other properties devised to her" vest in the other named heirs of deceased in equal shares. He is suing alone apparently in his personal capacity as an heir, but he asks to be declared entitled to "the said shares." The trial Judge dismissed his action holding that the prohibitions contained in the will only applied to those inheriting directly under the will, and not to descendants of the testator who acquired any interest by purchase. The plaintiff appeals from that decision.

Mr. Da Brera for the first defendant-respondent was prepared to argue that the will created no *fidei commissum* at all, but it was not necessary to hear him on that point. Assuming that the will did create a *fidei commissum* I am satisfied that on the question arising

here the trial Judge's interpretation of the will is correct. Seven persons are specifically named as heirs, and they alone are prohibited from alienating what they inherit outside the family. This prohibition is personal to them and only attaches to the share acquired from the testator and not to any share acquired from a co-heir. (*Sopi Nona v. Abeyawardena, 10 C. L. R. 25.*) In conveying to her sons first defendant contravened no provisions of the will. I can find nothing in the will expressing the intention of the testator to prohibit her sons from dealing with the property as they like, if they should acquire it. Neither of them, be it noted, is one of the grandchildren mentioned in the will.

The plaintiff's contention that the prohibition is a real and not a personal one, and that he has bound the lawful issue of the named heirs by the conditions of the will, is based upon the use by the testator of certain words in clause 8 of the will. Until clause 8 is reached it will be noted that the will makes no mention at all of the issue or heirs of the seven heirs named in the will, and there is no prohibition against alienation by anyone save the seven persons named. Clause 8, however, states "if any of my said heirs or in failure their lawful issue shall contravene the provisions contained in the clauses hereof," such heir or lawful issue shall forfeit all claim to the estate. It is argued for the appellant that the words "or in failure their lawful issue" mean that the testator has implemented the earlier clauses of the will and has bound the lawful issue of the heirs named by those conditions by which the named heirs are also bound. But supposing any of the named heirs had died in the lifetime of the testator it is admitted that no rights would devolve under the will upon his heir. On the other hand, it is urged for the respondents that the words mean nothing more than this, namely, that, if one of the seven heirs died before the testator, the heirs of such deceased heir stepped into his shoes. This latter argument seems to me to be the more plausible one, but there are difficulties in accepting it, as well as the other construction suggested. The words are admittedly difficult of interpretation, but I am quite unable to read them as expressing any intention by the testator to enlarge the number of persons who are subject to the prohibition contained in clause 5, or any intention to create a real prohibition attaching to the property bequeathed. That is the question that we have to decide, and it must, in my opinion, be answered against the appellant. That being so, there being no contravention of the provisions of the will by the first defendant, the plaintiff must fail in his action. It might be here noted that he was given an opportunity of purchasing the property himself for considerably less than the price paid by the second defendant.

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With regard to the conditions entered in the partition decree it is not suggested they go any further than the provisions of the will. On the above construction of the will the prohibitions are personal to the seven heirs named. Anything in the decree therefore admittedly does not go beyond that. The appeal is dismissed with costs

AKBAR J.—

The only question in this appeal is the correct interpretation of certain paragraphs in the last will of P. B. Palipane, Ratemahatmaya, who died on May 5, 1923, leaving a last will and codicil dated respectively May 15, 1922, and January 6, 1923, which were admitted to probate in D. C., case No. 2,395, Kurunegala.

The plaintiff is the son of the testator and also the executor and a devisee under the will; the first defendant is the daughter of the testator and also a devisee under the will. Certain properties were given to the plaintiff, the plaintiff's brother, the first defendant, and four grandchildren, the share being ¼ each, and then there is this proviso " Provided always and it is my express will and desire that my said children and grandchildren shall not sell, mortgage, lease for more than a year, gift or otherwise make over the said property in the said schedules to any outsider, *i.e.*, any one who is not a descendant of mine." By a later clause it was provided as follows:—" If any of my said heirs or in failure their lawful issue shall contravene the provisions contained in the clauses hereof or shall dispute or raise any objection to this my last will, such heir or lawful issue shall forfeit all claims to any share whatsoever in my estate, and the share which shall be so forfeited shall merge in the inheritance of and be divided equally among my other heirs, in which case the said property shall not be sold, mortgaged leased or otherwise alienated to any outsider as aforesaid. "

The first defendant transferred a part of her share to her two sons, Aelian and Neville. Then there was a partition case in which all the heirs under the will were parties, and the undivided shares were allotted as divided shares to all the heirs under the will and also to Aelian and Neville. Subsequently, the first defendant conveyed the remaining share belonging to her (being now a divided share under the partition case) to her son, Aelian. Neville and Aelian conveyed all their interests in the land so conveyed for a consideration to the second defendant who is an " outsider " within the meaning of the proviso quoted by me above. The sole question for consideration which was pressed at the hearing of this appeal is whether this sale to the second defendant was in violation of the terms of the will quoted by me above. It will be seen that the prohibition of alienation to an outsider in the proviso is restricted only to the immediate devisees. By the later clause it is only " If

any of my said heirs or in failure their lawful issue shall contravene the provisions contained in the clauses hereof . . . . such heir or lawful issue shall forfeit all claims to any share whatsoever in my estate "; and there is the further condition that the share so forfeited is to be divided equally amongst the other heirs subject to the restriction in the proviso.

It is argued by Mr. H. V. Perera that this will creates a *fidei commissum* within the family on the authority of the case of *Robert v. Abeywardane et al.*[1] but on the authority of the later cases, namely, *Hadjiar v. Meyappa*,[2] *Amarawickreme v. Jayasinghe et al.*,[3] and *Hettiaratchi v. Suriaratchi et al.*,[4] I do not think that the decision in the *15 N. L. R.* case is any longer an authority. On the construction of the proviso and the clause it seems to me that the prohibition is imposed only on the immediate devisees against alienating all the properties so devised to an outsider. The only question therefore which I have to decide is whether according to the terms of the will Aelian and Neville are also prohibited from alienating to an outsider. Upon this point the law seems to be clear that this prohibition is by the wording of the proviso a personal prohibition and not a real prohibition (see *Naina Lebbe v. Maraikar et al.*[5]). In *McGregor's Voet, p. 71* we find the following passages: " But prohibitions which are not nude, but binding, appear to fall under one of two general classes, to wit, (i) personal, (ii) real prohibitions—

(i) " A prohibition is personal when a testator interdicts certain persons, by name or as a class from making alienation; for example, if he says, ' I prohibit Titus or my heir or legatee from alienating the land. ' When a prohibition is in this way imposed upon a person, it applies only to the person prohibited, and does not go beyond him. " (Sande *de Proh. Al.* 3.2.1 and 2; Webber, p. 177.)

(ii) " A prohibition is real when the testator has conceived the prohibition rather *in rem* than *in personam*, and when it can be gathered from the words of the will that this was his intention : for instance, if, wishing to provide for the keeping up of his family, he has said, ' I desire that the land shall not pass away from my family. ' " (Sande, *ubi sup* section 8; Webber, p. 180). " Such prohibition is a real burden, which passes to all persons whatsoever to whom the thing prohibited from alienation comes. (*Ibid.* section 10, p. 181). "

[1] *(1919) 15 N. L. R. 323.*
[2] *(1923) 23 N. L. R. 333.*
[3] *(1923) 23 N. L. R. 462.*
[4] *(1924) 24 N. L. R. 140.*
[5] *(1922) 22 N. L. R. 295.*

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In my opinion the words of the will show that the prohibition is imposed only on the immediate devisees, and therefore Aelian and Neville are not precluded from alienating the share that devolved on them from their mother to an outsider. There is some difficulty owing to the occurrence of the words " or in failure their lawful issue " in the later clause. As Mr. Perera points out, if a devisee had died before the death of the testator, there would be a lapse of the devise, and therefore the words mentioned by me above can have no meaning. At any rate under the later clause it is only if there is a contravention of the proviso that a forfeiture ensues. A contravention can only occur under the proviso if it is one committed by the immediate devisees and by no one else. In this view I think the decision of the District Judge was right, and I would dismiss the appeal with costs.

Appeal dismissed.