Present: Fisher C.J. and Drieberg J.

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SILVA *v.* SILVA.

299—D. C. Negombo, 1,354.

Fidei commissum—*Mortgage by fiduciary and fideicommissary—Renunciation—Sale in execution—Civil Procedure Code, s. 218 (k).*

A land, which was gifted to A subject to a *fidei commissum* in favour of B, was mortgaged by A and B. In execution of a decree on the mortgage bond the land was sold and bought by C.

In an action brought by the heirs of B to vindicate title to the land,—

Held, that C had good title, as the act of B in joining in the mortgage bond amounted to a renunciation of the rights of herself and her heirs under the *fidei commissum*.

Held, further, that the interest of B was an assured and certain interest, by which she was entitled to succeed to the property on the death of A, and was not of the nature described in section 218 (*k*) of the Civil Procedure Code.

ACTION for declaration of title to a land which was gifted by Francina Fernando by deed No. 17,076 of March 6, 1862, to her daughter Lucyhamy and Lenohamy the only child of Lucyhamy. The gift was subject to the condition that the donee was entitled to possess the land "without selling, mortgaging, or alienating the same in any manner whatsoever and that it should devolve on their children to hold and possess the same and to do whatever they pleased with it."

Lenohamy died on July 31, 1903, leaving as her heirs her children, the respondents, and Lucyhamy died on July 8, 1922. By bond of December 26, 1900, Lucyhamy and Lenohamy mortgaged the land with two Chetties, who assigned the mortgage to the appellant. The bond was put in suit, and in execution the property was bought by the appellant under Fiscal's transfer of December 30, 1905. The learned District Judge held that the interest of Lenohamy could not be sold in execution during the lifetime of Lucyhamy and gave judgment for the respondents.

Croos Da Brera (with *Rajapakse*), for defendant, appellant.—Lucyhamy, the fiduciary donee, and Lenohamy, the fideicommissary donee, both joined in the bond. The defendant is the purchaser on the sale held on the decree entered on the bond. All Lenohamy's interests passed on the bond. She was not bound by any prohibition. There was nothing left by her. The plaintiffs inherited nothing. Lenohamy had a vested interest and not

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merely a hope of succession: A *fidei commissum* created by a donation differs from one created by last will in this respect (*Mohamad Bhai v. Silva*[1]). A vested interest in remainder can be alienated or renounced. Such an alienation or renunciation is not contrary to the policy of the law nor is it ineffectual to pass the rights of the fideicommissary heir (*Gunetilleke v. Fernando*[2]). The plaintiffs are the heirs of Lenohamy. They were parties to the mortgage action and are now estopped from questioning defendant's title.

H. V. Perera (with *Weerasooriya*), for plaintiffs, respondents.—The deed of gift was executed prior to 1876 and creates a *fidei commissum* which is good for four generations. Lenohamy too was bound by the prohibition against alienation. Her interest was only an expectancy, which was to accrue only after the death of Lucyhamy. At the time of the mortgage Lenohamy had no vested interest. Her interest, if any, was a contingent one and was not liable to be sold in execution under section 218 (*k*) of the Civil Procedure Code (*Mohammed Bhoy v. Lebbe Marikar*[3]), the subsequent acquisition of the title cannot benefit a mortgagee (*Alwis v. Fernando*[4].) The plaintiffs were merely parties as legal representatives.

Croos Da Brera, in reply.—Section 218 (*k*) is not applicable to mortgage sales.

The following further authorities were cited:—*Goonatilleke v. Jayasekere*[5]; *Mohammado Lebbe v. Umma Natchia*[6]; *Baba Singho Vederala v. Loku Banda*[7]; *3 Nathan, s. 1904; Voet, XXXVI. 1, 35; XXXVI. 1, 67; XXXIX. 5, 43.*

December 21, 1927. DRIEBERG J.—

The rights of the parties to this appeal depend on the construction of the deed of gift No. 17,076 of March 6, 1862, P 1.

By this deed, Francina Fernando, whose title is admitted, gifted three lands in the proportions of one-fourth to each of her children, Nonohamy, Siman, and Savariel, and one-fourth to her daughter Lucyhamy and Lenohamy the only child of Lucyhamy.

The relevant provisions of the deed are as follows:—

> "They should amicably divide the said lands in the manner shown above. The said lands are now worth about pounds two hundred and fifty. I do attach hereto the stamped deed No. 6,685 caused to be written and granted

[1] *(1911) 14 N. L. R. 193.*
[2] *(1921) 22 N. L. R. 385.*
[3] *(1912) 15 N. L. R. 466.*
[4] *(1911) 14 N. L. R. 90.*
[5] *(1911) 14 N. L. R. 65.*
[6] *(1896) 1 N. L. R. 346.*
[7] *(1911) 5 S. C. D. 59.*

during the last days of my said husband entitling me to the said lands and to all other properties belonging to him. Therefore the said Siman de Silva Kangany, Savariel Perera Appu, Lucyhamy and her children, Nonohamy and her three children, and their heirs, &c., are entitled to possess the said lands for ever after my death, subject to the planter's trouble of those planters who holding deeds of agreement or without holding are planting the said lands and are residing on them.

" And the said Siman de Silva Kangany, Savariel Perera Appu, Lucyhamy, and Nonohamy are entitled to possess the said land in their lifetime without selling, mortgaging, or alienating the same in any manner whatsoever, and after their death the said lands should devolve on their children to hold and to possess the same and do whatever they pleased with the same . . . . and we the said four persons, Siman de Silva Kangany, Savariel Perera Appu, Lucyhamy, and Nonohamy, say that we accept with pleasure the above-named subject to the conditions stated therein, and given to us to the child of the said Lucyhamy and to the children of Nonohamy."

It is admitted that the division was made and that the land in dispute was allotted to Lucyhamy and Nonohamy.

It was contended that the deed created a *fidei commissum* for four generations; though the first part of it would justify this view, it is in conflict with the later provision, which imposes a restraint on alienation on Lucyhamy but not on Lenhamy, and that on the death of Lucyhamy the property should devolve on her " children to hold and possess the same and do whatever they please with the same." The restraint on alienation, therefore, does not extend beyond Lucyhamy.

Lenohamy died on July 31, 1903, leaving as heirs her children, the respondents, and Lucyhamy died on July 8, 1922.

By bond No. 13,876 of December 26, 1900, D 2, Lucyhamy and Lenohamy with her husband Charles Alexander Silva mortgaged to Sithamperam Chetty and Kanappa Chetty what is admitted to be the divided one-fourth share in question. The debtors described themselves as the widow, daughter, and son-in-law, respectively, of Juse de Silva, Notary, and stated their rights to the land to be derived from him. Their reason for not declaring their title on deed P 1 is fairly clear.

The two Chetties assigned the mortgage to the appellant, who brought action on it, and in execution of the decree the property was sold and bought by the appellant, who obtained Fiscal's transfer No. 4,773 of December 30, 1905, D 4. It appears from this transfer

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that there was an order to sell under section 201 of the Civil Procedure Code issued to the Fiscal, but he proceeded by way of seizure and sale. The Fiscal's transfer also shows that the plaintiffs in this action were substituted as defendants in the place of Lenohamy. The proceedings in the mortgage action have not been put in evidence.

The question for decision is, whether by the mortgage of this one-fourth share by Lucyhamy and Lenohamy and the sale thereunder complete title passed to the appellant free from any rights which the respondents might assert after the death of Lucyhamy in 1922.

It is clear that the interest of Lucyhamy was a fiduciary and not a usufructuary one, and though ordinarily in such a case the fiduciary retains the *dominium* until his death and there is no vested interest in the fideicommissary until the fiduciary's death, it must be remembered that in this case the *fidei commissum* was created by deed, and the *spes successionis* of Lenohamy did not lapse on her dying before Lucyhamy but passed to her heirs (*Mohamad Bhai v. Silva*).[1]

The learned District Judge held on the authority of *Mohamad Bhoy v. Lebbe Maricar* [2] that the interest of Lenohamy could not be sold in execution during the lifetime of Lucyhamy as it was an interest of the nature described in section 218 (*k*) of the Civil Procedure Code. He was also of opinion that Lenohamy did not renounce her rights as a *fidei commissarius* by joining Lucyhamy in mortgaging the property.

The case of *Mohamad Bhoy v. Lebbe Maricar* (*supra*) was one of a will where no interest would have passed to the heirs of the *fidei commissarius* if he died before the *fiduciarius*, and his interest while the *fiduciarius* was alive was therefore of the nature described in section 218 (*k*) of the Civil Procedure Code. Further, the sale there was of the interest of the *fidei commissarius* during the lifetime of the *fiduciarius* by seizure and sale under a money decree to which alone section 218 is applicable. The sale in this case was on an order under section 201 of the Code to enforce a mortgage which was a voluntary transaction.

In my opinion the right of Lenohamy, which was an assured and certain interest by which she and her heirs were entitled to succeed to the property on the death of Lucyhamy whenever that occurred, was not such an interest as is described in section 218 (*k*) of the Civil Procedure Code.

It is clear that by Lenohamy joining Lucyhamy in the mortgage, and by the sale under the mortgage, she lost her right to succeed to the property, and that title to it has not passed to her heirs, the respondents.

[1] (*1911*) *14 N. L. R. 193.*

[2] (*1912*) *15 N. L. R. 466.*

Dealing with how *fidei commissa* may be determined, Voet refers to renunciation in these words : " It is also determined by renunciation or surrender on the part of all those on whom the *fidei commissum* ought to devolve on the fulfilment of the condition, whether they have an immediate or more remote expectation of succeeding to the *fidei commissum*, or whether they are the heirs of those who make the surrender, or whether they have expressly or tacitly made the renunciation, provided only that they have given their consent to the alienation of the fideicommissary property (about this we have already spoken) provided nevertheless that one who may have been present at the sale and perhaps signed as a witness be not considered a consenting party."—*Voet, XXXVI. 1, 65 (Macgregor's Translation)*.

Under the Roman-Dutch law a *fidei commissarius* who drew up in his own handwriting a document pledging the fideicommissary property was regarded as having given his consent to the mortgage (*Sande on Restraints, p. 268*).

The commentary on the passage in *Voet, XXXVI. 1, 65 which* I have quoted is particularly applicable to the present case: " But our text speaks of a further case, where the *fidei commissum* would only vest on the fulfilment of a specific condition. Here, any renunciation made by the remainderman, who has the *spes successionis* in respect of the *fidei commissum* and whose title thereto will vest on the fulfilment of the condition (so I assume), will defeat the trust. Nay, more, the heirs of the remainderman are bound by the renunciation, provided they derive title through their father."—*Macgregor on Fidei Commissa, pp.* 140, 141.

Lucyhamy was the owner of the property, subject to the liability to restore it on her death to Lenohamy or her heirs. By joining in the mortgage Lenohamy must be regarded as having renounced her *spes successionis* so as to enable Lucyhamy to grant a full and effective mortgage of the property. The respondents derive their title, not from the gift, but from their mother Lenohamy, and they consequently have no right to the property.

This is, in my opinion, the correct view of the position, but even if the mortgage be regarded as a separate mortgage of the interests of Lucyhamy and Lenohamy, there is authority for holding that such an interest as Lenohamy's is capable of alienation, see *Voet, XVIII.* 1, 13.

The appeal is allowed, and the respondents' action will be dismissed. The respondents will pay the appellant his costs of the appeal and in the District Court.

FISHER C.J.—I agree.

Appeal allowed.