1962 *Present :* **T. S. Fernando, J., and Tambiah, J.**

K. RAMANATHAN, Appellant, *and* L. H. PERERA and 2 others, Respondents

S. C. 45/59—D. C. Colombo, 760/ZL

Civil Procedure Code—Section 218 (k)—" Contingent right "—Trust—Interest of a beneficiary—Liability to be sold in execution of a money decree against him.

Where, in a trust created by will, the legal title to the property which is the subject matter of the trust is vested in the trustees during the continuance of the trust and the beneficial interest is vested in the beneficiaries, but the enjoyment of the beneficial interest is postponed till the death of the last of the trustees, the interest of any of the beneficiaries is an assured and vested interest and is liable, during the life time of a trustee, to be seized and sold in satisfaction of a decree entered against him for payment of money. In such a case the interest of the beneficiary is not a merely contingent right within the meaning of section 218 (*k*) of the Civil Procedure Code.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *M. S. M. Nazeem* and *M. T. M. Sivardeen*, for the plaintiff-appellant.

C. Ranganathan, with *S. C. Crossette-Thambiah*, for the defendants-respondents.

Cur. adv. vult.

January 16, 1962. TAMBIAH, J.—

The defendants in this case filed case No. 14,719/S in the District Court of Colombo against one Rajendram and, having obtained decree, they seized the land described in the schedule to the plaint. The present plaintiff, who purports to be one of the trustees under a last will left by the grandfather of the said Rajendram, made a claim before the District Court but his claim was dismissed by that court. The plaintiff thereupon filed the present action under section 247 of the Civil Procedure Code in which he asked for a declaration that the property, which has been the subject-matter of seizure, is not a seizable interest as it is exempted by the provisions of section 218 (*k*) of the Civil Procedure Code.

Section 218 (*k*) of the Civil Procedure Code (Cap. 101) of the Revised Legislative Enactments (1956 Edn.) gives the right to the judgment-creditor to seize and sell or realise in money by the hands of the Fiscal " all saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which the judgment debtor has a disposing power, which he may exercise for his own benefit, and whether the same be held by or in the name of the judgment debtor or by another person in trust for him or on his behalf ". The proviso to this section exempts certain classes of property from seizure or sale. One of the exempted classes of property is " an expectancy of succession by survivorship or other merely *contingent* or possible right of interest " (vide section 218 (*k*) of the Civil Procedure Code). The learned District Judge has held that the property in question does not fall within the ambit of section 218 (*k*) of the Civil Procedure Code and, therefore, is liable for seizure or sale. The plaintiff has appealed from this order.

The question for determination is whether the interest, which Rajendram has in the property in question, is a contingent or a vested right within the meaning of section 218 (*k*) of the Civil Procedure Code. The Indian Civil Procedure Code contains a provision similar to section 218 and it is therefore relevant to consider the distinction drawn between a contingent interest and a vested interest by their Lordships of the Privy Council in construing the corresponding section of the Indian Civil Procedure Code. In *Babui Rajeshwari Kuer v. Babui Kuhkhna Kuer and another* [1] a testator, who had no male issue, provided in his will that after his death, his wife should become proprietor having life interest only of all his properties. The will then proceeded as follows : " (4) On the death of my wife the whole of my estate being treated as 16 annas right, 3 as. and odd out of it shall pass into the possession of the daughter-in-law but she shall not have the right to transfer the same, 12 annas share shall pass into the possession of the two daughters born of the womb of my daughter *who are still living* in equal shares, i.e., each will get 6 annas share and 1 anna share shall pass into the possession of the sister-in-law as absolute proprietors having the right to alienate, etc. the property ". The will also had other provisions which are not relevant to this case. The

[1] *(1943) A. I. R., P. C. 121.*

question arose as to whether the grand-daughters, to each of whom half the property had been left by will, had a contingent or a vested interest within the meaning of section 61 of the Indian Civil Procedure Code. The contention of the appellant that, on a proper construction of the will, the interest of the grand-daughters was contingent on the survival of the widow was based on the clause " who was still living ". It was argued that these words are equivalent to " who shall be still living " and therefore, the grand-daughters only succeeded if they happened to survive the wife of the testator. Their Lordships of the Privy Council rejected this contention and held that the interest of the grand-daughters was a vested one and not a contingent one. Clause (6) of the will provided that " if for any reason God forbid, any portion of the said estate is not taken possession of by my daughter's daughters and the sister-in-law and they do not get the opportunity of entering upon possession and occupation of it, the entire estate will remain in my daughter-in-law's possession without the right of transfer and on her death the entire estate shall be treated as my estate with the District Magistrate and Collector of Saran as its manager and trustee ". Referring to this clause, their Lordships observed that the most that can be said is that this clause is intended, in certain events, to divest the interest which before those events have already become vested.

The term ' contingent ' right in section 218 (*k*) of the Civil Procedure Code means a right which is conditional as contrasted with a vested right which is a certain or assured right. When the word ' vested ' is used in this sense, Austin (Jurisprudence vol. 2, lect. 53) points out that in reality a right of one class is not being distinguished from a right of another class but that *a right is being distinguished from a chance or possibility of a right*, but it is convenient to use the well-known expressions vested right and conditional or contingent right (vide also *Jewish Colonial Trust Ltd. v. Est Nathan* [1], per Watermeyer J. A.).

Our Courts have also considered the meaning of the terms " contingent " and " vested " in dealing with properties which are burdened with a fideicommissum. In *Mohammed Bhoy et al. v. Lebbe Maricar* [2] it was held that the interests of a fideicommissarius cannot be sold in execution during the lifetime of the fiduciarius as it is a contingent interest within the meaning of section 216 (*k*) of the Civil Procedure Code where such an interest was created by will and contained the condition that, on the death of the fiduciarius, the property should pass to the fideicommissarius. The interest of the fideicommissarius, in this case, was " *expectant on his surviving his father* ". In *Silva v. Silva* [3] a deed of gift created a fideicommissum in which the fideicommissary succeeded to the property after the death of the fiduciary. It was held that the former acquired " an assured and certain interest " which was liable to be seized and sold under section 218 (*k*) of the Civil Procedure Code. Under the Roman-Dutch law, there is a distinction between a fideicommissum

[1] *(1940) A. D. 163 at 176.* [2] *(1912) 15 N. L. R. 466.*
[3] *(1927) 29 N. L. R. 373.*

created by deed and a fideicommissum created by will. Where a fideicommissum is created by deed, the fideicommissary has an assured interest which he could alienate even if he happens to die before the fiduciary.

In *Gunatilleke v. Fernando* [1] Lord Phillimore, delivering the opinion of the Privy Council, equated contingent interest to "*spes*". He said (vide 22 N.L.R. at page 393): "But as to the alienability of a contingent interest, there appears to be a dearth of authority. None has been brought to their Lordships' notice. No doubt the *spes* which such a remainder-man can alienate is a very shadowy one, for if he predeceases the fiduciary, his heirs take nothing, and therefore the alienee could take nothing".

In the instant case, the question is whether, on a true construction of Last Will No. 147, executed by Sathappa Chetty Kalimuttu Chetty, Rajendram, who is one of his grandsons, had a vested interest or merely a contingent interest. It was contended on behalf of the appellant that Rajendram's interest only vested if he happened to survive the last of the trustees. It was also contended that the trust operated during the subsistence of the will and that Rajendram had no right to the property or to the income thereof, and consequently he had only a contingent interest.

The counsel for the respondent, on the other hand, submitted that Rajendram had a vested interest but the beneficial enjoyment of his share of the property was postponed till the last of the trustees died. He also contended that during the pendency of the trust, the trustees were empowered to perform certain functions and duties which did not militate against the vesting of the rights of Rajendram.

Sathappa Kalimuttu Chettiar, after executing last will No. 147 of 20th August 1938, executed two other codicils. The terms of the codicils are irrelevant in determining the question at issue in the instant case. The testator, who executed this will, was possessed not only of this land but also of several other properties and he had eight children by two marriages. By the first bed, he had Sellatchi, Vettivel, Muttukaruppan and Periya Ponnatchi, and by the second bed, he had Sinna Ponnatchi, Thevagnanasekeram, Ramanathan and Nagendra. Of these eight children, seven of them had married and had children of their own. Nagendra was a minor and was unmarried at the time Kalimuttu Chettiar wrote his last will. Rajendram, one of the judgment-debtors in the case mentioned, was one of three children of Kalimuttu's son, Vettivel, by the first marriage.

The recital to the last will states that the testator is desirous of dividing his property among the grandchildren in the proportions : $\frac{1}{8}$ share to the children of Muttukaruppan, Periya Ponnatchi, Thevagnanasekeram and Ramanathan respectively and $\frac{1}{8}$ share to his son, Nagendra. The last

[1] *(1921) 22 N. L. R. 385 at 393.*

will states that the devisees will be called as donees or beneficiaries in the proportions set out in the last will and, subject to the conditions and restrictions and reservations, the child or children of any of the above take by representation the share his or her parent would be entitled to. The will also states that *the children of Vettivel, Rajendram, Somasunderam and Sandanam are entitled to an undivided ⅛ share of the capital and income of all the immovable and movable property in Schedules A and B.*

The testator devises and bequeaths the properties contained in the schedule to the will to his trustees upon trust subject to the conditions, restrictions and reservations and for the purposes set out in the will. The will further states that, for these purposes, the trustees shall be vested with title to the said property immediately after his death and shall stand seized and possessed of the same for the purposes of executing and carrying out all the purposes of the trust. Among the conditions set out are that *the donees should not mortgage, sell or alienate their shares* but that, after their death, the same shall devolve on their lawful heirs, subject to the proviso that *should the necessity arise they could sell, alienate or mortgage their shares among themselves.* The will also provides that the donees are not entitled to receive the income arising from their shares until the trust ceases as provided by the will. The donees are also prohibited from selling, mortgaging or alienating their rights to the said income and any such act on their part is to make the share of such donees liable for forfeiture at the sole and absolute discretion of the trustee or trustees. The forfeited share should then devolve on the brothers and sisters of the said donees and, failing them, it should devolve on the other donees. The trust should terminate with the death, incapacity or refusal to act, of the last surviving of the original trustees. The trustees are given the power of management of the testator's business and the properties. They are also given power of investment, power to make advances and certain other powers.

On a reading of this last will, it is clear that the legal title to the property, which is the subject-matter of this action, vested in the trustees during the continuance of the trust and the beneficial interest is vested in the beneficiaries, of whom Rajendram is one, but the enjoyment of the beneficial interest is postponed till the death of the last of the trustees. In view of the clear words in the last will vesting defined shares in the donees and the prohibition of alienation to outsiders, it cannot be said that the interest of Rajendram is only a contingent one and not an assured and vested interest.

The counsel for the appellant further contended that the clause which provides that the child or children of any of the donees take by representation the share of his or her parents, shows that the interest of the donee was only a contingent one. We are unable to agree. This clause, in our view, only provides for the substitution of the children to the interest which has already vested in the donees in the event of the death of the donees.

For these reasons, we hold that the judgment of the learned District Judge should be affirmed and we dismiss the appeal with costs. Application No. 323 of 1960 presented by the plaintiff seeking a revision of the same judgment of the District Judge is also dismissed.

T. S. FERNANDO, J.—I agree.

Appeal dismissed.