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Present: Hutchinson C.J. and Wood Renton J.

COSTA *et al. v.* SILVA *et al.*

139—D. C. Colombo, 960.

Bequest of "all" movable property followed by enumeration of things—Are only the things enumerated bequeathed?—Interpretation of last will.

A joint will contained the following clauses:—

(4) We do hereby give and bequeath to the survivor of us all our movable property consisting of pearls, diamonds, rubies, and other gems; gold, silver, and all jewellery and wearing ornaments; all furniture made of ebony, satin-wood, jak, tamarind, and of other wood; and all vehicles and animals belonging to us, and lying at Chilaw, Colombo, and elsewhere, which are worth upwards of Rs. 10,000.

(5) We do hereby give and bequeath to A, B, and C one just half of our property whatsoever belonging to us, and the other one-half share to E and F, who shall after our death hold and possess the same without mortgaging, selling, granting, or otherwise alienating the same or any part thereof, but only shall enjoy the rents and profits thereof, and after their death the said shares shall devolve on their lawful issue without any restriction whatever.

The District Judge held that under the 4th clause all the movable properties were bequeathed, and not the things enumerated only, and that the words "our property whatsoever" in the 5th clause meant "our immovable property."

Held, that under clause 4 only the movable properties enumerated in it were bequeathed to the survivor; and that under clause 5 all the rest of the property, both movable and immovable, were bequeathed to the persons named.

THE facts are set out in the judgments.

van Langenberg, Acting S.-G. (with him *Samarawickrame*), for the appellants.

Bawa (with him *F. M. de Saram*), for the respondents.

Cur. adv. vult.

November 16, 1910. HUTCHINSON C.J.—

We have to make the best guess that we can as to the intention expressed by certain ambiguous words in a will. The will is the joint will of a man and his wife, who, perhaps, did not clearly know what they wanted to say, and probably understood very imperfectly the language in which the draftsman of the will tried to express what he thought they meant. They were Sinhalese; the will is in the English language; the husband signed his name in English letters, and the signature is not more illegible than most English signatures, that is, one can read it when one knows what it was meant for; the wife signed it with a mark; and a notary "certifies and attests" at the foot of the will that he read it over and explained it to the testators.

The will is dated July 7, 1894, and the 4th and 5th clauses of it are as follows:—

Fourth.—We do hereby give and bequeath to the survivor of us all our movable property consisting of pearls, diamonds, rubies, and other gems; gold, silver, and all jewellery and wearing ornaments; all furniture made of ebony, satinwood, jak, tamarind, and of other wood; and all vehicles and animals belonging to us, and lying at Chilaw, Colombo, and elsewhere, which are worth upwards of Rs. 10,000.

Fifth.—We do hereby give and bequeath to Manan Muhandirange Lucia Perera, wife of Lolbadewaduge Don Louis of Colombo; Muhandirange Ana Perera, wife of Franciscu Morias; and Muhandirange Maria Perera, wife of M. A. Don Louis de Silva of Colombo, one just half of our property whatsoever belonging to us, and the other one-half share to Philippa Morias, widow of the late Philip Juan Costa of Chilaw, and to Helena Morias, wife of Don Philip Naide of Kandana, who shall after our death hold and possess same without mortgaging, selling, granting, or otherwise alienating the same or any part thereof, but only shall enjoy the rents and profits thereof, and after their death the said shares shall devolve on their lawful issue without any restriction whatever.

The question is whether the movable property, other than the things specifically enumerated in the 4th clause, passed under the 4th or under the 5th clause. The rest of the will does not appear to contain anything to throw light on this question.

The husband died on September 23, 1897. The will was duly proved; and the inventory filed by the executors on November 5, 1897, puts the value of the jewellery at Rs. 1,500; pony and two traps, Rs. 500; household effects, Rs. 5,000; cash in the bank,

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Rs. 6,740.25; value of the testator's interest in a shop in Colombo and in the property therein and in the business carried on there, Rs. 5,000; probable amount of debts due (to the testator), Rs. 3,500. But, of course, these values may be very different from the actual values at the date of the will. The widow died on January 28, 1908.

The District Judge considered that the 4th clause was intended to give all the movable property, and not only the things enumerated, and that the words " our property whatsoever " in the 5th clause mean " our immovable property." If that opinion is right, the words " which are worth upwards of Rs. 10,000 " refer, not to the pearls and other articles enumerated in clause 4, but to the whole of the movable property.

The learned Judge thought that, from the *fidei commissum* created by the 5th clause, it seemed clear that it was intended to apply to immovable property only. That seems to have been the principal reason for his decision, although he also thinks that this will is very like the one which had to be construed in *Dean v. Gibson*.[1] His principal reason does not strike me as a very cogent one, for it is not uncommon for movables as well as immovables to be the subject of a *fidei commissum*, and there is nothing in clause 5 inconsistent with its application to property of all kinds. And *Dean v. Gibson* [1] does not seem to me to help us at all. The will which was there in question contained only one clause: " I, A. G. Maw, being perfectly collected and in my right mind, wish to express my earnest desire that my personal property, consisting of money and clothes, shall be equally divided among my three surviving sisters, viz., Frances Gibson, Knathia Mary Dean, and Sarah Taffinder Belton." And the Court, having regard to the probability that the testatrix must have intended to dispose of the whole of her personal property, thought that she did not intend her enumeration of certain things to be exhaustive. The point of the case was that, if the enumeration was intended to be exhaustive, there was no disposition of the residue—a result which it was very unlikely that the testatrix could have intended. But in our will there is no intestacy in any case; for it is impossible to say that " our property " in clause 5 can only mean " our immovable property." And the word " all " in clause 4, which seems to the learned Judge to create even more ambiguity than there was in the will in *Dean v. Gibson*,[1] does not seem to me to have that effect; for if the testators meant " our movable property which consists of " so and so, that is, " so much of our movable property as consists of, " I cannot see that the word " all " makes any difference. It is most unlikely, too, that, if they intended to enumerate all their movable property, they should omit the two most obvious and most important items—money and the testator's shop and business. I think that the interpretation which is the most natural, and which makes clause 4 consistent

[1] *(1867) L. R. 3 Eq. 713.*

with clause 5, is this; that clause 4 is a gift of all that part of the movable property which consists of the things there enumerated, and that clause 5 is a gift of all the rest of the joint property, movable and immovable.

Mr. Bawa contended that, if this interpretation is adopted, there was an intestacy as to all the non-enumerated movables between the death of one of the testators and the death of the survivor, and that the Court ought to follow the rule of adopting, where it is possible, an interpretation which will prevent an intestacy. The Court has to find out the testator's intention as expressed in his will; if the will contains words capable of two meanings, and if one of the meanings would involve a partial intestacy whilst the other would not, the Court, or any man of sense, considering the probability that a man when he makes a will intends to dispose thereby of all his property, will (unless there is some good reason to the contrary) adopt the second of the two possible meanings, not because there is any rule on the point, but because it seems most likely that that was the testator's meaning. But in the present case, if Mr. Bawa's view is right, there is a partial intestacy whichever construction is adopted; and from that fact I infer either that such intestacy had no terrors for these two people, or else—which is most probable—that it did not occur to them or to their legal adviser, if they had one, that there would be a partial intestacy.

The case should, therefore, be sent back to the District Court with a declaration that all the movable property, except the articles specifically enumerated in clause 4 of the will, passed under the 5th clause. The executors shall pay out of the estate the appellant's costs of the contention on this point in the District Court and on this appeal.

WOOD RENTON J.—

The material facts in this case have been stated in the order of the learned District Judge, which is the subject of this appeal. The question to be decided is whether clause 4 of the joint will of Simon Morias and his wife Justina has the effect of vesting in the survivor all the movable property of the community, or only such portions of it as are specifically enumerated in that clause. The learned District Judge has adopted the former of these alternative constructions. With the greatest respect, I think that he is wrong. The clause in question is as follows:—

> " We do hereby give and bequeath to the survivor of us all our movable property consisting of pearls, diamonds, rubies, and other gems; gold, silver, and all jewellery and wearing ornaments; all furniture made of ebony, satinwood, jak, tamarind, and of other wood; and all vehicles and animals belonging to us, and lying at Chilaw, Colombo, and elsewhere, which are worth upwards of Rs. 10,000. "

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It is preceded by clauses devising certain immovable property to the Roman Catholic Churches of St. Sebastian, Silversmith street, Colombo, and St. Mary's Church, Chilaw, and providing for the payment of all debts by the executors appointed under the joint will. Clause 5, which follows it, is in these terms:—

> "We do hereby give and bequeath to Manan Muhandirange Lucia Perera, wife of Lolbadewaduge Don Louis of Colombo; Muhandirange Ana Perera, wife of Franciscu Morias; and Muhandirange Maria Perera, wife of M. A. Don Louis de Silva of Colombo, one just half of our property whatsoever belonging to us, and the other one-half share to Philippa Morias, widow of the late Philip Juan Costa of Chilaw, and to Helena Morias, wife of Don Philip Naide of Kandana, who shall after our death hold and possess the same without mortgaging, selling, granting, or otherwise alienating the same or any part thereof, but only shall enjoy the rents and profits thereof, and after their death the said shares shall devolve on their lawful issue without any restriction whatever."

It was admitted by counsel in the District Court that the testator, Simon Morias, was up to the time of his death engaged in the business of arrack rents, toll rents, and plumbago mining and exporting, and owned a liquor shop in Colombo; and the inventory filed in the testamentary case shows that his movable property greatly exceeded in value the value placed by clause 4 on the movable properties dealt with in that clause.

I do not think that much help is to be derived from any of the cases that were cited in the District Court, or in the arguments on the appeal. In *Dean v. Gibson*[1] the will in dispute consisted of a single clause, in which the only bequest was a gift by the testatrix of her "personal property consisting of money and clothes." She was possessed at her death of property, besides cash in hand and clothes, of money out on mortgage, of money secured on a promissory note, and of a reversionary interest in a sum in cash. It was held by Vice-Chancellor Wood that the whole personal estate passed by her will. The ground of this decision was that the words "consisting of money and clothes" did not cut down the generality of the gift of property, being only an imperfect enumeration of the particulars of which the personal estate consisted. The learned Vice-Chancellor attached importance to the fact that the clause in question constituted the whole will. The construction which he adopted was one that avoided an intestacy. *Fisher v. Hepburn*[2] was a clear case of a residuary devise, and the point of the decision was that the generality of the residuary clause was not cut down by words of specific enumeration following it. *Gover v. Dairs*[3] was

[1] (1867) *L. R. 3 Eq. 713.*

[2] (1851) *14 Beav. 6266.*

[3] (1860) *29 Beav. 222.*

also, in effect, a case of a residuary devise. *Timewell v. Perkins*[1] has been doubted in later decisions (see *King v. George* [2]). What was decided there was that a devise of plate, jewels, linen, household goods, and coach and horses would be confined to things of the same nature, and would not cover goldsmith's notes and bank bills. I do not think that this case would now be followed in England. The rule of law has thus been stated by Mr. Theobald (*6 ed. 221*) in his *Law of Wills*:—

> " Large words, such as goods, chattels, or effects, when they are followed by an enumeration of particulars, will not be limited to things *ejusdem generis* ..... The same is the case, though the particulars are introduced by words intended to be explanatory of the former words, for instance, ' namely,' ' consisting in,' ' together with,' ' such as,' ' both in,' or similar words ..... "

Admittedly, we have to look to the terms of the will under consideration itself, so as to ascertain what it was that the testators meant to do. The view adopted by the learned District Judge may be summarized thus: Clause 4 purports to deal with " all our " movable property; the words " consisting of," &c., are merely an imperfect enumeration of that property. Clause 4 follows specific devises of movable property, and precedes a clause creating a *fidei commissum*, which, both in itself and by the reference in it to " rents and profits," shows that it was intended to apply to immovable property alone. In the argument of the appeal Mr. Bawa raised a further point. He contended that if the appellant's contention was correct, there would be an intestacy as regards one-half of the residue of the movable property which belonged to either of the joint testators predeceasing the other during the interval between the death of that testator and the death of the survivor. I will deal with this argument at once. Under clause 7 the will can only be revoked during the joint lives of the testators. On the death of one of the testators, the immediate beneficiaries under clause 5 could no longer be deprived of their interest in the property dealt with in that clause by any testamentary act on the part of the survivor. All that clause 5 gives to them is a life interest in the rents and profits, and inasmuch as it expressly postpones the vesting of that interest till after the death of both the joint testators, the testators' intention must, I think, have been to reserve a life interest in such rents and profits in favour of the surviving spouse.

The argument in favour of the appellants' contention seems to me to be very strong. I would interpret the words " all our movable property consisting of," &c., as meaning " all such parts of our movable property as consisted of," &c. It will be observed that the testators used the words " all " repeatedly in the clause—a fact

[1] *(1740) 2 A. & K. 101.*

[2] *(1876) 4 Ch. D. 435.*

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which may be regarded, perhaps, as weakening, to some extent, the force of its use in connection with the words " our movable property." In addition to that, we have the fact that the testators put a specified value on the movable property dealt with in clause 4. This would have been unnecessary if they were disposing off all their movable property; and, moreover, it appears that the movable property as a whole is greatly in excess of the amount stated in clause 4. The terms of clause 5 furnish, I think, another reason in favour of the appellants' view. It makes use of the words " our property whatsoever belonging to us." These words are wide enough to include movable as well as immovable property, and, if I am right in what I have already said on the subject, to prevent a partial intestacy as regards the residue of the movable property not enumerated in clause 4. The term " profits " at least is not inapplicable to a portion of that residue. It seems very unlikely that a business man, such as Simon Morias is admitted to have been, should have said nothing in his will as to the disposal of his money, and as to the profits of the various business transactions in which he was engaged. On these grounds, I think that the appeal should be allowed on the terms stated by his Lordship the Chief Justice.

Appeal allowed.