

1913.

Present: Pereira J.

DIAS v. JANSEN et al.

99—C. R. Colombo, 30,396.

Fidei commissum—Last will—Words should not be treated as superfluous.

No words expressed in a will should be treated as superfluous if they could be given a meaning not inconsistent with the avowed intentions of the testator. And so where A by paragraph 10 of her will devised certain property to D and C subject to a *fidei commissum*, and to the condition that if the survivor of the two devisees contracted a second marriage, the children of such marriage should not be entitled to any interest in the property devised; and by paragraph 11 she devised certain other property to D, subject to the provision that the same should devolve on his children "exactly under the same restrictions as aforesaid"; and by paragraph 12 she devised certain other property to E and others subject to a *fidei commissum*, and "under the same restrictions as before"—

Held, that there is no justification for treating these words—"under the same restrictions as before"—as superfluous, but they must be deemed to refer to the restriction in paragraph 10 in addition to that involved in the *fidei commissum* mentioned therein, that is to say, the restriction against inheritance by the children of a second marriage of any one of the immediate devisees.

THIS was an interpleader action instituted by the plaintiff in respect of certain rents of houses in Colombo, which she had collected on behalf of the heirs of the late George Anderson Dias. The defendants-appellants (1-4) claimed to be sole heirs of G. A. Dias in respect of the houses in question. The defendants-respondents (5-16) claimed to be jointly his heirs with the defendants-appellants.

The properties in question were left by the late Johanna Tissera, who died in 1867, and the point in dispute arose out of the interpretation of her will.

The paragraphs of the will material to this report are the following:—

10. The testatrix declared to give and devise all that house and ground situated and lying in the Fourth Cross street, in the Pettah of Colombo, bounded, to George Anderson Dias and his wife Livertina Pautolina Dias, also to be held in trust and possessed during their lives, and at their deaths the same to devolve on their children and grandchildren and their descendants, on condition that neither the wife nor the husband nor their descendants shall ever be at liberty to sell, mortgage, alienate, or encumber the same, but that the same shall

always be possessed under the bond of *fidei commissum*. Provided always that if any of the survivors of the two shall happen to contract a second marriage, then and in that case the child or children of such second marriage are debarred from claiming any interest or right in and over the property hereinbefore devised.

11. The testatrix declared to give and devise all that house and ground situate and lying in the Main street, in the Pettah of Colombo, bounded, to the exclusive use and benefit of Bonny Lewis Dias, subject to the express condition that during the minority of the said Bonny Lewis Dias, her executors, whom she likewise appoints as guardians over all the minor heirs and heiresses, shall out of the rents and profits arising from the said house pay yearly the sum of twenty-five pounds sterling to the sole use and benefit of the said Bonny Lewis Dias, and the residue be deposited in the Savings Bank to accumulate as a reserve fund for the sole benefit of the said Bonny Lewis Dias, which accumulated funds shall be taken and appropriated by the said Bonny Lewis Dias when he attains the age of majority, hereby strictly enjoining the executors not to withdraw any part of the reserve funds from the Savings Bank, except for the urgent repairs of the said house ; in that case the executors are authorized to draw an amount that would be sufficient to meet the expenditure of the repairs only, reserving to the said Bonny Lewis Dias the right to possess the said house during his life, and at his death the same shall devolve upon his children and grandchildren and their successors, who are hereby strictly prohibited from selling, mortgaging, alienating, or encumbering the same exactly under the same restrictions as aforesaid, but if the said Bonny Lewis Dias dying single or dying married without issue, the premises above devised shall revert to his uterine brothers and sisters and their children and grandchildren, who possess the same under the bond of *fidei commissum*.

12. The testatrix declared to give and devise all that house consisting of six rooms, situate and lying in the Canal row, in the Fort of Colombo, bounded, for the use and benefit of George Anderson Dias, in addition to the property above devised, and his brothers and sisters, Benedict Oliver, Jane Adelaide, Bernard Krols, Arthur Dominic, Julia, and Henrietta, the children of Stephanis Gabriel Dias, to be held and possessed by them jointly and severally, and in the event of any one or more dying without lawful issue, his or their shares shall revert to their living brothers and sisters equally, and at their deaths the same shall devolve on their children and grandchildren and their descendants ; that they are strictly prohibited from selling, mortgaging, alienating, or encumbering the same, but shall be held under the bond of *fidei commissum* and under the same restrictions as above.

E. W. Jayewardene and de Silva, for first to fourth defendants, appellants.

W. H. Perera, for fifth and tenth defendants, respondents.

E. W. Perera, for sixth to ninth and eleventh to sixteenth defendants, respondents.

Cur. adv. vult.

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May 25, 1913. PEREIRA J.—

The first question in this case is as to the devolution of the property dealt with by the 10th paragraph of the will of Johanna Tissera. (I may here mention that I have, for convenience of reference, numbered the paragraphs on the copy at page 31 of the record.) The property is situated in the Fourth Cross street, Pettah. It is devised to George Anderson Dias and his wife Livertina, subject to a *fidei commissum*, and a provision that "if any of the survivors of the two devisees (meaning, obviously, if the survivor of the devisees) should happen to contract a second marriage, the children of such second marriage should not be entitled to any interest in the property devised." The question is whether the provision against the children of a second marriage extends to children so procreated by any descendant of the devisees. The words used are too clear for argument, and I agree with the Commissioner that the provision applies to his immediate devisees and no others.

The next question is as regards the property dealt with by paragraph 12 of the will. That property is situated in Canal row, Fort. It is devised to George Anderson Dias and others, also subject to a *fidei commissum*, and certain other restrictions which are indicated at the end of the paragraph by means of the words "and under the same restrictions as above." The question is what meaning is to be given to these words, and how far the devise is qualified by them. The Commissioner is unable to give them any meaning. But according to rules of construction the words are not to be regarded as superfluous if they can be given a meaning that is not inconsistent with the avowed intentions of the testatrix. Now, on a comparison of the two paragraphs 10 and 12 it will be seen that there is a great similarity between them. In paragraph 10 the property in the Fourth Cross street is devised to John Anderson Dias and Livertina subject to a *fidei commissum*; and immediately after the words "*fidei commissum*" comes the proviso against the issue of a second marriage that I have already cited. In paragraph 12 the property in Canal row is devised to John Anderson Dias and others, and immediately after the words "*fidei commissum*" follow the words "and under the same restrictions as before." If, therefore, paragraph 12 came immediately after paragraph 10, there would be no difficulty in understanding the words "and under the same restrictions as before." Clearly those words would imply the additional restriction against the children of a second marriage mentioned in paragraph 10, and that restriction would apply to the case of a second marriage by any of the immediate devisees only named in paragraph 12. Does the fact that a separate paragraph containing a separate devise comes between paragraphs 10 and 12 make a difference? In view of the terms of the intervening paragraph (paragraph 11) I should not say so. Paragraph 11 contains a devise of certain property to one Bonny Lewis Dias, with a provision that the same should devolve on his

children and grandchildren and their successors "exactly under the same restrictions as aforesaid." The last words clearly refer to the restrictions in paragraph 10. There is, thus, nothing in paragraph 11 to militate against the idea that the words "and under the same restrictions as above" in paragraph 12 also refer to certain restrictions in paragraph 10; and they can, of course, only be the restrictions in paragraph 10 additional to those involved in the *fidei commissum* mentioned therein. I set aside the order appealed from, and remit the case to the Court below for entry of decree after such further investigation as may be necessary in accordance with my decisions given above. As success in appeal is divided, I allow no costs in appeal. The Commissioner, in entering up final decree, will adjudicate upon the question of costs in the Court below.

Set aside.

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PEREIRA J.

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