5, 1968

IN THE PRIVY COUNCIL No. 23 of 1967

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

1. DERWENT PEIRIS
2. IVAN STEWART PEIRIS
3. SRIKANTHA PEIRIS
4. SITA LUCILLE WEERASINGHE
5. CARL WINDSOR PEIRIS
10 6. JOYCE WINIFRED PEIRIS
7. DAVID RAGLAN PEIRIS
(Plaintiffs-Respondents) Appellants

- and -

ABEYSIRI MUNASINGHE LAVIRIS APPU
(1st Defendant-Appellant) Respondent

C A S E FOR THE RESPONDENT

1. This is an appeal from the Judgment and Decree of the Supreme Court of Ceylon, dated the 25th August, 1965 allowing an appeal from the Judgment and Decree of the District Court of
20 Kurunegala, dated the 18th January, 1962, whereby, in an action instituted by the Appellants (hereinafter also referred to as "the Plaintiffs") against the Respondent (hereinafter also called "the Defendant") and one other (since discharged from the action) praying for (1) a declaration that the Appellants are entitled to certain land in the Kurunegala District, (2) an Order ejecting the Respondent therefrom (3) damages, and (4) costs, it was held that
30 Judgment should be entered for the Plaintiffs as prayed, with costs and damages at the rate of Rs.18,000/= per annum (as agreed) from the 18th

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March, 1957, until the date when the Plaintiffs are placed in possession of the said land.

In allowing the appeal, the Supreme Court directed that the action should be dismissed, with costs in both Courts.

2. The main questions for determination on this appeal are:-

(A) Whether or not, in the circumstances of this case, the si sine liberis decesserit condition to which a bequest of the residue in general terms to the three sons by their mother was made subject, has the effect, under the Roman-Dutch Law as administered in Ceylon, of creating, by implication, a fidei commissum in favour of the children of each son.

(B) If, in the said circumstances, a fidei commissum can reasonably be implied, whether or not the prohibition against alienation implicit therein is null and void inasmuch as it does not name, describe or designate, the person or persons in whose favour, or for whose benefit, it is to operate, contravening thus the provisions of Section 3 of the Entail and Settlement Ordinance (Cap. 67).

(C) Whether the Award of the Arbitrator which was made a rule of Court is binding on the immediate parties to the testamentary case of Adeline Winifred Peiris and her husband and their heirs and successors in title, or those claiming under them including the plaintiffs.

(D) Whether the obligations under the Indenture No. 1725 of 31st May 1917 prevails over the rights of the legatees under the Last Will No. 4188, dated the 3rd June, 1910, of Adeline Winifred Pieris who died after the date of the said Indenture.

(E) Whether, in any event, the alleged rights of the Plaintiffs to a one-third share of the property in dispute under the said Last Will became enlarged after the death of the testatrix.

3. The Appellants claim to be entitled to the said land as fidei commissaries. Their case appears to be that the land originally belonged to their paternal grandmother, one Adeline Winifred Peiris who, by the bequests she made, subjected it to a fidei commissum in their favour which became effective upon the death of their father, Richard Louis Peiris, the testatrix's eldest son on whom the land had devolved as a fiduciary. They seem to have reached this conclusion upon their interpretation of the relevant testamentary dispositions contained in the Last Will of their said grandmother (herein also called "the testatrix") read with the terms of an Indenture which she (and her husband) had subsequently entered into. Upon the death of the testatrix (on the 20th December 1918) disputes arose among her heirs and these were referred to arbitration. In the award which followed, the arbitrator expressed his view that the heirs are bound by the provisions of the Indenture which, in the main, are concerned with the distribution and settlement of the testatrix's estate. The award was subsequently made a rule of Court.

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4. In her said Will, dated the 3rd June 1910, the testatrix, after making certain bequests to her daughters, bequeathed the residue of her property to her three sons in equal shares, subject to the condition inter alia, that if any of the three sons died unmarried, or married but without leaving issue, then, subject to his widow's right to receive one-fourth of the nett income of the property or share to which her husband was entitled, the share of the deceased son would devolve upon his surviving brothers and the children of any deceased brother, such children only taking among themselves the share which their father would have taken had he lived.

A further condition stipulated that if any of the three sons died leaving children and a widow then the mother of such children would, during her widowhood, be entitled to, and receive, one-fourth of the nett income of the

property to which her children would be entitled to under the Will.

5. By the said Indenture, dated the 31st May, 1917, which the testatrix and her husband entered into, the testatrix agreed, inter alia, to convey, within three months of the date of the Indenture, or thereafter whenever called upon by her husband so to do, to her eldest son (the said Richard Louis, the Plaintiffs' father) her Moragolla Group of Estates, in extent about 1,000 acres, and inclusive of the Raglan Estate of 271 acres which is the subject matter of the present proceedings.

6. The testatrix died on the 20th December, 1918, her husband having predeceased her on the 23rd October, 1918. She died without having previously executed the conveyance of the said Moragolla Group of Estates in favour of her eldest son, the said Richard Louis, in accordance with the provisions of the said Indenture.

p. 121 On the 2nd November 1951, by Deed of Transfer No. 196, Richard Louis, as absolute owner of the said Raglan Estate (part of the Moragolla Group), sold and transferred the same to one S.R.U. Banda Senanayake (originally, in these proceedings, the 2nd Defendant, since discharged from the action) for the sum of Rs.135,000/=, the purchaser being the nominee of the present Respondent.

p. 124 On the 11th November 1951 by Deed of Transfer No. 199, the said S.R.U. Banda Senanayake sold and transferred 50 acres of the said Raglan Estate to one S.K.W. Mudianselage Punchi Banda
p. 127 who, on the 9th August, 1952, by Deed of Transfer No. 305, reconveyed the 50 acres to the said S.R.U. Banda Senanayake.

p. 130 On the 9th August 1952, by Deed of Transfer No. 306, the said S.R.U. Banda Senanayake, as owner of the entire Raglan Estate, sold and

transferred the same to the present Respondent who is still in exclusive possession thereof.

7. The Plaintiffs' father (the said Richard Louis) having died on the 13th December 1954, the Plaintiffs instituted this action in the District Court of Kurunegala in 1959.

The Plaint, dated the 18th March 1959, is printed on pages 23 to 26 of the Record. pp. 23 - 26

The Answer of the Defendant (i.e. the 1st Defendant, the present Respondent), dated the 18th February, 1960, will be found on pages 26 to 28 of the Record and that of the 2nd Defendant (since discharged from the action by Order made of consent) on pages 28 to 30 thereof. pp. 26 - 28; p. 36, Ll. 15, 16

8. Issues framed in the action were answered thus by the learned District Judge:- pp. 31 - 33

"1. Do Last Will No. 4188 of 3.6.10 and/or Indenture No. 1725 of 31.5.17 create a fidei commissum in favour of the Plaintiffs in respect of Raglan Estate, the subject-matter of this action? " p. 32 Ll. 25 - 27

Answer: "Yes - the Last Will and the Indenture create a fidei commissum in favour of the Plaintiffs (1 to 7), in respect of Raglan Estate." p. 52 Ll. 2 - 4

"2. If so, are the Plaintiffs the absolute owners of the said Raglan Estate after the death of their father Richard Louis Peiris? (It is agreed between the parties that Richard Louis Peiris, the father of the Plaintiffs, died on 13.12.1954)". p. 32 Ll. 28 - 31

Answer: "Yes, Plaintiffs 1 to 7." p. 52, L. 5

"3. If so, is the 1st Defendant in unlawful possession of the said Estate p. 32, Ll. 32 - 33

from 13.12.1954".

p. 52, Ll. 6 - 8 — Answer: "Yes.

"Damages as agreed upon at Rs.18,000/= per annum from 18.3.1957".

p. 32, Ll. 37 - 38 — "4. Was the said land devised by Last Will No. 4188 to Richard Louis Peiris subject to a fidei commissum?"

p. 52, Ll. 9 -11 — Answer: "The Last Will creates a valid fidei commissum but the disposition of this property was by the Indenture No. 1725".

9. Further Issues were answered thus by the learned District Judge:-

p. 32, Ll. 39 - 40 — "5. Does the Indenture referred to create a fidei commissum in favour of the Plaintiffs?"

p. 52, Ll. 12 - 14 — Answer: No. The Indenture does not create a fidei commissum. It only sets out the disposition of the various properties."

p. 33, Ll. 1 - 3 — "6. Or is the said Indenture a promise by which Adeline Winifred Peiris undertook to execute a deed embodying the terms contained in the said Indenture which deed she failed to execute?"

p. 52, Ll. 15 - 21 — Answer: "Adeline Winifred Peiris undertook to execute a deed embodying the terms contained in the Indenture and she died before the deed was executed. This Indenture along with the Last Will was referred to arbitration and the award made by the arbitrator is binding on the children of Richard Stewart Peiris and Adeline Winifred Peiris."

"7. If the Answer to Issue No. 6 is in the affirmative does the question of a fidei commissum arise at all in this case?" — p. 33, Ll. 4 - 7

"8. If there is no fidei commissum can the plaintiffs have and maintain this suit?"

Answers to Issues Nos. 7 and 8: "Do not arise in view of my Answer to Issue No. 1." — p. 52, L. 22

"9. Did the 1st Defendant purchase the said land on Deed No. 196 of 2.11.1951 in the name of the 2nd Defendant as his nominee?" — p. 33, Ll. 9 - 10

Answer: "Does not arise as the 2nd Defendant was discharged from these proceedings" (of consent, on the 5th December 1961). — p. 52, Ll. 23 - 24

"10. If so is the 2nd Defendant liable to warrant and defend the title of the 1st Defendant?" — p. 33, Ll. 11 - 12

Answer: "Does not arise". — p. 52, L. 25

10. By his Judgment, dated the 18th January, 1962, incorporating his said Answers to the Issues framed in the action, the learned District Judge held that the plaintiffs had established their claim and entered Judgment in their favour as stated in paragraph 1 hereof. — pp. 49 - 52

Referring to certain portions of the testatrix's Will, the learned Judge was clear that the testatrix had, by the words she used, impliedly prohibited her sons from alienating or disposing of the property to which they would succeed, her intention being that "the properties should remain in the family and go to her grandchildren who are the Plaintiffs in this case". He was of opinion that "the Plaintiffs' father, Richard Louis Peiris, had only a fiduciary interest although he purported to — p. 51, Ll. 25 - 40

transfer absolute dominium on Deed P5 and the Plaintiffs are therefore entitled to the property from the date of his death "(13th December, 1954)".

pp. 52 - 53 / pp. 54 - 56

11. A Decree in accordance with the Judgment of the learned District Judge was drawn up on the 18th January, 1962, and against the said Judgment and Decree the present Respondent appealed to the Supreme Court of Ceylon on grounds stated in his Petition of Appeal, dated the 18th January 1962, which contained the usual reservation of other grounds being urged at the hearing of the appeal.

p. 66, Ll. 7 - 8

12. The appeal came up for hearing before a Bench consisting of H.N.G. Fernando, S.P.J., and Abeysundere J., who heard the arguments of both sides on the 16th, 17th, and 18th June, and 21st, 22nd, and 23rd July, 1965.

pp. 65 - 73

By their Judgment dated the 25th August 1965, the learned Judges of the Supreme Court allowed the appeal and dismissed the action, with costs in both Courts.

13. Arguments for the present Respondent at the hearing of the appeal included a point of law concerned with the effect of the relevant provisions of the Entail and Settlement Ordinance (Cap. 67) on the prohibition against alienation alleged to be contained in the testatrix's testamentary dispositions in favour of her sons.

By Section 3 of the said Ordinance it is provided inter alia that:-

> "Where the will, deed or instrument in which any prohibition, restriction, or condition against alienation is contained, does not name, describe or designate the person or persons in whose favour or for whose benefit such

prohibition, restriction or condition is provided, such prohibition restriction or condition shall be absolutely null and void".

It was submitted, on behalf of the present Respondent (the Appellant in the Supreme Court) that, as in Ceylon, the Roman-Dutch law, ceases to apply on any subject in respect of which statutory provision has been made, the prohibition against alienation implicit in the alleged implied fidei commissum would, by reason of the aforesaid provisions of Section 3 of the Entail and Settlement Ordinance, be null and void; for, whatever be the position under pure Roman-Dutch law, it is now absolutely necessary, by the law of Ceylon to name, describe or designate the person or persons in whose favour or for whose benefit the prohibition is provided, and this, it cannot reasonably be said, was done by the testatrix in the instant case.

The Judgment of the Supreme Court does not unfortunately refer to this point of law and the arguments presented thereon.

14. Delivering the main Judgment of the Supreme Court, H.N.G. Fernando, S.P.J. (with whom Abeysundere J. agreed) referred to the testatrix's Will, the subsequent Indenture which she and her husband had entered into, to the disputes among the heirs after the testatrix's death and to the reference to arbitration of such disputes. He continued:-

"The award of the arbitrator was subsequently made a rule of Court in the Testamentary Proceedings in which the Will was declared proved. This award declared that, although the agreement in the Indenture of 1917 had not been implemented during the life of Adeline Peiris it was nevertheless binding on her heirs. Although the matter was not clarified in any way at the trial of this action, Counsel for the Plaintiffs in Appeal has argued

p. 67, Ll. 16 - 27

that certain assumptions may now be made upon the pleadings. One such assumption is to be that the three sons of the testatrix who were entitled under the Last Will to the whole residuary Estate in equal shares took instead properties which their mother agreed by the Indenture to transfer to each of them.

"There is no evidence whatever of any actual division of property, nor of any conveyance by executors. Nevertheless in disposing of this appeal, I can accept the correctness of this assumption. In doing so I should point out that in the pleadings, the Defendant (i.e. the present Appellant) while claiming that Richard Louis was absolute owner of Raglan Estate, did not present as a ground for that claim any basis different from that relied on by the Plaintiffs, viz., that Richard Louis took the entirety of Moragolla Estate because of the Indenture of 1917 and the award of the arbitrator and that his two brothers took other properties in lieu of their shares in the residuary estate."

p. 67, Ll. 27 - 37

15. Referring to the arguments of both sides, the learned Supreme Court Judge said:-

"The position of the Appellant (present Respondent) "has been that the Last Will does not affect the property which is the subject of this action. This position was based upon a finding of the arbitrator in his award P3 that the Indenture of 1917" is binding on the heirs" of the testatrix and her husband, and that "the two testaments do not therefore deal with the properties dealt with by the Indenture". (I should state that the second testament here mentioned is the Last Will of Adeline Winifred's husband, which was also a subject of the arbitration, although nothing is known as to its terms).

p. 68, Ll. 3 - 12

Exh. P.3, p. 109

"In the result the first contention for the Appellant has been that, even if the Last Will of the testatrix created a fidei commissum, the property which Richard Louis took by virtue

p. 68, Ll. 12 - 22

of the Indenture and award is free of that fidei commissum. The effect of the Indenture, it was argued, was to render the earlier Last Will inoperative, at least in respect of the properties specifically dealt with in the Indenture. An alternative contention (taken for the first time in appeal) was that even if the fidei commissum attaches, it can affect only a one-third share of the Raglan Estate, for that was the only interest in Raglan Estate which was devised to Richard Louis by and under the conditions of the Last Will."

16. In referring to the arguments advanced on behalf of the Plaintiffs (present Appellants) the learned Supreme Court Judge said:-

"The position taken by Counsel for the Plaintiffs is that the original one-third share of the residue devised to Richard Louis by the Will became converted by reason of the award into the Moragolla Group of Estates, of which Raglan Estate is one, and that his title to Raglan Estate was subject to the same conditions as were imposed by the Will in respect of the one-third share. If then those conditions created a fidei commissum in favour of the Plaintiffs, title to Raglan Estate passed to them on the death of Richard Louis as claimed in the plaint. p. 69 Ll. 13 - 21

"I have stated my acceptance for present purposes of this position and have referred to certain other matters in order to record briefly the arguments presented in Appeal. But I do not find it necessary to refer to the authorities upon which Counsel relied, or to decide whether or not Raglan Estate did devolve on the Plaintiffs' father under the Last Will. For even so in any event the conditions in the Last Will did not create a fidei commissum in favour of the Plaintiffs". p. 69 Ll. 21 - 28

17. The learned Supreme Court Judge next set out the clauses in the Last Will of the testatrix upon which the present Appellants had

founded their claim. He subjected the events contemplated and/or provided for in the said clauses to a close analysis and continued as follows:-

p. 71, Ll. 7 - 18

"The clauses therefore expressly provide for two matters:-

"Firstly, the imposition of a fidei commissum upon the share of each son, conditional upon his death without issue, in which event the fidei commissaries will be the surviving brothers, the children of a deceased brother taking by representation in his place, and, secondly, that the widow of a son dying childless, will have a right to a part of the income of the property or share which that son had, and that the widow of a son dying with children surviving him will have a similar right to income from any property which may devolve on those children under the Will. So far as these express provisions go, the children of a son who dies leaving issue will not on the death of their father succeed him as fidei commissary substitutes."

18. The learned Supreme Court Judge, for reasons that he gave, rejected the Plaintiffs' arguments founded on the fact that in the relevant testamentary provisions in the testatrix's Will there was a si sini liberis decesserit clause. He said, on this subject:-

p. 71, Ll. 32 - 38

"Every si sini liberis decesserit clause has the effect of nominating the persons who will take in the event of the death without issue of a donee. But the mere fact that the children of one deceased donee are thus nominated as heirs after the death of another donee is no indication of an intention to fetter the property in the hands of a donee who in fact has issue.

p. 72, Ll. 1 - 8

"It should not be supposed that the judgments in the two recent cases "(de Silva v Rangohamy, 62 N.L.R. 555 and Rosammah v Govindar Manar, 65 N.L.R. 467 both of which the learned

Supreme Court Judge had examined earlier) "evince any special readiness of the Courts to uphold the existence of a fidei commissum when property is subject to a si sine liberis clause. Such a clause is only one circumstance taken with the others, which may together suffice to establish an intention to make a gift-over to the children of a donee who does not die issueless. Any readiness to assume such an intention from the mere existence of the clause would be in conflict with the principle of construction Expressio unius est exclusio alterius".

19. The learned Supreme Court Judge H.N.G. Fernando S.P.J. (with whom Abeysundere J. was in agreement) said that his conclusion that "the two relevant clauses of the Will do not create a fidei commissum in favour of the Plaintiffs operative on the death of their father" was confirmed by other considerations to which he referred in detail. p. 72, Ll. 9 - 12

He concluded his Judgment thus:-

"I hold that even if Raglan Estate or any share thereof devolved on the father of the Plaintiffs under the Last Will of the testatrix, the terms of the Will did not create a fidei commissum in favour of the Plaintiffs operative on the death of their father". p. 73, Ll. 22 - 26

20. A Decree in accordance with the Judgment of the Supreme Court was drawn up on the 25th August, 1965, and, against the said Judgment and Decree, this appeal to Her Majesty in Council is now preferred, the Appellants having obtained leave to appeal by two Decrees of the Supreme Court, dated respectively the 21st June, 1966, and the 13th August, 1966. p. 74 p. 96 p. 98

In the Respondent's respectful submission the appeal should be dismissed, with costs throughout, for the following among other

R E A S O N S

1. BECAUSE in the circumstances of this case and on a true appreciation of the relevant laws of Ceylon -- Roman Dutch and Statutory - it is clear that Richard Louis Peiris (the Appellants' father) had a clear and absolute title to the land in question free from the fetters of any fidei commissum which title, following legitimate transactions and transfers for valuable consideration, is now lawfully in the Respondent.

3. BECAUSE on any reasonable interpretation of the relevant clauses in the testatrix's Will it cannot be said that she intended to, and did in fact, burden the testamentary bequest of the residue to her sons with, in each case, a fidei commissum for the benefit of the son's issue.

3. BECAUSE a fidei commissum is not lightly implied and, it would be contrary to reason to suppose that the testatrix intended to create inferentially in the case of her sons the fetter of fidei commissum which she had created, directly and with exactitude, in the bequests to her daughters.

4. BECAUSE a si sini liberis decesserit clause or condition is not of itself sufficient to raise the implication of a fidei commissum or to rebut the presumption of Roman-Dutch law against the existence of a fidei commissum.

5. BECAUSE in any event the fidei commissum (if one can possibly be implied from the testatrix's testamentary dispositions) was defeated when the fiduciary (the Appellants' father) had issue.

6. BECAUSE the Last Will did not name,

describe or designate the person or persons in whose favour or for whose benefit the prohibition against alienation would operate in the event of Richard Louis Pieris dying leaving issue and was therefore invalid being in contravention of the provisions of section 3 of the Entail and Settlement Ordinance (Cap.67).

7. BECAUSE the testatrix had in her lifetime incurred an enforcable obligation to make a gift of the property in dispute to Richard Louis Pieris free of any fidei commissum and was not free to dispose of that property by Last Will free of such obligation.

8. BECAUSE the Judgment of the District Court, dated 3rd December, 1925, making the award of the arbitrator a rule of Court operates to vest the property in the Respondent free of any fidei commissum.

9. BECAUSE the award and the rule of Court are binding on the parties to it and their heirs and successors in title including the Plaintiffs.

10. BECAUSE the Plaintiffs have not proved title to the entirety of the property in dispute or even to a part of the same.

11. BECAUSE the Judgment of the Supreme Court in favour of the Defendant was right and ought to be affirmed.

E.F.W. GRATIAEN

H.W. JAYA WARDENE

R.K. HANDOO

No. 23 of 1967

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C A S E

FOR THE RESPONDENT

LEE & PEMBERTONS,
11 South Square,
Gray's Inn,
London, W.C.1.