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1939 *Present :* **Wijeyewardene and Nihill JJ.**

NADARAJAN CHETTIAR *v.* SATHANANDAN *et al.*

296—D. C. Colombo, 940.

Fidei commissum—Deed of gift by father to his sons—Revocation of gift by subsequent deed—Power given to "mortgage", "hypothecate" and "tender" property as security—Prohibition of lease for certain period—Lease for longer term—Lease repugnant to deed.

By deed P 2 of June, 1917, R. gifted the property in question to his three sons, N., S. (the first plaintiff), and M. (second plaintiff), in equal shares, reserving to himself the right to revoke the gift and subject to certain conditions.

At the request of N.. the donor revoked P 2 and by P 1 gave him the undivided one-third share of the property by way of an irrevocable gift subject to the following conditions:—

(1) That the donee shall only possess the properties hereby gifted to him during the term of his natural life and take and enjoy the issues, rents, and profits, but shall not be at liberty to sell, mortgage (except as hereinafter mentioned) or . . . . lease the same for a term of more than five years at any one time . . . .

(2) . . . . It is hereby expressly declared that it shall be lawful for the donee to mortgage, hypothecate and tender the said property as security by him for all or each of the following purposes . . . .

(3) That on the death of the donee or in the event of his share or interest being seized in execution for his debts other than those hereinbefore provided for, the same shall devolve subject to any existing mortgage, hypothecation, tender or charge as hereinbefore provided, on the children of the said donee in equal shares . . . . or failing issue then in equal shares on his brothers, S. and M.

In 1936 N. and his wife, calling themselves lessors, executed indenture 1 D1 in favour of the first defendant who is described as lessee.

By it the lessors let to the lessee an undivided one-third of the property for seven years from July 1, 1936. N. died on January 21, 1937, without issue.

Held, that the deed created a valid *fidei commissum.*

Held, further, that the lease was bad as being repugnant to P1 and that the lessee was not entitled to claim any rights under it as against the plaintiffs, the heirs of N.

THE plaintiffs instituted this action for declaration of title to an undivided one-third share of a property in St. Paul's Ward, Colombo. The facts are stated in the head-note. The question to be decided was whether the first defendant was entitled to possess the premises under the lease 1 D1 against the plaintiffs, who claimed under P1. The District Judge held in favour of the plaintiffs.

C. Thiagalingam (with him *J. A. L. Cooray*), for first defendant, appellant.—The deed P1 does not create a *fidei commissum.* To create a *fidei commissum,* there should be an absolute prohibition against alienation—either express or implied. In the present case, the donee is told at one stage that he cannot alienate the property and at a later stage he is given the discretion to alienate it in a particular manner. "It should never be left to the option of the fiduciary to decide whether restitution should be made or not. To make this clearer we must preface the remark that it cannot be considered a *fidei commissum* when it is left to the discretion of the person whom the testator thinks of binding whether he is willing to give or restore, but that it is a good *fidei commissum* when it does not rest in the discretion of the person to whom the request is made to decide whether or no he shall make the restitution at all . . . ."—*Voet 35. 1. 29* (*Mc Gregor's Translation, p. 76*). See also *Kirthiratne v. Salgado*[1] and *Boteju et al. v. Fernando et al.*[2]

At the most, P1 contains a *fidei commissum residui—Lee on Roman Dutch law* (*3rd ed.*), *376.* The lease, therefore, prevails in any event.

The word "charge" in condition 3 of P1 has a wide meaning and would embrace a lease contemplated in condition 1. See meaning of "charge" in *Stroud's Judicial Dictionary.*

Although the lease 1 D1 is for a period of seven years, in view of condition 1 of P 1, it is good *pro tanto* for five years. There is no penalty or forfeiture imposed in P1 in the event of a lease exceeding the prescribed period. The lease is bad, therefore, only for the period beyond five years—*Saidu v. Samidu*[3]; *Sitty Naima v. Gany Bawa*[4].

H. V. Perera, K.C. (with him *E. B. Wikremanayake* and *S. Mahadeva*), for plaintiffs, respondents.—The lease is, in fact, for seven years and is, therefore, wholly bad inasmuch as it has exceeded the period for five years prescribed by P1. The term of five years fixed by condition 1 of P1 is an essential term of the *fidei commissum.* The time or term of letting is an essential part of a lease. The whole of the lease under consideration is repugnant to P1—*Jayawardene v. Jayawardene et al.*[5]; *3 Maasdorp* (*4th ed.*), p. *227.*

The word "charge" in condition 3 of P1 is *ejusdem generis* with "mortgage", "hypothecation", and "tender". It has never been used to include a lease. See meaning of "charge" in *Salmond on Jurisprudence* (*8th ed.*), p. *464,* and *Misso v. Hadjear*[6].

P1 is a conditional *fidei commissum.* A fiduciary may be given a limited power of alienation. Provided that "the three certainties" are present, any condition may be imposed and can be given effect to—*Vol. 2 of Burge's Colonial Law* (*1st ed.*) *p. 166; Steyn on Wills, p. 207; 1 Maasdorp* (*1903 ed.*), *p. 163; Sande on Restraints, p. 296.*

H. W. Thambiah, for second defendant, respondent.

C. Thiagalingam, in reply.—It is one of "the three certainties" referred to by Sande, and in the text books, that is lacking in this case.

[1] *(1932) 34 N. L. R. 69.*
[2] *(1923) 24 N. L. R. 293.*
[3] *(1922) 2 N. L. R. 506.*
[4] *(1930) 32 N. L. R. 55.*
[5] *(1939) 14 C. L. W 13.*
[6] *(1916) 19 N. L. R 277 at 278.*

It is a contradiction in terms to say of a donee who is allowed to put away the property that he is prohibited absolutely from alienating it.

A conditional *fidei commissum* is one where the fideicommissary is called to the inheritance on the happening of an event or in the event of a contravention.—*Voet 36.1.4; Steyn, p. 208; Lee p. 316.*

In the present case this question does not arise.

"Charge" must be given the dictionary meaning. See *Oxford Dictionary.*

Cur. adv. vult.

September 29, 1939. WIJEYEWARDENE J.—

The plaintiffs instituted this action for declaration of title to an undivided one-third of a property in St. Paul's Ward within the Municipality of Colombo.

By deed P2 of June, 1917, Namasivaya Modeliar Ratnasabapathy gifted the property in question and other properties to his three sons, Nagasen, Sathanandan (first plaintiff), and Muttusamy (second plaintiff) in equal shares, reserving to himself the right to revoke the gift and subject, *inter alia,* to the following conditions:—

(1) "That each donee shall possess the share or interest hereby gifted to him in the said several premises during the term of his natural life and take and enjoy the issues rents and profits thereof but shall not be at liberty to sell or mortgage his said share or interest or in any other manner alienate or encumber the same or lease the same for a term of more than five years at any one time or execute a lease thereof before the expiry of any lease already existing."

(2) "That it shall be lawful for any of the donees to tender the share or interest hereby gifted to him in the said several premises or any of them as security by him upon his appointment to any situation under the Crown or otherwise for the faithful performance of his duties therein notwithstanding the prohibition against alienation or encumbrance hereinbefore contained."

(3) "That on the death of each donee or in the event of his share or interest in the said several premises being seized in execution by any Fiscal for his debts as aforesaid the same shall devolve absolutely on the children of the said donee in equal shares and the share that shall or may have devolved on any deceased child of the said donee if alive shall devolve on his or her issue and failing issue of the said donee his share or interest shall devolve equally on the two other donees or their issues *per stirpes.*"

Nagasen entered the service of Hull, Blyth & Company (Colombo), Limited, and experienced some difficulty in persuading the lawyers of the Company to accept the properties donated to him under P2, as good security for the performance of his duties, in view of the conditions set out in the deed. Nagasen requested his father to revoke P2 and re-gift the property to him, "subject to the necessary conditions as will enable him to effect a valid tender and hypothecation of the said properties to the said Hull, Blyth & Company (Colombo), Limited", and the

donor thereupon revoked P2 and executed P1 of June 29, 1928 in compliance with the request made to him. (*Vide* recitals in P1.)

By P1 the donor gave to Nagasen the undivided 1/3 share of the properties gifted to him under P2, by way of an irrevocable gift subject to certain conditions:—

(1) "That the donee shall only possess the properties hereby gifted to him during the term of his natural life and take and enjoy the issues rents and profits thereof but shall not be at liberty to sell or mortgage (except as is hereinafter provided) or in any other manner alienates or encumber the same or lease the same for a term of more than five years at any one time or execute a lease thereof before the expiry of any lease already existing."

(2) "That the properties hereby gifted to the said donee shall in no event be liable (save as is hereinafter excepted) for his debts or for seizure on account of any debts and in the event of any such seizure the donee shall cease thereafter to have any right to or claim whatsoever in the said properties and the same shall immediately devolve absolutely on his heirs in reversion (hereinafter referred to), provided however and it is hereby expressly declared that it shall be lawful for the donee to mortgage hypothecate and tender the said properties or any of them or part thereof as security by him for all and each or any of the following purposes . . ."

(3) "That on the death of the donee or in the event of his share or interest in the said premises being seized in execution for his debts other than those hereinbefore provided for the same shall devolve subject to any existing mortgage hypothecation tender or charge as hereinbefore provided for on the children of the said donee in equal shares and the share that shall or may have devolved on any deceased child of the said donee if alive shall devolve on his or her issue or failing issue then in equal shares on his brothers Ratnasabapathy Sathanandan and Ratnasabapathy Muttusamy to their issues *per stirpes.*"

In 1936, Nagasen, his wife and one Charavanamuttu calling themselves lessors executed the indenture 1 D1 in favour of the first defendant who is described as the lessee. By the indenture, the "lessors" let to the "lessee" an undivided 1/3 of the St. Paul's Ward property for seven years from July 1, 1936, in consideration of a sum of Rs. 3,100. Some of the terms and covenants of the indenture are:—

(i.) That the "lessors" shall "see that the monthly rent is duly and promptly paid to the lessee by the tenant for the time being" of the leased premises.

(ii.) That in the event of the tenant failing to pay to the lessee the monthly rent of Rs. 80 "the lessors jointly and severally agree to pay the said sum of Rs. 80 or any portion thereof as may remain unpaid by the tenant with interest thereon at 15 per cent. per annum.

(iii.) That in the event of the said leased premises being vacant the period of the lease is to be extended to enable the lessee to make good the consequential loss.

(iv.) That if the monthly rent is over Rs. 80 the excess shall be credited to the lessors.

Nagasen died on January 21, 1937, without any issue.

The question that has to be decided is, whether the first defendant is entitled to possess the premises under the lease 1 D1 against the plaintiffs who claim under P1. The District Judge held in favour of the plaintiffs and the first defendant has appealed from this judgment. The second defendant who is made a respondent to the appeal claims to be a monthly tenant under the first defendant.

The Counsel for the first defendant-appellant argued before this Court—

(i.) that the deed did not create a *fidei commissum* and that the lease for seven years was good against the plaintiff;

(ii.) that even if the deed created a *fidei commissum*, the *fidei commissum* was more or less of the nature of a residuary *fidei commissum* and that the property would devolve on the plaintiff subject to the "charge" of a lease of five years, that being the period for which Nagasen was permitted to lease the property.

The first point does not appear to present much difficulty. The deed P1 designates the persons on whom the property should devolve, and states that such devolution should take place either on the death of the donee or the seizure of the property by the Fiscal, if the property is seized by the Fiscal during the lifetime of the donee for any debts save those specifically mentioned. The property that would devolve would be the property mentioned in the deed, subject to such transactions as have been specifically provided for. I hold that the deed creates a good *fidei commissum*.

The second point is not free from difficulty. The Counsel for the appellant argues that, even if the deed creates a *fidei commissum*, the plaintiffs can claim according to condition 3 of P1 only the undivided 1/3 share of the property subject to any existing "mortgage hypothecation tender or charge" as provided for under that condition. He contends that the words "mortgage", "hypothecation", "tender" in condition 3 refer to the transactions contemplated by condition 2, which are expressly referred to by these terms and that, therefore, the word "charge" could only have been intended to refer to the leases mentioned in condition 1. He concedes that 1 D1 which he calls a lease for seven years has been executed in contravention of condition 1. but states that 1 D1 should be regarded as a valid lease for five years. and that, therefore, the first defendant could under the joint operation of conditions 1 and 3 of P1 claim to possess the property against the plaintiffs for five years from July 1, 1936. This is a very attractive argument and should be examined in detail.

It is best to examine at the very outset the terms "hypothecate". "mortgage" "tender" and "charge". Under the Roman law the term *Pignus* was used to signify "a right created over a thing in favour of a creditor by which he was allowed to possess the thing and to

sell it in order to recover the debt from the price." The *Jus Pignoris* of the Roman-Dutch law embraced two divisions, *Pignus* and *Hypotheca*. In the case of *Pignus* the subject-matter of the transaction was delivered into the possession of the creditor, while in the case of *Hypotheca* the debtor remained in possession of the property and the creditor had only a *jus in re* for the satisfaction of his claim. The real distinction between the two classes of transactions lay in the fact that in the former the creditor got possession of the property while in the latter the possession remained with the debtor (*Voet 20.1.1*). The term "mortgage" was not known to the Civil law but was an invention of the Middle Ages. This term "mortgage" used in a comprehensive sense applied equally to *Pignus* and *Hypotheca* (Berwick's *Translation of Voet, page 269 note*). It is difficult to ascertain the special significance of the word "tender" in the context in which it occurs. It may be that the donor and donee of P1 contemplated the possibility of an agreement under which the employers of Nagasen would be given the properties to possess during the term of his employment or it may be that they were thinking of a usage in mercantile circles in pursuance of which a debtor deposited his title deeds with a creditor though, of course, under our law such a deposit would not create a legal obligation in respect of immovable property (*Vanderstraaten's Reports 267*). It is perhaps more probable that the draftsman of P1 was influenced by the use of the word "tender" in condition 2 of P2—"it shall be lawful for each of the donees to *tender* the share . . . . hereby gifted . . . . as security by him upon his appointment . . . . "—and adopted the word without attaching any special meaning to it when he drafted P1. It appears to me that the draftsman of P1 could have conveniently embraced all the transactions intended to be permitted by condition 2 by the use of the term "mortgage". He seems to have used the words "mortgage" "hypothecation" "tender" without a clear appreciation of the different transactions which these terms describe in strict law and the use of these words merely reveals an attempt on his part to describe by certain terms that occurred to him the transactions known to our law as mortgages. This view makes it highly probable that when the draftsman proceeded to use the terms "mortgage" "hypothecation" "tender" and "charge" in condition 3 he was not intending thereby to refer to separate and distinct transactions but only to the transactions known to our law as "mortgages". In other words, he used in condition 3 a group of four words to describe one kind of transaction just as he used a group of three words to describe the same kind of transaction in condition 2, though, in fact, he could have very well described these transactions by the single term "mortgage". If, on the other hand, he selected his words in condition 3 carefully and intended that the terms "mortgage" "hypothecation" "tender" should refer only to the transaction previously described by him in condition 2, one would have expected him to exercise the same amount of care and use in condition 3 the term "lease" instead of "charge" in referring to the transaction already described by him as a lease in condition 1, if he intended to provide by condition 3 that the property devolving on the reversioners should be subject to the "mortgage" "tender" and "hypothecation"

in condition 2 and "lease" in condition 1. Though perhaps it may not be quite possible to say that the term "charge" cannot be used in reference to a lease it is undoubtedly an unusual word to be so used. I have, therefore, come to the conclusion though, not without some hesitation, that by using the term "charge" in condition 3 the donor never intended to refer to leases and that the whole group of words "mortgage, hypothecation, tender or charge" was used by him to refer to transactions commonly known as "mortgages" and mentioned in condition 2. A comparison of P2 with P1 with which it is clearly connected seems to support this view. Condition 3 of P2 provided that the property gifted should, on the death of a donee or a seizure by the Fiscal, devolve absolutely on the reversionary heirs and thereby rendered somewhat precarious the posi ion of the mortgagees in whose favour the donee might have executed a mortgage bond under condition 2. It was, no doubt, the difficulty created by condition 3 that made the employers of Nagasen refuse to accept the security tendered by him unless P2 was revoked. The revocation of P2 was accordingly effected by P1 which aimed at securing the position of the employers of Nagasen by providing that the property devolving on the reversioners should be subject to such mortgages. Is it possible to credit the donor further with an intention to safeguard the lessees whom he had not protected by P2 and about whose interests no question appears to have arisen at the time of the execution of P1?

It is not sufficient for the appellant's Counsel to argue that "charge" in condition 2 means "lease" but he should go further and establish that 1 D1 is a lease as contemplated by condition 1. A study of the covenants of 1 D1, which I have set out earlier, shows that 1 D1 is a most unusual kind of document. It appears to me to partake more of the nature of a mortgage bond than an indenture of lease. I think that the appellant who wanted some security for the repayment of his money found that he could not obtain a valid mortgage from Nagasen and thought that by making the document 1 D1 appear as a lease he could safeguard his interests. If 1 D1 is in fact a mortgage, then it is a mortgage prohibited by P1, and the property in that case would devolve on the plaintiffs independent of the obligations created by 1 D1. Moreover, even if 1 D1 could be considered as a lease, is it a lease which the donor authorized the donee to execute by P1? By condition 1 the donor prohibited the donee from leasing the property for a term of more than five years. It was an express prohibition against leases subject to the exception that the donee could lease the property for five years or less. I do not think the word "charge" should in any event be given such an extensive interpretation as to include any leases other than those covered by the restricted authority given by condition 1 and should not be made applicable to a lease, which is in fact a lease for seven years and which could only be regarded as a lease for five years by a process of special reasoning adopted to meet the exigencies of the present case. The prohibition against a lease for more than five years was, I think, inserted in P1 primarily for the benefit of the donee whom the donor wanted to protect against the consequences of an improvident lease for a long term which would result in the donee getting a reduced income

during his lifetime. It is difficult to gather from P1 any intention on the part of the donor to protect against the reversionary heirs a lessee who has taken a lease prohibited by him. I hold, therefore, that the appellant is not entitled to claim any rights under 1 D1 against the plaintiffs.

I would dismiss the appeal and order the appellant to pay the costs of the first respondent. The second respondent will not be entitled to any costs.

NIHILL J.—I agree.

Appeal dismissed.