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1970 *Present :* **H. N. G. Fernando, C.J., and Tennekoon, J.**

K. M. A. MUDIYANSE, Appellant, *and* IMIHAMILLAGE APPUHAMY and 9 others, Respondents

S. C. 83/68 (F)—D. C. Ratnapura, 6240

Fideicommissa— Donation—Creation of an outright gift in the operative clause— Provision for gift over in the habendum—Effect of such inconsistency—Whether fideicommissum can be inferred—Effect of absence of prohibition against alienation.

The operative clause of a deed of gift executed by the donor in favour of his wife effected an outright gift and did not contain any prohibition against alienation by the donee. At the same time the *habendum*, although it commenced with the declaration that " the donee or her heirs, administrators or assigns shall and may quietly possess " the gifted property, contained the words that, on the donee's death, the donor's " children then living shall become entitled to the aforesaid properties ".

Held, that the deed did not create a fideicommissum. The declaration in the *habendum* that " the donee or her heirs, executors, administrators or assigns shall and may quietly possess " was a confirmation of the apparent intention of the operative clause that the heirs or assigns of the donee could possess the lands. Nor was there any restriction stated as to the duration of such possession, i.e., by any such language as " during the life-time of the donee ". The provision for a gift over in the *habendum* was merely inconsistent with the earlier part of the deed and did not negative with certainty the earlier conveyance of the full *dominium* to the donee and the earlier reference to the rights of her heirs and assigns.

APPEAL from a judgment of the District Court, Ratnapura.

H. W. Jayewardene, Q.C., with *G. S. Marapana* and *G. M. S. Sameraweera*, for the 1st defendant-appellant.

H. Rodrigo, with *Asoka Abeysinghe*, for the plaintiffs-respondents.

Cur. adv. vult.

May 10, 1970. H. N. G. FERNANDO, C.J.—

The plaintiffs' claim against the 1st defendant-appellant in this case depended solely on the question whether the deed P1 of 1897 by one Mudalihamy, by which he donated a 2/12 share of a land to his wife

Kirimenika, created a valid fideicommissum in favour of the children of the donor to be operative upon the death of the original donee.

The operative clause in P1 was the following :—

"Know all Men by these presents that I, Kalu Aratchillage Mudalihamy of Kandangoda in Uda Pattu of Kuruwita Korale for and in consideration of the love and affection, in order to get help and favours in future and for other various good reasons do hereby donate as a gift unto my beloved wife Eratne Paranagamage Kirimenike of Kandangoda aforesaid so that she will become entitled to the properties hereto, of the value of Rupees Five Hundred (Rs. 500) of lawful currency of Ceylon after my death."

This clause was followed by a description of the lands which were the subject of the donation. Thereafter there was the *habendum* :—

"Therefore, in respect of the aforesaid properties hereby donated no person whoever can make any dispute whatsoever on my death and thereafter on my death, Eratne Paranagamage Kirimenika, the donee aforesaid or her heirs, executors, administrators or assigns shall and may hold and quietly possess same and on her death my children then living shall become entitled to the aforesaid properties."

The grounds on which the learned trial Judge decided that the deed created a fideicommissum are stated in his judgment thus :—

"The deed P1 clearly provides that after the death of the donee, the donor's children then living shall become entitled to the properties. It is clear that the gift was not absolute to the donee. It is significant that the deed provides that the donee shall and may hold and quietly possess the properties. There is no power of disposal or alienation given to the donee indicating that the donor's intention was that the properties shall be possessed by the donee during her life-time and shall devolve on the surviving children of the donor after the donee's death."

The judgment takes no account of two important matters : *first* that the operative clause effects an outright gift to Kirimenike and contains no hint of any intention to impose a condition or restriction fettering the donee who (it is declared) "will become entitled to the properties" ; *second* that the *habendum* commences with the declaration that "the donee or her heirs, executors, administrators or assigns shall and may quietly possess" the lands. There is here confirmation of the apparent intention of the operative clause that the heirs or assigns of Kirimenike can possess the lands. Nor is there any restriction stated as to the duration of such possession, i.e., by any such language as "during the life-time of the donee". Thus the deed prima facie conveys to the donee the *plena proprietas*. No doubt the habendum continues to state that on the donee's death "my children shall become entitled to the properties". But at best this provision is merely inconsistent

with the earlier part of the deed ; it does not negative with certainty the earlier conveyance of the full *dominium* to the donee, and the earlier reference to the rights of her heirs and assigns. I cannot agree with the learned trial Judge that " it is clear that the gift was not absolute ".

Counsel appearing for the plaintiffs in appeal referred to decisions of this Court holding that conveyances to a " donee, his heirs, executors administrators or assigns " should not necessarily be construed as being absolute if other provisions make it clear that the property will pass to other designated persons on the death of the donee. In many of these cases [1], however, the decisions depended on the existence of an express prohibition against alienation by the donee. They are of no assistance in the construction of the deed P1 which does not contain any such prohibition.

Counsel relied also on *Perera v. Perera* [2] (20 N.L.R. 463) which held that " express words of restraint (against alienation) are not necessary to create a fideicommissum ". But in that case that Court was able to decide without difficulty that the donor intended that his children should only have a limited interest subject to a restraint against alienation. This conclusion was reached for reasons thus stated in the judgment of Bertram C.J. :—

" In the first place, he does not merely give directions for the devolution of shares given to his children on their deaths. He indicates specifically in the operative words of the gift that he intends that the property shall descend to the direct descendants of these children. He does that by limiting the ordinary words of conveyancing, " heirs, executors, administrators, and assigns ", to a specific class, namely, children and grandchildren. In the second place, he recites the fact that he is taking the measures which he talks of in the deed, partly to prevent his erring daughter and her mother from doing away with his property in an improper way, and partly also for preventing his remaining three children from falling into vice in the future. He appears to contemplate that he will preserve them in virtuous courses by giving them only a limited interest in the property, and by providing that it shall devolve on their deaths upon their lawful children. His directions would be rendered nugatory if his children could dispose of for money the property so left to them.

Finally, the provision he makes with regard to the marriage of his daughter seems to me to be conclusive. He declares that unless she contracts a marriage which is approved of by the authority he mentions, the donation to her shall be wholly void. This seems to me quite inconsistent with the idea that his daughter should have a free power of disposing of the share given to her. "

[1] *(1924) 26 N. L. R. 181 ; (1914) 17 N. L. R. 129 ; (1932) 34 N. L. R. 46 ; (1914) 18 N. L. R. 174.*

[2] *(1918) 20 N. L. R. 463.*

Indeed it appears that the donor's purpose in executing the deed of gift was to avert the possibility that his children might otherwise be the heirs upon his death intestate.

I do not find in the deed P1 which we have here to construe any of the indications of a restraint against alienation which were present in the deed construed in *Perera v. Perera*. Moreover, in that case even the reference to "heirs and assigns" was immediately qualified by the limitation "as children and grandchildren", whereas in P1 the donor has in fact used what Bertram C. J. called "the ordinary words of conveyancing".

The last of the cases to which I need refer is that of *Udumalevvai v. Mustapha* [1] (34 N. L. R. 46). The ground principally argued was that conceptions of the Roman Dutch Law cannot be incorporated into Muslim deeds, and this ground was rejected by the Court. On the question whether the deed created a fidei commissum, the Court followed *Perera v. Perera* in holding that an express prohibition against alienation is not necessary. In holding that "the clear intention was that each son's share if he died issueless was to vest in his brothers", the Court did not consider it necessary to refer in detail to the relevant provisions of the deed. The restraint against alienation was easily implied from the expressed intention to benefit the issue of the donees, or failing issue the surviving donees, which intention was stated in the operative clause of the deed. Akbar J. held that this clear intention was not affected by the word "assigns" appearing at the end of the deed. In the instant case, however, the reference to the passing of the property on the death of the donee occurs only at the end of the deed P1, which has earlier conveyed title to "the donee her heirs executors administrators and assigns" without limitation.

I hold for these reasons that the deed P1 did not create a fideicommissum. The judgment and decree under appeal are set aside. Decree will be entered in the terms set out in paragraphs (1) and (2) of the judgment of the District Judge (at p. 39), and in addition for the payment by the plaintiffs to the 1st defendant of the costs of this appeal.

TENNEKOON, J.—I agree.

Judgment and decree set aside.

[1] *(1932) 34 N. L. R. 46.*