1967 *Present* : T. S. Fernando, J., and Tennekoon, J.

MARY (Rev. Mother of Good Counsel), Appellant, *and* Mrs. A. A. KURERA, Respondent

S. C. 194/66(F)—D. C. Negombo, 677/L.

Fideicommissum—Use of words "heirs executors administrators and assigns" in apposition to the fiduciary and the fideicommissaries—Effect—Prohibition against alienation—Meaning of nude prohibition.

The words "heirs executors administrators and assigns" in apposition to the fiduciary do not derogate from the creation of a valid fideicommissum. They serve only to vest the *plena proprietas* as a preliminary to creating a fideicommissum. But the *plena proprietas* so vested in the fiduciary must be clearly and unambiguously qualified elsewhere in the deed by the presence of words disclosing an intention, and prescribing the elements necessary, to create a valid fideicommissum.

Similarly, the words "and their heirs executors administrators and assigns" in apposition to the fideicommissaries do not derogate from the creation of a fideicommissum in favour of the children of the fiduciary.

A fideicommissum which clearly designates the fideicommissaries is not any the less valid by reason of the absence of a provision that, in the event of a breach of the prohibition against alienation, the property will vest in the fideicommissaries. "All that the law requires is a prohibition against alienation (express or implied) and a provision that after a specified time or on fulfilment of some condition the property should go over from the first taker to a second beneficiary, who must of course be clearly designated."

APPEAL from a judgment of the District Court, Negombo.

K. C. de Silva, for the defendant-appellant.

J. W. Subasinghe, for the plaintiff-respondent.

Cur. adv. vult.

August 2, 1967. TENNEKOON, J.—

The question that arises in this case is whether Deed No. 8280 of 24th November 1916 (P1) created a valid fideicommissum. The Defendant-Appellant who claims title to the land dealt with in P1 on Deed of Gift No. 1246 of 12th December 1957 from the donee on P1 contends that P1

does not create a valid fideicommissum, while the Plaintiff-Respondent supports the contrary view. The Deed P1 (according to the translation from the original Sinhalese, produced by the plaintiff) stated (*inter alia*)—

" We, Martheenu Filisa Miral and husband Diago Nikulan Mirando .....hereby gave granted donated
"A" conveyed and assigned as an absolute gift which cannot be cancelled the premises described herein below.....*unto the said donee and his heirs executors, administrators and assigns.*

.....

Whereas, We the said donors hereby gave full power unto the said donee Nikulan Santiago Mirando to hold from today the said premises and everything belonging thereto hereby donated, but not to sell, donate, exchange, mortgage or lease out from (for) a period
"B" exceeding three years and sub lease before the expiration of the lease already given or to alienate in any other manner and that the said donee can or may possess the same subject to the regulations under mentioned, and *that after his death his children* and *their heirs executors administrators and assigns shall hold and possess uninterruptedly* for ever or deal with the same as they desire."

The two extracts from the deed are marked " A " and " B " for convenience of reference. Counsel appearing for the appellant sought to support his contention on two grounds. The first was that there is a conflict between paragraph " A " (where the property is granted to " the said donee and his heirs executors and administrators assigns ") and paragraph " B " where the donor having prohibited the donee from alienating the property goes on to say " and that after his (donee's) death his children, and their heirs executors and administrators and assigns shall hold and possess uninterruptedly for ever or deal with the same as they desire ". It is contended that the words in paragraph " A" and paragraph " B " are so irreconcilable that it is impossible to say what the intention of the donor was as to the persons to be benefited by the prohibition against alienation. Counsel relied on three cases *Rajapakse Estates Co. Ltd. v. Dulsin* [1]; *Amaratunga v. Alwis* [2], *Appuhamy v. Mathes* [3]. The first of these was the case in which this Court held that the Deed failed to create a valid fideicommissum as the beneficiaries were not clearly designated. It is unnecessary to examine the actual clauses which were considered in that case as they have no similarity at all to the ones under consideration in this case.

In *Amaratunga's case* there was a clear prohibition against alienation but a failure to designate with clarity the persons to be benefited. The words used were " the children and heirs descending from *her* (*the donee*)

[1] *(1965) 69 N. L. R. 287.* [2] *(1939) 40 N. L. R. 263.* [3] *(1944) 45 N. L. R 259.*

and authorised persons such as executors administrators and assigns " ; the intended beneficiaries were twice described in these or very similar words in different parts of the deed.

It will be noticed here that the fideicommissaries are designated as the children *and* heirs executors administrators and assigns *of the donee.* Since the class of persons so designated was too vague and general, Soertsz J. held that the deed did not create a valid fideicommissum.

In *Appuhamy's case* (supra) there were two clauses in the deed, each of which postulated the death of the donees as the event upon which the gift-over was to take place and then went on, in one clause, to designate the beneficiaries as the *children of the donees* and in the other to designate them as the *heirs executors administrators and assigns of the donees.* These are the two provisions which were—if I may say so with respect, quite rightly—held to be irreconcilable and as completely obscuring the intention of the donors as to the persons to be benefited.

The instant case is clearly distinguishable. There is in the first place a gift to N. S. Mirando (the donee). The vesting clause (Para " A ") no doubt used the words " the donee *and his heirs executors administrators and assigns* ". This is not a clause in which the donor is seeking to designate the beneficiaries ; that is to come later ; as Nagalingam J. said in *Jayatunga v. Ramasamy Chettiar* [1], the use of the words " heirs executors administrators and assigns " *in apposition to the fiduciarius* is for the purpose of vesting the *plena proprietas* as a preliminary to creating a fideicommissum and their use does not derogate from the creation of a valid fideicommissum. With this statement of the law I respectfully agree, subject to the qualification (which indeed is implied by Nagalingam J. but not made sufficiently explicit) that the *plena proprietas* so vested is elsewhere in the deed clearly and unambiguously qualified by the presence of words disclosing an intention, and prescribing the elements necessary, to create a valid fideicommissum. While it is true that fideicommissa have always been regarded as odious in the eye of the law and must be strictly construed, that is no reason why the courts should be astute to defeat the intention of the donor or the testator, if that can be clearly ascertained on a reading of the instrument as a whole.

There is then the clause reproduced above in para " B ". This clause clearly—(i) prohibits alienation, (ii) prescribes the condition or the event upon which the gift-over is to take place, viz, the death of the donee, and (iii) designates the persons to be benefited as " the children (of the donee) and *their heirs executors administrators and assigns*". The only question that arises on this clause is whether the fideicommissaries are designated with sufficient clarity. It is not contended by the respondent, nor is the deed open to the construction, that the property is to continue to be under the bond of fideicommisum even when the

[1] *(1950) 52 N. L. R. 171 at 174.*

children of the donee have taken over upon death of the donee. There is nothing in the deed to suggest that the donor intended that the prohibition against alienation should also bind the *children* of the donee; if that were the case it might have been relevant to inquire whether fideicommissaries *vis a vis* the children, as fiduciaries, have been sufficiently clearly designated by the words " their (the children's) heirs executors administrators and assigns ". It is however clear that the bond of fideicommissum was intended by the donor to last only up to the death of the donee and that the children were to take the property free from that incumbrance. In that context the description of the fideicommissaries as the " children and their heirs executors administrators and assigns " is an accurate designation of the children as the only persons to take over upon the death of the fiduciary. The expression " and their heirs executors administrators and assigns " refers to a class of persons who can take only after, and under or through, the children who themselves are not bound by a prohibition against alienation. As Nagalingam J. said in *Jayatunga's case* referred to above " A similar reasoning would and should apply even in regard to the grouping of these words ('their heirs executors administrators and assigns') *in relation to the fideicommissaries*..... The result would have been the same if the donors had omitted the words 'their heirs executors administrators and assigns ' from the deed and stated that on the death of the donee her children should have the right to possess the properties, for under our law a grant to X is a grant to X, his heirs executors administrators and assigns".

Accordingly the first ground on which the appellant contended that there was no valid fideicommissum created by P1 fails.

Counsel for the appellant next contended that P1 does not create a valid fideicommissum, for the reason that it does not provide that in the event of a breach of the prohibition against alienation the property will vest in the beneficiaries. Counsel was unable to cite any authorities in support of the proposition that every valid fideicommissum must contain a provision to the effect that upon breach of the prohibition against alienation the property will vest in the fideicommissaries. Indeed all that the law requires is a prohibition against alienation (expressed or implied) and a provision that after a specified time or on fulfilment of some condition the property should go over from the first taker to a second beneficiary, who must of course be clearly designated. Many of the deeds that have come up for consideration in our courts and been construed as creating valid fideicommissa did not contain any provision to the effect that upon breach of the prohibition against alienation the fideicommissaries were to take the property. In all, or nearly all, of them the provision has been, as in this case, that the fideicommissaries take over not upon breach of the prohibition against alienation but upon the death of the fiduciary. Counsel for the appellant

cited in support in his contention a passage from the judgment of My Lord the Chief Justice (then S.P.J.,) in the case earlier referred to—*Rajapakse Estate Co. Ltd. v. Dulsin* [1]—to the following effect :—

" I cannot but express dismay at the fact that the District Judge without any reference to authority, formed the opinion that (P3) created a fideicommissum. The prohibition against alienation, which was the only feature of the deed which could lead to that opinion, was nude, and inoperative to create a fideicommissum, unless the persons who were to take in the event of a breach of the prohibition were clearly designated ."

The only issue in that case was whether fideicommissaries were designated with sufficient clarity ; there was no controversy as to whether the deed failed to create a valid fideicommissum by reason of the absence of a provision to the effect that in the event of breach of the prohibition against alienation the fideicommissaries were to take over. In the circumstances I do not think the judgment can be taken as enunciating such a principle of law. What the law requires is that a valid fideicommissum must contain a provision that after a specified time or the fulfilment of some condition the property should go over to the fideicommissary ; that requirement is satisfied in this case.

Accordingly the appellant's second point also fails and the appeal is dismissed with costs.

T. S. FERNANDO, J.—I agree.

Appeal dismissed.