[IN THE PRIVY COUNCIL]

1961 ***Present:*** **Viscount Simonds, Lord Radcliffe, Lord Hodson, Lord Guest, Mr. L. M. D. de Silva**

K. NADESAN, Appellant, *and* V. RAMASAMY, Respondent

Privy Council Appeal No. 30 of 1960

S. C. 571—D. C. Point Pedro, 4187

Partition action—Corpus subject to fidei commissum—Effect of partition decree on the rights of a subsequent fidei commissarius—Claim by a fidei commissarius against his fiduciarius or his successors in title—Conclusive character of a partition decree—Partition Ordinance, No. 10 of 1863 (Cap. 56), ss. 2, 9.

Where property burdened with a fidei commissum under a deed of gift has been partitioned under the Partition Ordinance No. 10 of 1863, such partition has not the effect of destroying the fidei commissum which thereafter attaches to the land allotted in severalty to the fiduciarius or his successor in title, even though no mention has been made of his capacity in the partition decree. Section 9 of the Ordinance has no bearing upon the rights of fidei commissarii who have no present right or interest in the land which is being partitioned. They are not owners or co-owners to whom Section 2 can apply.

APPEAL from a judgment of the Supreme Court delivered on the 2nd November 1956.

A deed of donation relating to an undivided fourth share of a certain land created a fidei commissum in favour of the descendants of the donee and at the same time empowered the donee, if necessary, to dispose of the land by way of donation or dowry to his descendants. The deed was executed on the 19th March 1928. On the 6th September 1934 the fiduciarius, in purported exercise of his power, made an irrevocable donation of the whole property to a daughter. After a series of transactions the fiduciarius became the purchaser of it on the 16th November 1936. He subsequently sold it on the 11th October 1941 to one Vythilingam. The latter instituted proceedings for partition on the 25th June 1942 and in due course a partition decree was entered on the 13th June 1944 under which Lot 3 was allotted in severalty to Vythilingam. No mention was made in the decree of the fidei commissum created by the deed of 1928. On the 23rd August 1945 Vythilingam sold Lot 3 to the present respondent.

The plaintiff-appellant, who had been born in 1926, was one of the ten children of the fiduciarius living at his death in January 1948. As a fidei commissarius he instituted the present action in January 1952 claiming from the respondent a declaration of title to an undivided

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tenth share of Lot 3. He proved that the fiduciarius had acted fraudulently with a view to his own advantage when he made the donation to his daughter on the 6th September 1934. He proved also that the respondent was not a purchaser for value without notice. The respondent alleged, however, that the effect of Section 9 of the Partition Ordinance, 1863, which was then in force, was to confer on him, by the partition decree of the 13th June 1944, an absolute and indefeasible title whether or not the fiduciary or any purchaser from him had been guilty of fraud.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena*, for the plaintiff-appellant.

Dingle Foot, Q.C., with *R. K. Handoo* and *Dick Taverne*, for the defendant-respondent.

Cur. adv. vult.

May 8, 1961. [*Delivered by* VISCOUNT SIMONDS]—

In this appeal from a judgment and decree of the Supreme Court of the Island of Ceylon the appellant seeks to have restored a judgment in his favour given by the District Court of Point Pedro on the 2nd April, 1954.

The appellant as plaintiff claimed a declaration of title to an undivided tenth share of certain land which had itself been allotted out of a larger extent of land in the circumstances that will be stated to the predecessor in title of the respondent. He claimed also ejectment of the respondent and damages.

The appellant's father, Nagamattu Kanagasunderam, was one of four sons of Arumugam Nagamattu who, by deed of the 19th March, 1928, donated to him subject to a fidei commissum in favour of his descendants one fourth share of certain land known as Sadai-jakadu in the district of Jaffna. The fidei commissium was in these terms :—

> " I declare that the donee should not encumber the said lands by way of documents such as any transfer, otty, mortgage, donation and dowry etc. or encumber the same in any other way or alienate the same but possess the same during his lifetime and die leaving behind the same to devolve on his descendants but if found necessary he may dispose the same by way of donation or dowry to his descendants and will have no right to make these properties or property or any part of the properties or property bound for any kind of debts and would not be liable even for the penalties of Courts."

The appellant was one of the ten children of his father living at his death in January 1948. The father will for brevity's sake be called " the fiduciary ".

On the 6th September, 1934, the fiduciary in purported exercise of the power contained in the recited deed made an irrevocable donation of the same land to his daughter Vadivelambikai. The donation was expressed

to be made in consideration of the natural love and affection which he bore to her and for diverse other causes and considerations thereunto moving him. The validity of this gift is of primary importance. The discussion of it will be deferred until the rest of the story has been briefly told.

On the same 6th September, 1934, Vadivelambikai and her husband in consideration of the sum of Rs. 5,000 conveyed the same land to her grandfather Ponniah Mailerumperumah absolutely. It appears from the note of the attesting notary that Rs. 2,000 only were paid to the vendors in his presence.

On the same day Ponniah Mailerumperumah mortgaged the same land to one Parupathipillai for Rs. 2,000. Of this sum Rs. 500 only were given to Vadivelambikai, the remainder being appropriated by the fiduciary.

On the 16th November, 1936, Ponniah Mailerumperumah sold the same land to the fiduciary. The deed stated the consideration to be Rs. 10,000 paid by the fiduciary to him. The note of the attesting notary stated that out of the consideration Rs. 2,400 was paid in his presence and the balance was acknowledged to have been received. The mortgage for Rs. 2,000 was presumably discharged.

On the 7th December, 1936, the fiduciary and his wife mortgaged the same land to Ponnampalan Vythilingam to secure Rs. 6,000 and interest thereon, and on the same day Ponniah Mailerumperumah renounced any claims he might have to the property.

On the 11th October, 1941, the fiduciary and his wife in consideration of the sum of Rs. 5,000 conveyed the same land to the said Vythilingam. He was already a mortgagee for Rs. 6,000 and interest but nothing is said about this in the deed.

Vythilingam being thus apparently entitled to one fourth undivided share of the lands donated by the deed of the 19th March, 1928, instituted proceedings for partition in the District Court of Jaffna on the 25th June, 1942. The other parties to the suit were the three brothers of the fiduciary to each of whom an equal one fourth share of the property had been given. In due course a decree was made by that Court under which certain lands known as Lot 3 were allotted in severalty to Vythilingam. Lot 3 is the subject of the present dispute. No mention was made in the decree of the fidei commissum created by the deed of 1928.

Vythilingam, having thus obtained Lot 3, purported by deed dated the 23rd August, 1945, to sell it to Ramasamy the present respondent and defendant in the action. The consideration was expressed to be Rs. 13,500.

The appellant who had been born in 1926 commenced these proceedings in January, 1952.

The questions that arise are (1) whether the fiduciary was empowered by the deed of 1928 to donate the whole of the land subject to the fidei commissum to a single descendant : their Lordships will deal very shortly with this question ; (2) whether upon the assumption that he was so empowered he exercised the power fraudulently, that is, not with an entire and single view to the real purpose and object of the power but for the purpose of carrying into effect a bye or sinister object (see *Portland v. Topham* [1]) ; (3) whether, even if the exercise of the power was fraudulent, the respondent could either upon the ground that he was a purchaser for value without notice or by virtue of the Partition Ordinance maintain his title to the land against the appellant as fidei commissarius.

Upon the first question, viz. whether upon the true construction of the relevant clause in the deed the power vested in the fiduciary by the words " but if necessary he may dispose the same by way of donation or dowry to his descendants " was validly exercised by a donation of the whole of the property to one child and the consequent disinheritance of his other nine children then living, the trial Judge upheld the plea of the appellant but for some reason that was not explained this plea was abandoned before the Supreme Court. Their Lordships thought fit, as the question was purely one of law, to allow it to be raised, but, having done so, do not propose to decide it. It is unnecessary to do so in view of their other conclusions in the case and they think it proper not to make any observations which might be prejudicial if and when a similar question arises upon other deeds with clauses bearing a marked resemblance to this.

Upon the second question, viz. whether the power was fraudulently exercised, the learned trial Judge, having seen and heard the witnesses, came to a clear conclusion in the appellant's favour. The Supreme Court was of opinion that he was wrong, holding that the evidence fell short of the clear proof that is required to establish a fraudulent exercise of power especially where the person who has exercised it is dead. Their Lordships have carefully considered the several transactions in which the fiduciary was concerned and the oral evidence and cannot concur in the views of the Supreme Court. There is no reason to suppose that the learned trial Judge was unaware of the jealousy with which evidence directed against a dead man is to be regarded or of the suspicion that could be justly entertained of the testimony of the appellant's mother. There is on the other hand, as their Lordships think with great respect to the Supreme Court, some ground for doubting whether that Court directed its mind to the precisely relevant point. For its conclusion upon the evidence was that " the evidence in the case fails to establish that Kanagasunderam (the fiduciary) sold the land to Vythilingam in order to defraud his children by Sivapakiam ". But the alleged fraud began at an earlier stage, when the fiduciary donated the whole property to his daughter. It may well be that even then the subsequent transaction

[1] *11 H. of L. 32.*

was contemplated, but the initial fraud lay in the deed of the 6th September, 1934. As to this deed, their Lordships regarding the oral and documentary evidence with all proper jealousy and suspicion entertain no doubt that the fiduciary exercised his power not in order to benefit his daughter Vadivelambikai, one of the fidei commissarii, but with a view to his own advantage. There was some evidence that the daughter's husband was at one time unemployed and in poor circumstances, but it properly did not, in face of the other evidence, satisfy the learned Judge that the daughter and the daughter alone was the beneficiary of the transactions. She and her husband had gone to Malaya and were not called as witnesses. Her mother, the wife of the fiduciary, gave evidence which, if accepted, was conclusive. Their Lordships see no reason why it should not have been accepted. It was not contradicted and had the ring of truth. The trial Judge correctly concluded that the power reserved to the fiduciary was fraudulently exercised by him.

That however does not end the matter. It was urged on behalf of the respondent that, whether or not there was fraud in the exercise of the power, he was a purchaser for value without notice of the fraud and his title was accordingly unassailable. If the premiss was established, it would be necessary for their Lordships to examine the consequent plea. But again the finding of fact of the trial Judge is conclusive. He was amply justified by the evidence in finding that the deed of 1934 and the succeeding deeds relied on by the respondent were " executed fraudulently and collusively with intent to defraud the plaintiff (appellant) as a beneficiary " under the deed of 1928 and that the respondent was aware of the fidei commissum and had constructive notice of the fact that the fiduciary was planning a method of defeating it. His own conduct in regard to the lots allotted in the partition to the fiduciary's brothers gave support, if support were needed, to this view.

Their Lordships, having come to the conclusion that the respondent was not a purchaser for value without notice of the property in dispute, have finally to consider whether he was nevertheless protected from any adverse claim by the Partition Decree of the 13th June, 1944. He alleged that the effect of Section 9 of the Partition Ordinance, 1863, which was then in force, was to confer on him an absolute and indefeasible title whether or not the fiduciary or any purchaser from him had been guilty of fraud. Upon this part of the case their Lordships have not the advantage of a judgment by the learned Judges of the Supreme Court.

Section 9 of the Ordinance is in the following terms :—

" 9. The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor of any of them truly set forth, and shall

be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty :

Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued."

It must first be said that there is a long current of authority in the Courts of Ceylon to the effect that property burdened with a fidei commissum may be partitioned under the Ordinance and that such partition has not the effect of destroying the fidei commissum which thereafter attaches to the land allotted in severalty to the fiduciary. The substance of these propositions had already been laid down by this Board in *Dona Maria Abeyesekere Hamini v. Daniel Tillekeratne* [1]. At page 285 Lord Watson said : " Not one of these enactments (one of them being the Ordinance in question) professes to deal with or alter the law of fidei commissum : and in their Lordships' opinion they cannot be construed as having that effect ".

The first case in the Courts of Ceylon to which it is necessary to refer is *Babey Nona v. Silva*[2]. There, the precise point being raised, Lascelles A.C.J. said : " In my opinion the balance of reason and authority is in favour of the view that property subject to fidei commissum may be the subject of partition and I hold in the case under consideration, that the property in dispute, though subject to fidei commissum, was lawfully partitioned. But the partition decree in no way extinguishes the reversionary interest of the fidei commissarius. It merely sets apart a specific portion of the common estate to which the rights of the fidei commissarius attach in severalty. By no reasonable construction of the Ordinance can it be held that the effect of a partition decree is to enlarge the life interest of the fiduciarius into absolute ownership ". The learned Chief Justice then quoted the passage already cited from the judgment delivered by Lord Watson. In *Weeresekera v. Carlina*[3] the same learned Chief Justice assisted by De Sampayo (then A.J.) reaffirmed what had been said in *Babey Nona v. Silva* saying that he saw no reason to differ from it. In *Dassanaika v. Tillekeratne*[4] the matter was treated as settled law by Wood Renton C.J. In *Marikar v. Marikar*[5] the only question was whether the rule well established in regard to fidei commissa prevailed also in regard to trusts but there are in the judgment of Bertram C.J. some pertinent observations about the interests which were dealt with in partition proceedings. In *Gooneratne v. Bishop of Colombo* [6] (a useful case in which numerous previous authorities were examined) Lyall Grant J. said : " The net result of the cases seems to be that no partition can affect the rights of a subsequent fidei commissarius except

[1] *(1897) A. C. 277 ; 2 N. L. R. 313.*
[2] *(1906) 9 N. L. R. 251.*
[3] *(1912) 16 N. L. R. 1.*
[4] *(1917) 4 Ceylon W. R. 334.*
[5] *(1920) 22 N. L. R. 137.*
[6] *(1931) 32 N. L. R. 337.*

to the extent of attaching his rights to a divided portion of the land instead of to an undivided share and also perhaps to the extent of substituting money for land, the latter only in exceptional circumstances and under safeguards". It was urged by counsel for the respondent that this chain of authority was broken by *Kusmawathi v. Weerasinghe* [1]. But this is not so. The learned Chief Justice Macdonell who decided that case was careful to cast no doubt on *Babey Nona* and the succeeding cases but (rightly or wrongly) distinguished the case before him, saying: "The donor of the land charged by her with a fidei commissum under which she the donor was not a fiduciarius, thereafter enlarged by virtue of a partition decree the rights, dominial or usufructuary, remaining to her after her gift into the full and conclusive ownership that a partition decree title gives, which ownership she, not being a fiduciarius, could transmit unburdened by the fidei commissum to her successors in title". No doubt is cast on the title of a fidei commissarius as against his fiduciary or a person claiming through him. As has been already said, it is unnecessary to consider whether in the law of Ceylon the equitable doctrine of purchase for value without notice has any place. Observations will be found in favour of the view that it has, but the contrary view has also been entertained, see e.g. *Tillakaratna v. De Silva* [2]. The only question which their Lordships are now considering is the effect of a partition decree under the Ordinance of 1863 which makes no mention of a fidei commissum. Upon that question no doubt has been expressed.

It remains, so far as authority is concerned, to mention the case recently heard by this Board upon which reliance was placed by the respondent, *Adamjee v. Sadeen* [3]. That case proved upon examination to have no bearing upon a case in which a fidei commissarius claimed against his fiduciarius or his successors in title. The long and careful judgment delivered by Lord Cohen does not mention, much less purport to overrule, the long line of authority to which reference has been made. It asserts in a different context the conclusive character of a partition decree and emphasises that Section 9 of the Ordinance may in some circumstances even bar the title of a person whose interest has been concealed by the fraudulent collusion of the parties to a partition suit.

Their Lordships have referred to the line of authority by which for 50 years the Courts of Ceylon have held themselves bound and they would be reluctant to disturb it even if they came to a different conclusion upon Section 9 of the Ordinance. But that is far from being the case. It appears to them that this section has no bearing upon the rights of fidei commissarii who have no present right or interest in the land which is being partitioned. They are not owners or co-owners to whom Section 1 can apply: they may not even be in existence at the date of the partition suit. It is difficult to see what part they can play in such a suit. It might have been prudent to provide that in a partition decree, by which land was allotted in severalty to one who appeared to be a fiduciarius, some mention should be made of his capacity. But this might well

[1] *(1932) 33 N. L. R. 265.* [2] *(1947) 49 N. L. R. 25.*
[3] *(1957) A. C. 94; 58 N. L. R. 217.*

have created grave embarrassment. The absence of such a provision cannot, as it appears to their Lordships, bring them within the scope of Section 9. It is true enough that the words " against all persons whomsoever, etc. " are wide and general. But it is not a new doctrine that wide and general words may be limited by the field in which they are found.

Their Lordships accordingly reject this submission of the respondent both on reason and authority.

The appellant does not seek to disturb that part of the order of the trial Judge which provided for payment by him to the respondent of Rs. 1,500 for improvements and for jus retentionis until the same be paid.

For the reasons herein stated their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside and the decree and order of the Trial Judge restored.

The respondent must pay the appellant's costs here and below.

Appeal allowed.