1930

Present : Fisher C.J. and Drieberg J.

DE SILVA *et al. v.* RODRIGUE *et al.*

284—*D. C. Negombo*, 2,714.

Fidei commissum—*Gift of two lands—Donees and their descendants—Single* fidei commissum—*Intention of donor.*

Where by a deed of gift two lands were donated by a person to his sister subject to a *fidei commissum* in favour of her two daughters, C and D, and their descendants,—

Held, that it may be inferred that it was the intention of the donor to impress a single *fidei commissum* on the two lands in favour of the descendants of C and D.

APPEAL from a judgment of the District Judge of Negombo. The plaintiffs claimed a declaration of title to a land, Kekunagahalanda. It was alleged that two lands, of which the land in dispute was one, were gifted by Balthazar de Zoysa by deed of April 17, 1854, to his sister, Louisa de Zoysa, subject to a *fidei commissum* in favour of her two daughters, Johanna and Josephina, and their descendants. The material words were : "The said sister of mine shall receive and enjoy the benefits thereof during her lifetime without conveying the same by way of gift, transfer, mortgage and that, after her death, her two daughters, Johanna Amelia and Josephine Welhelmina, shall be entitled to and enjoy the said premises, and that they, their children, grandchildren, and their line of descendants shall continue to enjoy the benefits." Johanna died without issue and the plaintiffs claim that her half share accrued to Josephina. Josephina had issue, Letitia who died in 1925, and Grace who died in 1924. Plaintiffs are the children of Letitia and Grace. The defendants, who claimed title from an independent source, were admittedly in possession since January, 1883. The learned District Judge held that the property belonged to the donor, Balthazar de Zoysa, that the deed created a valid *fidei commissum*, and that the adverse possession of the defendants could not prevail against the plaintiffs, whose rights accrued in 1924 and 1925. It was contended on behalf of the defendant-appellant that even if there was a valid *fidei commissum*, it failed as regards the interests of Johanna, who died without issue and that possession would avail against her half share.

N. E. Weerasooria, for defendant, appellant.

H. V. Perera, for plaintiff, respondent.

April 15, 1930. DRIEBERG J.—

This is an action *rei vindicatio* by the first, third, and fourth plaintiffs-respondents in respect of Kekunagahalanda of 13 acres 3 roods and 15 perches. They claim it under a fideicommissary gift by Balthazar de Zoysa.

The defendants are in possession and admittedly have been so from January, 1883. The rights of the plaintiffs-respondents accrued in 1924 and 1925 and are unaffected by the defendants' possession if the creator of the *fidei commissum* had title.

The defendants claim title to the land ; they denied that the deed created a *fidei commissum* and that the donor was the owner of the land.

The learned District Judge held against them on this point, and gave judgment for the respondent ; the first defendant

being declared entitled to Rs. 350 compensation for improvements effected by him. The second defendant alone appeals from this judgment.

The case for the plaintiffs is that the original owners of this land and of Dewatagahalanda were Gregoris de Zoysa and his wife. They left a joint will (P1) of 1845 leaving their whole joint estate to the survivor ; no mention is made in the will of any property specifically. The will was proved and in the inventory (P3) of 1849 were included " two gardens called Kakoonagahalanda and Dewatagahalanda situated at Mukulangamuwa ". Gregoris de Zoysa's wife Margaret survived him and by deed (P4) of March 31, 1854, she sold these two lands to Balthazar de Zoysa. The boundaries and extent are not given. She declared her rights to it on the joint will and referred to certain declaratory deeds, one of which was dated February 27, 1847. These deeds are not produced. The deed of March 31 (P4) conveys other lands as well.

By deed (P5) of April 17, 1854, Balthazar de Zoysa gifted the two lands to Louisa de Zoysa subject to a *fidei commissum* in favour of her two daughters, Johanna and Josephina, and their descendants. This deed too does not give boundaries or extent.

Johanna Amelia died without issue and the plaintiffs claim that her half share accrued to Josephina. Josephina had issue, Letitia, who died in 1925, and Grace, who died in 1924. The first plaintiff is the daughter of Letitia, and the third and fourth plaintiffs are the children of Grace.

Josephina was married to William Norman Rajapaksa. In December, 1883, he brought a possessory action against James, Adrian, and Henry, the sons of John Zoysa, and Joronis, the husband of Maria, a daughter of John Zoysa, alleging dispossession in January, 1883.

The defendants say that John Zoysa was the original owner of the land ; Agida Fernando bought the interests of his heir ; this passed to Pemiano Fernando, who disposed of the southern 6 acres by D10 and D11, title under which has passed to the first defendant. The balance was bought by the second defendant-appellant on 2D13.

This possessory action was dismissed. The date of the judgment does not appear, but it must have been after March, 1884. It is admitted that the defendants in that action and their successors in title were left in undisturbed possession of the land.

The learned District Judge has rightly held that the deed (P5) created a valid *fidei commissum* in favour of Louisa and her two daughters and descendants, and if Balthazar was the owner of this property when he gifted it in 1854, the rights of the plaintiffs cannot be affected by any adverse possession, which began thereafter. The only question, therefore, is whether it has been proved that Balthazar was the owner. It is clear that Kekunagahalanda referred to in the inventory (P3) and in the deed (P5) is a land to the west of Dewatagahalanda. In 1879 by deed (P14) W. N. Rajapakse leased to Simon de Silva both Kekunagahalanda and Dewatagahalanda, in extent about 14 acres and 13 acres, respectively ; the boundaries are given and they are shown as adjoining lots. In the possessory action (D. C. Negombo, No. 13,556) brought in 1883, Rajapakse stated the extent of Kekunagahalanda as 13 acres 3 roods and 15.36 perches and, this suggests that it had been surveyed. In the survey made for the purpose of the Fiscal's sale against Martinu Fernando, through whom the second defendant-appellant claims, it is described as bounded on the east by " part of the same garden of William Rajapakse, " and in the Fiscal's survey of 1894 as bounded on the east by the " other half of this garden belonging to Mr. Rajapaksa, Proctor ". W. N. Rajapaksa was a proctor.

This shows that these two lands were regarded as one. Apparently, as the result of both being owned by the same person at one time, and by the fact of

W. N. Rajapakse leasing the two together in 1879 and of their being dealt with together by deed (P5) in 1854 and in the inventory (P3) in 1849. There is no evidence of title in John Zoysa, and the earliest deeds on which the appellant relies are by John Zoysa's descendants after the possessory action. The appellant has completely failed to prove prescriptive possession against the donor of the deed (P5) of 1854.

The appellant's only witness to the earlier period of possession is Thepanis Appu. He says he is eighty years of age and claims to have known the land when he was twenty years old ; when he first knew it James Zoysa was in possession and living on the land and his brothers and sisters used to visit him ; these are Henry, Adrian, and Maria, the children of John Zoysa. If his estimate of his age and the time is correct this must have been about 1869 ; but he cannot be right on this point, for he goes on to say that these persons possessed for ten years and then sold to Martinu ; but the sale to Martinu was in 1886, and he later said that he first came to know the land as Martinu's land.

The appellant having failed to prove a right by adverse possession against Balthazar Zoysa, subsequent possession by those through whom he claims cannot prevail against the respondents, whose rights accrued in 1924 and 1925. The appellant contends that even if there was a valid *fidei commissum* it failed as regards the interests of Johanna Amelia who died without issue, and that possession would avail against her half share. This would be so if the deed (P5) created separate *fidei commissa* in respect of Johanna Amelia and Josephina. But in my opinion the intention of the donor was to impress one *fidei commissum* on both lands in favour of the descendants of these two. There is nothing indicative of an intention to create separate and distinct interests in the donees. The donor was dealing with two cinnamon plantations nearly identical in extent, and separate gifts of each would have been an obvious course if it was the intention to create separate fidei commissary estates in each donee, and her descendants. The learned District Judge who has closely examined the original, which is in Sinhalese, says that words translated as " their descendants " indicate in the original a collective compound. It can fairly be inferred that it was not the intention of the donor that, if one donee died, the descendants of the other should hold an undivided share of each land in common with strangers who might succeed to the share of the deceased by intestate succession or under her will, if she so disposed of it.

There remains the question of compensation claimed by the appellant. He claimed Rs. 700 in his answer. At the trial he said that his predecessor made a coconut plantation for which he claimed Rs. 400 and that he had planted additional cinnamon plants for which he claimed Rs. 400. There is only his evidence on this point.

The learned District Judge rejected his claim on the ground that he could not claim for improvements made by his predecessor, but this is not so (*Mohamed Bhai et al. v. Silva et al.* [1]), for a man can claim compensation for improvements effected by his vendor.

The evidence of these plantations was given in a general way. There is no evidence, however, in rebuttal led by the plaintiffs-respondents. The point does not seem to have attracted much attention, and the learned District Judge has not found what the value of these alleged improvements is.

I think there should be a fresh inquiry on this claim of the appellant, as set out in paragraph 19 of his answer. So much of the decree as declares the respondents entitled to the land as against the appellant is affirmed, and the appellant will pay to the respondents their costs in the District Court and of this appeal.

[1] (1911) 14 *N. L. R.* 193.

We remit the case for further trial on the claim for compensation and the right of retention until compensation is paid. Both parties can lead additional evidence on this point if they so desire.

The costs of the further inquiry will be dealt with by the District Judge.

FISHER C.J.—I agree.

Sent back.