

1928.

Present : Garvin and Lyall Grant JJ.

MEIYA NONA *v.* DAVITH VEDARALA.

280—D. C. Chilaw, 8,466.

Fidei commissum—*Deed of gift to children—Prohibition against alienation—No designation of persons to be benefited.*

A deed of gift contained a grant of land in these terms:—

“ I, in consideration of the love and affection I have and bear to my children, have granted, conveyed, and set over unto them by way of gift, subject to the condition and promise that the same shall not be changed or altered at any time hereafter or in whatever manner.”

Then followed a prohibition against alienation and, thereafter, a clause which ran as follows:—

“ Therefore full power is hereby granted unto the five donees and their heirs, executors, administrators, and assigns to own all the right and power, which I, the donor, and my heirs, executors, administrators, and assigns have and hold in and to the same and to possess the same undisturbedly for ever subject to the aforesaid conditions and stipulations.”

Held, that the deed did not create a valid *fidei commissum*.

A PPEAL from a judgment of the District Judge of Chilaw.

H. V. Perera, for defendant, appellant.

Samarakoon, for plaintiff, respondent.

November 16, 1928. GARVIN J.—

By a certain deed of gift dated the 16th of July, 1894, and marked P1, one Naide, who was the owner of a half share of the land described in the plaint, made a gift of the premises to his five children. One of these children has died intestate and unmarried and the case has proceeded upon the assumption that his share vested in the other four. Lethina Manamali, one of the remaining four, was married to one Aratchi Naide, and died leaving surviving her husband Aratchi Naide and two children—the plaintiff and another. Under the ordinary rules of intestate succession, at Lethina's death her share of $\frac{1}{2}$ vested as to $\frac{1}{16}$ in her husband and as to the remaining $\frac{1}{16}$ in her two children in the proportion of a half to each. At a sale in execution against Aratchi Naide his $\frac{1}{16}$ share was seized and sold and purchased by the defendant. The plaintiff brings this action claiming that the whole of Lethina's share vested in him and his sister to the exclusion of their father Aratchi Naide, and that

the defendant has, therefore, acquired nothing of the purchase in sale in execution against Aratchi Naide. The foundation of this contention is that the deed of gift by Naide to his five children vested the property in those children subject to a *fidei commissum* in favour of their heirs up to the fourth generation.

The question for determination, therefore, involves a construction of this deed. After reciting his title to the several allotments of land, which were the subject of the deed, the donor proceeds as follows:—

“ I, for and in consideration of the love and affection which I have and bear to my children (here follow the names of the five children), and for divers other good causes, have granted, conveyed, and set over the same unto them by way of gift, subject to the condition and promise that the same shall not be changed or altered at any time hereafter or in whatsoever manner.”

There is here a simple gift of the premises to the five children and a declaration by the donor that the gift shall be irrevocable. There follows in general terms a prohibition of sale, mortgage, gift, exchange or alienation in any other manner. Then follows a clause which contains the words which are relied on as creating a *fidei commissum*:—

“ Therefore full power is hereby granted unto the five donees and their heirs, executors, administrators, and assigns to own all the right and power, which I, the donor, and my heirs, executors, administrators, and assigns have and hold in and to the same and to possess the same undisturbedly for ever subject to the aforesaid conditions and stipulations; and besides I have bound myself to settle any disputes which may arise regarding this donation owing to any defect of title of me, the donor.” It must be remembered that the deed in question was drawn in the Sinhalese language and that the clause as above quoted is taken from a translation filed of record and accepted by the parties as correct. Now, these words it seems to me are in the nature of a *habendum* clause and are intended to vest in the donees, their heirs, executors, administrators and assigns, all rights and powers in regard to this land which at the time of the making of this gift were vested in the donor. The conditions and stipulations subject to which this grant of the rights of the donor is made clearly refer to the prohibition against alienation earlier referred to. There is, therefore, here a gift to certain donees subject to a prohibition against alienation, but there is no indication who the person or persons in whose interests the prohibition has been imposed, and to whom the title to these premises is to pass at the death of the donees.

It has been urged that the words to which I have just referred, namely, that the grant to the five donees, their heirs, executors, administrators, and assigns of all the right and power of the donor

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subject to the aforesaid condition, namely, the prohibition against alienation, clearly indicates that the prohibition against alienation is imposed upon the donees and after them on their heirs and in default of heirs on the executors, administrators, and assigns of the original donees. Reading the document in this way, it is urged that there is here a grant to the donees subject to a *fidei commissum* in favour of their heirs. But that does not carry the case for the plaintiff very far. Aratchi Naide was the heir of Lethina, in that at her death the property would vest as to her share in him, and consequently the defendant would be entitled to the share he claims.

It is then sought to interpret the words " their heirs " to mean the heirs of the donees and the heirs of those heirs from generation to generation, and the sole basis upon which it is sought to base this contention is the presence of the words " to possess the same undisturbedly for ever."

Now, as I have already indicated, I am quite unable to assent to the interpretation it is sought to place upon these words. It is impossible to do so without taking the greatest liberty with the language employed by the donor. Moreover, the clause as a whole is such as one would expect, where it is intended to vest the donee with full rights of ownership, and the language which has been employed is language which would ordinarily be employed for that purpose. The words " to possess the same undisturbedly for ever " are words which are usually employed to indicate the vesting of the full rights of ownership, and no more. It seems to me that the plain and ordinary interpretation of the language of this clause is that the premises were to be vested in the donees, their executors, administrators, and assigns for ever. This is a deed of gift, and whatever the intention of the donor may have been, the rules of interpretation require that one should give to the language which he has used the ordinary meaning which would be attached to those words. Interpreting this deed in the light of that well known rule of interpretation, the utmost that can be said is that there is here a deed of gift in favour of five donees and a prohibition against alienation, but with no indication as to the persons or person or class of persons who were to take in succession to the donees. In my opinion, the property which was the subject of this deed of gift vested in the five donees absolutely.

In this view, the judgment under appeal must be set aside, and the plaintiff's action dismissed with costs both here and in the Court below.

LYALL GRANT J.—I agree.

Appeal allowed.