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Present : Branch C.J. and Schneider J.

JOHN SINNO *v.* LUVIS APPU.

96—D. C. Negombo, 16,770.

Fidei commissum—*Grant to a person, his heirs, assigns, and attorneys—Prohibition against alienation—Designation of persons to be benefited.*

Where by a deed of gift executed in 1884 a property was left to M and his heirs, assigns, and attorneys, and it was directed that " he should enjoy it until the succession of his descendants, without selling, mortgaging, or alienating the same."

Held, that the prohibition against alienation did not bind the children of M and that they took the property free from any *fidei commissum.*

THE property in dispute was gifted by deed to one Marthino and the plaintiff claimed a share through his mother Ambrosia, a daughter of Marthino. The claim was based on a *fidei commissum* created by the said deed. It was contended that Ambrosia was not alive at the date of execution of the said deed and that the prohibition was bad under the Entail and Settlement Ordinance of 1876. The learned District Judge held that it was not proved that Ambrosia was alive at the time of the execution of the deed and dismissed plaintiff's action. The defendant claimed through a transferee from Ambrosia.

H. V. Perera, for plaintiff, appellant.—The birth and marriage certificates of Ambrosia show that she was alive at the time of execution of the deed. Her sister's evidence also proves the same fact. The slight difference in name does not matter. The names of the parents are given and this leaves no room to doubt that Ambrosia was a child of Marthino.

Croos Da Brera, for defendant, respondent.—On the evidence the finding of the Judge is correct. There is no evidence to show that the person described in the certificates is identical with Ambrosia. The plaintiff has failed to prove her age. Even if Ambrosia was alive at date of execution of deed it is submitted that the *fidei commissum* is bad. The deed is contradictory inasmuch as there is an absolute gift to Marthino and a subsequent imposition of a condition. *Hormusjee v. Cassim*,[1] *Aysa Umma v. Noordeen*,[2]

[1] *(1896) 2 N. L. R. 190.*

[2] *(1902) 6 N. L. R. 173.*

Dassanaike v. Dassanaike.[1] There is no designation of persons to benefit. Even if there is, it is not sufficient to satisfy the requirements of the Entail Ordinance. The prohibition is therefore null and void. Certainly the prohibition does not extend to the decendants of Marthino.

Counsel also cited *Boteju v. Fernando*[2] regarding the construction to be placed on the deed.

H. V. Perera, in reply.—The word " descendants " is a clear indication of the persons to benefit. The intention to create a *fidei commissum* is clear. The Courts should construe a document liberally so as to carry out the intention of the donor. There have been several cases where words such as those under consideration were held sufficient to create a *fidei commissum*. Counsel cited *Coudert v. Don Elias*,[3] *Mirando v. Coudert*,[4] *Weerasekera v. Carlina*,[5] *Selembram v. Perumal*,[6] and *Gunaratne v. Perera*.[7]

September 22, 1925. BRANCH C.J.—

I have had the advantage of reading the judgment of my brother Schneider in this case and I agree that the appeal should be dismissed, and with costs. In my view no such prohibition, restriction, or condition against alienation is to be found in the deed P 1 as would prevent Ambrosia, the mother of the plaintiff-appellant, from alienating her interest in the land. It would be possible no doubt to rewrite the direction in P 1 in accordance with a supposed intention of the donor Don Augustino and create a prohibition against alienation by Ambrosia, but that is not within our province in this matter.

During the course of the argument I understood Mr. H. V. Perera, who appeared for the plaintiff-appellant, and Mr. Croos Da Brera, who appeared for the defendant-respondent, to say that they raised no objection to a fresh translation of the material portion of P 1 being made by Mr. D. B. Jayatilleke. That translation is as follows :—

> " Further it is directed that the said Marthino Perera, though he became entitled to this land, shall enjoy it until the succession of his descendants, without selling, mortgaging, (or) alienating the same."

[1] *(1906) 8 N. L. R. 361.*
[2] *(1923) 24 N. L. R. 293.*
[3] *(1914) 17 N. L. R. 129.*
[4] *(1916) 19 N. L. R. 90.*
[5] *(1912) 16 N. L. R. 1.*
[6] *(1912) 16 N. L. R. 6.*
[7] *(1915) 1 C. W. R. 24.*

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Subsequently Mr. Perera suggested that another translation might be obtained. I have obtained one from the Chief Sinhalese Interpreter of this Court, Mr. C. W. d'Alwis, and his translation is as follows :—

> " It is hereby directed that although the said land is taken possession of by the said Marthino Perera (the same) without selling, without mortgaging, without alienating by him, shall possess until the succession of his own descendants."

Mr. d'Alwis describes this as " the literal translation of the passage." This translation does not aid the appellant's case, and it is, in my view, impossible to import into the language used the restriction contended for by the appellant.

SCHNEIDER J.—

The decision of this appeal turns solely upon the construction of a deed of gift in Sinhalese bearing No. 9,851 and executed in 1884. The English translation of it has been admitted in evidence without objection and is the document marked P 1. The plaintiff claimed an undivided half share of a divided portion of the land Ambagahawatta, the whole of which was conveyed by the deed, alleging that his mother Ambrosia was a daughter of the donee Marthino Perera and upon his death succeeded to a share of the land donated, subject to a prohibition against alienation in favour of her children, and that she being dead, plaintiff as her only child succeeded to that portion. It would appear, therefore, that his claim depends entirely upon his mother having succeeded to an interest in the land by virtue of the deed and upon her being restrained or prohibited from alienating that interest. It is admitted that if she were not so prohibited or restrained her interest has rightly passed on to the defendant whose claim cannot legally be resisted by the plaintiff.

The deed having been executed after the proclamation of " The Entail and Settlement Ordinance, 1876," [1] it is governed by the provisions of the Ordinance. The main issue tried in the District Court was, " Does deed No. 9,851 create a *fidei commissum* in favour of the descendants of the donee." It is not appropriately worded. But from the arguments and from the decision of the District Judge it would appear that the issue was rightly regarded as raising the question whether the deed contained any valid prohibition or restriction, or condition against the alienation of the land dealt with by it binding upon Ambrosia, the mother of the plaintiff. The learned District Judge held against the plaintiff upon that issue on the ground that there was no proof that Ambrosia, the mother of the plaintiff, was a person who was in existence or *en ventre sa mere* at

[1] (*Proclaimed June, 1877—No. 11 of 1876.*)

the time when the deed in question was executed. It might be that the proof offered by the plaintiff was insufficient to establish his case. That is a question of fact which is not free from doubt. But it seems to me that the judgment of the learned District Judge should be upheld, for a different reason. His judgment proceeded upon the assumption that the deed contained a valid prohibition against alienation which was effectual to bind Ambrosia through whom the plaintiff claimed, provided she was " in existence or *en ventre sa mere* at the time " the deed was executed. In my opinion he was wrong in so assuming as the deed in question does not contain a prohibition, restriction, or condition against the alienation of the land by Ambrosia. It becomes necessary therefore to consider the deed. The relevant portions of it as they appear in P 1 are the following :—

(*a*) " That I have hereby granted and set over as a gift which cannot be revoked or altered hereafter in any manner whatsoever unto Kuranage Marthino Perera of Kurana Katunayaka and his heirs, assigns, and attorneys."

(*b*) " And it is hereby directed that the said Marthino Perera shall possess the said land from generation to generation without selling, mortgaging, or alienating the same."

(*c*) " Therefore the said Marthino Perera and his heirs, assigns, and attorneys have become owners of all the right, title, claim, and interest of me the said Don Augustino in and to the said land and all deeds, documents, and other writings relating thereto."

The portion (*b*) is nonsensical, as it is an impossibility for Marthino Perera to " possess from generation to generation." The words cannot be accepted as meaning that Marthino Perera and his generation shall possess. Mr. Advocate D. B. Jayatilleke very kindly acted as *Amicus Curiæ* and translated this portion into English for the assistance of our Court. His translation was :

" It is hereby directed that the said Marthino Perera though he became entitled to this land shall enjoy it until the succession of his descendants without selling, mortgaging, (or) alienating the same."

Apart from the fact that Mr. Jayatilleke has a reputation as a scholar of the Sinhalese language, I prefer his translation to that in P 1, because his translation gives a sensible meaning to all the words which the other translation does not. I would accept his rendering of this passage of the deed under consideration, and I will decide the question arising on this appeal accepting his as the correct rendering. The only question which arises for decision is whether the deed contains a " prohibition, restriction, or condition against alienation " (to use the language of the Ordinance) effectual to prevent Ambrosia

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from alienating. The passages marked (*a*) and (*b*) cannot be regarded as operating to convey directly any interest to the heirs of Marthino Perera. There is nothing in either of those passages beyond the words ordinarily used to convey an absolute title to a person. The only strange word used is " attorneys," which makes no difference to the effect of the grant. The grant is to Marthino Perera and his heirs and assigns in the passage (*b*). The passage (*c*) simply repeats that as a result of that grant Marthino Perera and his heirs and assigns are " become owners." The effect of those two passages of the deed was to vest the title in Marthino Perera absolutely. As Lawrie J. said in his judgment in *Tina v. Sadris*[1] " A grant to a man and his heirs has the same legal effect as a grant to a man without mention of heirs."

What is there in the deed to derogate from the absolute title conveyed to Marthino Perera ? The only passage which can be pointed to is (*b*). Mr. Jayatilleke's translation makes it quite clear that the prohibition against alienation refers only to Marthino Perera, and that his " descendants " are not included in that prohibition. The passage says that Marthino Perera shall enjoy, not that he and his descendants shall enjoy. It says that Marthino Perera shall enjoy without selling, &c., not that he and his descendants shall enjoy without selling, &c. If, therefore, the prohibition is effectual it binds Marthino Perera alone. It is personal to him. It does not extend to his successors in title. There is therefore no prohibition or restriction or even a condition fettering the title of Ambrosia, either expressly or by implication. She took an absolute title by right of intestate succession to Marthino Perera. The words " *until* the succession of his descendants " only express the point of time when the enjoyment of the land by Marthino Perera is to terminate. He is directed to enjoy the land without selling, &c., until his descendants succeed him. In the absence in the deed of any provision that his descendants are to succeed him upon the happening of any particular event they can succeed him only upon his death. That they would do, whether those words existed or not. The words are therefore redundant. But take the words as not being entirely redundant. The utmost extent to which they might be utilized would be as a peg to hang the argument that they show by implication that the prohibition against alienation was intended for the benefit of the " descendants " of Marthino Perera, and therefore save that prohibition from being void, which it would otherwise have been under section 3 of the Ordinance on the ground that the deed did not name, describe, or designate the person or persons in whose favour or for whose benefit the prohibition was provided.

Mr. Perera who appeared for the plaintiff-appellant argued that we should read the particular passage as if it ran so that the direction was that Marthino Perera and his descendants in their

[1] *(1885) 7 S. C. C. 135.*

succession shall enjoy the land without selling, mortgaging, or alienating the same. To do so would not be to construe the deed as it stands worded but to transpose words from the places they actually occupy in order that it might be said that the deed creates not only a valid prohibition but a prohibition extending from generation to generation. That is not permissible. A meaning is found for all the words in the passage under consideration by Mr. Jayetilleke's translation, and there is no good reason for not construing the deed giving to the words the plain sense conveyed by them.

Mr. Perera cited several cases decided by this Court; I might say, all the more important cases. It is needless to mention all of them. I will refer only to two of them, *Weerasekera v. Carlina* (*supra*) and *Selembram v. Perumal* (*supra*). I say, I will refer only to these two cases because the language of the instruments construed in them bear, of all the cases cited, the nearest similarity, if any at all, to the language used in the deed under consideration, In both those cases Lascelles C.J. delivered the principal judgment. In those cases and in another *Ibanu Agen v. Abeyesekere*[1] which is cited and followed by Lascelles C.J., in the former of those cases the instruments construed were last wills and a codicil. In all threo cases the same principle was followed. It was formulated by Wendt J. in *Ibanu Agen v. Abeyesekere* (*supra*) and was cited with approval by Lascelles C.J. in *Weerasekera v. Carlina* (*supra*). It is this:

> " In construing a will the paramount question is, what was the intention of the testator ? And if it be clear that the person to whom the property is in the first place given is not to have it absolutely, if it is also clear who is to take after him, and upon what event, then the Court will give effect to the testator's intention."

In *Ibanu Agen v. Abeyesekere* (*supra*) the words were :

> " It is hereby directed that the said O . . . . down to his descendants or posterity shall possess the said property. Except such possession, these lands or any part shall not be sold, mortgaged, made over in any other manner, nor seized for his debts."

In *Weerasekera v. Carlina* (*supra*) the words were :

> " I do hereby direct that the legatees shall for ever possess the immovable property of my said estate *throughout their descending generations* without selling or mortgaging."

In *Selembram v. Perumal* (*supra*) the words were :

> The devisees " shall not sell, mortgage, or alienate but the same shall be always held and possessed by them and their heirs in perpetuity under the bond of *fidei commissum*."

[1] *(1903) 6 N. L. R. 344.*

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In all these cases it was held that a *fidei commissum* was created by the words used because the intention was clear that the person to whom the property was given in the first place was not to have it absolutely, and that his descendants were to take after him. In all three cases the instrument directed in express terms that the descendants were to possess. It is in that respect the deed before us differs from the instruments construed in those cases. In this deed there is no direction that Marthino Perera and his descendants are to possess, but only that Marthino Perera is to possess, and by implication after his death his descendants are to succeed to the property. Unless words are lifted from the place they occupy and put elsewhere in the manner suggested by Mr. Perera, those cases will not help his argument that Ambrosia did not take an absolute title. They might help his argument that the deed does contain words sufficient to create a valid prohibition against alienation by Marthino Perera. But they will not carry him any further.

The appeal should therefore be dismissed with costs.

Appeal dismissed.