1938 *Present :* **Poyser S.P.J. and Koch J.**

VISALADCHYPILLAI *v.* SIVAPAKKIAMMAL.

21—D. C. Trincomalee, 2,121

Prescription—Donation subject to a condition—Trust—Claim by beneficiary—Ordinance No. 22 of 1871, s. 8.

Where a deed of gift was subject to the following among other conditions.

The said donor shall have the power to sell mortgage or otherwise alienate or encumber the said lands and premises.

That, in the event of the said donor dying leaving behind the said lands and premises, then it shall be obligatory on the said donee to pay out of the said lands and premises a sum of five hundred rupees to S.

Held, that the deed created a trust in favour of S and that a claim to recover the money was prescribed in 10 years under section 6 of the Prescription Ordinance.

HIS was an action to recover a sum of Rs. 500 due to the plaintiff under a deed of gift No. 966 of June 25, 1929. The material parts of which are set out in the head note. The defendant pleaded prescription. The learned District Judge gave judgment for the plaintiff.

S. J. V. Chelvanayagam (with him *M. Tiruchelvam* and *V. Manicavasagar*), for defendant, appellant.—The obligation to pay the sum of Rs. 500 is a mere parol undertaking and prescribed in three or at most in six years (see section 11 and section 3, Prescription Ordinance), the latter period if it is to be regarded as a promise in writing. The cause of action accrued to the plaintiff immediately upon the death of the donor when the donee became liable to fulfil the condition in the deed No. 966 of June 25, 1929.

N. Nadarajah (with him *G. E. Chitty*), for plaintiff, respondent.—We have here the clearest possible case of an express trust. The whole transaction seems almost in illustration of the definition of a trust as set out in section 3 of the Trusts Ordinance. The words "out of the said lands and premises" can mean one thing alone and that is that the property is bound in the hands of the donee under the trust and the donee's beneficial interest therein is to that extent diminished in favour of the *cestui que* trust, namely, the plaintiff. It may be that the donee has some other fund out of which she can pay the plaintiff the Rs. 500. She will, if she does pay, get the property free, but in no case will the obligation annexed to the ownership of this property be dissolved without such payment. The property will otherwise have to be sold and the money paid out of the proceeds in order to comply with the terms of the deed creating the trust. A refusal to pay the sum would be in fraud of the trust.

M. Tiruchelvam, in reply.—A gift subject to a condition is all we have here. It is a class of donation well known to the Roman-Dutch law and in such a case the Court will apply the common law in order to determine the rights and liabilities of the parties who must be deemed primarily to have intended to create only a common law obligation. The idea of a trust which is really the creation of another legal system should not be imported into the consideration of a transaction which falls well within the limits of our common law.

April 4, 1938. KOCH J.—

The respondent claimed a sum of Rs. 500 as due to her in terms of a deed No. 966 of June 25, 1929. That under the deed she was entitled to this sum is not denied, but the appellant contends that her claim has been prescribed by reason of the long delay in the institution of these proceedings.

The deed No. 966 gifted the four properties described in the schedule to the appellant who, to put it briefly, was directed to pay a sum of Rs. 500 to the respondent.

It is argued by Counsel for the appellant that his client succeeded as donee to the ownership of the properties on the death of the donor *subject to the condition* that she had to pay a sum of Rs. 500 to the respondent. The respondent's claim, he maintained, was therefore to enforce the condition and would be prescribed in six years at the latest dating from the death of the donor. The donor died on July 3, 1929, and this action was instituted on February 12, 1937—eight years later.

It may fairly be argued by the appellant that if the deed only contained a condition, the plaintiff's claim would come under section 11 of the Prescription Ordinance and would thus be prescribed in three years, but,

considering that eight years had elapsed, the appellant was content to permit the claim being regarded as controlled by section 7 in which the period of prescription is given as six years.

The respondent's Counsel, on the other hand, argues that his claim is to enforce a trust and, therefore, the period is regulated by section 6 which makes it ten years.

As the terms and covenants of the deed are of the utmost importance to the decision of this point, it is necessary that they should be set out. They are as follows:—

"No. 966".

"Know all men by these presents that Kathirkamathampy Chellapillai of Division No. 6 of Trincomalee (hereinafter called the said donor) in consideration of the love and affection which he has and bears unto his daughter Visaladchypillai of Division No. 6, Trincomalee (hereinafter called the said donee) doth hereby grant, assign, transfer, set over and assure unto the said donee all the lands and premises described in schedule hereto *subject to the conditions* and covenants hereinafter contained together with all rights members and appurtenances whatsoever to the said premises belonging or usually held or enjoyed therewith or reputed to belong or be appurtenant thereto, and all the estate, right, title, interest, claim and demand whatsoever of him the said donor in and to the said premises.

"To have and to hold the said premises with their and every of their appurtenances which are of the value of Rupees Ten thousand (Rs. 10,000) unto her the said donee, her heirs executors, administrators and assigns *absolutely forever*.

"1. That the said donor doth hereby reserve to himself the right of enjoying the rent, issue and profit of all the lands and premises described in schedule hereto.

"2. That the said donor shall have the power to sell, mortgage or otherwise alienate or encumber the said lands and premises described in schedule hereto.

"3. That in the event of the said donor dying, leaving behind the said lands and premises then it shall be obligatory on the said donee to pay *out of the said lands and premises* a sum of Rupees Five hundred (Rs. 500) to Sivapakkiammal, daughter of Rasandiramudaliar and a sum of Rupees Fifty to Kannamma, widow of Murkappar".

It will be seen from the foregoing that the grant is made *subject to conditions to follow*. This, it is claimed, is in favour of the appellant. Further, in the *habendum* clause the donee, her heirs, executors, administrators, and assigns receive the premises "*absolutely forever*", and this, it is argued, disproves the intention to create a trust.

The point is not free from difficulty, but after careful consideration I have come to the conclusion that a trust in favour of this sum has been created in favour of the respondent. I have based my conclusion on covenant 3. The precise words are that "the donee shall pay out of the said lands and premises a sum of Rs. 500".

Now, what do these words mean? In my opinion, they mean that the Rs. 500 should either come out of the income accruing from the properties donated or, if all or any of the properties have to be sold, this

sum should be paid out of the proceeds of such sales. It must be noted that the aggregate value of the properties donated was Rs. 10,000 and also that the donor died indebted within a few days of the execution of the gift and that it was admitted that some of the lands donated had to be sold to pay off his debts. The donor would have been well aware of his financial position and it is reasonable to suppose that he felt that if his creditors could be staved off for some time, these valuable properties would have furnished a sufficient income from which the payment to the respondents could have been made, but that if, on the other hand, they had to be sold, the payment should have to be made out of the proceeds. Some meaning must be given to the important words "*out of the lands and premises*", and I cannot see what other meaning can be given. If then the meaning I have given is correct, there can be little doubt that a trust has been created.

Our Trusts Ordinance, No. 9 of 1917, defines "a trust" in section 3 as "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another person; or of another person and the owner of such a character that while ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested or to be vested in such other person, or in such other person concurrently with the owner".

Now, as the legal ownership has to be vested in the person who is designated the owner, language, however forcible and full, may be invoked to vest that ownership without affecting the intention to create a trust in favour of another, and this will explain the use of the words "absolutely forever". This done, there must be words to indicate a beneficial enjoyment of the whole or part of that property by another. It would appear that the words "out of the said lands and premises" satisfies this requirement. There is confirmation of this view to be found in *section 22 of the 28th volume of Halsbury* at page 16. The section reads: "Where property is given to a person *upon condition* that he does a certain act or confers a certain benefit on another person, the condition may constitute a trust, if it is directed to be or must necessarily be *performed and satisfied out of the property* and consequently imposes a fiduciary obligation in respect of the property". A number of decisions are referred to in support.

I should wish to emphasise firstly the words "upon condition" in the passage quoted, for this will explain the presence of the words "subject to the conditions" in the deed in question; and secondly, the requirement that the condition must be "performed and satisfied out of the property". We have these words in clause 3 of the deed. The essentials of a trust being present, I hold that a trust has been created and that the respondent can bring his claim under section 6 of the Prescription Ordinance.

The period being ten years, the action was instituted in time and the appeal therefore fails and must be dismissed with costs.

POYSER S.P.J.—I agree.

Appeal dismissed.