

1950

Present: Jayetileke C.J. and Swan J.

VALLIPURAM *et al.*, Appellants, and GASPERSOON *et al.*, Respondents

S. C. 164—D. C. Point Pedro, 2,850

Fideicommissum in favour of family—Gift inter vivos—Acceptance by fiduciary alone—Enures to benefit of fideicommissaries—Fideicommissum residui.

A husband gifted by deed certain lands to his wife R subject to the conditions (a) that after R's death the lands should devolve on his three children, (b) that R should pay the principal and interest due on two mortgage bonds executed by him.

The deed of gift was accepted by R on her own behalf but it was not accepted by or on behalf of the children.

Held, (i) that the fideicommissary gift involved a benefit to a family and, therefore, the fiduciary's acceptance of it was sufficient acceptance on behalf of the fideicommissaries.

(ii) that R did not have the power, under the deed, to alienate the properties in order to pay the mortgage debts. The payment of the debts was a personal obligation which R should discharge out of her own money.

APPPEAL from a judgment of the District Court, Point Pedro.

H. V. Perera, K.C., with *C. Chellappah*, for the plaintiff appellant.

H. W. Tambiah, with *E. R. S. R. Coomaraswamy*, for the 2nd defendant respondent (substituted in place of the 1st defendant).

Cur. adv. vult.

September 29, 1950. JAYATILEKE C.J.—

This is an action for a declaration of title to two lands called Aravaravayal and Anaivilunthan. One Thambipillai was the original owner of the said lands. By deed P1 of 1930 he donated the said lands and sixteen other lands belonging to him to his wife Rasathangam. P1 provided

- (a) That Rasathangam should pay the balance interest and the principal due on two mortgage bonds executed by him in favour of N. G. C. Solomon and K. Sellappa.
- (b) That Rasathangam should have the right to possess and enjoy the lands donated by him and after her death the said lands should devolve on his three children Tangatchi, Anamuttu (3rd plaintiff) and Pethipillai in equal shares.

The gift was accepted by Rasathangam on her own behalf but it was not accepted by or on behalf of the children.

By deed 1D2 of 1932 Rasathangam transferred Aravaravayal and Anaivilunthan to the 1st and 2nd defendants who by an indenture of lease 1D7 of 1945 leased the same to the 3rd defendant. There is a recital in 1D2 that a sum of Rs. 475 out of the consideration was paid to one D. G. C. Solomon Selladurai in part payment of a mortgage bond No. 8810 dated June 1, 1925, by which the land Anaivilunthan had been mortgaged.

Pethipillai died before 1939 unmarried and issueless. Rasathangam died in the year 1939. By P2 of 1946 Tangatchipillai transferred a half share of the said lands to the 1st plaintiff. The 1st and 3rd plaintiffs claimed to be entitled to the said lands on the footing that P1 created a valid fideicommissum. The 1st and 2nd defendants filed answer alleging that P1 was not accepted on behalf of Tangatchi and the 3rd plaintiff and therefore no title passed to them on the death of Rasathangam and further that Rasathangam was entitled to sell the lands donated to her to discharge the mortgage bonds in favour of Solomon and Sellappa.

The District Judge held that P1 created a valid *fideicommissum residui* and that Rasathangam had the right to alienate the lands donated to her.

Mr. Tambiah did not contest that P1 created a valid fideicommissum but he urged that the donation was not accepted on behalf of the fideicommissaries and therefore no rights passed to them. He urged further that Rasathangam was given the implied power by P1 to alienate the properties donated to her to pay off the mortgage debts due to Solomon and Sellappa, and that, in any event, the 1st and 2nd defendants were entitled to claim the amounts paid out of the consideration on 1D2 to the mortgagees on the bonds executed by Thambipillai.

The questions that arise for our consideration are (1) whether the acceptance of the gift by Rasathangam enured to the benefit of Tangatchi and the 3rd plaintiff, and (2) whether Rasathangam had the power to alienate the properties donated to her to pay the mortgage debts due to Solomon and Sellappa.

As a general rule acceptance of the gift by or on behalf of the fideicommissary is necessary under our law to render it valid in his favour. The only exception to the rule is where the fideicommissary gift involves a benefit to the family in which case acceptance by the fiduciary enures to the benefit of the fideicommissaries.

In *Mudaliyar Wijetunge v. Duwalage Rossie*¹ where all the earlier decisions were reviewed, it was held that a gift to A for life and on his death to his children involves a benefit to a family. I would hold that P1 involves a benefit to the family and that Rasathangam's acceptance of it is sufficient acceptance on behalf of her children.

P1 does not give Rasathangam the right to alienate the properties expressly or by implication. It does not say that on her death whatever is left should go to the children. All that it says is that she should pay the debts due to Solomon and Sellappa. That, in my opinion, is a personal obligation which she should discharge out of her own money.

It is not possible for us to consider the claim for compensation put forward by Mr. Tambiah at the argument before us as no such claim was made in the Court below. But we think that, in all the circumstances of the case, the right should be reserved to the defendants to institute an action for the recovery of any compensation that may be due to them, if so advised, and we would order accordingly.

We would set aside the decree entered in this case and allow the plaintiff's appeal with costs here and in the Court below.

SWAN J.—I agree.

Appeal allowed.

¹ (1946) 47 N. L. R. 361.