1950 *Present :* **Nagalingam J. and Pulle J.**

JAYATUNGE *et al.*, Appellants, *and* RAMASAMY CHETTIAR *et al.*, Respondents

S. C. 223—D. C. Kurunegala, 3,052

*Fideicommissum—Effect of words "and their heirs, executors, administrators and assigns" in relation to the fideicommissaries—*Plena proprietas*—Partition—Right of fideicommissary to institute partition action during lifetime of fiduciary.*

A deed of gift imposed on the donee a prohibition against alienation and went on to say that the donee "shall only possess the said properties . . . and on the death of her the said donee the children from her and their heirs, executors, administrators and assigns shall have the right to possess the said properties or to do whatever they please with the same."

Held, that the persons who were to take the property on the death of the donee were clearly and adequately designated and, therefore, the property was burdened with a fideicommissum.

Held further, that a purchaser from one of the fideicommissaries was not entitled to maintain an action for partition during the lifetime of the fiduciary, although the fiduciary's life interest had devolved on the existing fideicommissaries.

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, K.C., with *J. M. Jayamanne*, for the 3rd, 4th, 6th and 10th defendants appellants.

N. E. Weerasooria, K.C., with *K. A. Kandiah* and *V. Arulambalam*, for the plaintiff respondent.

E. B. Wikramanayake, K.C., with *C. C. Rasaratnam* and *M. A. M. Hussein*, for the 11th defendant respondent.

Cur. adv. vult.

November 15, 1950. NAGALINGAM J.—

This is an appeal by the 3rd, 4th and 6th to 10th defendants from a judgment of the learned District Judge of Kurunegala entering a decree for partition of the land described in the schedule to the plaint.

The facts, so far as they are relevant and in regard to which there is no dispute, are that the land in question was by deed P 3 of 1907 gifted by one Iseris Appuhamy and his wife Mangohamy to their daughter Albina Hamy, wife of Don Jusey Jayatunga Appuhamy, subject to certain conditions which will be noticed presently. By deed P 5 of 1930, Albina Hamy and her husband conveyed to three of their children, the 2nd, 3rd and 4th defendants, their life interest. By deed P 6 of 1940, Albina Hamy, her husband and the 2nd defendant conveyed a $\frac{1}{8}$ share of the land to the plaintiff. The plaintiff by deed P 9 of 1944 conveyed a half share of his interests, namely a 1/16 share to the 5th defendant. The

life interest in the remaining 7/8 share of the land that remained vested in the 2nd, 3rd and 4th defendants has devolved by virtue of certain mesne conveyances on all the children of Albina Hamy who are the 2nd, 3rd and 4th and 6th to 10th defendants in certain proportions which it is unnecessary to ascertain for the purpose of the appeal. On the basis of this devolution of title the plaintiff instituted this action for partition, making Albina Hamy the 1st defendant as the person on whom the title was vested to the remaining 7/8 share and her children, the 2nd, 3rd, 4th and 6th to 10th defendants as persons entitled to a life-interest during Albina Hamy's term of life in the said 7/8 share.

The appellants contend that deed P 3 creates a valid fideicommissum anl that no action for partition lies in the present state of the title. The relevant parts of the deed P 3 are as follows:—

(1) The words of grant are:

> We..., Iseris Appuhamy and wife..., Mangohamy.............. in consideration of the love and affection we .... have and bear unto our daughter.........Albina Hamy wife of Don Jusey Jayatunga Appuhamy do hereby.........grant ....by way of gift absolute and irrevocable unto the said donee to possess only after the death of both of us or the survivor of us.........the lands described in the schedule hereto, subject to the conditions hereinafter set forth.

The conditions are:—

(2) (*a*) Albina Hamy.........shall only possess but shall not sell, mortgage or exchange or alienate in any other manner the aforesaid properties hereby conveyed.

(*b*) Albina Hamy.........shall possess only the said properties ....and on the death of her the said donee the children from her and their heirs, executors, administrators and assigns shall have the right to possess the said properties or to do whatever they please with the same.

In the condition (*a*), that there is a definite prohibition against alienation by the donee is undoubted and that the donee was only to possess the land is made equally clear by the use of the word " possess " not only in the words of grant but also in both the conditions (*a*) and (*b*). The donee is also clearly and precisely indicated by reference to the donee specifically without the addition of any other words such as heirs, executors, administrators and assigns.

It has been contended on behalf of the plaintiff that the persons who are to take the property on the death of the donee are, however, not clearly and adequately designated and therefore the property is not burdened with a fideicommissum. It is said that if the description had been " the children descending from her and the heirs, executors and administrators " no objection could be taken on the ground of insufficiency of description of fideiommissarii, but it is urged that as the word " assigns " too has been used in the same collocation the class of beneficiaries becomes vague and includes an indeterminate

class of persons whom it could never have been the intention of the donors to benefit. This contention is sought to be supported on the strength of certain cases which I shall proceed to consider *seriatim*.

The first case relied upon is that of *Boteju v. Fernando* [1]. The words used to designate fideicommissarii in this case were, " after his (donee's) death to be possessed by his heirs, executors, administrators and assigns for ever." It will be noticed that not only the heirs of the donee but also the donee's executors, administrators and assigns are indicated as the persons who are to take the property on the death of the donee. Had the words, " executors, administrators and assigns " been omitted and the fideicommissarii referred to merely as the heirs of the donee, there can be no question but that the fideicommissarii are sufficiently designated. By introducing the words " executors, administrators and assigns " which refer to executors, administrators and assigns of the donee the class to be benefited became an unwieldy body of persons inclusive of every person to whom the donee may leave the property by last will or by sale, gift or transfer. If, for instance, instead of the words, " his heirs, executors, administrators, and assigns " the language had been, " his heirs and their executors, administrators and assigns," the effect would not be the same as it would not be open to the donee the fiduciarius to bring into existence at his will any class of persons as beneficiaries and the beneficiaries will be limited to his heirs *ab intestato* and the argument that an indeterminate class of persons has been designated as beneficiaries would fail. There was therefore no difficulty in holding in this case that no fideicommissum was created.

The next case is that of *Amaratunga v. Alvis* [2] where there was a conflict in the several parts of the deed in regard to the designation of the parties to be benefited. In one part of the deed which may be regarded as directory " the children and heirs descending from her (the donee) and authorised persons such as executors, administrators and assigns " were set out as the beneficiaries, while in the words of grant the language used was " and after the death of the donee to her heirs, and authorised persons such as executors, administrators and assigns. " Mr. Weerasooria argued that the words " authorised persons such as executors, administrators and assigns " referred to the executors, administrators and assigns of the heirs of the donee. The judgment does not indicate that that is so and I have looked at the original deed considered in the case and I find that " the executors, administrators and assigns " refer to the executors, administrators and assigns of the donee. It will thus be seen that although in the directory part the children of the donee were mentioned yet along with them were also included the executors, administrators and assigns of the donee, while in the grant no reference to children was made. For the reasons I have already set out in discussing the case of *Boteju v. Fernando* (*supra*) it would be apparent that it cannot be said that the deed creates a valid fideicommissum.

The third case is that of *Appuhamy v. Mathes* [3] where also there was a conflict between several parts of the deed in that whereas in the directory

[1] (*1923*) *24 N. L. R. 293.* [2] (*1939*) *40 N. L. R. 363.*

[3] (*1944*) *43 N. L. R. 259.*

part the fideicommissarii were set out with precision as the children of the donees, in the words of grant the phraseology adopted was " after their (donees') deaths their heirs, executors, administrators and assigns as indicative of the class of persons to be benefited. Here, again, it will be noticed that the heirs, executors, administrators and assigns referred to are the heirs, executors, administrators and assigns of the donees, so that though in the directory part only the children were referred to, in the operative part a different and larger class consisting of heirs, executors, administrators and assigns of the donees were specified, resulting again in the view that the deed did not create a fideicommissum.

Fernando v. Rashid [1] was the last case referred to. There the beneficiaries were designated by the words, " their (donees') heirs, executors, administrators and assigns. " It will be noticed that this case is very similar to the case of *Boteju v. Fernando* (*supra*).

The principle deducible from all these cases is that where the executors, administrators or assigns of the donee or donees are indicated as the fideicommissarii, an uncertain class of persons are referred to as beneficiaries, thereby rendering nugatory any attempt made to create a fideicommissum, because the fideicommissarii are not clearly and adequately or sufficiently designated.

In the deed before me, no such difficulty arises. The fideicommissarii are referred to as the children descending from her (the donee) and *their* heirs, executors, administrators and assigns. The reference here to the heirs, executors, administrators and assigns is not to those of the donee but to those of the children of the donee. The persons to be benefited are the children of the donee, and the addition of the words " their heirs, executors, administrators and assigns " is used for the purpose of conferring on the children an absolute and unfettered right in the property conveyed. That the use of the words " heirs, executors, administrators and assigns " in apposition to the fiduciarius is for the purpose of vesting the *plena proprietas* in the property as a preliminary to creating a fideicommissum and that their use does not derogate from the creation of a valid fideicommissum has been held in several recent cases which it is unnecessary to recapitulate.

A similar reasoning would and should apply even in regard to the grouping of these words in relation to the fideicommissarius. I do not think, as was contended by Mr. Weerasooria, it is possible to say that the presence of the word " assigns " by itself creates a situation which is in any way different from the use of the words " heirs, executors and administrators." If by referring to children and their heirs, executors and administrators no ambiguity is caused, there can be equally little ambiguity caused by the use of the additional word " assigns " in the same connection. The words, " their heirs, executors and administrators " clearly refer to an indeterminate class of persons who would come into existence on the death of children, either by intestate succession to or under the last will of the children. If the contention

[1] *(1949) 50 N. L. R. 349*

is allowable that this class does not affect the precise designation of the fideicommissarii as the children, it is difficult to see how a no more indeterminate class of persons such as the assigns of the children could tend to create ambiguity in regard to the fideicommissarii being the children.

There is another approach to this question and that is, construing the words according to their plain meaning, the grant must first vest in the children before it could vest either in their assigns or in their heirs, executors or administrators; so that the immediate grant is to the children and thereafter it is left to them either to let the property pass to their heirs by intestate succession or to any person or persons by last will, or convey it by sale, gift or transfer to any person they may choose. It cannot in these circumstances be said that the donors intended that any person other than the children of the donee should be benefited. The most that can be said is that it was of no concern to the donors what the children of the donee did with the property. The result would have been the same if the donors had omitted the words, " their heirs, executors, administrators and assigns" from the deed and stated that on the death of the donee her children should have the right to possess the said properties, for under our law a grant to X is a grant to X, his heirs, executors, administrators and assigns, unlike under the common law of England where a grant to X in the case of a heritable estate would not tend to convey the land held in fee to the heirs of X *in re Ford & Fergusons Contract*[1]; and in order to vest such an estate in heirs under that system of law, it would have been essential to use the group of words " heirs, executors, administrators and assigns." The adoption of these words in our conveyancing practice is due to our having following English precedents and cannot be regarded as having been used for any other purpose than to vest an absolute title.

I am therefore of opinion that the fideicommissarii under this deed are the children of the donee and are clearly and unambiguously designated.

I now pass on to a consideration of the second question. It is admitted that the fiduciarius, Albina Hamy, and her husband, Don Jusey Jayatunge Appuhamy are both alive. It is true that they have eight children now and apparently on the assumption that they would not have more than eight children the 2nd defendant, who is one of the children, has conveyed a 1/8 share. Don Jusey Jayatunge Appuhamy in giving evidence gave his age as 72. There is no evidence as to what the age of the wife is. But be that as it may, Counsel for the plaintiff have not been able to show that there is any presumption in law that at or past any particular age a man or woman is deemed incapable of procreating children.

The property would pass to the children only on the death of Albina Hamy and it is impossible to say at present that the share of $\frac{1}{8}$ conveyed by the 2nd defendant would be operative to its full extent, for should Albina Hamy have one or more other children the share would in such an event become reduced. The plaintiff, therefore, cannot in these

[1] *(1906) 1 L. R. 607.*

circumstances be said to be entitled to possess an undivided $\frac{1}{8}$ share during the lifetime of Albina Hamy. Besides, the entire dominium is yet vested in Albina Hamy. The present interest, therefore, of the plaintiff is not such as entitles him to maintain an action for partition. Authority for this proposition would be found in the case of *Fernando, v. Fernando* [1], *and Kiri Etana v. Ran Etana* [2].

The plaintiff's action therefore fails and is dismissed with costs. The appellants will also be entitled to the costs of appeal payable by the plaintiff.

Pulle J.—I agree.

Appeal allowed.