

1963 *Present* : H. N. G. Fernando, J., and L. B. de Silva, J.

M. EELIATAMBY and Wife, Appellants, and S. KUMARASEGARAM-
PILLAI and others, Respondents

S. C. 143/60—D. C. Point Pedro, 5,928

Quia timet action—Declaratory action filed by fideicommissarius to prevent fiduciarius from building on fideicommissary property—Maintainability.

A person, alleging that he is *fideicommissarius* under a deed, is not entitled to file action for a declaration that the deed created a *fideicommissum* and to prevent the *fiduciarius*, or the transferee of the interests of the *fiduciarius*, from effecting useful improvements on the fideicommissary property.

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

H. V. Perera, Q.C., with *C. Ranganathan* and *E. Gooneratne*, for Defendants-Appellants.

H. W. Jayewardene, Q.C., with *S. Sharvananda* and *S. S. Basnayake*, for Plaintiffs-Respondents.

Cur. adv. vult.

February 8, 1963. L. B. DE SILVA, J.—

Vairamuttu Kandiah and his wife Nagamuttu conveyed their interests in a land called "Kalanai" described in the plaint to their son Rajaratnam upon deed No. 4,248 dated 15th May, 1921. The 2nd and 3rd Plaintiffs are the two children of Rajaratnam. They claim in this action that the deed No. 4,248 created a fidei commissum in favour of the children of Rajaratnam after his death.

Rajaratnam was also entitled to certain other interests in this property upon deed No. 3,482 dated 10th March, 1919. In partition action No. 24,217 D. C. Jaffna, Rajaratnam was allotted lot 5 in the partition plan in lieu of his undivided interests on both deeds. There was no reference in the partition decree that his interests derived under deed No. 4,248 of 15th May, 1921 were subject to a fidei commissum.

The rights of Rajaratnam in the said lot 5 were sold in execution in the partition action for non-payment of costs and were purchased by Arumugam Murugesu. Murugesu's rights have now devolved on the defendants-appellants. The defendants commenced to erect a building on the said lot in spite of the protests of the plaintiffs. The plaintiffs thereupon filed this action for a declaration that deed No. 4,248 aforesaid, created a fidei commissum in favour of the 2nd and 3rd plaintiffs and to prevent the defendants from erecting any buildings on the said property. Rajaratnam is still alive.

For the purpose of deciding this Appeal, it is sufficient to consider if a cause of action has now accrued to the plaintiffs as set out in their plaint. Whether the deed in question created a fidei commissum or not and if it did create a fidei commissum, whether the defendants are entitled to claim compensation for improvements as bona fide possessors or not when the rights of the 2nd and 3rd plaintiffs as fidei commissarii mature, there is no doubt that the defendants are entitled to erect buildings and otherwise improve this property for the full enjoyment of their rights even if their only right to this property was that of fiduciaries. They are doing no wrong to the plaintiffs nor committing any mischief to the property by erecting buildings. It is not suggested that this is not a buildable property.

In *Hewavitharna v. Chandrawathie*¹ Gratison, J. stated, "As at present advised, I see no reason why relief in a *quia timet* action should necessarily be denied to a person who, though possessing only a contingent interest in land, is placed by the conduct of some third party in such a situation that *there exists at present a substantial and imminent risk of the loss or impairment of his interests when the time eventually arrives for its enlargement into a vested right.*"

The principles applicable under our common law are in conformity with this view. So long as proof is forthcoming of some threatened 'concrete invasion of a party's rights' he can claim the protection of a declaratory decree in his favour".

In this case there is no such risk of loss or impairment of the rights of the 2nd and 3rd plaintiffs when their rights become vested, even if the deed in question created a valid *fidei commissum*. It would indeed create great hardship on fiduciaries if they are prevented from effecting useful improvements on *fidei commissary* property with a view to obtaining the full benefit of the property while they are entitled to possession thereof.

We accordingly allow the appeal, set aside the judgment and decree of the District Court and dismiss the action of the plaintiffs with costs on the ground that their claim is premature. The defendants-appellants are entitled to the costs of this appeal.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.

¹ (1951) 53 N. L. R. at p. 174.