

Present : Bertram C.J. and Schneider A.J.

1920.

KUMARIHAMY *et al.* v. KUMARIHAMY *et al.*

65—D. C. (Inty.) Ratnapura, 3,379.

Fidei Commissum—*Application for sale under the Entail and Settlement Ordinance—Policy of the law.*

“ It is the policy of the law that where land, which is subject to a *fidei commissum* cannot properly be developed for the advantage of the *fidei commissarii*, it should be freed from the *fidei commissum* by sale, and the purchase money deposited in Court for the benefit of those interested.”

THE facts appear from the judgment.

A. St. V. Jayawardene, for the appellants.

August 5, 1920. BERTRAM C.J.—

This appeal relates to an application under the Entail and Settlement Ordinance, 1876. The land in question is land subject to a *fidei commissum*, and subject to that *fidei commissum* it is vested in the two surviving daughters of the testator and the daughter and son-in-law of a third daughter. The land has been the subject of certain proceedings under the Waste Lands Ordinance, and, as a result of those proceedings, 265 acres and 22 perches have been declared private property. As to the remainder, the Crown has offered to settle some 322 acres upon the persons claiming under the will upon favourable terms. The land is jungle land in an inaccessible situation. It appears not to be worth the while of any of the persons interested to take advantage of the offer of the Crown as long as it remains upon its present tenure. The second and third petitioners, who, as I have said, are the daughter and

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son-in-law of one of the testator's daughter, and are supported by the first petitioner, who is another of those three daughters, asked the Court to allow the land, which the Crown proposes to settle, to be sold to them at a price to be fixed by the Court. It is assumed that the money realized by the sale will be subject to the *fidei commissum*, and it is proposed that this sum should be paid into Court to be held subject to the *fidei commissum*. I presume that it is intended that part of the sum thus paid into Court shall be devoted to procuring from the Crown the settlement which the Crown has offered to make. With regard to the land declared to be private under the Waste Lands Ordinance, the second and third petitioners propose to pay the value of their third share, and so to free that third share from the *fidei commissum*, the purchase price being deposited in Court subject to the *fidei commissum*.

The matter came before the District Court, and it there appeared that Mr. Dharmaratne, who is presumably a proctor appearing for some of the parties interested, raised an objection. No proxy appears to be filed defining his position, and we do not know for whom he purported to appear. The objection he raised was not to the merits of the proposal. He declined to assent unless the applicants admitted the exclusive right of his client or clients to some other block not more particularly specified.

The learned District Judge on this objection declined to grant the application, saying that he could not do so unless all parties consented. It appears that unless some arrangement of this sort is carried through, it will be impossible for the person interested in the *fidei commissum* to take advantage of the offer of the Crown to settle upon them the 322 acres. It also appears to be the case that no steps can at present be taken to develop the 265 acres which are admitted by the Crown to be private.

It is in accordance with the policy of the law that where land, which is subject to a *fidei commissum*, cannot properly be developed for the advantage of the *fidei commissarii*, it should be freed from the *fidei commissum* by sale, and the purchase money deposited in the Court for the benefit of those interested. I do not think that, where a good case has been made out for a relief of this nature, the Court should refuse to grant it, simply because some one appearing for some party interested wishes to extort as a price of his consent some concession from those applying for the relief in relation to some other piece of land not before the Court.

I would, therefore, allow the appeal, and grant the application of the petitioners. The price fixed in accordance with the first paragraph of their petition should, I think, be Rs. 80 per acre, namely, the amount of the valuation of the Ratamahatmaya. I would make no order as to costs.

SCHNEIDER A.J.—I agree.