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Present: Lascelles C.J. and De Sampayo A.J.

SILVA *et al.* *v.* SILVA *et al.*

56—D. C. Galle, 11,534.

Gift to "children," their heirs, executors, administrators, and assigns"— Fidei commissum.

A deed of gift contained the following clauses:—

"After the demise of both of us all the aforesaid properties to be entitled to the said seven children in equal shares.

"..... and when one of us dies a half out of the said rights should devolve on our said seven children, and when both of us are dead all the aforesaid rights should be entitled to the aforesaid children and their heirs, executors, administrators, and assigns, and they can only possess the same, but they cannot mortgage, sell, gift over, or lease over for a period of over five years, or alienate in any other manner, and our said children may get the rights partitioned."

Held, that the deed did not create a *fidei commissum*.

THE facts are set out in the judgment.

Bawa, K.C., for first plaintiff, appellant.

J. S. Jayewardene, for twelfth defendant, respondent.

Cur. adv. vult.

April 6, 1914. LASCELLES C.J.—

This is an appeal, in a partition action, from the decision of the learned District Judge that the deed of gift, marked P 1, created a *fidei commissum*.

The donors in the deed in question, which is in the Sinhalese language, were husband and wife. The donors, after reciting that they were then old and sickly, donated the property described in the deed to their seven children. The translation then proceeds as follows:—

After the demise of both of us all the aforesaid properties to be entitled to the said seven children in equal shares.

Therefore, regarding this inheriting over, settling over, and directing over in future, we two or our heirs, &c., cannot make or cause to make any dispute regarding this gift, and when one of us dies a half out of the said rights should devolve on our said seven children, and when both of us are dead all the aforesaid rights should be entitled to the aforesaid children and their heirs, executors, administrators, and assigns, and they can only possess the same, but they cannot mortgage, sell, gift over, or lease over for a period of over five years, or alienate in any other manner, and our said children may get the rights partitioned.

There was some discussion in the judgment in the Court below as to the meaning of the word *bharakarayo*, which in the translation of the deed is rendered "assigns." But there seems to be no doubt that the word is habitually used by Sinhalese notaries as the equivalent of the English word "assigns" in collocation with the words "executors and administrators."

The terms of the donation when analysed may be stated as follows. It contains—

(*a*) A reservation of a life interest to each of the donors.

(*b*) A gift, on the death of each of the donors, of half of the property to the seven children, "their heirs, executors, and assigns."

(*c*) A prohibition against alienation.

(*d*) Power to partition.

(*e*) No mention of the persons to whom the property is to go after the death of the children.

The appellant's case is that although there are indications of a vague intention to create a *fidei commissum* still no *fidei commissum* was created, because the persons to be benefited on the death of the fiduciaries are not clearly indicated.

The respondent, on the other hand, has recourse to the words "heirs, executors, administrators, and assigns" in the original limitation to the donees, and contends that from these words the intention of the donors to benefit their children's heirs may be extracted.

Apart from authority, the difficulties in the way of this construction are obvious.

The words "heirs and executors, administrators and assigns" are words which are frequently, though unnecessarily, used by Sinhalese notaries to denote a gift or transfer of *plena proprietas*. There is no reason for assigning any other meaning to them. But it may fairly be argued that the prohibition against alienation shows that the donors did not intend to invest the donees with *plena proprietas*.

But in order to give effect to the respondent's contention we must construe the terms of the original gift to the donees, not as defining the interest of the donees, but as designating the persons who, after their death, are to succeed them. We must also get rid of the words "executors, administrators, and assigns" and retain only the word "heirs."

The authorities appear to me to be against the respondent's contention.

It is a principle of the Roman-Dutch law, to which our Courts have always given full effect, that in order to create a valid *fidei commissum* the *fidei commissaries* must be clearly designated.

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Hormusjee v. Cassim [1] was a case very similar to the present case, where it was held that the *fidei commissum* failed for want of a clear designation of the persons in whose favour the prohibition was made. *Tina v. Sadris* [2] was a decision of the Full Court, and is a leading case on the subject. There was a clause that the land should be possessed only by the donor's son A or the heirs of his estate, " to do what they pleased with the same, and also that they cannot be sold or mortgaged by the said A or the heirs of his estate."

There it was held that the *fidei commissum* failed for want of clear designation of the persons in favour of whom the prohibition was declared.

Aysa Umma v. Noordeen [3] is another case where it was held that the prohibition against alienation was not followed by a sufficient designation of the parties to be benefited to constitute a valid *fidei commissum*.

In that case the difficulty of discovering whom the donor intended to benefit was less than in the present case, because the gift was to the donor's grandsons " to have and hold the said premises with the said ..... their heirs, executors, administrators, and assigns, and their children and grandchildren."

This case was confirmed in review by the Full Court.[4]

We were also referred to the case of *Dassanaike v. Dassanaike*.[5] This was a case where the Court refused to hold that a deed, the terms of which were contradictory and unintelligible, created a *fidei commissum*.

The case most in favour of the respondent is *Wijetunge v. Wijetunge*.[6] There, after the prohibition against alienation, there was a prohibition that the donee's " heirs, executors, or administrators " should hold and possess the property or deal with it as they please. But that case is distinguishable from the present case, in that it did contain a designation of the persons in favour of whom the prohibition was declared. It did not involve the necessity of having recourse to the terms of the original gift to the donee to ascertain the persons who were to take after the donee's death.

In *Weerasekera v. Carlina et al.*[7] the words " throughout their succeeding generations " were held to be a sufficient designation of the persons on whom the property was to devolve after the death of the legatees. Similarly, in *Salembram et al. v. Perumal et al.*[8] the expression " heirs in perpetuity " under the bond of *fidei commissum* was considered a sufficient indication of the class in whose favour the *fidei commissum* was created.

From these authorities it is clear that the Courts have consistently insisted on the requirement of the Roman-Dutch law, that the

[1] (1896) 2 *N. L. R. 190.*
[2] (1885) 7 *S. C. C. 135.*
[3] (1902) 6 *N. L. R. 173.*
[4] (1905) 8 *N. L. R. 350.*
[5] (1906) 8 *N. L. R. 361.*
[6] (1912) 15 *N. L. R. 493.*
[7] (1912) 16 *N. L. R. 1.*
[8] (1912) 16 *N. L. R. 6.*

persons for whose benefit the *fidei commissum* is created should be plainly designated; and that instruments which do not comply with this requirement are not effective to create *fidei commissa*, even when the intention of the donor or testator to create a *fidei commissum* may be gathered from the document. *Wijetunge v. Wijetunge* [1] is the case in which the Court has gone the furthest in collecting from an ambiguous expression the donor's intention as to the persons to be ultimately benefited. Here we are asked to take a distinct step further in that direction. This I am not disposed to do. The rule of the Roman-Dutch law is a salutary one; and in cases of doubt the presumption is against a *fidei commissum*.

In the present case it would be impossible to hold—and there is certainly no authority for the proposition—that the words "heirs executors, administrators, and assigns," used as they are with reference to the original gift to the donees, are a clear and precise indication of the class which is to take after the death of the donees.

I would therefore hold that the deed P 1 does not create a *fidei commissum*, and remit the action to the District Court to be disposed of on that footing. The appellant is entitled to the costs of the appeal and to the costs of the contention in the Court below.

DE SAMPAYO A.J.—

I also think that the deed of gift does not create a valid *fidei commissum*. There was some question raised at the argument of the appeal as to the correctness of the translation of the Sinhalese word *bharakaraya* as meaning "assign." The Sinhalese word no doubt literally means custodian or person in charge, as the District Judge says, but in the present context I think it is intended to be the equivalent of "assign." I may say that notaries, in reproducing in Sinhalese the English conveyancing formula "heirs, executors, administrators, and assigns," generally use the phrase "*urumakkara polmakh athmistrasi bharakaradin.*" It will be observed that the words used to indicate "executors and administrators" are corruptions of two Dutch and English words, and I believe, in imitation of this expedient, some Sinhalese notaries, instead of using the bare word *bharakaraya* to mean "assign," adopt the curious though expressive combination "*assignbharakaraya*" or "*assignbalakaraya.*" Taking, then, the translation filed in the case as correct, it will be seen that the words "heirs, executors, administrators, and assigns" are used as words of limitation in respect of the estate conveyed to the immediate donees, and thus an unfettered title is conveyed to them in the first instance. The unreported case, 443 D. C. Colombo, 86,298 (Supreme Court Minutes, February 25, 1914), was cited in this connection. There the Court, if I may be allowed to say so, rightly pointed out that the use of the word "assigns" was not inappropriate

[1] (1912) 16 *N. L. R.* 428.

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for the purpose of conveying the *dominium* in the property to the fiduciary. I should say myself that it would not necessarily make invalid a *fidei commissum* which is otherwise well created. But where the instrument to be construed is such that there is no clear designation of the persons who are to take after the immediate donee, then I think that the use of such words as "executors, administrators, and assigns" as part of the same formula with the word "heirs" is of material importance. The present case is in that situation. For it is argued that the *fidei commissari* are the "heirs" who are mentioned in that context. It appears to me impossible to disconnect the word "heirs" from the rest of the context, and so I think that this is a case in which there has been no designation of the persons in whose favour or for whose benefit the prohibition against alienation is provided. There may be another effect in the use of such words as these mentioned, viz., that the prohibition against alienation itself may be rendered ineffectual. In D. C. Colombo, 20,345 (Supreme Court Minutes, June 11, 1906), Wendt J., referring to the class of cases in which the word "assigns" occurred, observed that this Court did not mean to lay down a general rule that, where an absolute grant was made, any subsequent provision cutting down the full *dominium* was nugatory, but said that each of the cases in question dealt with an alleged *fidei commissum*, a necessary element of which was a prohibition against alienation, and that this Court decided that in each instance an unequivocal prohibition was not to be gathered from the deed, and the *fidei commissum* therefore failed. Looked at in this way also, the provisions of the present deed of gift are ineffectual to create a valid *fidei commissum*. I think, therefore, that the appeal should be allowed, and I agree to the order as to costs.

Set aside.

84—D. C. Kalutara, 5,982.

May 12, 1915. WOOD RENTON C.J.—

This is an action for partition. The land in question was gifted to Carlina Perera by deed No. 4,515 dated August 25, 1896, by her parents on the occasion of her marriage with Peter Edward Pieris. Carlina and her husband leased the land to the second defendant on deed No. 10,173 dated February 12, 1908, for a period of eight years, and before the expiry of that lease, namely, on September 29, 1910, by deed No. 18,187 leased it to him again for a further period of five years from the expiry of the first lease. Carlina and the sole child of the marriage died in the lifetime of Peter Edward Pieris. By deed of transfer No. 502 dated March 24, 1914, he sold the land to the first defendant. The covenant for freedom from incumbrances in this deed of sale contained a reference to the existing leases in favour of the second defendant. The first defendant, by deed No. 58 dated June 19, 1914, sold one-fourth of the land to the plaintiff. The plaintiff and the first defendant are quite content that the subsisting leases in favour of the second defendant should be appraised, and that

compensation should be awarded to him in terms of the appraisement. But the second defendant, while he has no objection to the land being partitioned between the plaintiff and the first defendant, insists that the partition of the land shall be subject to his possession under the leases. The learned District Judge held that the deed of gift by her parents in favour of Carlina Perera created a valid *fidei commissum*, and that on the death of the fiduciary Carlina, who only had a life interest, and of her child, the *dominium* of the property passed unencumbered to her husband. The District Judge held at the same time that the second defendant was entitled to compensation, and took as a basis of that compensation the value of the unexpired portion of the lease *plus* nine per cent. interest up to the date of the judgment. The second defendant appeals.

Two points were argued before us in support of the appeal; in the first place, that the plaintiff and the first defendant are estopped, as Peter Edward Pieris, their predecessor in title, himself would have been, from disputing the validity of the leases in favour of the second defendant; and in the second place, that deed No. 4,515 of August 25, 1896, did not create a valid *fidei commissum*, and that, therefore, the powers of Carlina and her husband under it were unfettered. It is unnecessary to consider the former of those points, because I am satisfied that the latter is entitled to succeed. The deed of 1896 gifts the land to Carlina, and provides that she shall take possession of it from and after the expiration of a subsisting lease in favour of one Podisingho Perera. The deed then proceeds as follows:—

> "And it is hereby directed that she can only lease out the said land, but not sell, mortgage, or tender as security, nor in anywise alienate the same; nor is it subject to any of her debts. That, after her death, her children, heirs, executors, administrators, and assigns can deal with the same as they like. And it is hereby further directed that any of our other descending children, heirs, or assigns shall have no right or title whatever to the said land hereby gifted."

The prohibitory clause in this deed is substantially identical with the clause construed by Sir Alfred Lascelles C.J. and De Sampayo A.J. in *Silva et al. v. Silva et al.* (*1914, 18 N. L. R., p. 174*). In that case the learned Judges held, after a most careful survey of all the authorities, that the clause in question did not create a valid *fidei commissum*, inasmuch as it did not contain an adequate designation of the persons to be benefited on the death of the fiduciary. This decision is binding upon us, and I feel that I cannot usefully add anything to the reasoning by which it is supported.

I would set aside that portion of the decree of the District Court in which it is provided that the plaintiff and the first defendant should pay to the second defendant the value of the unexpired portion of the lease in his favour, with interest thereon at nine per cent. per annum till February 2, 1915, and that the second defendant should pay to the plaintiff and the first defendant their costs of the contest, and in lieu thereof would order that the property in suit should be partitioned, subject to the right of the second defendant to possession under his leases, and that the plaintiff and first defendant should pay to the second defendant his costs of the contest and of this appeal.

ENNIS J.—I agree.