

1935

Present : Poyser and Koch JJ.

SIRI KANTHA *et al.* v. THIAGARAJAH *et al.*

163—D. C. (Inty.) Colombo, 27,716.

Fidei commissum—Property sold under partition decree—Fidei commissum not disclosed—Proceeds in Court—Application to draw proceeds.

Where property subject to a *fidei commissum* is sold under a partition decree without the existence of the *fidei commissum* being disclosed and the proceeds are deposited in Court,—

Held (on an application by the assignee of a party bound by the *fidei commissum* to draw the proceeds) that the *fidei commissum* attached to the proceeds in Court.

A PPEAL from an order of the District Judge of Colombo.

The appeal was by the ninth defendant, an assignee of the interests of the eighth defendant, one of the fiduciaries under a will creating a *fidei commissum*. The property devolving under the will formed the subject of a partition action in which the Court ordered a sale but did not refer to the *fidei commissum* or give directions as to the manner in which the proceeds were to be conserved for the benefit of the fideicommissaries.

The property was sold and the proceeds were brought into Court.

The assignee moved to draw the proceeds deposited in Court and the application was opposed on behalf of the eighth defendant.

The learned District Judge ordered that the proceeds should remain in Court subject to the *fidei commissum*.

H. V. Perera, (with him *Subramaniam*), for appellant.—The will of 1834 does not create a *fidei commissum*. An examination of the words used in the will reveals that the meaning is not clear. Even if the will creates a *fidei commissum* it does not extend up to the fourth generation. The words used clearly show that the prohibition against alienation is binding only on the persons named in the will and no further. The will was produced at the trial, and the learned trial Judge entered a partition decree for sale and made no order reserving the rights of the fideicommissaries. The rights of parties now flow from the decree. The decree entered must be taken to be an adjudication regarding the existence or otherwise of the *fidei commissum*.

N. Nadarajah (with him *S. J. V. Chelvanayagam*), for respondent.—It is too late to contend that the will does not create a *fidei commissum*. This will was interpreted to contain a *fidei commissum* in S. C. 163—D. C. Col. 28,982 (*vide* Min. of S. C. 12.11.1909). The wording of the will is

clear (30 N. L. R. 266). This will was executed before the Entail and Settlement Ordinance of 1871, and therefore the question of the period during which the *fidei commissum* is to last must be decided according to the principles of Roman-Dutch law. Ordinarily a *fidei commissum* extends to four generations. (*Pereira's Laws of Ceylon*, p. 436.) A partition decree does not wipe out a *fidei commissum*. (*Jayawardene on Law of Partition*, p. 205.) The decree entered—this did not refer to the question of *fidei commissum*. No issue was raised by the parties and there was no adjudication by the Court. A *fidei commissum* cannot be wiped out by merely mentioning same in the plaint, and obtaining a decree without any reference to same. A partition decree does not wipe out a *fidei commissum* whether same was disclosed or not. (*Baby Nona v. Silva*¹, *Abeyundere v. Abeyundere*², *Weeraman v. Silva*³.)

Cur. adv. vult.

September 11, 1935. KOCH J.—

The dispute in appeal mainly centres round the point whether the joint will of one Supramaniam Chetty Thiagappa Chetty and his wife, Nagamma, creates a *fidei commissum*, and if so, to what degree of descent does it extend. The learned District Judge after careful consideration of the terms and conditions of this will has decided that it does create a *fidei commissum* and that the *fidei commissum* does extend up to and including the fourth generation. The will was executed in October, 1834, a little over a hundred years ago, so that the second matter for consideration will be governed by the Roman-Dutch law and not by the enactments in the later Entail and Settlement Ordinance, No. 11 of 1876.

I think I can with confidence assert that the view consistently taken in Ceylon based on the Roman-Dutch law is that where a *fidei commissum* has been created by an instrument executed before the Ordinance fettering the power of alienation of the devisees or the donees, as the case may be, and their descendants, the fetter binds such devisees and donees and the three generations following; but the generation thereafter will succeed to the property unfettered and absolutely. There are numerous decisions to this effect. The learned Judge's view therefore on this point is correct. Is he equally right in his construction of the terms of the will and the conclusion he arrived at? I am of opinion that he is. Considering that the document we have to construe is a will, the fullest effect should be given to the author's intentions.

In paragraph 5 of this will the testator and his wife devise certain property absolutely to the son and daughter of the first marriage and the two sons of the second.

In paragraph 6 they proceed to create what the respondent contends is a *fidei commissum* in respect of the Bankshalls and other landed property. The property concerned in this appeal is Bankshalls.

The testator and testatrix, after providing for a division of these properties into shares, direct that these properties should be inherited in these shares by these four children, and after further providing for the manner of their enjoyment during their lives, enjoin them not to alienate their shares, but that after their deaths these shares should devolve on

¹ 9 N. L. R. 251 at p. 256.

² 12 N. L. R. 373.

³ 22 N. L. R. 107.

their descendants "in the same proportion". They also direct that if any of them "should die without issue, the share of such person shall be added to the others". Mr. H. V. Perera contends that "others" mean the devisees. I am willing to assume he is right, but this makes no difference to the intention to create a *fidei commissum*. I am of opinion that the necessary requisites of a *fidei commissum* are present.

It may be of interest to remark that in a previous case No. 28,982 of the District Court of Colombo the interests that passed under this self-same will came to be considered. The disputants in that case conceded that the will contained a *fidei commissum*, and the presiding District Judge—Mr. Justice Drieberg—dealt with the shares on this footing.

There was an appeal to this Court and the appeal was dismissed. This is shown by the order of this Court in S. C. No. 163—D. C. (Inty.) Colombo, No. 28,982 (S. C. Minutes of November 12, 1909). It does not appear definitely that the existence of a *fidei commissum* was specifically considered by this Court, presumably not, but if so, for the good reason perhaps that it was always regarded by all persons interested that this century old will did create a *fidei commissum*.

It is now necessary to state what the actual dispute in this appeal is and how it transpired. Several Bankshalls, *i.e.*, properties in Bankshall street, Sea street, and Chekku street, were the subject of a partition in this case. The plaint recited this will and its terms in allotting shares to the respective parties. The fact that the will created a *fidei commissum* was not specifically recited. Two answers were filed and this fact again was not referred to in either of them. Evidence was called and the will marked and read in the proceedings. The learned District Judge thereupon ordered a sale but did not refer to the *fidei commissum* or give any directions as to the manner in which the proceeds were to be conserved for the benefit of the beneficiaries, except that the decree contained the following:—"The proceeds to be brought into Court to be distributed amongst the said parties in the shares as aforesaid." The properties were duly sold and the proceeds brought into Court.

It is contended by Mr. H. V. Perera that the words "to be distributed amongst" necessarily meant to be divided up and drawn out. I am not quite so sure that one need necessarily go to that length. It is possible to argue that that order merely meant that as the proceeds represented the land those proceeds were to be divided up accordingly to the shares allotted to the parties respectively, *non sequitur* that they could be drawn out. It is true that if nothing prevented the drawing out this might be done, but if it became patent to the Court before the proceeds were drawn out that the property sold was subject to a *fidei commissum*, I feel that the Court would be justified in preventing the money being drawn out, thus conserving it for the protection of the beneficiaries. The purchasers of the lands sold, however, will acquire them absolutely and free of the *fidei commissum*.

The eighth defendant, one N. Mahadeva, along with the first, second, third, fourth, fifth and seventh defendants, represents the fourth generation. Their interests therefore are subject to the *fidei commissum*. He (the eighth defendant) is said to be a lunatic and the respondent is the

manager of his estate. He, before his adjudication as lunatic, it would appear, assigned his interests to Natchiappa Pillai, the ninth defendant (the first appellant) who mortgaged his interests to one Venugopal Mudaliyar. The second appellant is the assignee of the interests of the ninth defendant.

The respondent on May 25, 1932, moved the Court to direct notice to issue to him before any part of the proceeds was drawn by anyone. On June 20, 1932, the journal entry reads, "Let notice of Mr. Ramachandra's application (manager's) dated May 5, 1932, be issued on all parties returnable for July 4". This order was complied with. The ninth defendant (first appellant) moved to draw the eighth defendant's share of the proceeds out. This was objected to by the eighth defendant's manager (respondent). The points I have already dealt with were discussed. A further point was also argued, and that was whether, assuming there was a *fidei commissum* and the proceeds were consequently subject to its terms, the ninth defendant could be affected thereby. The learned District Judge was of opinion that the assignee (ninth defendant) could not be in a better position than the assignor (eighth defendant). I think the District Judge was right in this view also. His order that the proceeds of sale should remain in Court subject to the *fidei commissum* is in the circumstances correct, and the appeal must be dismissed with costs.

This being the result of the appeal, it is hardly necessary to deal with Mr. Nadarajah's (respondent's counsel's) preliminary objection, viz., that the appeal is not in order as other interested parties on the record have not been made parties to the appeal.

POYSER J.—I agree.

Appeal dismissed.

