

1963

Present: Sansoni, J., and L. B. de Silva, J.

B. M. CHARLESHAMY, Appellant, and P. H. CARLINA
and others, Respondents

S. C. 643/60—D. C. Galle, 6048

Fidei commissum in favour of particular members of a family—Non-acceptance by the fidei commissaries—Right of donor to revoke the gift.

A fidei commissum in favour of particular members of a family is different from a fidei commissum in favour of a family as a class.

L gifted a land to C and C's husband E subject to a fidei commissum in favour of their two sons D and P and their lawful children. The gift was accepted by the two fiduciaries but was not accepted by the fidei commissaries.

Held, that, since this was not a fidei commissum in favour of a family as a class, it was open to the donor, in view of the non-acceptance by the fidei commissaries, to revoke the gift so far as it related to the fidei commissaries and their children.

APPEAL from a judgment of the District Court, Galle.

C. Ranganathan, with *Walter Widyaratne*, for the Plaintiff-Appellant.

E. B. Wikramanayake, Q.C., with *N. E. Weerasooria (Jnr.)*, for the Defendants-Respondents.

Cur. adv. vult.

March 22, 1963. SANSONI, J.—

The plaintiff sued for declaration of title in respect of a land which formerly belonged to one Lusina. She gifted the land by deed P1 of 1945 to Carlina (1st defendant) and Carlina's husband Emanis (4th defendant) subject to a fidei commissum in favour of their two sons Dharmadasa and Piyadasa (2nd and 3rd defendants) and their lawful children.

The gift was accepted by the two fiduciaries; but it was not accepted by the fidei commissaries either at the time of the making of the gift or subsequently. Since this was not a fidei commissum in favour of a family, it was open to the donor, in view of the non-acceptance by the fidei commissaries, to revoke the gift so far as it related to the fidei commissaries and their children—see *Packirmuhaiyadeen v. Asia Umma*¹. In 1951 the donor Lusina by deed P2, to which Carlina, Emanis, Dharmadasa and Piyadasa were parties, revoked the earlier deed of gift P1 and

¹ (1956) 57 N. L. R. 449.

Emanis, Carlina, Dharmadasa and Piyadasa renounced all their right, title, interest and claim, if any, under that deed of gift. This deed P2 had the effect of revesting the title in Lusina.

The next transaction was a gift by Lusina to Carlina alone (P3 of 1951), after which Carlina, Dharmadasa and Piyadasa by deed P4 of 1953 transferred the land to the plaintiff, reserving to themselves the right to obtain a re-transfer on payment of Rs. 5,000 and interest at 12% within a period of five years. That period elapsed without any reconveyance being obtained, and the plaintiff brought this action against the three vendors for declaration of title, ejectment and damages. The 4th defendant Emanis was later added as a party. The plaintiff's action was dismissed by the learned District Judge and he has appealed.

It seems to me that the appeal must succeed because the deed P1 of 1945 was effectively revoked by Lusina. Mr. Wikramanayake sought to support the judgment by relying on the case of *Abeywardene v. West*¹. He argued that acceptance by the fiduciaries was sufficient acceptance to make the fidei commissum valid and binding in favour of the children of Dharmadasa and Piyadasa and to render the gift irrevocable. I do not agree that this decision is in point. It dealt with a fidei commissum in favour of a family as a class, and not a fidei commissum in favour of particular members of a family, which is the case we are dealing with. That difference makes the Privy Council decision inapplicable.

I would, therefore, hold that in view of the non-acceptance by the fidei commissaries, it was open to the donor to revoke the gift so far as they and their children were concerned. When the fidei commissaries and the fiduciaries renounced their rights, if any, in favour of the donor, who contemporaneously revoked the gift, there was nothing left to any of the defendants. Consequently, the subsequent transactions were valid and the plaintiff became the owner absolutely at the expiry of five years from the date of his purchase.

I would set aside the judgment under appeal and give judgment for the plaintiff as prayed for with costs in both Courts, save that damages will be at the agreed rate of Rs. 20 per month from the date of action.

L. B. DE SILVA, J.—I agree.

Appeal allowed.

¹ (1957) 58 N. L. R. 313.