Present : Pereira J. and De Sampayo A.J.

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ASERAPPA *et al. v.* JULIHAMY *et al.*

26—D. C. Negombo, 10,028.

Deed of gift—Interpretation—Property gifted to a person subject to the condition that if the donee should die without descendants his share should be added to the estate of donor—Death of donee's child without issue—Are donor's heirs entitled to property?

By a deed of gift the donor donated certain property to his three daughters, A, B, and C. He then declared as follows: "If any of them (*i.e.*, the donees) shall depart this life without descendants, his or her share, or part of the said premises, shall be added to my estate for the benefit of my heirs; and I do hereby declare and desire that the above-named three persons and their descendants may possess and enjoy the produce of the said premises, subject, however, under the same express restriction before mentioned, without disposing, mortgaging, or alienating the same, only possessing and enjoying the produce thereof." After the donor's death A died leaving child (D), and D died leaving no descendants.

Held, that on the death of A the property that she had received under the deed of gift vested in D, and that on D's death it reverted to the estate of the donor.

THE facts are set out by the District Judge (H. E. Beven, Esq.) as follows:—

The property in claim belonged to one P. P. Aserappa. By deed of gift 1,562 of July 19, 1841, he gifted it to one Lenohamy, wife of L. Mathes, subject to a *fidei commissum* in favour of her descendants, and subject also to the express provision that if Lenohamy died without descendants the said land "shall be added to my estate for the benefit of my heirs." The donor died in 1851. His son and only heir, John de Melho Aserappa, died on March 29, 1891, leaving the plaintiffs as his heirs. They now claim the premises donated to Lenohamy on the ground of the failure in her line of descendants. Lenohamy and her husband died thirty or forty years ago, leaving as their heir one child, Madalena Silva, who herself married and had one child, who, however, predeceased her, so that at her death, which took place on May 21, 1912, Madalena left no issue.

Descendants thus being wanting, plaintiffs claim that the condition on which the reversion of the premises to the estate of the donor depends has been fulfilled.

The defendants, who are the heirs of Salman, the husband of Madalena Silva, on the other hand, contend that when Lenohamy died leaving a child, the condition on which alone the property was to revert to the original donor effectually came to an end, and the succession to the property was finally secured for Madalena Silva and her heirs, subject only to this bond of *fidei commissum*.

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The District Judge, after discussing the points raised, held as follows:—

I hold that the property vested in Madalena Silva, and on her mother's death subject only to the entail created in favour of Lenohamy's descendants. It is a well-recognized principle in Roman-Dutch law that if the *fidei commissum* fails, as, for instance, by the death of the *fidei commissarius* before the fiduciary, the latter reaps the benefit, and becomes the absolute owner of the property.

When Madalena Silva's child predeceased her the entail came to an end, and the ordinary rule of succession came into operation, so that defendants as heirs of Madalena's husband got good title.

The plaintiffs appealed.

The material portions of the deed P 1, on which the parties relied, are as follows:—

And whereas by a subsequent instrument executed by me, the said Pedros Peries Aserappa Pulle, before the said notary of Negombo above named, also appended to the said title deed, and bearing of the same date of the afore-mentioned instrument, wherein is mentioned that my said godson, Ellegay Christian Perera, should only and solely possess the said premises after the death of his parents under the bond of *fidei commissum* as an entailed property: And whereas I, the said Pedroe Peries Aserappa Pulle, being desirous of cancelling the same: Now therefore know Ye that I, the said Pedroe Peries Aserappa Pulle, for divers good causes and considerations moving unto me, do hereby declare to have cancelled the paragraph which is mentioned by the said instrument "that my said godchild, Ellegay Christian Perera, should only and solely possess the said premises after the death of his parents," and in lieu thereof I do hereby substitute the following proviso, that is to say, that the aforesaid premises should be divided into three equal parts; the first part, wherein I have constructed a house, to be bestowed to my said godson, Ellegay Christian Perera; the next one or the middle part thereof is to be given to his youngest sister Justina Perera, wife of Ambrasso Wyndrog; and the last or third part of the afore-mentioned premises, which is bordering the lane leading to Kundenwelle, to be given to his sister Linohamy, wife of Liyenegay Mathees Sielve. And that the said premises called Kosgahawatta so divided to be possessed and enjoyed the produce thereof by the above-said three persons. But if any of them shall depart this life without descendants, that his or her share, or the part of the said premises, shall be added to my estate for the benefit of my heirs; and I do hereby further declare and desire that the above-mentioned three persons and their descendants may possess and enjoy the produce of the aforesaid premises, subject, however under the same express restriction before mentioned, without disposing mortgaging, or alienating the same, only possessing and enjoying the produce thereof.

A. St. V. Jayewardene and *Aserappa*, for plaintiffs, appellants.—The words in this deed are similar to those in the will construed by the Supreme Court in *Francisco Pulle v. Wanniappa Pulle*.[1]

[1] (1856) *1 Lor.* 256.

The Supreme Court held in that case that there was a *fidei commissum* created by the will, and that on the failure of the descendants it reverted to the original granter's estate.

E. I. Pereira (with him, *Canekaratne*), for the defendants, respondents.—The intention of the donor is clear from the words of the deed: if Lenohamy died without any children her share was to revert to the estate of Aserappa. Lenohamy died leaving a daughter; therefore the contingency on which her share was to revert to the donor's estate did not happen. Lenohamy's title was perfect. If appellants' contention is sound, even at the lapse of a hundred years the land may revert to Aserappa's estate—a very extraordinary proposition. Aserappa died about fifty years ago, leaving a son, who himself died in 1890. The donee's title will, if the appellant's construction is upheld, never become perfect.

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

March 2, 1915. PEREIRA J.—

The only question argued in appeal in this case is whether on the death of the woman Lenohamy the property in claim devolved absolutely on her child Madalena. I am quite at one with the District Judge in the conclusion that he has arrived at on the portion of deed P 1 that he has dealt with in his judgment, but the appellants reply upon a further portion of the deed in support of their contention. The portion dealt with by the District Judge is as follows: "But if any of them (that is, the donees) shall depart this life without descendants, his or her share, or part of the said premises, shall be added to my estate for the benefit of my heirs." It is quite true that in view of this disposition, by reason of Lenohamy's death leaving a descendant, condition under which the property was to revert to the estate of the donor was defeated, that is to say, if only the portion of the deed relied on by the District Judge was taken into consideration. But, as observed already, the appellants rely on a further provision in the deed, namely, that which immediately follows the portion relied on by the District Judge, which is as follows: "And I do hereby declare and desire that the above-mentioned three persons and their descendants may possess and enjoy the produce of the said premises, subject, however, under the same express restriction before mentioned, without disposing, mortgaging, or alienating the same, only possessing and enjoying the produce thereof." These last words standing by themselves are valueless to create a *fidei commissum*, because a prohibition against alienation is not absolutely necessary for the creation of a *fidei commisum*, but they, taken together with what immediately precedes them, sufficiently indicate an intention on the part of the donor to attach a *fidei commissum* on to the property in the hands of the descendant of Lenohamy. The prohibition

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against alienation shows that the intention was to vest in them, not merely the income of the property, but the *corpus* as well. The position then is that the descendants of Lenohamy were to hold the property under the same express restriction before mentioned. What is that restriction? The only express restriction appearing on the deed is that if the person holding the property depart this life without descendants it shall be added to the donor's estate. In the proper line of devolution the property became vested in Madalena, and she having died without descendants the property reverted to the estate of the donor.

Having thus decided the question argued, I would do no more than set aside the judgment appealed from and remit the case to the District Court for further proceedings in due course.

I think that the appellant should be allowed his costs of this appeal in this Court, and that the costs in the District Court should be left to the discretion of the District Judge when making the final order.

DE SAMPAYO A.J.—I agree.

Set aside.