1951 *Present:* **Gratiaen J. and Gunasekara J.**

KIRI BANDA, Appellant, *and* **PUNCHIAPPUHAMY** *et al.*, Respondents

S. C. 7—D. C. Kegalle, 5,632

Fideicommissum—Direction that fiduciary should at death "make over" the gifted property to the fideicommissary—Failure to carry out such direction—Does not defeat fideicommissary's rights.

A deed of gift by which U donated certain lands to his daughters T. M. and D. M. contained the following clause:—

"I hereby . . . . grant and make over as a gift unto . . . . my daughters T. M. and D. M. . . . . (the land is then described) to be possessed by them during their life time . . . .

"Further, the said T. M. and D. M. shall only possess the said lands and premises allotted to them during their life time and shall not transfer or mortgage the same outside and the said T. M. and D. M. shall at their death make over their shares of the lands and premises allotted to them to no other person than P or to P's heirs and shall not alienate the same to any other person whomsoever".

Held, that the gift created a valid fideicommissum in favour of P or, in the event of P's death, of his heirs. No express deed from the fiduciaries was necessary to render it effective.

APPEAL from a judgment of the District Court, Kegalle.

H. V. Perera, K.C., with *C. V. Ranawake*, for the plaintiff appellant.

E. B. Wikramanayake, K.C., with *Cyril E. S. Perera*, for the 9th defendant respondent.

Cur. adv. vult.

July 5, 1951. GRATIAEN J.—

Under a deed of gift dated 21st July 1877, a man named Ukkurala donated certain properties to his son Punchirala; he also gifted his interests in the land which is the subject matter of the present action to his daughters Tikiri Menika and Dingiri Menika. The only question which arose for our decision in this appeal was whether the gift of the interests which passed to Tikiri Menika and Dingiri Menika created a valid fidei commissum in favour of Punchirala or, in the event of Punchirala's death, of his heirs. It is agreed between the parties that if this question be answered in the affirmative, a decree for partition should be entered allotting shares to the parties on the basis set out in paragraph 14 of the amended plaint dated 10th May, 1949. If, on the other hand, the learned District Judge was right in holding that P1 did not create a valid fidei commissum, the judgment appealed from must be affirmed.

Admittedly, the gifts under P1 in favour of Ukkurala's son Punchirala were absolute and unfettered by any conditions. By contrast, the gift in favour of Tikiri Menika and Dingiri Menika is in the following terms:—

" I hereby . . . . . grant and make over as a gift unto my daughters Tikiri Menika and Dingiri Menika (the land is then described). *to be possessed by them during their life time*. . . . . .

Further, the said Tikiri Menika and Dingiri Menika shall only possess the said lands and premises allotted to them *during their life time and shall not transfer or mortgage the same outside and the said Tikiri Menika and Dingiri Menika shall at their death make over their shares of the lands and premises allotted to them to no other person than Punchirala or to Punchirala's heirs and shall not alienate the same to any other person whomsoever* ".

The view taken by the learned District Judge was that, notwithstanding the unambiguous prohibition against alienation or disposition to outsiders the deed did not clearly designate " who are to get the properties *if Dingiri Menika and Tikiri Menika did not execute a deed in favour of Punchirala or his heirs* ". In that view of the matter he held that P1 did not create a valid fidei commissum. In support of this decision the learned Judge purported to follow an unreported judgment of this Court affirming a previous ruling of the same learned Judge with regard to a conveyance containing terms which do not exactly correspond to the language of the deed of gift P1. (*S. C. Minutes of 28.3.50—501/D. C. Kegalle, 4,831*). It suffices to state in this connection that the brief judgment under reference is unhelpful in connection with the present case because its *ratio decidendi* is not very clear.

The point at issue is amply covered by authority. The view had no doubt been held at one stage that no valid fidei commissum can be created by a deed of conveyance which merely *directs* the first institute *to convey* the property to the second institute on the happening of a specified event—and that in such a case the property would not pass to the second institute unless the direction was, at the appointed time, specifically carried out by the first institute. Vide *Dantuwa v. Setuwa* [1] (*per* Hutchinson C.J.) where Middleton J. agreed, but for different reasons, on the assumption, long since discarded, that the Roman Dutch Law principles of fidei commissum are inapplicable to the construction of Kandyan deeds of gift.

Later decisions of this Court have however rejected the views expressed by Hutchinson C.J. in *Dantuwa's case*. In *Sethuhamy v. Kiribanda* [2], Bertram C.J. and Schneider J. considered the effect of a deed of gift where the donee was directed " on the approach of death to divide the property among the three children " of himself and the donor, who was his wife. Bertram C.J. pointed out that " a positive act by the donee ", i.e., a distribution of the property *in specie* among the three children—was indicated. Nevertheless, the Court took the view that a valid fidei

[1] *(1907) 11 N. L. R. 37* [2] *(1922) 23 N. L. R. 376*

commissum was created so as to pass the property automatically to the children, without any specific conveyance from their father, on the latter's death. Dealing with *Dantuwa's case*, Bertram C.J. said, " I venture to think that, if the history of the law of fidei commissum in Professor R. W. Lee's Introduction to Roman Dutch Law had been fully considered, the result of that case might have been different ". . . . . .

The law was finally settled by Garvin J. and Lyall Grant J. in *Bibile v. Mahaduraya* [1] which held that a valid fidei commissum was created, and that *no express deed from the donee was necessary to render it effective*, where a conveyance contained " not a mere request but a direction and an imperative order " requiring the first institute to pass the land to the next set of institutes. With regard to the contention that the fidei commissum did not become effective by reason of the absence of a deed of conveyance by the fiduciary in favour of the fidei commissaries; Garvin J. declared that " if a valid fidei commissum has in point of fact been created, then the fidei commissary become vested with the property immediately the fidei commissum matured by the happening of the contingency, i.e., the death of the donor ". The ruling in *Dantuwa's case* was once again expressly rejected.

Learned Counsel have not referred me to any case in which doubts as to the correctness of the decision in *Bibile v. Mahaduraya* [2] have been raised since 1926. Indeed, the point seems to have been regarded as so well settled that in *Selvadurai v. Thambiah* [3], counsel of great experience did not challenge the proposition that a deed of gift by way of dowry directing that " if she, the dowry grantee, has issue she shall *cause the properties to reach them* when they come of age " was sufficient to create a fidei commissum in favour of the grantee's children notwithstanding the absence of any express indication as to what should happen in the event of the directions to the donee not being carried out.

The principles of law to which Bertram C.J. and Garvin J. had referred are now very clearly set out at page 143 of Mr. Nadaraja's Treatise on the Roman Dutch Law of Fidei Commissum in the following terms:—

" In the pre Justinian Roman Law, the fideicommissary did not acquire ownership in the property until ' restitution ' of it had been made by him to the fiduciary at the time prescribed by the testator. But after Justinian had enacted that there was to be no difference between the different kinds of legacies and between legacies and fideicommissa and that fideicommissaries and legatees equally should have not merely a personal action but also the real action which had formerly been open to legatees *per vindicationem*, ownership (at any rate in the case of singular fideicommissa) passed from fiduciary to fideicommissary, even without any express restitution, as soon as the gift-over to the latter was expressed to take effect. In the modern law it would seem that in all cases the transfer of ownership takes place authomatically at the time prescribed by the testator for the vesting of the fideicommissary's interest, and the fideicommissary

[1] *(1926) 28 N. L. R. 253* [3] *ibid*
[2] *(1934) 36 N. L. R. 105.*

is entitled from that time to the use and enjoyment of the property and to enforce his claims to the property against the fiduciary, his representatives, or other possessor ".

Applying these principles to the present case, I would hold that there is a very clear indication in the deed P1 of an intention on the part of the donor to impress the respective shares in the property donated to each of his daughters with a fidei commissum, taking effect on her death, in favour of Punchirala or (should Punchirala pre-decease her) in favour of Punchirala's heirs. The failure of either daughter to obey the direction that she should " make over " her share to her fidei commissary did not have the effect of defeating the donor's intention.

I would set aside the judgment appealed from and direct the learned District Judge to enter an interlocutory decree for partition, allotting shares to the parties on the basis that the deed of gift P1 operated as a valid fidei commissum. The 9th defendant should pay to the plaintiff the costs of this appeal and of the contest in the Court below. The costs of partition will be borne *pro rata*.

GUNASEKARA J.—I agree.

Judgment set aside.