1945 *Present:* **Wijeyewardene and Jayetileke JJ.**

ARUMUGAM PILLAI, Appellant, *and* VELUPILLAI PERIYATAMBY *et al.*, Respondents.

13—D. C. (Inty.) Jaffna, 1,895.

Charitable trust—Deed of gift for natural affection—Conditions for performance of poojah—Prohibition against alienation by an act inter vivos*—Conditions not sufficient to constitute charitable trust.*

Where a deed of gift contained the following conditions:—

(1) That the said V. S. shall look after the said properties and take the rents and profits of the said properties and perform the Artha-samapoojah, which is being generally performed and which we now are performing and also the Theertam festival in the temple standing in the land.

(2) That after the lifetime of the said V. S. the person who was appointed by him in his place and, in default of such appointment the eldest child of his descendant will have the right to perform the duties of the said temple.

(3) That the said V. S. will have no right to sell and transfer the said properties or alienate the same by documents such as mortgage and otty or encumber or alienate the same in any other way in his lifetime and that whenever he in his lifetime appoints a person or persons, whom he likes, he shall have to appoint such person or persons subject to the bindings recited in this paragraph.

Held, that the conditions annexed to the deed were not sufficient to constitute a charitable trust.

APPEAL from a judgment of the District Judge of Jaffna. By deed P 1 plaintiff and his wife transferred to their son, Sabaratnam, a land called Mailavalai subject to the conditions set out in the headnote. By deed P 2 executed by the plaintiff, his wife and Sabaratnam, they revoked and cancelled the conditions laid down in P 1 and declared that the deed should be considered a donation free from all conditions in favour of Sabaratnam. The latter sold his interests in the land to the defendants. The learned District Judge held that the conditions in P 1 did not create a trust.

L. A. Rajapakse, K.C. (with him *P. Navaratnarajah*), for plaintiff, appellant.—The main question is whether the deed P 1 created a charitable trust. The land in dispute was transferred to one Sabaratnam who was enjoined to utilize the rents and profits for the purpose of performing certain religious ceremonies in a specified temple. There is a beneficiary indicated, namely the temple. In *Lindeboon v. Cannille* [1] it was held that a gift for the saying of masses is charitable as being for the advancement of religion. The earlier cases, *West v. Shuttleworth* [2], and *Heath v. Chapman* [3] were overruled by the House of Lords in *Bourne v. Keene* [4]. In view of these authorities it is submitted that P 1 created a charitable trust.

[1] *(1934) 1 Ch. 162.*
[2] *(1835) 2 Myl. & K. 684.*
[3] *(1854) 2 Drew. 417.*
[4] *(1919) A. C. 815.*

N. Nadarajah, K.C. (with him *C. Chellapah*), for first defendant, respondent.—There was no intention on the part of the donors to create a trust. The intention was only to give a benefit to a son for whom the donors declare their " love and affection ". See *S. K. Iyer: Indian Trusts Act*, p. 37. A charitable trust must be for one of the purposes indicated in section 99 of the Trusts Ordinance. There is no clear indication in P 1 of the purpose of the trust. There is uncertainty as to what extent of the income is to be used for the supposed trust. For these reasons it is submitted that the District Judge was right in holding that P 1 did not create a trust.

H. W. Thambiah (with him *V. Joseph*) for second defendant, respondent.

L. A. Rajapakse, K.C., in reply.—According to the cy-pres doctrine even if the purpose fails the trust does not fail. See section 99 of the Trusts Ordinance and *Keeton's Trusts, p. 147.*

April 23, 1945. WIJEYEWARDENE J.—

By deed P 1 of 1925 the plaintiff and his wife transferred to their son, Sabaratnam, a plot of land called Mailavalai subject to certain conditions. The land was valued at Rs. 3,000. The deed P 2 of 1928 executed by the plaintiff, his wife and Sabaratnam " revoked, cancelled and made null and void " the conditions laid down in P 1 and declared that the land should be considered " a donation free from all conditions " in favour of Sabaratnam. By 1 D 1 executed on the same date as P 2 the plaintiff and his wife transferred another land to Sabaratnam subject to the same conditions as those set out in P 1. Sabaratnam, who considered himself as the absolute owner of Mailavalai by the joint effect of P 1 and P 2, sold for Rs. 3,375 all his interests in the said land to the two defendants by deeds 1 D 2 and 2 D 1 of March 16, 1940. The plaintiff, thereupon, filed the present action alleging that the defendants were in wrongful possession of the land. He contended that P 1 created a charitable trust, that P 2 could not extinguish that trust and that, therefore, the defendants did not get any title to the land under 1 D 1 and 2 D 2. The District Judge dismissed his action and the plaintiff has appealed to this Court from that judgment.

The deed P 1 was clearly a deed of gift. It was given on account of the " natural affection " that the plaintiff and his wife had for Sabaratnam who accepted the land " by way of donation ". An important question that has to be decided is whether the deed P 1 annexed such an obligation to the ownership of the property as was sufficient to constitute a charitable trust. The donors, no doubt, desired that Sabaratnam should " perform the Arthasamapoojah, ... which we now perform and also the Theertham festival ". As no oral evidence has been placed before the Court, it is not possible to say what the nature of those ceremonies is or whether or no the performance of those ceremonies involves the expenditure of any money. The deed P 1 itself does not state that any part of the income from Mailavalai is to be utilized for those ceremonies. Moreover the deed says in express terms that Sabaratnam should take " the rents and profits ". It is true that the deed prohibits the alienation

of the property by an act *inter vivos*, but, at the same time, it does not indicate the institutions which are to be benefited in the event of such an alienation. On the other hand, it leaves unfettered Sabaratnam's right to make a testamentary disposition.

A study of P 1 leads me to the conclusion that, when they executed P 1, the plaintiff and his wife intended merely to ensure the enjoyment of the property by Sabaratnam during his lifetime and save him from the consequences of an improvident alienation, and that they desired in addition that their son should lead as religious a life as they said they had led. I am unable to say that the District Judge has come to an erroneous decision when he held that the conditions in P 1 did not create a trust.

I dismiss the appeal with costs.

JAYETILEKE J.—I agree.

Appeal dismissed.