

1963 Present : H. N. G. Fernando, J., and T. S. Fernando, J.

Y. SUDHARMAN SILVA and another, Appellants, and D. SENAHAMY  
and 4 others, Respondents

S. C. 100/1961—D. C. Negombo, 171/L

*Fideicommissa—Meaning and effect of Sinhala word "bharakaraya" in a deed of gift.*

The words "unto the said donees and after their lifetime, their heirs executors administrators and their custodian or trustee" in a deed of gift are insufficient to create a fideicommissum. The Sinhala word *bharakaraya* in such context is the equivalent of "assigns".

*William Nonis v. Simeon Nonis (1960) 61 C. L W. 17* not followed.

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q.C., with L. C. Seneviratne, for the Defendants-Appellants.

S. C. E. Rodrigo, for the Plaintiffs-Respondents.

*Cur. adv. vult.*

October 30, 1963. H. N. G. FERNANDO, J.—

It is common ground in this case that one Thamis Nona and her husband Abaran became entitled to certain shares in land under deed No. 16450 of 1896 (P3), and that those two persons together with others were by deed of Partition of 1904 (D2) allotted in respect of their rights lot 'C', which is the subject of the present action. The Plaintiffs who are the children of Thamis Nona and Abaran claim that the deed P3 of 1896 created a Fideicommissum and on this basis instituted this action to be declared entitled to a 17/20 share of the land in dispute. The Defendants claim that same share by virtue of a deed of 12th March 1904, by which Thamis Nona and Abaran Silva purport to have conveyed the 17/20 share to the predecessor in title of the Defendants. The claim that P3 created a Fideicommissum has been decided by the learned District Judge in the affirmative and in favour of the Plaintiffs.

The translation of the relevant clause of the deed P3 of 1896 is as follows :—

"Therefore, we the said Donors hereby gave full power unto the said Donees Kalinga Thamis Nona and Dinayadura Abaran Silva to hold and possess subject to the aforesaid regulations the said undivided portion of land and all the rights title interest and privileges of us the said Donors in and to the same, and after their lifetime their heirs executors administrators and assigns to hold and possess subject to the Government regulations the same uninterruptedly for ever or to deal with the same as please."

It is unnecessary for me to refer to the numerous decisions of this Court holding that language of this description, that is to say, "Unto the said donees and after their lifetime, their heirs, executors, administrators, assigns", is insufficient to create a fideicommissum; for those decisions are mentioned in the recent judgment of Weerasooriya J. in *Seneviratne v. Mendis*<sup>1</sup>. If those decisions are to be followed the plaintiffs' present action must clearly fail.

The learned District Judge, however, has provided his own translation of the Sinhalese original in which in lieu of the phrase "their heirs executors administrators and assigns", there occurs instead the phrase "their heirs executors administrators and their custodian or trustee". In accepting this translation the learned Judge has followed the same course as did Basnayake C.J. in the of *William Nonis v. Simon Nonis and others*<sup>2</sup> where the learned Chief Justice gave to the Sinhalese word "භාරකාර" the meaning "Trustee, bailee, consignee, custodian, warden". Weerasooriya J. in the recent judgment mentioned above, took the view that the judgment of Basnayake C.J. should not be followed and it might be helpful for me to state my own reasons for concurring in that view.

The same point as to the true meaning of the Sinhalese word "භාරකාර" was considered in 1914 by De Sampayo J. in *Silva v. Silva*<sup>3</sup>, where the learned Judge made the following observations:—

"There was some question raised at the argument of the appeal as to the correctness of the translation of the Sinhalese word *bharakaya* as meaning 'assign'. The Sinhalese word no doubt literally means custodian or person in charge, as the District Judge says, but in the present context I think it is intended to be the equivalent of 'assign'. I may say that notaries, in reproducing in Sinhalese the English conveyancing formula 'heirs, executors, administrators, and assigns', generally use the phrase 'urumakkara polmakh athmistrasi bhara-karadin'."

From these observations, it is apparent:—

- (a) that some fifty years ago a District Judge had held, and this Court accepted, the literal meaning of the Sinhala word to be "custodian or person in charge";
- (b) that, nevertheless, de Sampayo, J., presumably acting upon knowledge and experience acquired professionally, pointed out that notaries used the word as an equivalent for the English word "assigns", and
- (c) that this Court in the judgment recognized not the literal meaning of the word, but rather the meaning attaching to it according to previous notarial practice.

<sup>1</sup> (1962) 65 N. L. R. 169.

<sup>2</sup> (1960) 61 C. L. W. 17.

<sup>3</sup> (1914) 18 N. L. R. 174.

Prior to the recent decision of my Lord the Chief Justice, there has been no case in which this Court has disagreed with the observations of de Sampayo J., and it is proper to presume on the contrary that those observations have guided notaries and Judges in advising and deciding upon questions of title arising upon deeds in which the same Sinhala word occurs. Since a judgment of this Court pronouncing upon the construction of particular language in a document has stood unquestioned for so long a period, there is no doubt that transactions must have taken place on the faith of the correctness of the judgment. The acceptance at the present day of a different construction would result in the condemnation of titles long regarded as valid and settled. Moreover, the opinion of de Sampayo J. related to a notarial practice which to his knowledge prevailed during a period prior to 1914, and there is not, nor is there likely to be, available material on which we can now hold that the learned judge formed an incorrect opinion upon what was for him a past or a contemporary practice of notaries. It is significant also that the opinion was expressed with full knowledge of the correct meaning of the Sinhala word.

For the reasons stated I would hold that the deed P3 did not create a Fideicommissum. The appeal is allowed and the Plaintiffs' action is dismissed with costs in both Courts.

T. S. FERNANDO, J.—I agree.

*Appeal allowed.*

