Present : De Sampayo J. and Schneider A.J. 1921.

NAINA LEBBE *v.* MARAIKAR *et al.*

242—D. C. Jaffna, 14,170.

Gift subject to condition that the several donees shall not alienate their shares except among themselves—Alienation by one donee to another—Re-conveyance of the share to the first donee—Deed of partition by several donees—Mortgage of a divided lot by a donee to a stranger—Sale under mortgage decree—Is mortgage in favour of stranger valid ?—Effect of partition deed and conveyance by one donee to the other.

By a deed of gift some pieces of land were gifted to three brothers, A, B, and C. The deed provided " that if they like to alienate or encumber their share by any deed, such as mortgage or transfer, they shall do so between themselves, and not with others." In 1910 A mortgaged his share in three lands. In 1912 (July 6) A sold his interest in these lands to his brother B, who on July 20, 1912, re-conveyed the same to A. The share of C was sold in execution against him, and by a series of deeds C's wife obtained title from the purchaser at the Fiscal's sale. In 1913 A, B, C, and C's wife entered into a deed of partition, by which divided portions were allotted to the parties, and the portion in question was allotted to A. On the same day the mortgage bond of 1910 was discharged, and a fresh bond was executed for the divided lot by A. Under the mortgage decree this lot was sold, and was purchased by the plaintiff.

Held, that the mortgage of 1913 was not void, and that the plaintiff had good title.

DE SAMPAYO J.—" The prohibition against alienation is not followed by any words indicative of an intention that in the event of one donee contravening the condition, the others should get his share, nor has the provision in the deed any analogy to the well-known form of *fidei commissum* which is created by prohibiting alienation out of the family. All that can reasonably be said is that the deed provided that if a donee wished to mortgage or dispose of his share, the other donees should have the preferent right to advance or pay money and accept the mortgage or transfer. But the defendants did not and do not claim such preference."

SCHNEIDER A.J.—" The right conferred by the deed upon each of the donees in regard to the shares of the others was that he might demand the option first of lending money upon a mortgage of the shares of the others or of purchasing them. It is a purely personal right. It placed no burden on the land itself."

SCHNEIDER A.J.—" The intention and effect of the deed of partition was to confer on each of the donees absolute title to the portion allotted to him."

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SCHNEIDER A.J.—"I am unable to agree with the contention that the prohibition against alienation to a stranger is void under the Entail and Settlement Ordinance or under the Common law, because the persons to be benefited by the prohibition are not named, described, or designated. The direction that any mortgage or sale shall be among the donees sufficiently indicates them by name as the persons for whose benefit the prohibition was made."

When A sold his share to his brother B in 1912, the latter acquired this share free from any burden whatever, and when he (B) re-sold it to A, the latter also acquired absolute title.

THE facts appear from the judgment.

Bawa, K.C. (with him *E. W. Jayawardene* and *Canakeratne*), for plaintiff, appellant.

Samarawickreme (with him *Croos-Dabrera*), for defendants, respondents.

Cur. adv. vult.

April 6, 1921. DE SAMPAYO J.—

The plaintiff has brought this action to establish title to a portion of land called Punkady in extent 9 lachams and 2¾ kulies varagu culture. The case turns upon the construction to be placed on a deed of gift bearing No. 2,424 and dated May 14, 1904. The facts of the case are somewhat complicated, but it is necessary to state them for the purpose of deciding the question of title. Meera Saibo and his wife Sultan Mohideen Natchia were entitled to some adjacent pieces of land, of which the portion in question is a part, and by the said deed No. 2,424 they gifted the same to their three sons, Nayna Mohamado, Assena Marikar (first defendant), and Mohideen Saibo (second defendant), subject to a condition which ran as follows: "As we reserve life interest to us jointly and severally, we declare that they (the donees) shall after our lifetime possess the said properties in equal shares . . . . that if they like to alienate or encumber their share by any deed, such as mortgage or transfer, they shall do so between themselves, and not with others."

By bond No. 5,996 dated June 11, 1910, Nayna Mohamado mortgaged with one Pitche Kurukkal and Sornamma his one-third share in three of the said pieces of land as security for the repayment of Rs. 1,000 and interest. Subject to this mortgage, Nayna Mohamado by deed No. 6,966 dated July 6, 1912, sold his interest to his brother Assena Marikar, who on July 20, 1912, re-conveyed the same to Nayna Mohamado. These deeds on the face of them represent real transactions, and no question is raised as to their *bonâ fides*. In the meantime the share of the remaining donee, Mohideen Saibo, was sold in execution against him, and it is now vested in his wife on *mesne* conveyances from the purchaser at the Fiscal's

sale. Then all the original donees and the second defendant's wife entered into the deed of partition No. 7,604 dated September 19, 1913, by which the various pieces of land were consolidated, and divided portions were allotted to the parties, the portion in question in this case being allotted to Nayna Mohamado. On the same day the mortgaged bond of 1910 appears to have been discharged, and by a fresh bond No. 7,605 Nayna Mohamado mortgaged this divided portion to Pitche Kuralkal and Sornamma as security for the payment of Rs. 2,000, which included the old debt or part of it and a further sum of Rs. 880 then borrowed. This bond was put in suit in D. C. Jaffna, No. 13,450, in which a decree for a certain sum of money and an order under section 201 of the Civil Procedure Code for the specific sale of the property mortgaged were entered. For the purpose of carrying out the sale, the Court on June 19, 1919, issued a commission to K. Kantiah, Mudaliyar. The property was duly sold by the Commissioner on August 2, 1919, and was purchased by the plaintiff in this action. The same was confirmed by the Court, and a conveyance was issued to the plaintiff on September 11, 1919.

The question is, whether the mortgage of September 19, 1913, violated the condition in the original deed of gift and was void, and whether, therefore, the purchase by the plaintiff at the sale in execution of the mortgage decree in action No. 13,450 conferred any title on the plaintiff. It is contended that the deed of gift created a *fidei commissum conditionale*, that is to say, that if any one of the donees acted in contravention of the prohibition contained in the deed, he would forfeit his share, and the same would vest in the remaining donees, and that, therefore, in consequence of a mortgage effected by Nayna Mohamado in favour of "strangers," he forfeited his interest in favour of his co-donees, the first and second defendants, and the plaintiff got nothing by his purchase at the execution sale against Nayna Mohamado. I, however, think that, whatever might have been the intention of the donors, the language employed was insufficient to create such a *fidei commissum*. The prohibition against alienation is not followed by any words indicative of an intention that in the event of one donee contravening the condition, the others should get his share, nor has the provision in the deed any analogy to the well-known form of *fidei commissum* which is created by prohibiting alienation out of the family. The prohibition is a bare prohibition, and is substantially similar to the one dealt with in *Peris v. Soysa*,[1] which is therefore an authority in this case. All that can reasonably be said is that the deed provided that if a donee wished to mortgage or dispose of his share, the other donees should have the preferent right to advance or pay money and accept the mortgage or transfer. But the first and second defendants did not and do not claim such preference.

[1] *(1920) 21 N. L. R. 446.*

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On the contrary, they appear to have been content that Nayna Mohamado should deal with his share in the way he did. For, in the conveyance to the first defendant by Nayna Mohamado, the mortgage of 1910 was recited, and the first defendant undertook the payment of it, and, similarly, when he re-conveyed the share to Nayna Mohamado, the consideration was adjusted by reference to the amount still due on the mortgage. In this connection it is relevant to note that not only did the donees effect a partition among themselves, but each of them was allotted a divided portion absolutely. Moreover, the effect of the transfer to the first defendant must itself be taken into account. That act of alienation was in favour of one of Nayna Mohamado's co-donees, and was, therefore, within the liberty provided for in the deed of gift. The result in law was that the share so alienated was freed from any further burden and vested absolutely in the first defendant, and when it was re-conveyed by him the title acquired by Nayna Mohamado was likewise absolute. For the prohibition was personal only, and did not extend beyond the nominated donees, and so the condition was fulfilled when the property was once alienated to one of the donees, and Nayna Mohamado was not prevented thereafter from making any disposition of the property he pleased. See *Sande on Restraints, part III., ch. 2, paragraph 3.* Consequently, the mortgage effected by Nayna Mohamado after the re-conveyance to him by the first defendant was good and valid, and the plaintiff acquired good title when he purchased at the sale held in execution of the mortgage decree.

For these reasons, I also think that this appeal is entitled to succeed, and I agree to the order as to damages and costs suggested by my brother Schneider.

SCHNEIDER A.J.—

There is no dispute as to the facts. Two spouses transferred in 1904 by a deed of donation (D 1) five allotments of land to their three sons, Mohamado, Marikar (first defendant), and Saibo (second defendant). The deed is in Tamil. The relevant portions of the deed read accordingly to the translation in the record as follows: "We have donated the above five lands subject to the binding (restriction ?) shown below. As we reserve life interest to us jointly and severally, we declare that they shall after our own lifetime possess the said properties in equal shares; that if they like (desire ?) to alienate or encumber the share, by way of mortgage or transfer, they shall do so between themselves, but not with others."

Of the events which happened after the death of the donors, the following should be noticed. In 1910 Mohamado mortgaged his undivided one-third share of the lands to one Pitche Kurakkal and

his wife Sornamma (D 2). In 1912, on July 6, he sold and transferred this share to his brother the first defendant. In this deed (D 5) he expressly recited that the share was subject to the mortgage in favour of Kurukkal and his wife, and that he therefore permitted his brother to retain out of the consideration a sum sufficient to pay the principal due on the bond. On the 20th of that month the first defendant sold and transferred this share back to his brother Mohamado (D 6). In this deed the mortgage is recited as still in existence, and that a deduction for its satisfaction had been made from the consideration. This transfer and re-transfer within a few days suggest to my mind that a lawyer had been consulted, and that these transactions were intended to break down the restraint on alienation contained in the deed of donation. The one-third share of the second defendant was sold in execution by the Fiscal in 1910. In 1912 the purchaser of that interest sold it to the second defendant's wife (D 11).

In 1913, on September 19, there took place before the same notary three transactions closely connected with one another and having an important bearing on the question of title. The three original donees, together with the wife of the second defendant, appeared to have agreed among themselves to treat four of the lands conveyed by the deed of donation, which were contiguous to one another, as one block of land, and to partition it among the three shareholders. To do this effectively it was necessary to clear the mortgage created by Mohamado in favour of Pitche Kurukkal and his wife over his share. The latter appeared to have agreed to accept in lieu a mortgage over the defined portion which would be allotted to Mohamado. Accordingly, Kurukkal and his wife discharged the old bond by their receipt No. 7,603. By deed No. 7,604 the partition was effected, and by bond No. 7,605 a fresh mortgage was created by Mohamado over the defined portion allotted to him. It should be noticed that the parties to the deed of partition are the three original donees and the wife of one of them (second defendant) who had acquired his one-third share, and that to each of the shareholders a defined portion was conveyed "absolutely."

In 1919 the mortgagees sued upon the bond No. 7,605, and at the sale in execution the plaintiff became the purchaser of the land allotted to Mohamado. The first and second defendants resisted his claim of title on the ground that the deed of donation created a *fidei commissum* in favour of the intestate heirs of each of the donees, and that they, as the heirs of Mohamado, who died before the sale to the plaintiff, were entitled to the land. The plaintiff accordingly brought this action claiming a declaration of title in his favour and damages at the rate of Rs. 40 per mensem. This claim for damages is not referred to in the answer of the defendants, nor was any issue raised regarding it. The learned District Judge dismissed the plaintiff's action with costs, holding in favour of the defendants'

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contention that the deed of donation created a *fidei commissum* as submitted by them, and that the deed of partition was subject to this *fidei commissum*. He has omitted to consider the effect of the sale in execution by the Fiscal of the interest of the second defendant. The plaintiff has appealed.

Mr. Bawa, for the plaintiff, argued: (1) That the prohibition against alienation to an outsider was absolutely void, inasmuch as the persons to be benefited were not named, described, or designated as required by section 3 of the Entail and Settlement Ordinance, 1876 (No. 11 of 1876), and void also under the Common law as it was nude for the same reason; (2) that the prohibition if clothed was purely personal, and in the events which had happened had ceased to exist—its force having been exhausted, so to speak.

Mr. Samarawickreme, for the defendants, wisely refrained from any endeavour to support the contention submitted in the lower Court that the deed created a *fidei commissum* in favour of the heirs of the donee. That contention is clearly unsustainable. He took up the only position he could with any show of law endeavour to maintain. He argued that a breach of the prohibition induced a *fidei commissum conditionale*, so that upon the mortgage by Mohamado the land in dispute vested in the other two donees.

Taking the facts to be those which I have mentioned, I will now proceed to consider the deed of donation. The words of grant being "We have donated," the deed operated to vest the *dominium* in the three donees *in presenti* and absolutely, unless the direction that they shall mortgage or sell among themselves but not to a stranger created a burden on the title. The words "that they shall sell or mortgage among themselves" gives each of the donees a right to insist that before any other of the donees mortgages or sells to a stranger, he shall be given the option of taking the mortgage of making the purchase. They do no more. The prohibition follows the words directing that the dealing with the shares shall be among the donees. It is intended to give effect to that part of the direction that the mortgaging and selling shall be among the donees. It does not enlarge the right conferred by the words which precede it. It is not an absolute prohibition. The deed does not say that in no circumstances is the land or any share of it to be sold to a stranger. It does not place any penalty upon a mortgage or sale in contravention of the prohibition. It does not provide that a forfeiture of the share sold to the benefit of the unoffending donees would be the result of a sale in contravention. There are no words in the deed from which an inference can be drawn that the donors intended that the share sold in contravention should vest in the unoffending donee or donees. If that had been the intention, the donors should have made express provision to that effect. There is nothing in

the deed from which the inference can be drawn that the donors intended that in the event of a mortgage or sale, or in any other event, the share conveyed to any one of the donees should pass to the other donees without payment of some consideration. There is no justification in the language of the deed for concluding that the donors intended that the land shall be preserved within the circle of the donees. It seems to me, therefore, that the right conferred by the deed upon each of the donees in regard to the shares of the others was that he might demand the option first of lending money upon a mortgage of the shares of the others or of purchasing them. It is a purely personal right, that is, one which could be asserted by one donee against another. It placed no burden on the land itself. A breach of the right gave rise to an action for damages only, not to pursue the land in the hands of strangers. The right might be described as a right of pre-emption (for, after all, the right of mortgage resolves itself into one of purchase) enforceable, not for specific performance, but for damages against the offending donee. If, therefore, any one of the donees had offered to sell his share to the other donees and they had refused to purchase, he would be justified in selling it to a stranger; or if all three donees had joined in selling all their shares, the purchaser would acquire an absolute title free of any restraint whatever. Accordingly, if the facts of this case had been other than they are, I would have given judgment for the plaintiff on this ground alone. But the actual facts give rise to a stronger ground. The direction about the mortgage and sale is intended for the benefit of the donees to enable any of them if so minded to purchase before others any share which might be sold. It is competent, therefore, for each of them to waive his right so as to release the share of each from any restraint in favour of the others. This it was competent for them to do whether the right be regarded as purely personal or as attaching to the land. The donees accordingly could lawfully have entered into the deed of partition. By that deed they allotted—each to the other of them—a definite portion of the land in lieu of the undivided share in all the four lands. Each conveyed title to the other to a defined portion "absolutely." The conclusion is irresistible that the intention and effect of the deed of partition was to confer on each of the donees absolute title to the portion allotted to him. Mohamado, therefore, derived an absolute title to the portion in dispute by virtue of the deed of partition. Neither his mortgage nor the sale in execution of the decree founded upon that mortgage was therefore a mortgage or sale in contravention of the deed of donation. The plaintiff is therefore entitled to the land in dispute for this reason.

As there has been a long argument on other aspects of the case, I would refer shortly to some of the arguments submitted on appeal. I am unable to agree with the contention that the prohibition against alienation to a stranger is void under the Entail and Settlement

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Ordinance or under the Common law, because the persons to be benefited by the prohibition are not named, described, or designated. The direction that any mortgage or sale shall be among the donees sufficiently indicates them by name as the persons for whose benefit the prohibition was made.

There remains the question whether the restraint upon alienation in this instance belongs to that class of prohibition which are called personal prohibitions in the Roman-Dutch law, and if so, whether the mortgage by Mohamado was in contravention of the prohibition. The division of prohibitions which are not nude into personal and real is well recognized in the Roman-Dutch law, which is applicable to this Colony. The division is founded upon the nature of the *fidei commissum* created by the prohibition. If that *fidei commissum* is a single one (*unicum*), the prohibition is personal. If it is a "recurring" (to adopt the translation of the term by MacGregor) *fidei commissum* (*multiplex*), the prohibition is called real. In the former case, where it has operated once, the *fidei commissum* is at an end, while in the latter the operation recurs from grade to grade of *fidei commissarii*[1] and is perpetual. The clearest description of the distinction between personal and real prohibitions and their effect is to be found in *Sande*.[2] The distinction is also pointed out by Voet.[1] But from all that these writers say it is obvious that whether the prohibition be personal or real it must create an interest in the thing prohibited to be alienated so that the right can be asserted *in rem*. If the right created by the deed of donation was such as to create an interest running with the land, the prohibition against alienation would have fallen into the class of *personal* prohibitions. I have already given expression to my view that the deed of donation fails to create an interest in the lands. But granting that the prohibition is one falling into the class of personal prohibitions, Mr. Samarawickreme's argument would still fail for two reasons. When Mohamado sold his one-third share to his brother, the first defendant, in 1912, the latter acquired this share free from any burden whatever, and when he re-sold it to Mohamado, the latter also acquired absolute title, because the prohibition provides that no one of the donees shall alienate his share to a stranger, but does not prevent one of the donees alienating the share which he has acquired from a co-donee.[3] For this reason Mohamado was entitled to deal with his one-third share as he pleased without any restraint. The second reason is that Mohamado acquired an absolute title to the land in dispute by virtue of the deed of partition, and his mortgage thereafter was not in contravention of the prohibition against a mortgage to a stranger, and hence no *fidei commissum conditionale* was brought into existence by his mortgage.

[1] *Voet 36, 1, 28.*

[2] *Sande, Restraints upon Alienations, Weber's Translation, pp. 176-181.*

[3] *Sande (ib.), p. 177 (part III., ch. 11, s. 3) ; Voet 36, 1, 28.*

I would, therefore, allow the appeal, with costs, and direct judgment to be entered in favour of the plaintiff as prayed for, with costs, but damages to be reckoned at Rs. 15 per mensem. Although the claim for damages was not contested in the answer or by an issue or by any evidence, I feel that the sum claimed is excessive.

Appeal allowed.