Present : Garvin and Lyall Grant JJ.

PETER APPUHAMY *v.* MUDALIHAMY.

1926.

295—D. C. Kegalla, 6,817

Fidei commissum—*Gift to wife and children—Prohibition against alienation to outsider—Possess as* paraveni.

Where a person gifted certain lands to his wife, his son, and two minor daughters, and the deed, proceeded to provide as follows: " And the said donees shall continue to render unto me all help and succour, as they are at present rendering, so long as I live, and after my death the four donees or their heirs, executors, administrators, and assigns can possess the same undisputedly and as *paraveni* property, and, further, I do ordain that the said four donees during their lifetime shall not mortgage, sell, or transfer to any outsider except among themselves the said donated lands",—

Held, that the deed did not create a valid *fidei commissum* in favour of the children of the donees. *Robert v. Abeyewardene* [1] considered.

BY a deed of gift No 1,886 of July 22, 1896, the donor gifted certain property to four members of his family ; the possession of the property was to take effect after his death. The relevant portion of the deed recited as follows : " And the said donees . . . . shall continue to render unto me all help . . . . so long as I live, and after my death the said Davith Sinno . . . . the four donees or their heirs, executors, administrators, and assigns can possess the same undisputedly and as *paraveni* property . . . . the said four donees shall not mortgage . . . . to any outsider except among themselves the said donated lands."

[1] *(1912) 15 N. L. R. 323.*

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The donees sold their shares in this land to the plaintiff and another. In an action brought by the plaintiff in the District Court for the land, the learned District Judge held that a valid *fidei commissum* had been created by the deed in favour of the children. From this judgment the plaintiff appealed.

H. V. Perera (with him *Ranawake*), for plaintiff, appellant.—In the case of a *fidei commissum* two things must be specified, viz., (1) the event in which the title of the donees is to cease ; (2) who is to get it when such title ceases.

In this case there is no *fidei commissum* in favour of the heirs of the donees. Even if it can be said that there is a *fidei commissum* as between the donees, the plaintiff gets a good title, because both the donees have joined in the conveyance.

In *Naina Lebbe v. Maraikar*,[1] a gift to three brothers, A, B, and C, with a condition " that if they like to alienate or encumber their share by any deed such as a mortgage or transfer they shall do so between themselves and not with others," it was held that no *fidei commissum* was created in favour of the other donees by a breach of the prohibition by one of them. What was created was only a right of preemption in favour of the donees. *Peris v. Soysa.*[2] A deed of conveyance to four persons, their heirs, or legal representatives, with a prohibition against alienation, except among the four grantees, was construed as not creating a *fidei commissum.* Counsel also cited *Amarawickreme v. Jayasinghe et al.*[3]

Drieberg, K.C. (with him *Navaratnam*), for intervenients, respondents.—A prohibition against alienation out of the family is sufficient to create a valid *fidei commissum*, especially when the gift is made to one's children. If the property is to remain permanently in the family, and the words used are sufficient to disclose the intention of the donor, then a *fidei commissum* has been created. *See Robert v. Abeyewardene* (*supra*).

In the case of *Vyramuttu v. Mootatamby*,[4] the absence of the words " their heirs," rendered a construction in favour of a *fidei commissum* impossible. Here mention is made, not only of the donees, but also of heirs, &c., and, further, they were to hold it as *paraveni* property. The latter direction clearly shows that it was the intention of the donor to keep the property within the family.

Counsel also cited *24 N. L. R. 420, Josef v. Mulder,*[5] ; *Burge 112*, and *Sande on Restraints 181.*

May 10, 1926 Garvin J.—

The point for determination in this case is whether a valid *fidei commissum* in favour of the children of the donees is created by the deed of gift No. 1,886 of July 22, 1896, and marked 2 D 1. In the opening recital the donor says : " I thought it fit that a settlement

[1] *22 N. L. R. 295.*
[2] *21 N. L. R. 446.*
[3] *23 N. L. R. 462.*
[4] *23 N. L. R. 1.*
[5] *(1903) App. Cases 190.*

should be made by me in regard to my lands and the house so that there may be no dispute about them after my demise." He then proceeds to make a present gift of the lands and premises to his son Davith Sinno, his minor daughters Ran Menika and Podimahatmeya, and his wife Punchi Menika, possession being postponed till after his death. The deed then proceeds as follows: "Henceforth any of my other daughters, children, heirs, or any one whomsoever shall raise no dispute or put forward any claim whatever " in regard to the subjects of the gift. This is followed by a clause, the language of which is strongly relied upon in support of the contention that a *fidei commissum* has been created, "And the said donees . . . . shall continue to render unto me all help and succour as they are at present rendering so long as I live, and after my death the said Davith Sinno, and the minors Ran Menika and Podimahatmeya, and my wife Punchi Menika, the four donees or their heirs, executors, administrators, and assigns can possess the same undisputedly and as *paraveni* property, and, further, I do ordain that the said four donees during their lifetime shall not mortgage, sell, or transfer to any outsider except among themselves the said donated lands." It is urged that these words indicate an intention on the part of the donor to create a *fidei commissum* in favour of the members of his family. The case of *Robert v. Abeyewardene* (*supra*) is cited as an authority for the proposition that where there is disclosed a clear intention on the part of the donor that the subject of the gift is to remain permanently in the family a *fidei commissum* is induced in favour of the members of that family. The case is also relied upon as an authority for the proposition that the particular form of words used in this case should be construed as sufficient to disclose an intention to create a *fidei commissum*. That a valid *fidei commissum* is created where the language of a document clearly indicates an intention that property shall remain in the family for the benefit of the members of the family and shall not be alienated outside the family is not disputed. I might further observe in passing that with the exception of *Robert v. Abeyewardene* (*supra*) Counsel has not been able to refer us to any other case in which it has been successfully contended that such a *fidei commissum* is created. Now the words "I do ordain that the said four donees during their life time shall not mortgage, sell, or transfer to any outsider except among themselves the said donated lands " do not create a *fidei commissum* in favour of the members of a famly. A very similar form of the words appear in a deed which was the subject of litigation in the case of *Naina Lebbe v. Maraikar* (*supra*). They are as follows : " That if they like to alienate or encumber their share by any deed such as a mortgage or transfer they shall do so between themselves and not with others." The words appear in a deed of gift in favour of three brothers. It was held that the words did not even constitute a valid *fidei commissum conditionale*, that

is to say, a *fidei commissum* induced in favour of the other donees by a breach of the prohibition against alienation by any one of them. It is contended, however, that the words which immediately precede this prohibition, to wit, "after my death the said Davith Sinno, and the minors Ran Menika and Podimahatmeya, and my wife Punchi Menika, the four donees or their heirs, executors, adminsitrators, and assigns can possess the same undisputedly and as *paraveni* property," have an important bearing upon the interpretation of the prohibition. It is said that these words contemplate the successive enjoyment of this property by the donees and their heirs, and that the words "possess as *paraveni* property" have the import that the donees and the heirs were to possess this property in succession.

Now these words must not be read out of their context. The material parts of the deed to which I referred earlier indicate, in the first place, that the object of the testator was to make a settlement of this property on certain members of his family in view of disputes which he anticipated might arise in the event of his death. To give effect to this object he makes a gift and lays his other daughters, children, heirs, and everybody else under an injunction not to dispute or to put forward any claim to the premises. Having done so, he proceeds to say that after his death possession of the property should pass to the donees, and in contemplation of the case of the possible death of one or more of the donees, he uses words which indicate that the heirs, executors, administrators, and assigns of the donees shall in that event take their place. The words "possess the same undisputedly" clearly refer to the injunction under which he has laid "other daughters, children, and heirs," and the words "as *paraveni* property" were I think used for the sole purpose of indicating, not only that their possession was not to be disputed, but that it should be regarded as if it were possession by the donees or their heirs, as the case may be, of property which had come to them by inheritance. The language of the donor is intended to show that the possession of the subject of the gift should be undisputed and of the fullest possible character.

These words are followed by the words of prohibition. But the prohibition is unaccompanied by any indication that it was made in pursuance of an intention to impose upon the property a *fidei commissum* in favour of the family of the donor.

The learned District Judge is wrong, and his judgment must be modified accordingly.

The appeal is allowed, with costs, and the plaintiff and the fourth defendant are declared entitled to this land, in the proportion of a half share to each.

The plaintiff is entitled to the costs of the contest in the Court below between him and the second and third defendants.

Appeal allowed.