Present : Ennis and Porter JJ. 1922.

HADJIAR *v.* MEYAPPA.

324—D. C. Colombo, 1,303.

Fidei commissum—*No indication of persons to be benefited.*

A last will provided as follows: "The testator says that he desires that (a certain boutique) shall be conveyed to his son N by deed subject to *fidei commissum, i.e.*, the said N can only take and enjoy during his lifetime the profit accruing from the said two lands, but that he or his heirs shall not sell or mortgage them, nor can they donate them as gift to any outsider, and that after the death of the said N, the said lands shall rest on his heirs, and that these shall have no power to sell or mortgage them, nor to donate them as gift to any outsider; further he (testator) desires that the expenses shall be borne by the latter."

Held, that no *fidei commissum* was created by the clause.

THE facts are set out in the judgment of the District Judge (H. A. Loos, Esq.) :—

This is a partition action. The property sought to be partitioned belonged to Omer Levvai Sinnetamby who died in 1852, leaving a last will No. 443 dated April 19, 1852, whereby he bequeathed the premises to his son, Sinnetamby Neina Marikar, in the following words :—

"The testator says that he desires that (a certain boutique) shall be conveyed to his son N by deed subject to *fidei commissum, i.e.*, the said N can only take and enjoy during his lifetime the profit accruing from the said two lands, but that he or his heirs shall not sell or mortgage them, nor can they donate them as gift to any outsider, and that after the death of the said N, the said lands shall rest on his heirs, and that these shall have no power to sell or mortgage them, nor to donate them as gift to any outsider; further he (testator) desires that the expenses shall be borne by the latter."

There is no allegation by any of the parties to this action that the property in question was not conveyed to Neina Marikar by deed, and the parties are agreed that Neina Marikar was married to Tangamma, that the former died in 1880 and the latter about twenty-five years ago, leaving three children, viz., (1) Pathumma Natchia; (2) Sinne Lebbe Marikar; and (3) Aise Umma; that Aise Umma died without issue, and that Pathumma Natchia died leaving three children, viz., the plaintiff and the first and second defendants. The third defendant is the husband of the second defendant. So far there is no dispute. The fourth defendant, who is a Chetty, contends that neither the plaintiff nor the first and second defendants are entitled to the property sought to be partitioned, and that it belongs to himself.

He states that by deed No. 2,828 dated October 8, 1891, the heirs of Neina Marikar, including the plaintiff and the first and second defendants conveyed the property in question to A. L. M. Arisi Marikar Hadjiar, who by deed No. 12,611, dated September 11, 1905, gifted it to his son, Mohammado Sali, in execution against whom it was sold by the

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Fiscal on September 13, 1916, and purchased by him (fourth defendant), and that he has obtained a Fiscal's transfer, No. 11,338, dated January 18, 1917.

The first added defendant, whose husband is the second added defendant claiming to be the sole surviving child of Sinne Lebbe Marikar who was the son of Neina Marikar, and as such entitled to two-thirds share of the property, sought to be partitioned.

The plaintiff contends that by the clauses referred to in the last will, a valid *fidei commissum* was created, and that Neina Marikar and his heirs were restrained from selling, mortgaging, or donating the property to an outsider, so that the transfer by Neina Marikar's heirs by deed No. 2,828 dated October 8, 1891, being to an " outsider " is bad—the intention of the testator having been to keep the property in the family.

It was agreed that, in the first instance, the Court should decide the question as to whether or not the last will created a valid *fidei commissum* restraining the children of Neina Marikar from alienating the property.

The fourth defendant's counsel admitted that by the clause referred to, a valid *fidei commissum* had been created so far as Neina Marikar himself was concerned, but he contended that it did not do so in the case of Neina Marikar's heirs, for there was no sufficient indication as to who was to benefit in the event of the heirs violating the wish of the testator—that there is no express reference in the clause to the children or heirs of Neina Marikar's heirs, and he questioned whether such children or heirs of Neina Marikar's heirs would succeed by implication.

It seems to me that the intention of the testator was clearly to create a *fidei commissum* to the extent that the law permitted; that his intention was not only to prevent alienation by Neina Marikar himself, but by his heirs also, and to keep the property in his family for so long as the law permitted, for after stating that the property is to be conveyed to his son Neina Marikar subject to *fidei commissum*, he immediately proceeds to provide that neither Neina Marikar or his heirs shall alienate the property to an " outsider," and that after Neina Marikar's death it shall vest on his heirs who shall have no power to alienate it to any " outsider."

I do not think that it can be said that those words were inserted in the clause for any other purpose than that of " inducing " a *fidei commissum* and retaining the property in the family of the testator.

The provision that Neina Marikar's heirs should not alienate to an outsider was, I think, a manifest indication that the property should descend to the heirs of Neina Marikar's heirs, and that the latter were not intended to get a free inheritance.

There can be no question that if the testator had said that the property was to be conveyed to Neina Marikar and his heirs "in perpetuity," with a restriction against alienation, a valid *fidei commissum* would have been created for the full period allowed by law in favour of the persons, who, under the law of intestate succession, would be entitled to succeed Neina Marikar (*Selembram et al. vs. Perumal et al.*).[1]

These are not the words in the clause of the will in question tantamount to a provision in favour of the heirs " in perpetuity " of Neina Marikar? Although expressed in different language, was not that the intention of the testator?

[1] *(1914) 16 N. L. R. 6.*

I am unable to see what other intention the testator meant to express by the words used by him.

I would hold accordingly that the last will does create a valid *fidei commissum* in respect of the heirs of Neina Marikar, and that they were not competent to convey the property by the deed No. 2,828 referred to above, and that the fourth defendant had no valid paper title to the property sought to be partitioned.

A. St. V. Jayawardene, K.C. (with him *Navaratnam*), for the fourth defendant, appellant.

Samarawickreme (with him *Garvin*), for plaintiff, respondent.

March 30, 1922. ENNIS J.—

This was a partition action. At the trial a preliminary issue was raised as to whether the plaintiff and the first, second, and third defendants had any title under the will of Sinnetamby made in 1852. The plaintiff claimed that Sinnetamby's will created a *fidei commissum* under which they benefited. It was agreed that in the event of the decision on this point being in favour of the fourth defendant, the plaintiff's action should fail. The learned Judge found in favour of the plaintiff, and the fourth defendant appeals. The material portions of the will in question are as follows: " The testator says that he desires that (a certain boutique) shall be conveyed to his son, Sinnatamby Neina Marikar, by deed subject to *fidei commissum*, *i.e.*, the said Neina Marikar can only take and enjoy during his lifetime the profit accruing from the said two lands, but that he or his heirs shall not sell or mortgage them, nor can they donate them as gift to any outsider, and that after the death of the said Neina Marikar the said lands shall vest on his heirs, and that these shall have no power to sell or mortgage them, nor to donate them as gift to any outsider, further he (testator) desires that the expenses shall be borne by the latter." The learned Judge held that reading the whole of this together there was an intention by the testator to create a *fidei commissum* to the extent the law permitted, and an intention of keeping the property in his family for that time. The learned Judge appears to have considered that the prohibition against alienation to an outsider was a manifest indication that the property should descend to the heirs of Neina Marikars' heirs, and that the latter was not intended to get a free inheritance. There have been a series of cases on the interpretation of similar wills, but in every case where a *fidei commissum* in favour of the family has been found words such as " permanently," or " entail," or " for ever," or " posterity " are found in the clause creating the *fidei commissum* to indicate the persons who are to benefit. In the present will there are no such words. In the present case the prohibition against alienation to outsiders is limited to the heirs of Neina Marikar without any mention of what

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is to happen in the event of an alienation to outsiders. It may be that the words are equivalent to giving the other heirs a right of pre-emption, a question which does not arise in the present case, as all the heirs of Neina Marikar joined in 1891 in a sale by virtue of which the fourth defendant ultimately claimed. The counsel for the respondent based his contention mainly on an argument that the will should be construed according to the intention of the testator. There is, however, nothing in the history of the property which would leave the Court to think that the testator intended to create an entail beyond the persons he has specially mentioned, as the property appears to have been acquired by a purchase at an auction sale. Moreover, in order to create a valid *fidei commissum*, not only must there be a prohibition of alienation, but the persons to benefit must be clearly indicated. No persons are specifically indicated in the will, and no class of persons can be said by inference to have been indicated. In the case of *Livera v. Abeyesinghe*[1] and *Livera v. Gunaratna*[2] the will contained an express provision that the property was entailed as a *fidei commissum*, and in the case of *Selembram v. Perumal*[3] there was a provision that the property should be held and possessed by the beneficiaries and their heirs in perpetuity. The main case in which it was held that the will created a *fidei commissum* in favour of the family is the case of *Robert v. Abeywardane.*[4] That case has been distinguished many times since. It was considered in the case of *Peris v. Soysa*[5] and in the case of *Cornelis v. Wattuhamy.*[6] There are also two unreported cases where the judgment was delivered by the same Judge, 265, D. C. Galle, 16,803,[7] and 327, D. C. Galle, 17,353.[8] In all those cases it was held that there was no clear indication that the will under review indicated the persons to benefit by the prohibition. In the circumstances I am of opinion that the appellant is entitled to succeed, and that the plaintiff's case fails, as he can claim no title under Sinnetamby's will.

I would accordingly allow the appeal, with costs, and dismiss plaintiff's action, with costs.

When the appeal was first presented it occurred to me that the case was one that should not have been made the subject of a partition action, but inasmuch as the learned Judge has found in favour of the plaintiff in the Court below, it is unnecessary for us to consider the question of the plaintiff's *bona fides* in having the point decided in a partition action.

PORTER J.—I agree.

Appeal allowed.

[1] *(1916) 18 N. L. R. 57.*
[2] *(1915) 17 N. L. R. 289.*
[3] *(1914) 16 N. L. R. 6.*
[4] *(1917) 15 N. L. R. 323.*
[5] *(1921) 21 N. L. R. 446.*
[6] *(1922) 22 N. L. R. 77.*
[7] *S. C. Min. of Feb. 24, 1922.*
[8] *S. C. Min. of Mar. 27, 1922.*