1955 *Present:* Gratiaen, J., and Fernando, J.

R. BABEE *et al.*, Appellants, *and* P. NAIDA *et al.*, Respondents

*S. C. 146—D. C. Kandy, 3,292*

Fideicommissum—"*Warga paramparawe*"—*Express fideicommissum—Alienation—permitted between original donees—Effect.*

A deed of gift contained the following condition :—

"This property shall be held and possessed by my sons S—and H—or their descending heirs children and grandchildren unto *warga paramparawe*; they shall have the right to dispose of same among the brothers only, but shall not offer as security mortgage or sell in any manner whatsoever to anyone outside."

*Held*, that the first part of the condition constituted a gift over in favour of the lineal descendants of the original donees and was sufficient to create an express *fideicommissum*; the subsequent reference to alienation was merely a qualification of what would otherwise have been an implied total restraint.

APPEAL from a judgment of the District Court, Kandy.

*W. D. Gunasekera*, for the plaintiffs appellants.

No appearance for the defendants respondents.

*Cur. adv. vult.*

June 10, 1955. FERNANDO, J.—

This is an appeal against the refusal of the learned District Judge to hold that a *fideicommissum* was created by a deed of gift which was subject to the following conditions :—"This property shall be held and possessed by my sons Setuwa and Hawadiya the two of them or their descending heirs children and grandchildren unto *warga paramparawa*; they shall have the right to dispose of same among the brothers only, but shall not offer as security mortgage or sell in any manner wharsoever to anyone outside".

The Judge thought that the restriction against alienation is partial and not complete and assumed that "What is not expressly prohibited is implicitly allowed". It is apparent that the only question to which he sought an answer was whether a tacit *fideicommissum* was created by reason of a prohibition against alienation imposed on the beneficiaries. Where that is the only question which properly arises, then vagueness or ambiguity as to the extent of the restraint or a failure to give a clear indication of the persons in whose interests it is imposed might each negative the intention to create a *fideicommissum*; and such I think was the case in *Lushington v. Samarasinghe* [1] upon which the learned Judge relied.

The real question which arises in the present case however, is whether the first part of the condition is sufficient to create an express *fideicommissum*, in which event the subsequent reference to alienation is merely a qualification of what would otherwise have been an implied total restraint. The language of the condition is very similar to that construed in *Sopinona v. Abeywardene* [2];—"I do further direct that the

[1] *(1897) 2 N. L. R. 295.* [2] *(1928) 30 N. L. R. 295.*

property bequeathed to the parties named, who are the legatees of this last will and testament, are hereby authorised to possess among themselves and their descending heirs, and they are hereby prohibited from selling, mortgaging, or gifting to others, save and except among themselves and their descending heirs ". Neither side there contested the existence of the *fideicommissum*, and the only point argued for the respondent was that the prohibition was personal and not real and had therefore lapsed by reason of a permitted alienation. His counsel rightly conceded that " the testator whilst imposing a *fideicommissum* intended to permit an alienation under certain conditions ".

It is scarcely necessary to point out that no particular formula, and not even the use of the word *fideicommissum*, is necessary in order to create one, so long as the intention is clear. That intention is manifested in the deed under consideration by the words " shall be held and possessed by my sons or their descending heirs children and grandchildren under *warga paramparawa* ", which constitute a gift-over in favour of the lineal descendants of the original donees. Nothing more would have been necessary, but for the desire of the donor to permit alienations between the original donees ; and " where there is an express *fideicommissum*, the apparent nudity of the express prohibition imposed on the fiduciaries is immaterial to the existence of the *fideicommissum* ". (cf. *Nadarajah* at p. 107).

I would therefore hold that the deed under consideration created a valid *fideicommissum* in favour of the plaintiffs in respect of the half-share of the property donated to their father. The appeal has to be allowed and the decree of dismissal set aside. The case is remitted to the District Court for decree to be entered declaring the plaintiffs to be entitled to the half-share and for adjudication upon the issues relating to damages and the claim for compensation for improvements. The defendants must bear the costs of appeal and of the proceedings in the District Court which preceded the appeal.

GRATIAEN, J.—I agree.

*Appeal allowed.*