

Present: De Sampayo and Dalton JJ.

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SILVA v. KEKULAWELA.

340—D. C. Colombo, 101,815.

Fidei commissum—Grant to donees, their descendants, executors, and assignees—Designation of persons to be benefited—Sale for non-payment of taxes—Purchase by Municipality—Municipal Councils Ordinance, No. 6 of 1910.

Where a deed of gift contained the following clause:—"The said property shall be owned, improved, and possessed by the said three persons, as aforesaid, during their lifetime, and I have hereby firmly directed that the said three persons cannot sell, mortgage, or subject the said property to any debt, security, or writ, or otherwise alienate the same: And I have hereby further directed that the descendants, executors, administrators, and assigns of the said three persons can do whatever they please with the said property after the death of the said three persons.

Held, that the deed did not create a valid *fidei commissum*.

ACTION for declaration of title to half share of certain buildings and premises bearing assessment No. 32, Armour Street, Colombo. One Dona Francina Hamine was admittedly the original owner of the premises, the subject-matter of the action. She gifted the property in equal shares to her son and daughter. The daughter's half share devolved on the present defendant, and there is no dispute regarding it. The dispute relates to the other half.

The plaintiff contended that the gift to the son created a *fidei commissum* in favour of the heirs of the donee, and he claimed title to that half share as purchaser from the sole heir of the donee. The defendant claimed it on a deed of gift from K. Don David to whom the son had transferred his interests in 1901. The defendant who for a considerable time was in possession of the entire property leased the whole of the premises subject to the due payment of rates and taxes. The lessees having committed default, the property was sold and purchased by the Council. Thereafter, the defendant got a retransfer of the property in his favour. The learned District Judge held that the deed of gift created a valid *fidei commissum*, but was of opinion that the purchase by the Municipal Council under the circumstances stated gave the Council an absolute title, which title on its retransfer to the defendant enured to his benefit and prevailed over the title of the plaintiff.

De Zoysa, for plaintiff, appellant.

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Plaintiff as a purchaser from the sole surviving heir of the original donee on the deed of gift of 1881 claims superior title to a half share, on the ground that that deed created a *fidei commissum* in favour of heirs, and that consequently the sale by Don Davith Alwis in 1901 was bad, and conveyed no title to defendant's predecessor in title.

The defendant sets up two defences: In the first place, he contends that no such *fidei commissum* was created by the deed of gift. He further contends that even, if there was a *fidei commissum*, on the sale by the Municipality—the purchaser being the Municipality itself—the Municipality obtained absolute title to the property, which title has endured to his benefit by the sale of the right, title, and interest of the Municipality.

The deed of gift in unmistakable terms contains a prohibition against alienation. "The executors, administrators, and assignees" are clearly those of the descendants of the donees and not the donees themselves. The words "after the death of the said three persons (donees)" makes it clear that the reference is not to the donees themselves. Hence the sale by Don Davith Alwis is bad, and the defendant gets no title thereby.

With regard to the other contention of the defendant that he has absolute title by virtue of the transfer to him by the Municipal Council. In the first place, the defendant was at the date of the sale by the Municipality a co-owner in possession of the whole of the property. He could not by his own default in not paying up taxes change the nature of his possession as co-owner. Accordingly, on his repurchase from the Municipality, he must be taken to be a trustee of the half share in dispute. All that the defendant is entitled to is to be compensated for moneys paid out by him in respect of this half share.

It has been doubted whether a sale such as the present one wipes out a *fidei commissum*, vide *Sivacolundu v. Noormaliya*.¹

Furthermore, the sale itself is not valid, inasmuch as there is no evidence that the rule with regard to the sales of movables first has been complied with. The trend of modern decisions of this Court seems to require a strict compliance with this rule, and it was for the defendant to prove that such order was complied with in the present case.

Samarawickreme, for defendant, respondent.—On the question whether the deed in question created a *fidei commissum*, it must be conceded that there is a prohibition against alienation. But this is in itself insufficient to create a *fidei commissum*, as the party to be benefited has not been indicated at all or at the best there is no clear indication. The deed, therefore, creates no *fidei commissum*, and hence defendant's title is superior. Cited *Silva v. Silva*² and *Botaju v. Fernando*.³

¹ (1921) 22 N. L. R. 427.² (1914) 18 N.L. R. 174 & 178.³ (1923) 24 N. L. R. 293.

The decision (*Sivacolundu v. Noormaliya (supra)*) has been considered in a later case S. C. Min., 175—D. C. Colombo, 9,369, and a distinction was drawn there between sales under sections 143 and 146 of the Municipal Councils Ordinance. The sale under section 146 was held to vest absolute title in the Council, and the certificate to be conclusive evidence. So that the defendant being at present the successor in title to the Council must also be deemed to have absolute title.

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With regard to the rule referred to as to the order in which sales ought to take place, it need only be stated that there is the return of the officer who conducted the sale, and that must be deemed sufficient *prima facie* evidence that the order was duly observed.

The contention that the defendant is a trustee for the plaintiff of the half share in dispute cannot on the argument of the appellant be sustained, as it assumes that the defendant committed default. That is not so. The deed of lease recites that the taxes were to be paid by the lessee, and the default was on the part of the lessees and not of this defendant.

June 16, 1925. DE SAMPAYO J.—

This is a claim by the plaintiff to a half share of certain premises and buildings bearing assessment No. 32, Armour street, Colombo. One Dona Francina Hamine was the former owner of the entire property, and she, by deed No. 3,160 dated October 5, 1881, gifted one-half of it to her daughter, Dona Carlina, and intended son-in-law, Don Harmanis Perera, and the other half share to her son, Don Davith Alwis. The defendant has upon various deeds become entitled to Dona Carlina's and Don Harmanis Perera's half share, and there is no dispute as to it. The dispute is to the other half share. In February, 1901, Don Davith Alwis sold his half share to K. Don David from whom the defendant received it as a gift in February, 1913. The defendant, being in possession of the entirety of the premises, leased it to a third party for a number of years, subject to payment of the assessment taxes to the Municipal Council. The lessee having made default in the payment of the taxes for a certain period, the Municipal Council seized and sold the property in May, 1920, for the recovery of the amount of taxes due, and purchased it themselves for the sum of Rs. 120. Subsequently, the Council by deed dated February 25, 1924, sold it to the defendant for a sum of Rs. 1,190.38. I have mentioned these figures in order to show that this sale by the Council to defendant was an independent transaction and not, as was contended for the plaintiff appellant, a mere handing back of the property on receipt of the taxes due. The facts which I have so far stated show that the defendant has a *prima facie* good title, both through the gift from K. Don David and the purchase from the Municipal Council.

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The plaintiff, however, says that the deed of gift No. 3,160 of 1881 from Dona Françina Hamine creates a *fidei commissum* in favour of the children of the donees, and that therefore the sale by Don Davith Alwis in 1901 of a half share of the property had only the effect of transferring his life interest to K. Don David. Don Davith Alwis died in 1918, leaving one child named Don Mendis Alwis, who, on February 3, 1921, purported to sell the half share to the plaintiff. The plaintiff contends that the defendant, who was in possession of the whole premises, should have paid the Municipal taxes, and having made default and allowed the property to be sold and having subsequently repurchased it from the Council, he must, in view of the provision of section 92 of the Trust Ordinance, No. 9 of 1917, be taken to hold the half share in trust for the plaintiff. As regards the sale by the Municipal Council he contends that the Council should have observed the order in which the property of the defaulter is required to be sold, and should have first sold the movable property on the premises. But it should be noted that the failure to pay the taxes was not intentional on the defendant's part, and the defendant relied on his title to the whole property and was not even aware of a possible claim by Don Mendis Alwis. As regards the order which is to be observed in selling property for the recovery of taxes, there is nothing to contradict the return of the officer who conducted the sale, and who reported that various classes of property were first put up for sale and that there were no bidders. Moreover, as was pointed out in 178—D. C. Colombo, 9,369 (S.C. Min., February 12, 1925), there is a great distinction between section 143 and section 146 of the Municipal Councils Ordinance, No. 6 of 1910, and when the Council purchases under the latter section objections as regards formalities cannot be taken and are even forbidden.

But it is unnecessary to notice the above contention further, because all the objections vanish if there was no *fidei commissum* attaching to the property. The relevant portion of the deed No. 3,160 is as follows:—

And the said property shall be owned, improved, and possessed by the said three persons as aforesaid during their lifetime, and I have hereby firmly directed that the said three persons cannot sell, mortgage, or subject the said property to any debt, security, or writ, or otherwise alienate the same. And I have hereby further directed that the descendants, executors, administrators, and assigns of the said three persons can do whatever they please with the said property after the death of the said three persons.

The question is whether there is a clear designation of those who are to take the property after the death of the immediate donees. The District Judge thinks that in the above passage "the executors, administrators, and assigns" are those of the descendants of the

donees and not of the donees themselves, and that the *fidei commissaries* are the descendants. But this is an impossible construction. All the words " descendants, executors, administrators, and assigns " go together and clearly refer to the descendants, executors, administrators, and assigns of the donees. In my opinion the deed, while it contains a prohibition against alienation, does not designate the party or parties who are to take the property after the donees, and there is, therefore, no valid *fidei commissum* created thereby. The sale by Don Davith Alwis to K. Don David was good and effective as regards the half share, and Don Mendis Alwis had no interest therein.

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The appeal fails, and should be dismissed with costs.

DALTON J.—I agree.

Appeal dismissed.

