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Present : Bertram C.J. and Schneider J.

SETHUHAMY *et al.* v. KIRIBANDA *et al.*

406—D. C. Kegalla, 5,542.

Gift by wife to husband and three children—Husband to take care of property during minority of children and possess jointly till death, and divide the property among children at death—Fidei commissum—Interpretation of deed.

A wife gifted a property to her husband and three children. The deed provided that during the minority of the children the husband should take care of the property, and on their attaining majority that he should possess the property with the three children, and on the approach of death should divide the property among the children.

Held, "It may be said that the words do contemplate that the property shall not be alienated during the lifetime of the husband. To that extent, perhaps, we ought to construe the words as constituting a prohibition against alienation during the lifetime of the husband Until the death of the husband the properties were to be held in undivided shares, but that at his death he must distribute the property in specie among the three children It is also contemplated that that distribution shall include the one-fourth share already vested in the husband by the operative words of the deed. If this is the view to be taken, then the deed would appear to constitute a *fidei commissum* of the one-fourth, the *fidei commissarii* being the three children."

*Dantuwā v. Setuwā*¹ commented upon. BERTRAM C.J.—"I venture to think that if the history of the law of *fidei commissum* as set out in *Professor Lee's Introduction to Roman-Dutch Law*, passage 318, had been fully considered, the result of that case might have been different."

THE facts appear from the judgment.

The deed in question was as follows:—

The purport of the deed of gift written and granted at Kalugalla on December 1, 1862, is as follows, to wit:—

That though I, the hereunder signed, Halawatrallage Dingiri Menika of Kalugalla in Deyala Dahamunu pattu of Kinigoda korale, belonging to the Four Korales, being now only 25 years old, and though I am at present in my good and sound mind, yet I do not think myself that I shall live long in this world, as I am suffering with a serious sickness, namely, dysentery, and as my husband Dodanwelagedera Ukku Banda of Ilukwatta in Meda pattu of Yatinuwara is rendering me every assistance and help necessary for this said sickness, dysentery, through his

¹ (1909) 11 N. L. R. 39.

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will and consent, and with the object of obtaining kindly from him in future all and every kind of help as long as I live in this world, and having thought it proper to make a transfer, whatever it may be, of the herein below-mentioned property (to which there is no better heir than myself), thinking that disputes will be made for the same after my demise, and to prevent such disputes that arise during my lifetime, and as my said husband Ukku Banda and son Kiri Banda were of great assistance and help to me during the different kinds of sickness with which I was subjected to on various occasions, I do hereby transfer over unto herein named my three children and my husband Ukku Banda the following *paraveni* property which are uninterruptedly possessed by me, the said Dingiri Menika, for a period of six years up to date having been entitled to me, through my deceased father Halawatbandararallage *alias* Wattekorallage Banda Korala making them, the said husband Ukku Banda and the three children born to me, named Halawatbandararallage Kiri Banda, Punchi Banda, and Bandara Menika, to inherit the said property, as they have no other landed property besides these to inherit, namely

Therefore, all the herein named high and low lands, gardens, and houses, together with all the fruit trees standing thereon, including all other lands which are not mentioned here and which are of the value of fifty pounds of the lawful money of Ceylon, have been gifted and transferred over unto my said husband, Kiri Banda, Punchi Banda, and Bandara Menika, together with all the power, right, title to and interest which I, the said Dingiri Menika, had over them having thus gifted and transferred. It is hereby agreed that my husband, the said Ukku Banda, should, until my said three children attain age, take care of the said property, and do the needful in cases that will be taken regarding them, and my said husband may live on them and possess them till his death with my said three children, and at the deathbed of the husband he should divide and give the said landed property among my three children. Therefore, with regard to this grant, neither I, nor any of my heirs or descendants or anybody else, could make any dispute whatever from this day, and that the said husband and three children—Kiri Banda, Punchi Banda, and Bandara Menika—and their descendants, heirs, &c., of their estate, should do whatever they please with the said lands, and possess them for ever as uninterrupted property.

Having thus empowered, this deed of gift was caused to be written, &c.

Signed, witnessed, and attested.

Keuneman, for the appellants.

E. W. Jayawardene, for the respondents.

March 29, 1922. BERTRAM C.J.—

This is a case which turns on the construction of a somewhat peculiarly drafted deed. The deed purported to be a deed of gift by one Dingiri Menika in favour of her husband Ukku Banda and her three children, Kiri Banda, Punchi Banda, and Bandara Menika. The plaintiffs in this case claim under a person said to be an heir of the three children. The defendants claim through the husband,

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Ukku Banda. The case has been decided without oral evidence, but on a reference to previous proceedings and admissions of the parties. There is a preliminary question of fact which has to be dealt with before we consider the construction of the deed. That question is whether one Bisso Menika, the predecessor in title of the plaintiffs, was, in fact, the daughter of Bandara Menika, and, therefore, an heir of Bandara Menika and her two brothers. This is a question on which two views might be taken. But the learned Judge, having sifted the previous evidence above referred to, finds, as a fact, that Bisso Menika was the heir of Bandara Menika and her brothers, and I see no reason why we should disturb that finding of fact. I will proceed, therefore, on the supposition that that finding of fact is correct.

We have now to deal with the construction of the deed. The deed disposed of some twenty-eight properties. After various recitals, it says: "I do hereby transfer over unto herein named my three children and my husband, Ukku Banda, the following *paraveni* property," and the grantor expresses her intention that her husband and the three children should inherit the property. At a later stage in the deed she says: "All the herein named high and low lands have been gifted and transferred over unto my said husband, Kiri Banda, Punchi Banda, and Bandara Menika, together with all the power, right, title to and interest which I, the said Dingiri Menika, had over them." It is impossible to imagine clearer and more positive words for the purpose of transferring the title to the properties referred to in undivided shares of one-fourth each. We must take it, therefore, that that was the intention of the deed.

The words that cause trouble are to be found in a subsequent clause, and the question is whether these words in any way limit the previous operative words, and whether they either vest the husband with only a usufructuary right, or whether, on another interpretation, they create a *fidei commissum*. The clause contemplates three stages. The first is the minority of the children. The deed is executed presumably by husband and wife, and it is said to be agreed that Ukku Banda, the husband, should, until the three children attain age, take care of the property, and do what was necessary in the event of certain apprehended litigation. That was the first stage.

The second stage is from the time of the attainment of majority of the three children to the death of Ukku Banda. During that stage it is said that the husband shall live on the lands and possess them till his death with the said three children.

Then comes the final stage. At the deathbed of the husband he is to divide and give the said landed property among the three children, and the question is what is the effect of this provision upon the previous operative words. The first stage is unimportant. It merely directs the husband to look after the property during the

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minority of the children. With regard to the second stage, after the attainment of majority, it contemplates that the properties are to be possessed in common until the death of the husband.

Mr. E. W. Jayawardene, for the plaintiffs, by a process of reasoning which I cannot understand, wishes us to construe these words as limiting the husband's right to a life interest in the whole property. I cannot see how that interpretation could possibly be maintained. It may, however, be said that the words do contemplate that the property shall not be alienated during the lifetime of the husband. To that extent, perhaps, we ought to construe the words as constituting a prohibition against alienation during the lifetime of the husband.

Now we come to the final words. It is said that at the deathbed the husband is to divide and give the landed property to the three children. What is the meaning of these words? My brother has suggested, and I think that the suggestion seems to throw some light on the meaning of the deed, that the intention was that, until the death of the husband, the properties were to be held in undivided shares, but that at his death he must distribute the property in specie among the three children. A positive act is contemplated, and the most reasonable explanation of what is meant by that positive act seems to me to be a distribution in specie. But it is also contemplated that that distribution shall include the one-fourth already vested in the husband by the operative words of the deed. If this is the view to be taken, then the deed would appear to constitute a *fidei commissum* of that one-fourth, the *fidei commissarii* being the three children.

Now, if that is the interpretation to the deed, what is the effect of it? All three children predeceased their father. The one-fourth share, therefore, vested in the father, ceased to be burdened by the *fidei commissum*, and he retained an absolute right in that one-fourth undivided share. The remaining three-fourths originally vested in the three children passed to their heir. The result, therefore, is that the legal title was as regards the one-fourth in Ukku Banda, the husband; as regards three-fourths in Bisso Menika, the heir of the three children.

But the plaintiffs made an admission which seems to me, in this view of the deed, to dispose of their case. They admitted that for over forty years the property in question has been in the possession of the defendants and their predecessors in title. Mr. Jayawardene seeks to escape from the effect of that admission by saying that they, no doubt, may have been possessed, but that they possessed as co-owners, and consequently no prescription arises, unless adverse possession is proved or presumed. But in this case there is the strongest evidence of adverse possession. Ukku Banda for many years maintained a position entirely hostile to the claimants or those claiming through the children. It is quite true that the basis

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on which he maintained this position is unfounded. He claimed to be in possession of the lands comprised in the deed by virtue of *daru uruma*, alleging that Bisso Menika was not a daughter of Bandara Menika. That claim, as I have said, is unfounded. But his possession was none the less adverse. It seems to me, therefore, that that admission, taken in conjunction with the attitude of Ukku Banda, establishes a case of prescription. It is quite true that Ukku Banda parted with this particular property many years ago in 1883. But the attitude of hostility I have referred to was taken up with regard to the other property mentioned in the deed, and I think that those who claim through Ukku Banda in regard to this property are entitled to take advantage of that attitude for the purpose of establishing their claim by prescription.

I should mention a case brought to our notice by Mr. Jayawardene, and that is the case of *Dantuwa v. Setuwa*.¹ There the words of the deed were very similar to those which we are considering. The property was conveyed to the wife and children in equal shares, and it was directed that the wife having possessed her share of the several premises should, at the approach of her death, grant and convey the same unto the four children. It was held in that case that this direction to the wife was inconsistent with the original gift, and that the wife took an absolute interest in her share.

If that case were followed here, the result would be the same, that is to say, the husband, as co-owner, having an absolute right to a one-fourth by himself, and those claiming under him by prescription would have enlarged that one-fourth to a right to the whole. I venture to think, however, that if the history of the law of *fidei commissum*, as set out in *Professor R. W. Lee's Introduction to Roman-Dutch Law, passage 318*, had been fully considered, the result of that case might have been different. In any case, the decision is only a decision of the words on the particular document. I prefer to deal with the case on the lines I have indicated. The defendants, therefore, having in my view established a title by prescription, I would allow the appeal, with costs, here and below.

SCHNEIDER J.—I agree.

Appeal allowed.

¹ (1909) 11 N. L. R. 39.