

1931

Present : Macdonell C.J. and Garvin S.P. J.

PERERA *et al.* v. YOOSOOF.

189—D. C. (Inty.) Colombo, 33,232.

Fidei commissum—Prohibition against alienation—Donees and their heirs—Beneficiaries—Subject to above-named restrictions—Beneficiary dying without issue—Share passing to surviving beneficiaries—Bond of fidei commissum.

Where a deed of gift, which vested certain property in the wife of the donor and his children provided as follows:—"All of which shall be held and possessed after my death by the aforesaid donees under the following provisions, conditions, and restrictions (*i.e.*), the said X (the wife) shall not sell, mortgage, or alienate . . . but she shall freely hold and enjoy and possess the same during the term of her natural life and then the same shall pass to her before-mentioned six children or their survivors and that the remaining seven lots including the last-mentioned land wholly given to Y (the son) shall like wise be held and possessed by the six donees respectively, and their heirs agreeable to the division aforesaid, subject to the above-mentioned restrictions and under the bond of *fidei commissum*. That if any one either of the last-mentioned six donees die without legitimate issue, then, in that case his or her or their shares or lots shall pass to their survivors or their legitimate issue". Y died intestate and unmarried and his share devolved upon his brothers and sisters.

Held, that the lots gifted to the children were subject to a *fidei commissum* in favour of their legitimate issue.

Held also, the share of Y, which passed to the surviving donees, was subject to the same *fidei commissum*.

THIS was an action for declaration of title to a land, the owner of which was one Don Hendrick Perera Jayatileke. He executed the deed of gift No. 45 of May 1, 1859, the relevant provisions of which are set out in the head-note. By the deed he settled seven allotments of a land upon his wife and six children, Don Joseph, Lucia, Sophia, Johana, Christina, and Robert, giving in addition certain other remises to his son Joseph. Don Joseph died in 1888 and it was common ground

that his interests devolved on the surviving brothers and sisters and the legitimate issue of a deceased brother Robert. The plaintiffs were the legitimate children of Christina, Johana, and Sophia, who had conveyed their interests to one Mohamadu Ismail Hadjar. The plaintiffs claimed that they were entitled to the property on the death of their parents by reason of the *fidei commissum* created by Don Hendrick. The learned District Judge held that their parents had absolute title and dismissed the plaintiff's action.

dstayley K.C. (with him *N. E. Weerasooria* and *H. R. C. Fonseka*), for plaintiffs, appellants.—Lot No. 1 given to Isabella is subject to *fidei commissum* in favour of the other six donees or their survivors. The intention of the donor was clearly to impress a *fidei commissum* on the remaining lots also. The words are "shall likewise be held and possessed by the said six donees respectively and their heirs agreeable to the division aforesaid subject to the above-mentioned restrictions and under the bond of *fidei commissum*." The word "likewise" in this clause and the words "without legitimate issue" in the next clause indicate that the heirs contemplated are the legitimate issue of the donees and the legitimate issue of those legitimate children. The deed must be construed as a whole and to give the property absolutely to the children of the donees would be contrary to the intention of the donor as expressed in the deed.

H. V. Perera (with him *Canakaratne* and *Marikkar*), for defendant, respondent.—The children of the donees take the lot in question absolutely. The deed does not expressly bind the property in the hands of children of the donees with a *fidei commissum* in favour of their issue. The words are the "said six donees and their heirs". If any of the donees die without legitimate issue the property is to pass to their survivors or their legitimate issue, the clause which provides for what is to happen in the event of the procreation

of an illegitimate child is a further indication that the children of the donees take the property absolutely.

Hayley, K.C., in reply.

March 4, 1931. GARVIN S.P. J.—

The decision of this appeal turns upon the construction of a deed of gift bearing No. 45 and executed on May 1, 1859, by one Don Hendrick Perera Jayatileke Aratchi.

It is evident from the deed that the donor being seized and possessed of two allotments of land situated in Colombo, one of them of the extent of 1 acre 3 roods and 11·3 perches, and the other, an allotment of the extent of 1·56 perches, situated at St. John's road, Colombo, resolved to make a settlement of this property, with a reservation to himself of a life interest, upon his wife and children. He causes the larger of these two pieces of land to be divided up into seven allotments. He settled one of these seven allotments upon his wife, distributing the remaining six allotments to his six children, Don Joseph, Lucia, Sophia, Johana, Christina, and Robert, and giving in addition to his son, Don Joseph, the premises in St. John's road, above referred to, and with which alone we are concerned in this appeal.

Don Joseph died intestate and unmarried, in the year 1888, and it is common ground that his interests in these premises thereupon devolved upon his brothers and sisters, and the legitimate issue of a deceased brother Robert. The plaintiffs are the legitimate children of Christina, Johana, and Sophia. Notwithstanding that their respective mothers, Sophia, Johana, and Christina, purported to sell and convey their interests to one S. L. M. Mohamadu Ismail Hadjar, the plaintiffs claim that they became entitled to the premises upon the death of their respective parents, by reason of a *fidei commissum*, which they contended was created by the donor.

Having vested in the widow and each of the children a separate allotment, and in Don Joseph in addition thereto the premises situated in St. John's road, the deed proceeds as follows:—“All of which shall be truly and respectfully held and possessed after my death by the aforesaid donees under the following provisos, conditions, and restrictions, that is to say that the said Galaboda Aratchige Isabella Rodrigo (the wife) shall not sell, mortgage, or alienate her share of lot No. 1, but that she shall freely hold and enjoy and possess the same during the term of her natural life, and then the same shall pass to her before mentioned six children or their survivors, and that the remaining seven lots of the first mentioned premises including the last-mentioned land wholly given to the said Pantiyage Don Joseph Dabera Jayatileke shall likewise be held and possessed by the six donees, respectively, and their heirs agreeable to the division aforesaid subject to the above-mentioned restrictions and under the bonds of *fidei commissum*. That if any or either of the last-mentioned six donees die without legitimate issue, then in that case his, her, or their shares or lots shall pass to their survivors or their legitimate issue. If any or either of the last-mentioned six donees shall procreate any illegitimate child or children he, she, or they shall forfeit his, her, or their shares of the said premises obtained by them by virtue of this deed, and the same shall immediately pass to the survivors or survivor of the said last-mentioned six donees and their heirs, subject to the same restrictions.”

The conditions and restrictions which the gift of lot No. 1 to Isabella (the wife) is made subject clearly impress the gift made to her with a *fidei commissum* in favour of the other six donees or their survivors. This is not challenged.

We have next to consider whether the several allotments gifted to the children were also impressed with a *fidei commissum*. This, I think, is to be

gathered from the words which follow viz., "shall likewise be held and possessed by the said six donees, respectively, and their heirs agreeable to the division aforesaid subject to the above-mentioned restrictions and under the bond of *fidei commissum*," and the next clause "that if any or either of the last-mentioned six donees die without legitimate issue, then and in that case his, her, or their shares or lots shall pass to their survivors or their legitimate issue." The first of these two clauses would seem at least to indicate an intention to subject the property in the hands of each of these donees and their respective heirs to a *fidei commissum*. A difficulty arises from the circumstance that though each donee and his heirs is required to hold under the bond of *fidei commissum*, neither the exact nature of the *fidei commissum* nor the persons for whose benefit they are to hold is explicitly stated. But it seems to me that the answer to this difficulty is that this is implicit in the word "likewise". This word clearly has reference to the conditions under which Isabella is to hold and possess. The clause may thus legitimately be expanded to be that the subject of the gift to each of the children shall be held and possessed by the six donees respectively and their heirs subject to the same restrictions and under *fidei commissum* of the same character as that imposed on the gift to Isabella.

The word "heirs" is undoubtedly of wider significance and includes a larger class than the phrase "legitimate children" and if the word "heirs" is to be construed to include this larger class, then the *fidei commissum* imposed on the donees to this extent differs from that imposed upon the gift to Isabella. But there are indications that the word "heirs" as used in this clause should be construed as meaning "legitimate children." In the first place such an indication exists in the *fidei commissum* impressed on Isabella's share and to which the donor expressly refers in this

very clause when he used the word "likewise". But that this was his intention is more clearly to be gathered from the clause which follows by which when substituting "the surviving brothers and sisters or their legitimate issue" the event contemplated is the death of one of the donees "without legitimate issue," not without heirs.

The language of the donor in my opinion clearly impresses the gift made to each of the six children with a *fidei commissum* in favour of their legitimate issue and the legitimate issue of those legitimate children. It further provides for the contingency of the death of one of the donees without children by substituting the surviving donees for such legitimate children.

It is urged, however, that the surviving donees and their children so substituted take their respective shares of the land gifted to the donee who dies without legitimate children—in the case with which we are concerned, Don Joseph—absolutely. To this argument I cannot assent. The *fidei commissum* into which they are admitted by this substitution is one which the donor intended should bind the property in the hands of each of his children, the donees and their children, his grandchildren, and his great grandchildren, the children of such children. Those who take in substitution for the grandchildren take the property, subject to the conditions and restrictions which would have bound those grandchildren had they succeeded. Notwithstanding that a lot in severalty has been gifted to each of the donees and that a separate *fidei commissum* is impressed upon each one, these gifts in severalty taken together form one family settlement, and the donor has manifested his intention that the property which he had divided up and gifted to them in severalty was to be preserved to their children and their grandchildren after them. To secure this end he has provided for the case of the failure of the *fidei commissum* by the death of one of the donees without issue by directing that the

surviving donees or their children should take the place in the *fidei commissum* impressed by him on the property given to each, which would have been occupied by the legitimate children of such donee had there been any.

Sophia, Johana, and Christina took the interests, which by reason of the provisions of this deed vested in them upon the death of Don Joseph without children, subject to a *fidei commissum* in favour of their children. This conclusion is decisive of the matter before us as it is unnecessary to consider whether as has been suggested, the *fidei commissum* is one which extends to four generations.

The judgment under appeal will be set aside and the case remitted to the Court below for the determination of such other matters as may be awaiting decision, and for final determination upon the footing that Sophia, Johana, and Christina took the shares which vested in them on the death of Don Joseph charged, with *fidei commissum* and not absolutely.

MACDONELL C.J.—I concur.

Set aside.

