Present : Dalton and Drieberg JJ.

1929.

BAKELMAN *v.* GOULDING *et al.*

415—D. C. Colombo, 26,676.

Fidei commissum—*Property sold by Municipal Council against fiduciary for arrears of taxes—Purchase by Council—Conveyance to fiduciary subject to same conditions*—Spes successionis—*Municipal Councils Ordinance, 1910, ss. 143 and 146.*

Property subject to a *fidei commissum* in terms of a last will was sold by the Municipal Council for default of payment of taxes by the fiduciary and purchased by the Council. On payment of arrears of taxes, the Council conveyed the property back to the fiduciary subject to the same conditions as those imposed upon him under the *fidei commissum*, viz., that he could not sell or encumber it but that on his death it was to devolve upon his children and, if there be no children, upon his heirs.

The fiduciary and three of his children sold the property to the added defendant. The fiduciary died in 1927, one of the said children having predeceased him.

In an action for partition brought by three other children of the fiduciary whose existence had not been disclosed by him, it was contended on behalf of the added defendant that the *fidei commissum* had been created by an act *inter vivos*, viz., the deed granted by the Municipal Council, and that therefore the deceased child had a vested interest which could be transmitted.

Held, that the deceased child had no *spes successionis* which could pass to the added defendant under the conveyance to him, as the object of the deed between the Council and the fiduciary was to give continued effect to the *fidei commissum* created by the will.

THIS was a partition action brought by the plaintiffs to partition a property at Slave Island allotting a one-third share each to themselves and one third to the defendant. Added defendant intervened stating that he had purchased the property. The property belonged to one Thomas Goulding. By joint will dated June 16, 1869, he and his wife left it to their son Charles, subject to a *fidei commissum* in favour of his children. The two plaintiffs and the first defendant are his children by his first marriage, while Mabel Rose, Thomas Patrick, and Gladys Maud were his children by his second marriage. On September 29, 1922, Charles and his three children by the second bed sold the property to the added defendant by A D 1. Charles died in 1927. During his lifetime the property was sold by the Municipality for default of payment of taxes and purchased by the Council for Rs. 250. A certificate was signed by the Chairman under section 146 of the Municipal Councils Ordinance. The

1929.

Bakelman v. Goulding

Municipality then conveyed the property back to Charles on payment of all the taxes in arrears subject to the same conditions as those in the *fidei commissum* created by the last will. The question that arises for decision is as to the share of the added defendant under the decree. The learned District Judge allotted a two-fifth share to him on the ground that nothing vested in Thomas Patrick could pass to the added defendant.

De Zoysa, K.C. (with *Croos da Brera*), for appellant.—The *fidei commissum* has been created by a deed *inter vivos*. On the death of one of the fideicommissaries his interest is transmitted to his heirs. When the property was bought by the Municipal Council the *fidei commissum* created by the last will was extinguished. The subsequent transfer by the Council created a new *fidei commissum*. Counsel cited *Mohamed Bhai v. Silva*[1], *Nafia Umma v. Abdul Aziz*[2], *Silva v. Silva*.[3]

H. V. Perera, for respondents.—The transfer by the Council does not impose a new *fidei commissum*. It merely reimposes the *fidei commissum* created by the will, and on the death of one of the fideicommissaries his interest is transmitted to the others and not to his heirs. Even if the *fidei commissum* be considered to be one created by a deed *inter vivos* the persons to be benefited belong to a particular class or group, and so long as one member of this class or group is in existence there cannot be a lapse and he takes the whole of the property. Here the parties to be benefited are the children, and if one child dies the other children step into the shoes of the fideicommissaries as a class. No question of transmission of interest to the heirs arises. Counsel cited *Tillekeratne v. Abeysekere*[4], *Carry v. Carry*[5], *Sivacolundu v. Noormaliya*[6], *Carlinahamy v. Juanis*[7].

De Zoysa, K.C., in reply.

May 12, 1929. DALTON J.—

The plaintiffs brought this action to partition a property at Slave Island, Colombo, allotting a one-third share each to themselves and one-third to the defendant. Defendant filed an answer in agreement with the plaint. Added defendant, the present appellant, however, intervened, pleading that he had purchased the property and asking that plaintiffs' action be dismissed. He further pleaded that the Partition Ordinance was being used by the plaintiffs and defendant to settle a dispute as to title.

The property originally belonged to one Thomas Goulding. By joint will dated June 16, 1869, he and his wife left this property to their son Charles, creating a *fidei commissum* in favour of the

[1] *(1911) 14 N. L. R. 193.*
[2] *(1925) 27 N. L. R. 150.*
[3] *(1927) 29 N. L. R. 373.*
[4] *(1897) 2 N. L. R. 314; A. C. 277.*
[5] *4 C. W. R. 55.*
[6] *(1921) 22 N. L. R. 427.*
[7] *(1924) 26 N. L. R. 129.*

children of Charles. The will set out that Charles should not sell or encumber the property and after his death it should devolve upon his children and, if there be no children, upon his heirs.

A dispute arose in the case as to who were the children of Charles, but the finding of the trial Judge upon that point is not now questioned. The two plaintiffs and the first defendant are his children by his first marriage, whilst Mabel Rose, Thomas Patrick, and Gladys Maud are his children by his second marriage.

Charles died in 1927. During his lifetime the Municipal taxes on the property got into arrears and it was sold for default of payment by Charles, the Municipality purchasing the property for the sum of Rs. 250. A certificate was signed by the Chairman under the provisions of section 146 of the Municipal Councils Ordinance, 1910, and thereafter the property vested absolutely in the Council free of all encumbrances. The value of the property has been variously given as from Rs. 7,000 to Rs. 30,000.

In accordance with what we are informed is a common practice in such cases, the Municipality conveyed the property back to Charles on payment of all the taxes in arrears. The legality of this action has not been questioned in this case, so it is not necessary here to say anything on that point. By deed P 11 of September 5, 1922, the property is conveyed back to Charles for the sum of Rs. 1,586·50. It is however made subject to certain conditions, namely, that Charles could not sell or encumber the property, but on his death it was to devolve upon his children and, "if there be no children," upon his heirs. It is suggested that the Council here sought to put Charles in the same position he occupied prior to the purchase of the property by the Council. As against that it is urged, however, that whatever limitations are placed upon Charles after September 5, 1922, in respect of the property they are created by the deed P 11, and not by will.

On September 29, 1922, by a further deed A D 1, Charles and three of his children, Mabel Rose, Thomas Patrick, and Gladys Maud purported to sell and convey the property to P. S. Subbiah Reddiar, the present added defendant. That deed does not refer to deed P 11 obtained by Charles less than a month before, but recites the terms of the will of Thomas Goulding. It also sets out only the second marriage of Charles and is silent about his first marriage and the children of that marriage. Two days before the execution of this deed Charles swore to an affidavit that he was only married once and that beside the three children joining him in the deed A D 1 he had no other children. It is admitted now that that is false. Although not seeking to put himself in any better position than he was under the will, there seems to be ground for the

1929.

DALTON J.

Bakelman v. Goulding

conclusion that he was seeking to benefit the children of his second marriage at the expense of the children of his first marriage, and the former were aware of this.

Charles died in 1927, and this partition action was commenced on February 1, 1928, deliberately ignoring the added defendant. The question arising on the appeal is as to the share to which added defendant is entitled on the decree. He has been given a two-fifth share—the shares, that is, that would have gone to Mabel Rose and Gladys Maud. Thomas Patrick died before Charles, and although he was a party to A D 1, the trial Judge holds that, owing to the death of Thomas Patrick before Charles, nothing vested in Thomas that he could pass on to his vendee. Added defendant wants a three-sixth and not a two-fifth share of the property. As his reason for his conclusion that nothing had vested in Thomas, the learned Judge states that this is a case of a will and not a contract made by way of donation.

In his argument that this decision is wrong, Mr. de Zoysa urges that the *fidei commissum* was created by an act *inter vivos*, that is the deed P 11, the former *fidei commissum* having been wiped out by the purchase of the property by the Municipal Council. It was urged that the *fidei commissum* did not extend beyond the children of Charles, of whom Thomas Patrick was one. Relying upon the decision in *Mohamed Bhai v. Silva*,[1] it is argued that the fidei-commissary Thomas Patrick having died before the fiduciary Charles, the former transmitted the expectation of the *fidei commissum* to his heirs, and inasmuch as here he had conveyed during his lifetime the expectation to the added defendant in deed A D 1, the added defendant is entitled in this action to that one-sixth share, making his total share on the partition three-sixth.

It has been pointed out in a later case (*Carlinahamy v. Juanis*[2]) that *Mohamed Bhai v. Silva* (*supra*) must be considered as authoritative of the law of Ceylon. It has however been carefully analyzed, and the principle it embodies has been carefully examined by the Court in the later case I cite. Does the case before us come within that principle ?

The first matter for consideration on this argument is the effect of the purchase by the Council of the property which is subject to the *fidei commissum* created by the will of Thomas Goulding. What is the effect of the certificate signed under the provisions of section 146 upon that *fidei commissum* ? It will be noted that if the property seized is purchased by the Council the certificate " shall vest the property sold absolutely in the Council free from all encumbrances. " On the other hand, if the property had been purchased by someone other than the Council, under section 143 a certificate granted under that section " shall be sufficient to vest

[1] *14 N. L. R. 193.*

[2] *26 N. L. R. 129.*

the property in the purchaser free from all encumbrances." The difference between the two sections is at once apparent, although in both cases the property vests "free from all encumbrances."

The terms of section 143 have been considered by the Court in the case of *Sivacolundu v. Noormaliya.*[1] That case seems to be almost on all fours with the case now before the Court, save that there the fiduciary himself was the purchaser and not the Council. Here the Council is the purchaser, but the Council subsequently conveys to the fiduciary. In both cases the fiduciary had stood by and allowed the property to be sold for rates for which he (the fiduciary) was presumably liable. The question raised there was whether by his purchase and obtaining of a certificate under section 143 the purchaser could convert his fiduciary interest into an absolute one and extinguish the rights of the fideicommissaries. Here the question is whether by his purchase from the Council, who had a certificate under section 146, the purchaser could rid himself of his character of fiduciary as created by the will of Thomas Goulding and detrimentally affect the interest of some at any rate of those who were the fideicommissaries named in the will creating the *fidei commissum.*

In reply to the argument that a certificate under section 143 vested the property in the purchaser "free of all encumbrances" and therefore obliterated any *fidei commissum,* Bertram C.J. in the case cited sets out at length his reasons for disagreeing with any such interpretation of the section. His opinion is of course *obiter,* inasmuch as the appeal was allowed on other grounds, but he comes to the conclusion that the word "encumbrance" does not include *fidei commissum,* being satisfied that it is clear there was no intention on the part of the legislature to confiscate the interest of fideicommissaries. He terms the section an extremely violent provision if that is the meaning of it. With this de Sampayo J. agrees. A similar conclusion, it may be noted, was come to in respect of the application of section 9 of the Partition Ordinance, which it has been held does not extinguish a *fidei commissum* (*Weerasekara v. Carlina* [2], *Marikar v. Marikar*[3]); the terms of that section are considerably stronger and more explicit than those of section 146.

The same words "free from all encumbrances" also appear in section 146, and it does not seem possible to argue that the word "encumbrances" there has any different meaning to the word as used in section 143. It is clear, however, as has been pointed out in *Nafia Umma v. Abdul Aziz*[4], the legislature considerably strengthened the provisions of section 146 as compared with those of section 143. In this latter case the Court held that a certificate granted under section 146 excluded all evidence setting up another title,

[1] *22 N. L. R. 427.*
[2] *16 N. L. R. 1.*
[3] *22 N. L. R. 137.*
[4] *27 N. L. R. 150.*

1929.

DALTON J.

Bakelman v. Goulding

either directly or through impugning the certificate on the ground of a fundamental infirmity. It may well be argued from this that the opinion expressed by the Court as to the effect of a certificate issued under section 143 in regard to a *fidei commissum* is no guide to the interpretation of the effect of a certificate granted under section 146 in a similar case. It is a difficult question, and I should wish to hear further argument upon the point before coming to any conclusion. The argument before us was chiefly on other points. It is possible, however, for the purposes of this case, to assume that the *fidei commissum* created by the will was terminated by the issue of the certificate under section 146. The construction of the deed P 11 and the effect of the *fidei commissum* set out therein remains to be decided. Whatever the effect of the certificate under section 146 upon the then existing *fidei commissum*, there is not the least doubt in my mind that by the deed P 11 the Council, who had the title vested in them, intended to do no more than maintain the *status quo ante*, that is, to keep in force the effect of the will of Thomas Goulding. The fideicommissaries referred to in the deed are no more and no less than the fideicommissaries referred to in the will, namely, the children of Charles, who could only be ascertained on the death of Charles. This was the evidence of the second defendant in the lower Court to which no objection was taken. This was clearly the intention also of Charles when he entered into the agreement with the Council upon which the property was conveyed to him by the deed. It was not in my opinion open to him under the circumstances to take up any other position. His intention and position are quite clear from the recital in his subsequent deed A D 1 to the added defendant. There the only reference is to the *fidei commissum* created by the will. There is no reference at all in A D 1 to the deed P 11 or to any *fidei commissum* created by that deed. The added defendant accepted that position, as did the three children who were parties to the deed. In these circumstances there seems to me to be no room for the argument that the Court must shut its eyes as to what had happened prior to and subsequent to the execution of the deed P 11 and deal with this document alone.

Further, the question raised in this appeal cannot be answered by merely ascertaining whether the *fidei commissum* was created by deed or by will. It is a question of the construction of the *fidei commissum* set out in the deed P 11. As pointed out by de Sampayo J. in *Carry v. Carry*,[1] the decision of the Privy Council in *Tillekeratne v. Abeysekera*[2] lays down a rule of construction which is applicable to all fideicommissary dispositions whatever the form of instrument may be. With this view Bertram C.J. entirely agrees (see *Carlinahamy v. Juanis*[3]). Applying these authorities to the

[1] *4 C. W. R. at 55.* [2] *2 N. L. R. 314; (1897) A. C. 277.*

[3] *26 N. L. R. at 140.*

case before us I am satisfied that the *fidei commissum* set out in the deed P 11 definitely vested no *spes successionis* in Thomas Patrick and the other children in existence at the time, but it is a case of a deed entered into between Charles and the Council to give continued effect to the *fidei commissum* created by the will of 1869, the fidei-commissaries being a class, namely, the children of Charles, which was only definitely ascertainable on his death. This case does not come therefore within the principle embodied in *Mohamed Bhai v. Silva* (*supra*).

Other grounds urged in support of the judgment appealed from were also it seems to me most weighty and authoritative, but it is sufficient to say that for the reason I have given the judgment of the trial Judge must be affirmed.

A small matter respecting costs remains. The District Judge directed that the added defendant (appellant) pay to the plaintiffs half their taxed costs of the contest. It is urged for the appellant that there is no justification for this order. Both parties were in part successful and in part failed in their claims, but there is no doubt there was some ground for the argument put forward that plaintiffs' action was an abuse of the Partition Ordinance. The trial Judge even considered the question of imposing double stamp duty. Further, they deliberately ignored the added defendant in bringing their action, whilst they also affect in their plaint to be ignorant of their father's second marriage and of the existence of his second family. Under all the circumstances I consider it is only just that each party should pay his own costs of the contest, and I would so order.

With this variation in the decree, I would dismiss this appeal. The appeal having failed save on a minor point, the respondents are entitled to the costs of the appeal.

DRIEBERG J.—I agree.

Appeal dismissed.