1965 *Present :* **Tambiah, J., and Manieavasagar, J.**

H. EDIRISURIYA and 2 others, Appellants, and **D. WIJEDORU** and 3 others, Respondents

S. C. 293/61-D. C. Hambantota, 358/P

(i) Fideicommissum simplex- Validity of it in Ceylon-Alienation of fideicommissum property by the fiduciary-Permissibility-Bight of the fiduciary to sell his fiduciary interests.

(ii) Construction of Deeds-Deeds executed contemporaneously-Inference of asingle transaction.

(i) The fideicommissum which belongs to the class known to Roman-Dutch Law as fideicommissum simplex is recognised in Ceylon. In a fideicommissum simplex, the fiduciary is permitted, notwithstanding the fideicommissum, to alienate the property which is subject to the fideicommissum ; the gift-over to the fideicommissary takes effect only if the fiduciary does not exercise the power he is given of alienating the property.

A father donated certain property to his son on 1st January 1924, with the following conditions :-

" To have and to hold the said premises hereby donated subject to the life interest of me, the donor, and subject to the condition that the donee shall not sell, mortgage, gift, exchange or alienate, the said premises in any manner, except among his brothers in case of necessity, and that he may possess the same during his lifetime and after the death the same shall devolve on his legal heirs who would be entitled to deal with the same in any manner they desire. "

On 19th November 1938 the donee transferred the land to one of his brothers but there was no proof that the transfer was effected " in case of necessity "

Held, (a) that the deed of gift created a fideicommissum simplex and that, as the transfer of 1st January 1924 was not a permitted alienation, the legal heirs of the fiduciary would be entitled to the property on the death of the fiduciary. The power of alienation given by the donor to the fiduciary did not affect the creation of the fideicommissum. In such a case it cannot be contended that there is no fideicommissum on the ground that, although there is a prohibition against alienation, there is no indication of the persons to whom the property should pass on the breach of the prohibition.

(b) that the fiduciary was entitled to sell to a stranger his fiduciary interests. The sale, however, would be valid only until the fiduciary's death, after which the gift-over to the fideicommissaries would become operative.

(ii) When contemporaneous Deeds are executed which, on the face of them, show that they are one transaction in respect of the same property, the Court should consider them as a single transaction.

APPEAL from a judgment of the District Court, Hambantota.

H. W. Jayewardene, Q.G., with E. B. Vannitamby and S. S. Basnayake, for the 34th, 35th and 36th Defendants-Appellants.

N. E. Weerasooria, Q.C., with N. E. Weerasooria (Jnr.), for the 30th, 31st and 32nd Defendants-Respondents.

Cur. adv. vult.

February 5, 1965. **TAMBIAH, J.-**

This is a Partition action in which there was a contest between the 34th, 35th and 36th defendant-appellants on the one hand and the 30th, 31st and 32nd defendant-respondents on the other, to a one-third share of the land described in the Schedule to the plaint.

It is common ground that one Jacolis Wickramasuriya Edirisuriya was the owner of one-third share of this land. Jacolis Edirisuriya by Deed No. 500 of 1st January, 1924, marked 1D1, donated this land to his son, Charles Edirisuriya subject to certain conditions which will be set out later. The 34th, 35th and 36th defendants are the children of Charles Edirisuriya.

Charles Edirisuriya, by Deed No. 1122 of 19th November 1938, marked 1D2, transferred his interests in this land to his brother Dionisius Dias Edirisuriya. The Deed, on the face of it, shows a consideration of Rs. 200.

Dionisius Dias Edirisuriya, by Deed No. 1123 of 19th November 1938, marked 1D3, transferred his interests to one Mendis, an outsider. The Deed, on the face of it, shows that it was transferred for a consideration of Rs. 750. It is significant that Mendis by Deed No. 1124 of 19th November 1938 marked 36 D2, agreed to re-transfer to Charles Edirisuriya his interests in the property if the latter paid a sum of Rs. 750 and interest at 15% from 19th November 1938 for a period of three years.

Despite the execution of contemporaneous Deeds 1D2, 1D3 and 1D4, which bear not only successive numbers, but were also executed by the same notary, Charles Edirisuriya was in possession of the property. The Deed No. 1124 of 19th November 1938, marked 36 D2, recites that Charles Edirisuriya should pay water rates and that he in lieu of interest, should give six amunas of paddy for a crop at the Ambalantota bazaar to Mendis for a period of three years. It was further agreed that if he gives this quantum of paddy, Mendis should give a further period of two years to enable Charles Edirisuriya to pay Rs. 750 and interest accrued thereon and to get a reconveyance of the property.

Mr. Jayewardene contended that the Deed 1D1 created an express fideicommissum in favour of the children of Charles Edirisuriya and that the fideicommissum operated on the death of Charles Edirisuriya. He further submitted that Charles Edirisuriya in fact transferred the said property to Mendis and in order to get over the conditions in Deed 1D1, he adopted a subterfuge of first transferring same to Dionisius Dias Edirisuriya and then getting the latter to transfer it to Mendis.

It is convenient at this stage to examine the relevant terms and conditions set out in Deed 1D1. There are two translations, 32 Dl and 32 D2 filed in Court. They are substantially the same except that in 32 Dl a Sinhalese word is translated as ' necessity ' while in 32 D2 it is given the meaning ' extreme necessity '. These differences do not affect the interpretation of this Deed. Jacolis Wickremasuriya Edirisuriya, father of Charles Edirisuriya, after donating the property to

his son, set out the following conditions in the habendum clause: (vide page 292 of the record in this case).

" To have and to hold the said premises hereby donated subject to the life interest of me, the donor, and subject to the condition that the donee shall not sell, mortgage, gift, exchange or alienate, the said premises in any manner except among his brothers in case of necessity, and that he may possess the same during his lifetime and after the death the same shall devolve on his legal heirs who would be entitled to deal with the same in any manner they desire. "

Mr. Weerasooria who appeared for the respondent contended that this clause did not create a fideicommissum in favour of the legal heirs of Charles Edirisuriya, since although there was a prohibition against alienation, the donor did not indicate the persons to whom the property should pass on the breach of the prohibition. Alternatively, he argued that even if a fideicommissum was created, the transfer by Charles Edirisuriya to his brother, Dias Edirisuriya was a permitted alienation and the 34th, 35th and 36th defendants got no title.

The learned District Judge took the view that this was an attempt to create a tacit fideicommissum and as no beneficiaries were indicated in the event of a breach of the condition prohibiting the alienation, no fideicommissum was created. By adopting this view the learned District Judge held that the 34th, 35th and 36th defendants were not entitled to the one-third share of this land.

In creating a fideicommissum no particular formulae or words are necessary. An expression of an intention on the part of the donor or a testator, as the case may be, that there should be a gift over from the first taker to another person or persons on the happening of an event creates a valid fideicommissum.

In Deed 1D1, the donor had stated in clear and unambiguous language that the interests of Charles Edirisuriya should, on his death, devolve on his legal heirs. Therefore, an express fideicommissum had been created in favour of Charles Edirisuriya's legal heirs which would operate on his death. The language used in Deed 1D1 is similar to the instrument which was construed in the case of Babee v. Naide [1 (1955) 67N.L. R. 376.]. In that case the Deed that came up for consideration had the following words :

" This property shall be held and possessed by my sons Setuwa and Hawadiya, the two of them or their descendant heirs, children and grand-children unto warga paramparawa ; they shall have the right to dispose of the same among the brothers only, but shall not offer as security, mortgage or sell in any manner whatsoever to anyone outside. "

It was held that the Deed in that case created a valid express fideicommissum, and that the words " shall be held and possessed by my sons or the descendant heirs, children and grand-children unto warga paramparawa " constitute a gift in favour of the lineal descendants of the original donee. Fernando J. in the course of his judgment, said : (vide 57 N. L. R. 377).

" Nothing more would be necessary, but for the desire of the donor to permit alienations between the original donees. "

and cited with approval the following passage from Professor Nadaraja's book entitled Roman Dutch Law of Fideicommissa-

" 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. "

Fernando J. also followed the ruling in Sopinona v. Abeywardena[(1928) 30 N. L.R. 295]. The

conditions contained in the last will in that case are as follows :

" I do further direct that the properties bequeathed to the parties named, who are the legatees of this Last Will and Testament, are hereby authorised to possess among themselves and their descendant heirs, and they are hereby prohibited from selling, mortgaging or gifting to others, save and except among themselves and their descendant heirs. "

In that case neither side contested the existence of the fideicommissum. The only point that was considered was whether the prohibition was personal or real. The deed P2 considered in Nadarajan Chettiar v. Sathanandan[" (1939) 41 N. L. R.1.] is also an example of one which created a fideicommissum in which the fiduciary was given a power of alienation for certain purposes.

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Although, as a general rule, the fiduciary has no power of alienating the fideicommissary property, yet if the creator of the fideicommissum " has intended the fiduciary to have this power, such an intention must be given effect to, where that intention is clearly expressed or can be reasonably implied from the language " used (vide Roman Dutch Law of Fideicommissa by T. Nadaraja, page 189). " The Dutch jurists recognised in the institution of fideicommissum simplex the possibility of framing a fideicommissum in such a way that the fideicommissary's succession t o the property was conditional on the fiduciary not having alienated". The fideicommissum simplex has been recognised in both Ceylon and South Africa (vide Nadaiaja, notes 7-9, p. 195 and note 13 at p. 197).

The view, rather hesitantly expressed by Wijeyewardene J. in Noordeen v. Badurdeen[1 (1941) 42 N. L. R. 401.], that the " fideicommissum simplex appears to have been a form of fideicommissum recognised in the local laws of Amsterdam " cannot be supported. What was peculiar to Amsterdam was the special effect given to a prohibition of alienation verbis in rem concept is (vide Nadaraja, p. 189). In the instant case the power of alienation is not inferred from such a prohibition but is given in express terms, alienation to the brothers of the fiduciary being permitted in case of necessity.

Therefore, it is quite clear that a valid express fideicommissum was created in favour of the children of Charles Edirisuriya, who would be entitled to the property on his death if he had not alienated it " in case of necessity " to a brother. In other words, he could transfer only his fiduciary interest to strangers, though he could in exercise of the power of alienation expressly given to him, transfer even the full dominium to any one of his brothers " in case of necessity ". There is however no evidence that the transfer made by Deed 1D2 was effected " in the case of necessity " : or that at the time the transfer was executed the transferee was in necessity. The Deed 1D2 does not even recite that the transferee was in necessity. It was a Deed executed in consideration of natural love and affection which the donor bore towards the donee. By such a transfer Charles Edirisuriya, could have only transferred his fiduciary interest.

Meudis fulfilled his obligations created by 36 D2, an agreement to re-convey to Charles Edirisuriya, by executing Deed 1D4 of 4th April 1942. Charles Edirisuriya effected a conditional transfer by Deed 1D5 on 4th April 1942 to H. E. Wickremanayake, who transferred the property back by 1D6 of 20th May 1942 to Charles Edirisuriya. It is, therefore, clear that up to 20th April 1942 Charles Edirisuriya was in possession of this property. Thereafter by Deed 1D7 of 1st September 1946 he transferred the same to Babinona who, by Deed 1D8 transferredit to Dionisius, the first defendant who by Deed 37 D9 transferred it to the 32nd defendant.

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In view of my finding that there is no proof that Dias Edirisuriya was in necessity when he obtained transfer Deed Dl, it is unnecessary to consider the further submission by Mr. Jayewardene that the Deeds 1D2 and D3 should be read together and that the transfer was infact effected in favour of Mendis. But since Mr. Jayewardene stressed this point, I shall consider it. The Deeds speak for themselves. I have no doubt in my mind that Charles Edirisuriya adopted a device to transfer this property to Mendis from whom he borrowed money by first effecting the transfer to his brother, Dias Edirisuriya who, in turn, conveyed the same to Mendis by Deed 1D3. When contemporaneous Deeds are executed which, on the face of them, show that they are one transaction, Court should construe them as a single transaction. This principle is laid down by Fletcher Moulton, L.J. in the case reported in (1912) L. R. 1 Chan. 735 at 751 and was adopted in the case of Dingiri Naida v. Kirimenika[1 (1955) 37 N. L. R. 559.]. In Hanks v. Whildy [2 (1912) 1 Chan. 735.], the Lord Justice stated as follows : " Where several Deeds form part of one transaction, and are contemporaneously executed, they have the same effect for all purposes, such as are relevant to this case as if they were one Deed Each is executed on the faith of all ethers being executed also and is intended to speak only as part of the one transaction and if one is seeking to make equities apply to the parties, they must be equities arising out of the transaction as a whole. "

For the reasons set out, I set aside the order of the learned District Judge, and hold that the one-third share of the property, which is the subject matter of this action, is subject to a fideicommissum in favour of the legal heirs of Charles Edirisuriya, and the fideicommissum will operate on the death of the said Charles Edirisuriya. Further, I hold that the 30th to 32nd defendants are only entitled to the fiduciary interests of Charles Edirisuriya, which should terminate on his death.

The appeal of the 34th. 35th and 36th defendants for a declaration that one-third share is subject to a fideicommissum in favour of the legal heirs of Charles Edirisuriya succeeds. The appellants are entitled to the costs of this appeal as well as the costs of contest in the lower Court.

MANICAVASAGAR, J.-

I agree that this appeal should be allowed with costs here, and in the court of first instance.

My opinion is in accord with that of my brother, Tambiah, that deed 31 Dl created a fideicommissum, the gift-over being to the legal heirs of the fiduciary, and that the power of alienation given by the donor to the fiduciary did not affect the constitution of the Fidei Commissum which belongs to the class known to Roman-Dutch Law as Fidei Commissum Simplex.

Wijeyewardene, J. in his judgment at page 401 in 42 N. L. R. was apparently indoubt as to whether the Fidei Commissum Simplex prevailed in Ceylon : he was, Isay with respect, of the erroneous view that this

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class of Fidei Commissum was peculiar to the local laws of Amsterdam, and was not recognized in other parts of Holland. The error into which the learned Judge fell has been pointed out by Professor Nadaraja in his Chapter on Alienation of Fidei Commissum property by the fiduciary (page 189 Chapter Nine), and the correctness of his view is borne out by Voet in Book XXXVI, Title 1, Section 5. There can be no doubt whatsoever that the Fidei Commissum Simplex was recognized and prevailed in Holland: what was peculiar to Amsterdam was that the Fidei Commissum Simplex was confined to cases when the testator's or donor's language referred more especially to the thing (in Rem Concepta Sunt), as distinguished from the Fidei Commissum Simplex where the language referred more especially to persons (concepta in personam). Voet goes on to say that " as a rule, in other places, and even in Holland itself (with the exception of

Amsterdam), it makes no difference whether the testator's words refer specifically to things or to persons. " As Professor Nadaraja points out, " the fact that at Amsterdam the use of a particular form of words-a prohibition on Alienation Verbis in Rem Concept is-which elsewhere created a fully-binding Fidei Commissum had the effect of creating only a Fidei Commissum Simplex does not exclude the possibility of creating such a Fidei Commissum Simplex, whether in or outside Amsterdam . . . ."

Wijeyewardene, J. 's doubts appear to have also been partially influenced by certain observations of Bertram, C. J. in Perera's case reported in 20 N. L. R.463 at page 468, which he has cited in his judgment. The learned Chief Justice did not, as Wijeyewardene J. did, confine the Fidei Commissum Simplex to Amsterdam alone : he said it was recognized by the Law of Holland, but seemed to be in two minds as to whether it should be recognized in Ceylon: whilst presuming that if appropriate words are used, the Fidei Commissum Simplex will be recognized in this country, he seems to have been assailed by doubts for two reasons, namely, whether we should be introducing a form of tenure of property which is unfamiliar to us and English Law, the latter observation has been rightly criticised by Professor Nadaraja at page 199 of his book, and whether it may not be a contradiction in terms to have a prohibition on alienation coupled with a power to alienate vested in the same person. In a later case reported in 21 N. L. R. 257, at page 272, which was not cited to the Bench in the 42 N. L. R. case, his doubts seem to have been resolved by the recognition of the Fidei Commissum Simplex in the deed which was in issue in the case.

There is no reason that I can think of as to why we should fight shy of the Fidei Commissum Simplex : it was recognized by the Dutch Jurists, and prevailed in Holland and adopted in South Africa : in a Fidei Commissum Simplex, the gift-over to the fidei commissary took effect only in the event of the fiduciary not having exercised the power he was given of alienating, and if the testator or donor intended that it should be thus, it should be given effect to for otherwise we would be going counter to his wishes.

Appeal allowed.

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