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Present: Schneider A.J.

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VYRAMUTTU v. MOOTATAMBY et al.

332—C. R. Kalmunai, 10,102.

Fidei commissum—*Donees to possess for ever according to the custom of Mukkuwas as their ancestral property and as property of nephews—Prohibition against alienation not necessary to create* fidei commissum.

Under a deed of 1857, executed by a Mukkuwa of Batticaloa, the donees were " P and his brothers, being the children of one sister" ; " K and brothers, being the children of another sister"; and A, being the grandson of a third sister. One portion he granted to P and his brothers and to A, and the remainder to K without mention of brothers.

I.—The donees were " to possess and enjoy for ever according to custom of the Mukkuwas as their ancestral property and as property of nephews."

II.—He also directed that the share of A should be possessed and enjoyed by him during his lifetime, and that after him the same should go to the children of the other two sisters.

Held (a), that the words in paragraph I. were not sufficient to indicate the beneficiaries. If the words had been " these children and their heirs according to the Mukkuwa custom may possess and enjoy, the beneficiaries would have been indicated."

(b) The share given to A was subject to a *fidei commissum* in favour of the children of the other two sisters.

As *fidei commissarii* should be in existence when they are called to the succession, this share of A would have devolved upon such of those children as were alive at the death of A. The succession will not be limited to females, as the deed itself describes the beneficiaries as being the " children."

"I would, therefore, hold that no *fidei commissum* attached to the shares given to P or K, and that once the share of A devolved upon the children of the other two sisters of the donor, those children also derived absolute title."

An express prohibition against alienation is not necessary to create a *fidei commissum.*

THE facts are set out in the judgment of Schneider A.J. The following is the judgment of the Commissioner of Requests (E. Rodrigo, Esq.) :—

This is an action brought by the plaintiff to have himself entitled to certain shares of land as against the defendants. Both the plaintiff and the defendants claim title through a deed of gift P 1. The case turns on the construction of this deed. The portion of the deed material to the point at issue in this case is as follows :—

"These children of three mothers shall possess and enjoy the land of the sowing extent of two amunams, twenty-six manikkas, and two measures of paddy for ever according to the Mukkuwa custom and co-ancestral property and as property of nephews."

The relevant portion of the evidence led was intended to show what the "Mukkuwa custom" was, and what the expression "property of nephews" means.

After carefully considering the evidence I am convinced that according to ancient custom amongst the Mukkuwa community of Batticaloa District, ... intestate succession to immovable property was limited to the female line, that although the custom ceased to be legally enforceable long ago, it survives to a limited extent . . . . I am also convinced that "property of nephews," or the Tamil word, which has been thus translated, means lands which are inherited by females only according to the Mukkuwa custom as explained above.

Therefore, I have not the slightest doubt that the intention of the donor, in this instance, was that in the event of intestacy this property should descend in the female line. But there is no prohibition of alienation and no unmistakable indication of the beneficiaries. Therefore the deed creates no *fidei commissum.* The effect of the deed—I mean the intended effect—is to make an absolute gift in favour of the donees with unrestricted power of alienation by deed *inter vivos* or by will, but with a limitation of intestate succession. The donor in effect says: "The ordinary laws of intestate succession should not apply to the land which I donate." The question is, whether such a clause is effective or should be ignored.

On the first date of trial the parties led a great deal of evidence, both material and immaterial, but on the main point they failed to quote to me any ruling or principle of law. On the second date Mr. Nagapper, for the defendant, quoted the judgment of the Supreme Court in case No. 2,987 of this Court, and Mr. Dharmalingam, for the plaintiffs, quoted Supreme Court judgment in case No. 4,015 also of this Court.

In the former case the Court definitely held that a direction in a deed like the present is inoperative.

In case No. 4,015 the question which the Supreme Court had to answer was whether a provision in a certain deed created a valid *fidei commissum,* and the Court held that it did not. Such a decision is not material to this case.

I therefore answer the issue in the negative, and enter judgment dismissing plaintiff's action, with costs. But this does not mean that plaintiff is entitled to no share in this land. He is entitled to succeed to whatever interest his vendors had in the land, and he can vindicate his title to such interest if he is so advised. In this action I have not the material before me to say exactly what share he is entitled to.

Samarawickreme, for plaintiff, appellant.

Weeresinghe, for first, second, and third defendants, respondents.

July 13, 1921. SCHNEIDER A.J.—

The plaintiff-appellant claimed certain undivided shares in a field by right of purchase. The first, second, and third defendants claimed shares also by purchase. It was common ground that the field belonged originally to one Sinnavappodiyar, who by deed No. 1,510 dated November 2, 1857 (P 1), had donated it. The main question at issue between the parties was whether the deed in question limited the devolution of the property to the female line in perpetuity. This was formulated into an issue and was tried. From the pleadings it is obvious that other matters were also in issue. There is nothing on record to show that the parties agreed that the one issue which was tried should determine this action. The learned Commissioner dismissed the plaintiff's action holding that the deed operated to pass unfettered title to the donees. He recognized the fact that even upon that holding the plaintiff would be entitled to some shares, but he states that he is unable to determine what they are upon the material before him. His obvious duty in those circumstances was to call upon the plaintiff to produce evidence. He should have fixed the case for trial upon the other issues which arose as the result of his holding. His dismissal of the plaintiff's action might operate as *res judicata.* His order should be set aside, for the one reason that he was not justified in dismissing the plaintiff's action altogether, but there are other reasons, too, why it should not be allowed to stand. I do not entirely agree with this construction of the deed. It is in Tamil, but as the translation submitted in the lower Court was not satisfactory, I have had a fresh translation made by the Tamil Interpreter Mudaliyar of this Court. I have marked it " S," and also initialled and dated it. I will adopt this translation for the purposes of this judgment. The donor sets out his intention as being to donate the field to the issue of his three sisters. The donees are " Panikkippoddi and his brothers," being the children of one sister; " Kanthappoddi and his brothers," being the children of another sister; and Aliyappoddi, being the grandson of a third sister. The field is described as of 12 avanams in extent. Of this extent, 9 avanams and a fraction he " granted " to " Panikkippoddi and his brothers " and to Aliyappoddi, and the remainder to Kanthappoddi

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without mention of "brothers." The grant is followed immediately by the words that the donees "may possess and enjoy for ever according to the custom of the Mukkuwas as their ancestral property and as 'property of nephews.'" He also directed that "the share of Aliyappoddi should be possessed and enjoyed by him during his lifetime, and that after him the same should go to the children of the other two sisters."

The parties are Mukkuwas. Upon the evidence called as to the customary succession to immovable property in case of intestacy among those people, the Commissioner came to the conclusion that the succession is limited to the female line, and that the words "property of nephews" mean lands which are inherited by females according to custom. He holds, it seems to me rightly, that the intention of the donor was that the property should descend in the female line. But he thought that this intention was frustrated by the omission of any prohibition against alienation and of an unmistakable indication of the beneficiaries. He followed the decision of this Court in action No. 2,987 of the District Court of Batticaloa. I agree with the Commissioner, but not wholly or with all his reasons. It is well-settled law that an express prohibition against alienation is not necessary to create a *fidei commissum*. To take a simple example. A grant of land to A, subject to the condition that upon his death it shall devolve upon B and C, creates a valid *fidei commissum* in favour of B and C, although there is no express prohibition. The condition implies the prohibition, for if the land were alienated, the condition would be defeated. I am unable to agree entirely with the decision cited by the learned Commissioner. If the meaning of that decision be that where land is granted to A, subject to the condition that upon his dying intestate it shall devolve upon B, no *fidei commissum* is created; the decision is, I think, not correct. This point has been considered and decided in the case of *Perera v. Perera.*[1]

The deed in question in the present action contains two distinct conditions: (1) As regards the share of Aliyappoddi, there is a condition that upon his death it shall devolve upon "the children of the other two sisters." This is undoubtedly a valid *fidei commissum* in favour of these children. It is the rule that the *fidei commissarii* should be in existence when they are called to the succession. This share, therefore, would have devolved upon such of those children as were alive at the death of Aliyappoddi. This succession will not be limited to females, for the deed itself describes the beneficiaries as being "the children." Therefore, as regards this share, title will have to be adjusted upon that footing.

The second condition is that contained in the words "those children may possess and enjoy for ever according to the Mukkuwa custom as their ancestral property." I agree with the Commissioner

[1] *(1918) 20 N. L. R. 463.*

that those words are not sufficient to indicate the beneficiaries. If the words had been "these children and their heirs according to the Mukkuwa custom may possess and enjoy," the beneficiaries would have been indicated as pointed out in the case of *Perera v. Perera*[1] already referred to. I would, therefore, hold that no *fidei commissum* attached to the shares given to Panikkippoddi or Kanthappoddi, and that once the share of Aliyappoddi devolved upon the children of the other two sisters of the donor, those children also derived absolute title.

I would, accordingly, set aside the order dismissing the plaintiff's action, with costs, and remit the record for the shares of the contestants to be determined upon the footing of the interpretation given by me to the deed of donation. On appeal success has been divided, therefore each party will bear his own costs.

Set aside.