

1932

Present : Garvin S.P.J. and Driberg J.

AMARASEKERE v. PODI MENIKA et al.

9—D. C. Kurunegala, 12,889.

Fidei commissum—Deed of gift—Prohibition imposed on donee and heirs, executors, and assigns—No indication of persons to be benefited—Validity.

Where a deed of gift, contained the following clause:—I, the said donor, have hereby granted and set over unto the said donee as a gift all the aforesaid lands . . . and have also hereby ordered that the same shall not be sold, mortgaged, or in any manner alienated by him the said donee or by his heirs, executors, administrators, and assigns and the same shall not be leased out more than two years but to be held and possessed by them for ever after the death of the said M (i.e., donor).

Held, that it did not create a valid *fidei commissum*.

THIS was an action for partition in which the question was whether the deed of gift No. 5875 granted by one Menuhamy to her son Kiri Banda created a valid *fidei commissum*. The District Judge held that the deed created a *fidei commissum*.

Croos Da Brera, for plaintiff, appellant—There is no indication of the persons who are to benefit by the *fidei commissum*. The heirs, executors, administrators, and assigns are grouped together as one class. This is not a clear designation as required by the Entail Ordinance, No. 11 of 1876. Counsel relied on *Silva v. Silva*,¹ *Ponnusamy v. Karthi*,² *Boteju v. Fernando*.³

N. E. Weerasooriya (with him M. C. Abeywardene), for defendant, respondent.—Words used expressly indicate an intention at least to prevent donee from alienating or even leasing. The word used to denote donee's right is "possessed" not "entitled". "To be held and possessed by them for ever" means that the heirs are the instituted donees.

¹ (1914) 18 N. L. R. 174.

² (1915) 1 C. W. R. 91.

³ (1923) 24 N. L. R. 293.

An entail may not be valid as a whole in that the person to get the free inheritance is not indicated but it may be good in part. The prohibition imposed on the donee's heirs may be disregarded (17 N. L. R. 129).

[DRIEBERG J.—There are no *fidei commissarii* mentioned at all.]

The word "assigns" must be ignored in view of the use of the words "for ever". When the words "heirs for ever" are used, Statute law allows an entail for four generations.

[GARVIN J.—Statute law definitely states that you must indicate who is to take the free inheritance.]

"Heirs" is a sufficient designation. The Supreme Court has held this.

The deed in itself may not give it free. The question will arise, How will the law construe such a term. The law might hold that in fact they are to get it free.

July 12, 1932. GARVIN S.P.J.—

The only question which arises for decision upon this appeal is whether a valid *fidei commissum* has been created by a certain deed of gift No. 5,785 of the year 1899, marked P 1. By that deed one Menuhamy purported to give the lands marked 1, 3, and 5 in the schedule to the plaintiff and certain other premises to her son, Kiri Banda. The plaintiff and the defendants both claim through Kiri Banda. The learned District Judge took the view that the deed did create a valid *fidei commissum*.

Now the words which we have to construe are really those which constitute the last paragraph in that deed. They are as follows:—
"And I the said donor have hereby granted and set over unto the said donee as a gift all the aforesaid high and low lands with all the things thereto belonging or used or enjoyed therewith together with all right, title, and interest thereto and all the deeds and writings relating thereto and have also hereby ordered that the same shall not be sold, mortgaged, or in any manner alienated by him the said donee or by his heirs, executors, administrators, and assigns and the same shall not be leased out more than two years but to be held and possessed by them for ever after the death of me, the said Menuhamy, the *ex Korala*." There is here a clear conveyance of the estate to the donee and the conveyance so made is followed by a prohibition against alienation which is imposed upon the donee as well as upon his heirs, executors, administrators, and assigns. The prohibition having thus been imposed both upon the donee and his heirs, executors, administrators, and assigns, the donor has not proceeded to indicate in any way who are to be the ultimate beneficiaries. This is the first objection to the submission that these words create a valid *fidei commissum* for they do not "name, describe, or designate the person or persons in whose favour or for whose benefit such a prohibition has been imposed." That being the case, the whole prohibition is null and void and the submission that this is a valid *fidei commissum* fails.

We have been invited, however, to construe these words as if the prohibition which the donor has undoubtedly imposed upon the heirs, executors, administrators, and assigns were ineffective or inoperative. While I do not desire to appear to assent to any such suggestion or to

admit that this is a possible construction, if I take the case upon that basis I am still unable to see how it would be possible to give to this clause the effect which counsel invites us to do. If we treat this as a case in which the prohibition against alienation has been imposed upon the donee alone, it remains to inquire for whose benefit that prohibition has been imposed and to whom it was intended that the property should ultimately pass as a free estate. The only words in the deed which can be pointed to as giving us any such indication are the words "his heirs, executors, administrators, and assigns". These words as I have said in the case of *Botejue v. Fernando*¹ are wide enough to include any and every person into whose hands this property may pass by operation of law or by assignment. They clearly do not describe or designate the person or group of persons to whom the property is to pass ultimately and it is impossible as a mere matter of construction to infer from these words any intention on the part of the donor to benefit any particular individual or group of individuals. If, therefore, the case be taken upon the basis upon which counsel for the respondents has invited us to take it, he is confronted by the decision in the case of *Botejue v. Fernando (supra)* which is a clear authority for the proposition that in such circumstances as these no valid *fidei commissum* is created, and for my part I see no reason to think that that decision is otherwise than sound.

The case will therefore be remitted to the Court below for further proceedings upon the footing that so far as the lands Nos. 1, 3, and 5 in the schedule to the plaint are concerned Kiri Banda through whom these parties claim was the full owner free from the burden of a *fidei commissum*. The judgment of the District Court is accordingly set aside. The appellant is entitled to the costs of this appeal.

DRIEBERG J.—I agree.

Set aside.
