

Present: Garvin and Lyall Grant JJ.

1926.

BIBILE *et al* v. MAHADURAYA.

165—D. C. Kandy, 33,761.

*Fidei commissum—Gift to wife subject to direction to give grandchildren—Vesting of property—Persons to be benefited.*

Where a Kandyan gifted certain property to his wife with a direction that after his death the donee should give the property to two grandchildren named therein, and where the deed of gift continued to provide as follows: "The said lands shall not in any way be sold, subjected to security or mortgage, or leased for a period exceeding three years. None of those children becoming owners of the said lands shall by word or deed exercise any power or authority whatsoever regarding the said lands. Hereby directing that the said R (the donee) shall give the lands with these conditions imposed, I authorize R, her children, grandchildren, race, and generation to undisturbedly possess all those lands as a *paraoveni* inheritance for ever,"—

*Held*, that the deed created a valid *fidei commissum*.

*Held*, further, that no express deed from the donee was necessary to render the *fidei commissum* effective.

**A** PPEAL from a judgment of the District Judge of Kandy.

This was an action for declaration of title to half share of a field called Radapetta, the original owner of which was one Loku Mudianse. By deed No. 2,740 dated December 4, 1868, he gifted the field to his wife Ran Menika subject to the direction that on his death it should be given to his two grandchildren, Bandara Menika and Muttu Menika, and that after them it should devolve on their heirs. On the death of Ran Menika, the grandchildren divided the property between themselves and became entitled to a half share each. The said Bandara Menika died, leaving her surviving as heir a son, William, from whom the defendant purchased by deed No. 4,929 dated January 9, 1914. William died in 1918, leaving him surviving as heirs his widow, the first plaintiff, and her children, the second, third, and fourth plaintiffs. The learned District Judge held that the deed of gift by Loku Mudianse created a *fidei commissum* in favour of the heirs of William, and that William had no right to sell to the defendant. He accordingly gave judgment for the plaintiffs.

*Drieberg K.C.* (with *Keuneman*), for defendant, appellant.

*Zoysa* (with *H. V. Perera*), for plaintiffs, respondent.

1926.

November 24, 1926. GARVIN J.—

*Bibile v.  
Mahaduraya*

This appeal depends upon a construction of a certain deed of gift bearing No. 2,740 and dated December 4, 1868, the question for decision being whether or not it creates a valid *fidei commissum*. The donor, Loku Mudianse, made a gift of the subject of this action and certain other property to his wife Ran Menika. The deed commences with the statement that, having revoked certain other deeds of gift made by him, the donor "hereby" gives to his wife "who has for a long time been rendering me assistance ungrudgingly as an inheritance in the following manner." Then follows a description of the property given. The deed continues "Therefore none of my descendants shall dispute this gift either by word or deed; the said Ran Menika shall, during my life in this world, render to me from date thereof all assistance ungrudgingly, and shall after my death have my body duly buried according to the customs of the world, and shall perform for me all necessary duties according to religion in regard to the next world." The parties to this deed of gift are Kandyans, and the clauses which I have thus far referred to are clauses of an ordinary Kandyan gift by a donor for services and assistance rendered and in order to secure to himself future assistance, but it will be noticed that the words of gift are made subject to limitations indicated by the words "in the following manner." Then follows a somewhat lengthy clause, by which it is ordered "that neither the said Ran Menika nor anyone whosoever may become entitled to the said lands shall, for any reason or in any way, sell, subject to security or mortgage, or lease for a period of more than three years"; and then there are words which lay Ran Menika under a duty to give the said lands "after my death" to two persons specified. Those persons were Bandara Menika and Muttu Menika, who are Ran Menika's granddaughters. There are further provisions which indicate that after the death of one of them without children the children of the survivor of those two was to be "made entitled to the land." There is a further clause which prohibits alienation, and the clause concludes as follows: "Hereby ordering or directing that the said Ran Menika shall give (convey) the land with these conditions imposed, I authorize this Ran Menika and her children, grandchildren, race, and generation to undisturbedly possess all these lands as above as a *paraveni* inheritance for ever in the line." The learned District Judge held that it created a valid *fidei commissum*. Counsel for the appellant contended, however, that the direction to Ran Menika to give the property has no real legal effect. He also argued finally that even if these words be construed as sufficient to disclose the intention of the donor to create a *fidei commissum*, Bandara Menika and Muttu Menika, the next instituted heirs, and their descendants took no real interest in the land in the absence of

a deed of gift by Ran Menika. The gift, as I have already indicated, is made subject to certain words which indicate at once that the donor intended to impose certain limitations upon it. There is a clear prohibition against alienation imposed upon the gift, not only upon the immediate donee, Ran Menika, but upon all those subsequently indicated as the persons who may become entitled to the said land. This is followed by a direction that after the death of the donor the land was to be gifted by Ran Menika to the persons indicated. The purpose of the prohibition against alienation is clearly that the property should be held by Ran Menika, not as her absolute property, but for a definite purpose, and that purpose is indicated by an express direction to her that after the death of the donor the property was to be passed by her to the next set of institutives. The concluding words I have referred to again emphasize, what is not a mere request to Ran Menika, but a direction and an imperative order requiring her to pass the land to those indicated. A little ambiguity as to the point of time when the property was to be so passed appears in the words "after my death," but upon a construction of the terms of the deed of gift, I think it was the intention of the donor to secure to himself the assistance of Ran Menika for the purpose indicated in the deed, that during that period she was to have the enjoyment of the property, but immediately there was no longer any need for assistance by reason of the death of the donor, her rights under the deed were to cease, and she was to pass the property on to Bandara Menika and Muttu Menika. There appears to me to be a clear indication here of an intention on the part of the donor to impress this property with a *fidei commissum* by which Ran Menika was to be first instituted heir, and I agree with the conclusion at which the learned District Judge arrived. As to the contention that the *fidei commissum* did not become effective by reason of the absence of a deed of gift in favour of Bandara Menika and Muttu Menika, I think the answer is that if a valid *fidei commissum* has in point of fact been created, then the *fidei commissary* became vested with the property immediately the *fidei commissum* matured by the happening of the contingency, the death of the donor. That that event has occurred is beyond question. Counsel for the appellant relied on the judgment in the case of *Dantuwa v. Setuwa*,<sup>1</sup> where it was contended that a certain deed of gift contained language which created a valid *fidei commissum*. The Court there held that no *fidei commissum* was created. Very little assistance is derivable from a decision which proceeds upon a deed of gift in which different language is used. The basis of the decision in *Dantuwa v. Setuwa* (*supra*) was that upon an interpretation of that deed the Court was satisfied that it created an absolute gift, and that the restrictions and limitations subsequently imposed were inconsistent with the absolute grant. This

1926.  
GARVIN J

*Bibile v.  
Mahaduraya*

case was considered in the case of *Sethuhamy v. Kiribandu*,<sup>1</sup> and it was thought that a different decision may possibly have been arrived at had the attention of the Court been drawn to certain passages at pages 318 and 319 of Professor Lee's *Introduction to the Roman-Dutch Law*.

For the reasons that I have already given, my own opinion is that the language of this deed sufficiently expresses an intention to create a *fidei commissum*.

I would therefore dismiss the appeal, and remit the case to the Court below for further hearing and disposal.

The respondent is entitled to the costs of the appeal.

LYALL GRANT J.—I agree.

*Appeal dismissed.*



<sup>1</sup> (1912) 23 N. L. R. 376.