

1949

Present : Nagalingam and Windham JJ.

FERNANDO, Appellant, and RASHEED, Respondent

S. C. 297—D. C. Puttalam, 5,099

Fidei commissum—Deed of gift—Description of fidei commissarii—Heirs, executors, administrators and assigns—Uncertainty of beneficiaries.

A deed of gift vesting property in three persons in equal shares imposed a prohibition against alienation and went on to say "and thereafter their heirs, executors, administrators and assigns shall possess the same for ever".

Held, that no *fidei commissum* was created as there was no clear designation of the beneficiaries.

**A**PPPEAL from a judgment of the District Judge, Puttalam.

*E. B. Wikramanayake, K.C.*, with *H. A. Koattegoda*, for defendant appellant.

*Naina Marikar*, for plaintiff respondent.

*Cur. adv. vult.*

January 21, 1949. NAGALINGAM J.—

The only point involved in this appeal is whether the deed P 1 creates a valid *fidei commissum*. The relevant clause runs as follows :—

"I do hereby make known that I shall be entitled to the life interest of the said properties during my life time and thereafter the said Casie Mohiedeen Peeru Mohamado and Casie Mohiedeen Mohamado Cassim shall possess in equal shares the said property and all things appertaining, connected, used or enjoyed therewith together with all my right, title and interest thereon without encumbering same by way of mortgage or usufruct or alienating by way of transfer or gift and without leasing same for over three years at any one time and subject to the condition of *fidei commissum* and thereafter their heirs, executors, administrators and assigns shall possess the same for ever and that the said property have not been encumbered or alienated in any way, that I have full right and power to donate the said property hereby and that I shall not have the right to revoke this gift in any manner or for any reason, so as to make it null and void."

That the *fiduciarii* are indicated with a sufficient degree of certainty is not challenged and that they are prohibited from alienating or encumbering the premises is also conceded; but the question that has been contested is whether the *fidei commissarii* are equally clearly specified. The words "and thereafter their (*fiduciarii*) heirs, executors, administrators and assigns shall possess the same for ever" are the only words from which the persons to be benefited could be ascertained. No doubt where similar words were used in describing the *fiduciarii*, those words

have been held to be words used by a notary for the purpose of vesting the dominium in the *fiduciarii* and that they must be regarded as in no way derogatory to the creation of a valid *fidei commissum*. But a similar reasoning cannot be said to apply where in regard to the persons to be benefited these are the only words, for as de Sampayo J. said in *Silva v. Silva* 1,

“ Where the instrument to be construed is such that there is no clear designation of the persons who are to take after the immediate donee, then I think that the use of such words as ‘ executors, administrators and assigns ’ as part of the same formula with the word ‘ heirs ’ is of material importance. The present case is in that situation. For it is argued that the *fidei commissarii* are the ‘ heirs ’ who are mentioned in that context. It appears to me impossible to disconnect the word ‘ heirs ’ from the rest of the context, and so I think that this is a case in which there has been no designation of the persons in whose favour or for whose benefit the prohibition against alienation is provided.”

The learned District Judge seems to have been to some extent influenced in the view he took that the deed creates a valid *fidei commissum* by the reference to the fact that the property was to be held subject to the “ condition of *fidei commissum* ”, but the most that can be said, giving full effect to these words, is that the donor intended to create a *fidei commissum* and no more. While the intention to create a *fidei commissum* is unquestionable, it is an essential requisite to the constitution of a valid *fidei commissum* that the beneficiaries to be benefited must be specifically and clearly designated. In this respect the deed completely fails.

I am therefore of opinion that the deed does not create a valid *fidei commissum*. The plaintiff’s action therefore fails and is dismissed with costs in both Courts.

WINDHAM J.—I agree.

*Appeal allowed.*

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