

Present : Ennis A.C.J. and Shaw J.

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THYAGARAJA v. THYAGARAJA *et al.*

196/5—D. C. Colombo, 159.

Fidei commissum—*Deed inter vivos—Gift subject to condition that if donee died issueless, property to go to another person or his heirs, &c.—Is widow entitled to a share?—“Heirs, executors, and administrators.”*

By a deed *inter vivos* N gifted the land in dispute to his daughter K, her heirs, executors, and administrators, subject to the condition that she shall not sell or mortgage or otherwise alienate the said properties, and that in case K died issueless, the property was to devolve on N and his wife, and in case they had predeceased her, then in that case the property was to vest in T or his heirs, executors, &c., under the like conditions. N and his wife and T predeceased K, who died issueless.

Held, that T had a contingent interest, and on his death his heirs succeeded to his contingent rights, and that as T's widow was an heir of T she was entitled to a share of the property.

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THE facts are set out in the judgment of the District Judge (L. M. Maartensz, Esq.), which was as follows :—

The premises forming the subject of this action, No. 4, Main street, and another property, were gifted by the admitted owner Sivakurunada Mudaliyar Namasivayam Mudaliyar to his daughter Kamalamba, her heirs, executors, and administrators, by deed No. 2,637, dated September 6, 1889, subject to the following conditions, namely :—

“That she shall not sell, mortgage, or otherwise alienate the said properties, nor can her life interest therein be sold or alienated for her debt or that of her husband, but she shall enjoy the rents and profits of the said properties” (here follows a clause providing that the donor may purchase other properties and transfer them to the donee, in lieu of the properties in question, and that the donee should re-transfer these properties to the donor, which is not relevant to the action), “and in case the said Namasivayam Mudaliyar Kamalamba were to die issueless then either the said two properties or the property that shall be purchased and given to her shall devolve on me, the said (donor), and my wife Sinnachi Amma, and in case we both predecease her, in that case the said property shall vest in our son Namasivayam Mudaliyar Thyagarajah, or his heirs, executors, administrators, under the like conditions and restrictions, and in case he were to depart this life issueless, then the same shall vest in our daughters Swarnachi and Tangamma, or their heirs, under like conditions and restrictions.” The rest of the clauses are not material to the issues.

The provision for transferring other property to the donor were not given effect to, and need not be considered.

The donee has died, without issue, leaving her husband surviving her. He has so far not asserted a claim to share in the property. The donor and his wife predeceased her. The substituted heir, Thyagarajah, has also died leaving a widow, the plaintiff, and the first, second, third, fifth, and sixth defendants, his children, by the plaintiff.

The plaintiff claims half the premises as an heir of her husband. The claim is denied by all the children, on the ground that her right to succeed to a share of the property, as heir of her husband, is excluded by the terms of the deed of gift. The first issue formulates the question to be decided, and is as follows :—

“Did plaintiff on death of Kamalamba become entitled to any share of the property in dispute under deed 2,637 of September 6, 1889.” Thyagarajah should be substituted for Kamalamba.

Plaintiff's counsel conceded that plaintiff would not have been entitled to share in the property if Thyagarajah had died issueless, as in that case the clause substituting his sister's heirs would have taken effect. He contended, however, that plaintiff was entitled to share with the issue by virtue of the words “or his heirs, executors, and administrators,” following the name of Thyagarajah in the clause substituting him as heir.

The argument in support of this contention was that effect must be given to these words under the rule that effect should be given to all the provisions of a gift or will, if possible, and that if plaintiff was excluded from a share there would be a distinct contravention of the terms of this clause.

There was, he submitted, no inconsistency in the use of these words the intention of the donor being that if there was no issue the property

should pass to the substitutes, but if there were issues, the mother of such issues should share with the children.

This argument did not consider the possibility of Tyagarajah being twice married and leaving a widow who was not the mother of the children.

The reply to this argument was that the donor intended to provide for the children of the successive donees and intended to exclude all other heirs.

I do not see how any other construction can be placed on the deed of gift. It was executed in 1889, long before that time when the use of the words "heirs, executors, or administrators" became the subject of controversy in these Courts.

Bonser C.J. gave effect to such words in the case of *Hormusjee v. Cassim*,¹ because the donor who intended to create a *fidei commissum* had not designated the persons for whose benefit it was created. In later cases this proposition was given a more extended effect. *Perera v. Fernando*.²

I have no doubt that these words "heirs, executors, and administrators" were a mechanical addition by the draughtsman. A notary or his clerk, habitually draughting deeds of conveyance, would add such words unconsciously.

The more recent cases *Wijetunga v. Wijetunga*³ adopted the principle that the proper way of constructing an instrument was to give effect to the intention of the testator so far as it could be clearly ascertained from the terms of the instrument and treat words inconsistent with this intention as unnecessary.

I am of opinion that the intention of the donor can be clearly ascertained from the terms of the deed of gift in question, and that his intention was to create a *fidei commissum* for the benefit of the issue of Kamalamba, and, failing issue, he substituted Tyagarajah as heir under the same conditions for the benefit of Tyagarajah's children.

I am of opinion that the words "or heirs, executors, or administrators" are clearly inconsistent with the intention, and should not be given effect to.

I accordingly answer the issue in the negative, and dismiss plaintiff's action with costs.

The deed of gift was as follows :—

No. 2,637.

Whereas I, Sivakurunada Mudaliyar Namasivayam Mudaliyar of Colombo, at the treaty for the marriage of my daughter Namasivayam Mudaliyar Kamalamba with Tambyya Mudaliyar Sanmugam Mudaliyar of Marandhan, Colombo, agreed to give her as a dowry landed property to the value of Rupees Twenty thousand (Rs. 20,000), which agreement was hitherto unfulfilled :

And whereas I am now desirous of fulfilling the said agreement :

Now know all men by these presents that I, the said Sivakurunada Mudaliyar Namasivayam Mudaliyar, in consideration of the marriage of the said Namasivayam Mudaliyar Kamalamba with the said Tambyya Mudaliyar Sanmugam Mudaliyar, and for other causes and considerations, me hereunto specially moving, have given, granted, assigned, transferred, and set over, as I do hereby give, grant, assign, transfer, and

¹ (1896) 2 N. L. R. 190.

² 6 Leader 12.

³ (1912) 15 N. L. R. 493.

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set over unto the said Namasivayam Mudaliyar Kamalamba, her heirs, executors, and administrators, as a dowry or gift, as agreed to at the treaty of the said marriage, the following properties, to wit :—

To have and to hold the said premises with all and singular the appurtenances thereof or thereunto in any wise belonging to the value of Rupees Twenty thousand (Rs. 20,000) unto the said Namasivayam Mudaliyar Kamalamba and her aforewritten for ever, subject, however to the condition that she shall not sell, mortgage, or otherwise alienate the said properties, nor can her life interest therein be sold or alienated for her debt or that of her husband, but she shall enjoy the rents and profits of the said properties until another property worth Rs. 20,000 shall be purchased and given to her on the same conditions and restrictions by me, the said Sivakurunada Mudaliyar Namasivayam Mudaliyar, or my heirs, executors, or administrators, when the aforesaid two properties shall vest in me, the said Sivakurunada Mudaliyar Namasivayam Mudaliyar and my wife Sinnachchi Amma, or my heirs, executors, administrators, or assigns; and the said Namasivayam Mudaliyar Kamalamba, or her heirs, executors, or administrators, shall execute a valid and marketable deed of transfer in favour of me, the said Sivakurunada Mudaliyar Namasivayam Mudaliyar, or my heirs, executors, or administrators, free from all encumbrances, and in case the said Namasivayam Mudaliyar Kamalamba were to die issueless, then either the said two properties or the property that shall be purchased and given to her shall devolve on me, the said Sivakurunada Mudaliyar Namasivayam Mudaliyar and my wife Sinnachi Amma; and in case we both predecease her, then in that case the said property shall vest in our son Namasivayam Mudaliyar Tyagarajah, or his heirs, executors, or administrators, under the like conditions and restrictions, and in case he were to depart his life issueless, then the same shall vest in our daughters Swarnachi and Tangamma, or their heirs, under like conditions and restrictions; and in case there are no heirs to succeed to their rights, then the same shall vest in Nadarajah Wala Supramania Swami Kovil in Ana Kotte in Jaffna for the maintenance of the *chatram* and daily *pusha* under the like conditions and restrictions.

And further, the said Namasivayam Mudaliyar Kamalamba, or her heirs, executors, or administrators, shall not be entitled to any further share from my estate or the estate of my wife.

And I, the said Sivakurunada Mudaliyar Namasivayam Mudaliyar, do hereby covenant, promise, and agree to, and with the said Namasivayam Mudaliyar Kamalamba, her heirs, executors, and administrators, that the said premises are free from encumbrances, and that I and my aforewritten shall and will always warrant and defend the same unto her and them against any person or persons whomsoever.

And I, the said Namasivayam Mudaliyar Kamalamba, do hereby thankfully accept the above dowry or gift, subject to the aforesaid conditions.

H. J. C. Pereira, K.C., and *Drieberg, K.C.* (with them *Samara-wickrema* and *Canakeratne*), for appellant.—Tyagarajah became the absolute owner on the death of Kamalamba without issue.

The deed created a *fidei commissum conditionale*. (*MacGregor.*)

On Tyagarajah's death, his heirs became entitled to the property. The appellant, who is a widow, is entitled to one-half.

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Bawa, K.C. (with him *E. W. Jayawardene* and *Croos-Dabrera*), for respondent.—By the deed the property was given to Kamalamba subject to a *fidei commissum* in favour of the donor and his family. On the death of Tyagarajah (the donor's son) the property devolved on his children. "Heirs" means those descended from the donor. *2 C. W. R. 26; 3 C. W. R. 58; 20 N. L. R. 89.*

Tyagarajah died before Kamalamba. On the death of a *fidei commissary* before the fiduciary, the *fidei commissum* lapses.

Samarawickreme, in reply.—This is a deed of gift and not a will, and Tyagarajah had an expectancy of succession, and on his death that expectancy passed to his heirs.¹

Cur. adv. vult.

March 2, 1921. ENNIS A.C.J.—

The facts in this case are as follows. In 1889 one Namasivayam Mudaliyar executed a deed of gift to his daughter Kamalamba of certain property by way of dowry. The parts of the deed material for the consideration of this case are:—

"I do hereby give unto Kamalamba, her heirs, executors, and administrators, as a dowry or gift, as agreed at the treaty of the said marriage, the following properties To have and to hold unto the said Kamalamba and her aforewritten for ever, subject, however, to the condition that she shall not sell, mortgage, or otherwise alienate the said properties, nor can her life interest therein be sold or alienated In case the said Kamalamba were to die issueless the property shall devolve on me and my wife; and in case we both predecease her, then in that case the property shall vest in our son Tyagarajah, or his heirs, executors, and administrators, under the like conditions and restrictions, and in case he were to depart this life issueless, then the same shall vest in our daughters Swarnachi and Tangamma, or their heirs, under like conditions and restrictions; and in case there are no heirs to succeed to their rights, then the same shall vest in Kovil under the like conditions and restrictions."

The donor and his wife and their son Tyagarajah predeceased Kamalamba, who died issueless. Tyagarajah left a widow, the plaintiff in the case, and children, the defendants in the case.

The learned Judge held that the words "heirs, executors, and administrators" were a mechanical addition by the draughtsman, and should not be given effect to. He held that it was the intention of the donor to create a *fidei commissum* for the benefit of the heirs of Kamalamba, and he dismissed the plaintiff's action with costs. The plaintiff appeals.

¹ (1911) 14 N. L. R. 193. 2 Burge.

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The learned Judge has dealt with the case as if the document were a will, and not a conveyance *inter vivos*. It is a question of giving effect to the terms of an agreement between the parties, and not as in the case of a will of giving effect to the intention of the donor. The terms of an agreement must be strictly construed. As a conveyance *inter vivos* the *plena proprietas* vested immediately in Kamalamba as fiduciary. Tyagarajah had a contingent interest, and on his death his heirs succeeded to his contingent rights *Mohamed Bhai v. Silva*.¹

The plaintiff is one of the heirs of Tyagarajah, and is therefore entitled to succeed on the appeal. I would allow the appeal, with costs, and give judgment for the plaintiff with damages as agreed, and with costs.

SHAW J.—I agree.

Appeal allowed.