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No. 24 of 1951.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CEYLON.

UNIVERSITY OF LONDON
W.C.1.
21 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN—

A. NAGALINGAM of Polikandy
(Plaintiff) *Appellant*

— AND —

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1. ARUMUGAM THANABALASINGHAM
2. KANDAVANAM VADIVELU
3. KANDAVANAM CHELLIAH
4. KANDAVANAM KANDASAMY, all of Polikandy (Defendants) *Respondents*.

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from a judgment and two decrees of the Supreme Court of Ceylon dated the 13th October, 1948, whereby it was ordered that an appeal by the 2nd, 3rd and 4th Defendants from a judgment and decree of the District Court of Jaffna held at Point Pedro dated the 7th March, 1947, should be allowed with costs and a cross appeal by the Appellant from the same judgment and decree should be dismissed.

pp. 96, 101, 102.

pp. 80, 85.

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2. The questions which arise in this appeal may be summarised as follows:—

(a) Whether there was any valid acceptance on behalf of an infant donee of a deed of gift of certain land made in 1896;

(b) Whether, assuming the answer to the above question (a) is in the positive, the said deed could be validly revoked with the consent of the donee after majority;

(c) Whether, under a subsequent deed of gift of the same land to a donee subject to a life interest for the donors and subject to a fideicommissum in favour of three named fideicommissaries, any interest devolved upon the heirs of a fideicommissary who died before the donee.

p. 13, l. 17.

3. The proceedings giving rise to this appeal concerned the title to a parcel of land called Mungodai and Mavattai in extent 14 latchams varagu culture and $3\frac{3}{4}$ kullies. A full description of the said land was set out in the Schedule to the Plaint in the District Court.

p. 16, l. 1.

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p. 18.

4. In the course of the proceedings certain intervenients were allowed to appear in support of a claim that a small portion of the above named land belonged to them. Their claim was dismissed by the District Judge and, as there was no appeal from his decision, those intervenients have disappeared from the case. The subject matter of the appeal is accordingly the full parcel of land above mentioned.

p. 84, l. 29.

p. 13, ll. 17-26.
p. 16, l. 29

5. Subject to what is stated in paragraph 4 hereof, there was no dispute in the proceedings in Ceylon that the said land became vested absolutely in 1882 in one Koolayar Arumugam (for convenience hereinafter called "Koolayar"). The substantial questions which arose were as to its devolution among the family of Koolayar and his wife Walliammai.

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6. The family of Koolayar and Walliammai consisted of, or at any rate comprised, four sons, namely:—

p. 15.

(a) Arumugam Nagalingam, called hereinafter for convenience "Nagalingam".

(b) Arumugam Thanabalasingham, called hereinafter for convenience "Thanabalasingham".

(c) Arumugam Poopalasingham, called hereinafter for convenience "Poopalasingham".

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(d) Arumugam Kandavanam, called hereinafter for convenience "Kandavanam".

p. 42, l. 37.

Koolayar himself died in 1920 and his wife Walliammai died in 1929.

Nagalingam was the Plaintiff in the action and is the present Appellant.

Thanabalasingham was the First Defendant in the action and is the First named Respondent. Throughout the proceedings he supported the contentions of Nagalingam, and accepted the portion of the land—one half—allotted to him in Nagalingam's plaint.

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Poopalasingham died issueless on the 3rd August, 1917, aged 23. This appears from the death certificate which was annexed to Nagalingam's Petition of Appeal to the Supreme Court, but has been omitted from the record. Leave will be craved to produce it at the hearing.

p. 88, l. 20.

Kandavanam died in July, 1931, leaving behind him as his heirs the 2nd, 3rd and 4th Respondents.

p. 44, l. 26.

7. On the 1st April, 1896, deed No. 5825 (P. 4 in the proceedings) was executed by Koolayar and his wife Walliammai. This was a deed of donation of various parcels of land, including the land now in question, to Kandavanam who at the time was a minor. According to his death certificate he would appear to have been born in 1885, making him 11 years of age at the time of the deed, but according to his marriage certificate he was twenty-six in 1904 making his year of birth 1878 and his age in 1896 eighteen. The deed did not purport to be executed by Kandavanam, the donation being expressed to be accepted on his behalf by a maternal uncle Kanthar Sinnatamby. This deed was the root of title relied on by the 2nd, 3rd and 4th Respondents: Nagalingam and Thanabalasingham maintained that it was invalid, alternatively had been validly revoked.

pp. 113-117.

p. 246.

pp. 128-9.

p. 117, l. 25.

8. On the 6th July, 1908, two deeds were executed by Koolayar and Walliammai, namely deed No. 799 (P. 5 in the proceedings) revoking, for the reasons therein stated, the absolute donation deed of 1896 (P. 4) and a deed No. 800 (P. 6 in the proceedings) donating the same parcels of land (subject to reservations of life interests for the donors) to Kandavanam subject to a fideicommissum in favour of Nagalingam, Thanabalasingham and Poopalasingham. This deed was the root of title of Nagalingam and Thanabalasingham, but it could not, of course, be of any effect unless the deed of 1896 was either invalid or had been validly revoked.

pp. 140-143.

pp. 143-148.

9. The proceedings were commenced by Nagalingam in the District Court of Jaffna holden at Point Pedro on the 23rd August, 1944. By his plaint of that date Nagalingam set out the dealings with the said land including the deed of 1896 (P. 4) the deed revoking that deed in 1908 (P. 5) and the deed setting up the fideicommissum on the same date in 1908 (P. 6). There was also a claim to prescriptive title. Nagalingam claimed a partition of the land in question allotting half to himself and half to Thanabalasingham as fideicommissaries entitled absolutely on and after the death of Kandavanam.

p. 13.

p. 14, l. 9.

p. 14, l. 3.

10. By their answer dated the 10th November, 1944, the 2nd, 3rd and 4th Respondents alleged that the deed of 1896 (P. 4) could not be validly revoked and in addition that the fideicommissary deed

pp. 16-17.

p. 16, l. 33.

- p. 17, l. 2. of 1908 (P. 6) had been neither accepted nor signed by Kandavanam.
- p. 17, ll. 8, 15. They accordingly claimed that as heirs of Kandavanam the entirety of the land passed unencumbered to them on the basis of Kandavanam having become absolute owner by virtue of the deed of 1896. They also claimed prescriptive title.
- p. 17, l. 17.
- pp. 26-40. 11. The hearing had an abortive start in December, 1946, as the then Judge in the District Court was transferred elsewhere.
- p. 40, l. 20. The hearing was resumed before Additional Judge G. C. T. A. de Silva in February, 1947, and Nagalingam was the first witness. He
- p. 41. produced the relevant title documents and asserted that 10
- p. 41, ll. 26-39. Kandavanam had acquiesced in the revocation of the deed of 1908,
- p. 41, l. 38; producing a considerable body of further documentary evidence in support of this. In cross examination a fierce attack on his credit
- p. 43, l. 1. was made on behalf of the 2nd, 3rd and 4th Respondents and in the result the trial Judge said he was not prepared to accept
- pp. 43-4. Nagalingam's oral evidence unless it was supported by documentary
- pp. 44-56. or other evidence. The attack went to the length of suggesting that
- p. 83, ll. 4-8. Nagalingam had forged the deed of donation of 1908 (P. 6) and every effort was made to impugn this deed and challenge its due execution.
- p. 55, l. 4. The original of P. 6 had been lost, Nagalingam explaining the 20
- p. 42, ll. 9-14. circumstances, but a certified copy was produced and the second witness Sathasivam, the record keeper of the Land Registry,
- p. 57, l. 10. produced (P. 6A) the duplicate then filed. The third witness was
- p. 57, ll. 23, 34. Vallipuram who had signed both the deeds of 1908 as a witness. He
- p. 57, ll. 29-31. verified his signature both on P. 5 and on P. 6A and said that when he went to the Notary's office Koolayar, his wife Walliammai and
- p. 57, l. 37. Kandavanam were there, along with the others who signed as
- p. 57, l. 38. witnesses, that both deeds were read out to Kandavanam and were executed and witnessed in his presence and that Kandavanam had
- p. 82, l. 7. himself signed P. 6. The evidence of this witness was in terms 30
- accepted by the trial Judge. The final witness spoke to Nagalingam and Thanabalasingham being the people who after Kandavanam's death were in possession of the land in dispute.
- pp. 63-72. 12. For the 2nd, 3rd and 4th Respondents the 2nd Respondent
- p. 65, ll. 11-12. gave evidence. He asserted that his father Kandavanam had never executed P. 6 and that the recitals in P. 5 were not true. He produced a number of documents on which he relied as supporting the view that P. 6 had not been executed, the most important being
- pp. 119-127. partition proceedings in 1899 of another parcel of land included in P. 4 and also included in P. 6. As the trial Judge pointed out, how- 40
- p. 120, l. 12. ever, that showed not that P. 6 had never been executed, but merely that the draftsman of it had merely copied the parcels from P. 4,
- p. 82, l. 15. overlooking the fact that one parcel had already been disposed of. He also asserted that after his father's death he and his brothers
- p. 67, l. 19.

had cultivated the land in question. The second witness for the 2nd, 3rd and 4th Respondents spoke only as to the prescription issue. The final witness Saravanamuttu was one of the witnesses to P. 5 and he proved the execution of that deed. He asserted that Kandavanam was not present at the time and that no other deed was executed on the same occasion. It emerged, however, in cross examination that he had never previously told anyone that Kandavanam had not been there at all.

pp. 72-4.
pp. 74-7.
p. 75, l. 5.
p. 75, l. 14;
p. 75, l. 18.
p. 76, ll. 28-32.

10 13. The Additional District Judge gave his reserved judgment on the 7th March, 1947. On the relevant questions of fact he accepted Vallipuram's evidence as to the execution by Kandavanam of P. 6 and rejected the suggestion that the deed was a forgery by Nagalingam. He pointed out that Kandavanam had never taken any steps to set it aside and had indeed been a party to proceedings in which it was relied on as a root of title. In view, however, of his decision on the legal questions as to the validity of P. 4, he contented himself with saying that "there seems to be some force in the suggestion made by Counsel for the Plaintiff that Kandavanam consented to the revocation of P. 4 and the execution of P. 6 as a mark of filial respect to his parents". With regard to the prescription issue, the Judge said "it is difficult to believe that the contesting Defendants were allowed to possess this land by the Plaintiff thereafter", and by entering a decree in favour of Nagalingam he plainly indicated that he rejected the prescription claim of the 2nd, 3rd and 4th Defendants.

pp. 80-84.
p. 82, l. 6.
p. 81, l. 30-32.
p. 81, l. 3.
p. 81, ll. 6-17.
p. 82, l. 34.
p. 82, l. 32.

30 14. On the legal questions, the Additional District Judge followed authority in the Supreme Court (11 N.L.R. 161) that a maternal uncle, not being the maternal or legal guardian of a minor, cannot validly accept a donation on his behalf and that accordingly the deed of 1896 (P. 4) was invalid for want of proper acceptance. He did not in these circumstances consider the question whether it could be revoked, but upheld the donation of 1908 (P. 6), there being no impediment to its validity. He then held, however, that Poopalasingham on his death left as heirs not only Nagalingam and Thanabalasingham, but also the three children of Kandavanam. Accordingly, in his view, Poopalasingham's 3/9th share went as to 1/9th to Nagalingam, 1/9th to Thanabalasingham and 1/9th to the 2nd, 3rd and 4th Respondents equally. A decree of the District Court was entered directing partition in accordance with this judgment.

p. 83, ll. 28-33.
p. 83, l. 41.
pp. 85-6.

40 15. With regard to this final point in his judgment, it is respectfully submitted that the Additional District Judge misconceived the position. No suggestion had been made by anybody that, in the event of P. 6 being upheld, the succession was as the learned Judge

p. 84, l. 5.

laid down, which was entirely out of conformity with relevant inheritance law contained in the Matrimonial Rights and Inheritances Ordinance (Jaffna) contained in Chapter 48 of the Legislative Enactments of Ceylon 1938. In any event it is fundamental in the law of fideicommissa that a fiduciary has full dominium of the property in question and is not a trustee for the fideicommissaries: the full dominium passes on his death to the fideicommissaries and if, in the case of a single fideicommissary, he dies before the fiduciary, the fideicommissum lapses unless there is specific reservation of an interest for the fideicommissary's children. 10
Similarly if one of three fideicommissaries dies, there being no such specific reservation in favour of his children, the remaining fideicommissaries are the only fideicommissaries and must take equally.

p. 91.

16. Against the decision of the Additional District Judge the 2nd, 3rd and 4th Respondents appealed to the Supreme Court by Petition dated the 17th March, 1947 and Nagalingam cross appealed on the point last mentioned by Petition dated the 19th March, 1947.

p. 86.

pp. 96-101.

p. 97, l. 17.

p. 97, l. 20.

p. 97, l. 30.

p. 97, l. 33.

pp. 97-99.

p. 98, l. 20.

p. 98, l. 27.

p. 98, l. 36.

p. 99, l. 20.

p. 99, l. 30.

17. In the Supreme Court (Canakeratne and Dias, JJ.) the leading judgment was delivered by Canakeratne, J. He started by aspersions on the Notary before whom the deed P.6 had been 20
executed and also on Nagalingam and Vallipuram and expressed doubt as to the Additional District Judge's experience of men and matters in the part of the country involved, but ultimately said that it was unnecessary for the purposes of the appeal to decide the point whether Nagalingam had proved that P.6 was executed by Kandavanam. Turning to the first question of law, namely whether P.4 was a valid gift, the learned Judge gave a general examination of the law of donation, stressing the contractual elements of offer and acceptance which must be present in order to make a gift binding, and the need for acceptance on behalf of a minor to be by his guardian 30
whether maternal or appointed. As to these general matters, there is no controversy. He then said that infants who have attained puberty can accept on their own behalf but, even if the authority to that effect in 11 N.L.R. 232 be sound, it has no bearing on the present case because Kandavanam did not purport to accept on his own behalf. The learned Judge stressed that the donors had an intention to donate, and said that "there is a natural presumption that the "gift was accepted: every instinct of human nature is in favour of "that presumption"; but the donor's intention is no guide on the question of the donee's acceptance, nor is there any room for a 40
presumption of acceptance when it is known that there was in fact a purported acceptance, and the question is whether it was valid in law. The learned Judge also discussed the questions of a later ratification of an unauthorised acceptance and of a later acceptance

by the donee himself, but these questions are also, it is submitted, irrelevant when the issue is whether an acceptance which did take place was in law valid. The learned Judge mentioned that in three cases it had been decided in Ceylon that acceptance by an uncle was "insufficient", but his reasons for distinguishing those cases are not easy to follow. It is respectfully submitted that those cases were rightly decided and should have been followed in the present case. p. 98, l. 21.

18. On the second question of law which thereupon arose, namely whether the deed of 1896 had been validly revoked, the learned Judge said very little. He said that it "was the unilateral act of the donors, it was not executed by Kandavanam and it cannot affect the title that Kandavanam had acquired to the lands years before. It is only in 1907 . . . that he (Koolayar) thought of finding an excuse for revoking the gift: most of the reasons he gives seem obviously inconsistent with the facts . . .". The learned Judge gave no indication as to what facts he was finding, and on what evidence, which showed the recitals to P. 5 to be untrue, and seems to have paid no heed to the overwhelming evidence that, even though he did not execute P. 5, Kandavanam agreed to its being executed: he was a party to and signed the simultaneous deed P. 6 and always acted on the basis that P. 6 was valid. Nor, it is submitted, is there any principle of law debarring a donee from consenting later to a restoration of the *status quo*. p. 99, l. 30.

19. On the final legal question, Canakeratne, J. discussed once again the oft mooted question as to determining whether a fideicommissum is single and indivisible or really a collection of separate fideicommissa, and expressed the view that it was a question of the interpretation of the particular instrument whether, on the death of a fideicommissary, there was a *jus accrescendi* in favour of the other fideicommissaries or a devolution on the heirs of the deceased fideicommissary. Unfortunately no very clear view was expressed as to the category in which the present case fell. It is, however, respectfully submitted that this discussion has no bearing on the situation when a fideicommissary predeceases not merely the fiduciary but also the donors. In that case it is not merely a case of lapse: there never is an interest in him at all. Further it will be submitted that even if it is a question in the present case of determining whether there was a *jus accrescendi* or not, the true answer on the interpretation of the deed is that there was. p. 99, l. 38-
p. 100, l. 44.
p. 100, ll. 38-44.

20. In accordance with the foregoing judgment with which Dias, J. agreed, the appeal of the 2nd, 3rd and 4th Respondents was allowed and Nagalingam's appeal was dismissed and two decrees of the Supreme Court dated the 13th October, 1948, were drawn up and entered accordingly. p. 101, l. 5.
p. 101; p. 102.

p. 103.

21. On the 11th November, 1948, the Appellant Nagalingam applied for conditional leave to appeal to His Majesty in Council from the said judgment and decrees, but the Supreme Court by judgment dated the 3rd February, 1949, refused his application for technical reasons and a decree of the Supreme Court of the same date was drawn up and entered accordingly.

pp. 104-6.

pp. 106-7.

pp. 107-9.

22. By Order in Council dated the 31st May, 1949, His Majesty in Council granted to the Appellant special leave (subject to conditions which have been complied with) to appeal to His Majesty in Council from the said judgment and decrees of the Supreme Court of Ceylon. 10

23. The Appellant humbly submits that this appeal ought to be allowed and the judgment and decrees of the Supreme Court of Ceylon set aside and in lieu thereof judgment entered for the Appellant for the relief claimed by him and that an Order be made for payment to the Appellant of his costs of this appeal, and of the proceedings in the Courts below for the following amongst other

REASONS.

1. BECAUSE the deed No. 5825 of the 1st April, 1896, was invalid for want of a valid acceptance. 20
2. BECAUSE the said deed, even if valid, had been validly revoked with the assent of the donee by deed No. 799 of the 6th July, 1908.
3. BECAUSE the deed No. 800 of the 6th July, 1908, was as found by the District Court a valid deed validly executed.
4. BECAUSE the decision of the District Court upon the foregoing matters was right and ought to be *pro tanto* restored.
5. BECAUSE under deed No. 800 of the 6th July, 1908, the property in question passed in equal shares to the Appellant and the First Respondent on the death of Kandavanam. 30
6. BECAUSE there was no basis in law for holding that any interest in the property in question passed on the death of Kandavanam to the heirs of Poopalasingham.
7. BECAUSE the decision of the District Court was wrong on the last mentioned point.
8. BECAUSE the decision of the Supreme Court was wrong and ought to be reversed. 40

STEPHEN CHAPMAN.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

A. NAGALINGAM of Polikandy

(Plaintiff) *Appellant*

v.

1. ARUMUGAM THANABALASINGHAM

2. KANDAVANAM VADIVELU

3. KANDAVANAM CHELLIAH

4. KANDAVANAM KANDASAMY,

all of Polikandy.

(Defendants) *Respondents.*

CASE FOR THE APPELLANT.

DARLEY CUMBERLAND & Co.,

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Bedford Row, W.C.1,

Appellant's Solicitors.