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IN THE PRIVY COUNCIL

No. 55 of 1964

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

- 1. AMBALAVANAR KANAYSON and Wife
- 2. SELVAKKANMANIAMMAL
- 3. SANGARAPILLAI PARAMESWARAN
- 4. NAGARAJESWARI

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
 LEGAL STUDIES
15 MAR 1968
 25 RUSSELL SQUARE
 LONDON, W.C.1.

Plaintiffs - Appellants

- and -

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ERAGUNATHAR PONNU RASIAH

Defendant - Respondent

C A S E FOR THE APPELLANTS

1. This is an appeal by the Plaintiffs-Appellants above named (hereinafter called the Appellants) from the Judgment and Decree of the Supreme Court of Ceylon of June 1 1962 whereby the Supreme Court dismissed, without reasons, the Appellants' appeal from the judgment and decree of the District Court of Jaffna of July 6 1959 dismissing with costs the Appellants' action.

p.70 1.1 -
 p.71 1.5
 p.58 1.28 -
 p.64 1.30

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2. The action from which this appeal arises was filed by the Appellants on June 11 1958 praying that the 2nd and 4th Appellants be declared the owners of certain lands (the subject matter of the action), (b) for damages (c) for the ejection of the Respondent from the said lands and (d) costs of action.

p.11 1.15 -
 p.15 1.30

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3. The 2nd and 4th Appellants claimed title to the said lands upon a fidei commissum created by Deed of Donation No. 21891 dated March 3 1921; and the principal question arising for consideration in

p.40 11.21-32

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this appeal is whether the said deed, properly construed, creates a fidei commissum.

4. The facts relating to the claim of the Appellants may be briefly summarised as follows:-

- (a) Venasithamby, who was at all relevant times admittedly the owner of the said lands, donated them to his sons Kumaravetpillai and Kathiravetpillai by Deed No. 21891 of March 3 1921 subject to the condition -

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p.84 11.13-21

"I do hereby declare and enjoin that the donees shall not within a period of twenty-five years from the date of my death alienate the said lands by way of transfer, donation, dowry or by any other document that they should allow the said lands to devolve on their children by way of mudusom and may only give the said lands to their children by way of donation or dowry, that they shall have no power to encumber the said lands by way of mortgage, otty or security or by any other document and that the said lands shall not be liable to be executable for any debts incurred by them."

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p.46 11.9-14

- (b) Kumaravetpillai died unmarried and issueless in the lifetime of his father and his undivided half share of the lands devolved on the father free of the fidei commissum. The said undivided half share (free of the fidei commissum) passed to the surviving son Kathiravetpillai under the last will of his father who died on August 27, 1921.

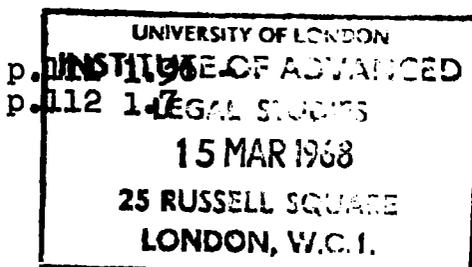
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p.90 1.1 -
p.91 1.32
p.92 1.8

p.103 1.11 -
p.105 1.17

- (c) Kathiravetpillai transferred the said undivided half share free of the fidei commissum, to one Coomaswamy by deed No. 4579 dated April 11, 1928; and by a decree passed in a partition action brought by Coomaswamy, the other undivided half share retained by Kathiravetpillai, subject to the fidei commissum, was declared the separate

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property of Kathiravetpillai. By the operation of law, the fidei commissum attached to such separate property.

- 10 (d) By deed No. 3186 dated June 18, 1934, Kathiravetpillai contrary to the prohibition referred to in sub-paragraph 4(a), sold the lands declared to be his separate property to the Respondent's predecessor in title. The 2nd Appellant, born on June 6, 1928, and the 4th Appellant, born on November 24, 1933, were minors at the date of this sale. p.130 1.1 - p. 137 1.33
- (e) The 2nd and 4th Appellants are the two daughters and the only living children of Kathiravetpillai. The 1st and 3rd Appellants were joined as parties to the action as the husbands. p.114 1.9 p.129 1.9
5. The Defendant contested the action, inter alia, on the following grounds:-
- 20 (a) That the said Deed of Donation does not create a fidei commissum; p.18 1.32-33
- (b) That he is a bona fide purchaser for value without notice of the fidei commissum; p.23 1.39 - p.24 1.2
- (c) That he has acquired prescriptive title to a half share of the said lands: and p.24 1.20-26
- 30 (d) That he is, in any event, entitled to a jus retentionis and cannot be dispossessed until compensation for improvements, bona fide made, is paid. p.24 1.33-38 p.25 1.17
6. The trial commenced on May 13 1959. The issues on which the trial proceeded and the answers of the learned Judge in his judgment dated July 6 1959 are as follows:-
- 40 (1) Did Murugesapillai Kathiravetpillai become entitled to half share of the land described in Schedule "A" to the plaint subject to fidei commissum in favour of his children on deed No. 21891 dated 3.3.21? p.62 1.30 - p.63 1.20

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A. Yes, but not subject to a Fidei Commissum.

(2) Was the land described in Schedule "B" to the plaint allotted to the said Kathiravetpillai for the said half share referred to in issue in partition case No. 23784 District Court, Jaffna?

A. Yes.

(3) Was Kathiravetpillai entitled to the land described in Schedule "B" to the plaint subject to a fidei commisum in favour of his children? 10

A. No.

(4) Are the Plaintiffs entitled to the said land?

A. No.

(5) Was deed of donation No. 21891 referred to in issue (1) duly accepted?

A. Yes, because the evidence shows that Kathiravetpillai after his father's death possessed this land among others and even accepted the position that he could not alienate this land for 25 years. 20

(6) If the above issue is answered in the negative, is the said deed invalid?

A. Does not arise in view of my answer to issue 5.

(7) Was Murugesapillai Kathiravetpillai the sole heir of Vinasithamby Murugesapillai?

A. Yes.

(8) Did the said Kathiravetpillai by virtue of the final partition decree in case No. 23784 District Court, Jaffna, become absolute owner of lot 3 on Plan No. 1308 dated 24.1.59 filed of record marked X? 30

A. Yes.

5.

(9) Did the said Kathiravetpillai and certain others by deed No. 3186 dated 18.6.34 sell and convey to S. Vinasithamby the right, title and interest of the said Kathiravetpillai in the said lot 3 of plan X?

A. Yes.

10 (10) Did the said Vinasithamby leave behind a last will No. 3311 dated 8.10.34 bequeathing all his property to his wife Thaialmuttu?

A. Yes.

(11) Did the said Thaialmuttu by deed No. 92 dated 27.8.37 sell and convey lot 3 along with other land to the Defendant?

A. Yes.

(12) Prescriptive right of parties?

A. Defendant has acquired prescriptive right and title.

20 (13) Did the said Deed No. 21891 create a valid fidei commissum?

A. No.

(14) Even if Court holds that deed No. 21891 created a valid fidei commissum is the Defendant a bona fide purchaser for value without notice of fidei commissum?

30 A. No. He will not be a bona fide purchaser if Pl created a fidei commissum.

(15) If issues Nos. 6, 7, 8, 9, and/or 14 are answered in the affirmative -

(a) has the Plaintiff a cause of action?

(b) is the Defendant entitled to the said land?

- A. (a) No.
(b) Yes.

(16) Even in the event of the Court holding that deed No. 21891 created a valid fidei commissum, is the half share of the said lot 3 free of the said fidei commissum?

- A. No. If P1 created a fidei commissum, half share of lot 3 cannot be free of fidei commissum.

(17) Has the Defendant improved the said Lot 3 in the manner stated in the amended answer? 10

- A. Yes, not to the value of Rs. 25,000/-.

(18) In the event of the Court holding that the said land is subject to fidei commissum -

(a) what amount, if any, is the Defendant entitled to as compensation for improvement?

(b) is the Defendant entitled to retain possession of the said lot 3 till such compensation is paid to him? 20

- A. (a) Rs.9,000/-.
(b) No.

(19) Is deed No. 3186 invalid in law in as much as the proceedings held in case No. T.R. 36 of this Court were and are ultra vires?

- A. No.

(20) Was deed No. 21891 referred to in the issue never registered? 30

- A. Deed 21891 was registered.

(21) Were deeds Nos. 3186 dated 18.6.34 and 92 dated 22.9.37 duly registered?

- A. Deeds 3186 and 92 were registered but not correctly.

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(22) Were the said deed and/or No. 92 executed for valuable consideration?

A. The said deeds were executed for valuable consideration.

(23) If issues (20), (21) and (22) are answered in the affirmative does the said deed No. 3186 and/or No. 92 prevail over the said deed No. 21891?

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A. Does not arise. Deeds 3186 and/or 92 cannot prevail over deed 21891 if they are conflicting deeds.

(24) If issue (23) is answered in the affirmative, is the Defendant entitled to lot 3 on the said plan 'X'?

A. Does not arise in view of my answer to 23.

7. In dismissing the Appellants' action the learned District Judge stated as follows:-

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"The Plaintiffs have come into Court on the basis that deed No. 21891 Pl created a valid fidei commissum would have succeeded in the action if I answered issue 13 in the affirmative. They have failed in this Court, but they appear to have honestly believed that Pl created a valid fidei commissum."

p.63 11.21-26

It is respectfully submitted that, but for the decision on the issue of fidei commissum, the answers to issues 8 and 12 would have been in the Appellant's favour because -

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(a) The land in dispute was subject to the fidei commissum in favour of the Appellants at the time the predecessor in title of the Respondent purchased it; and

(b) Because the Appellants were minors at the time of the sale and the present action was brought by them before the Respondent could acquire title by prescription.

In the event of the Court holding that deed

No. 21891 created a fidei commissum, the Appellants would then become the fidei-commissaries and as against them prescription did not begin to run until after the death of the fiduciaries (9 N.L.R.126; 9 N.L.R.257; 28 N.L.R.92; 58 N.L.R.217 PC; 61 N.L.R.138, 412; section 3 Proviso). When this right accrued to the 2nd and 4th Plaintiffs, they were minors and hence section 13 of the Prescription Ordinance applies and prescription would begin to run only when each of them attained majority. This action was filed within ten years of their majority.

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8. The vital question whether the deed of donation 21891 created a fidei commissum was answered by the learned District Judge against the Appellants for two reasons which are contained in the passages from his judgment reproduced below -

p.60 1.41 -
p.61 1.3

(a) "Under the deed if the contention of the Plaintiffs be accepted, the children of Kathiravetpillai and Kumaravetpillai as fidei commissarii, would be entitled to the properties. But Murugesupillai would have had the power to revoke the deed and exercise the powers reserved to him under the said deed. I am inclined to think that no fidei commissum could be created by a deed of this kind, where the donor reserves to himself the right to revoke."

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p.61 11.7-24

(b) "That portion which deals with prohibition against alienation does not set out who were to be the beneficiaries. It might have been the intention of the donor to have made the children of the donees the beneficiaries. If this instrument were a last will or testament, there would have been a certain amount of latitude in the interpretation of this instrument and the intention of the testator could have been taken into account. But this being a deed inter vivos, I am unable to find in the deed itself any words which designate beyond doubt the beneficiaries or the persons who would be benefited as fidei commissarii under this deed. Every deed has to be considered carefully before one can state whether there is a clear designation of the fidei commissarii or not."

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Learned Counsel for the Plaintiffs argued that Clause 2 consists of one sentence and it is to be considered as a whole, and if one read that Clause as consisting of one involved sentence, one would find that the fidei commissarii had been clearly designated. There is something in what he says; but taking all things into consideration, I hold that Pl does not create a valid fidei commissum."

9. In regard to the quantum of compensation the learned District Judge said -

"There is no evidence placed before me to show that the Defendant could not have spent Rs.10,200/- on the said improvements. I, however, value the improvements at Rs.9,000/-. In the event of the Defendant failing on the question of fidei commissum, he will be entitled to compensation in a sum of Rs.9,000/-."

p.62 11.18-22

10. As to the decision of the learned District Judge on the question whether deed No. 21891 creates a fidei commissum, it is respectfully submitted that -

(a) The decision is contrary to authority, in particular to an unreported decision of the Supreme Court (Supreme Court Minutes on September 15 1949) which was considered and applied in Mohideen Hadjiar v. Ganeshanetal (65 New Law Reports 421) and in Kanayson et al. v. Thankachiammal. An appeal from the last mentioned decision is now pending before Your Lordships Board (Appeal No.7 of 1965). In each of these cases the decision was based upon the finding that the deed in question created a valid fidei commissum;

(b) The learned District Judge wrongly broke up the second condition in the deed into two parts and then looked at each part in isolation for the purpose of deciding whether there was a sufficient designation of beneficiaries in the condition.

(c) The view of the learned District Judge

that the reservation of the power of revocation defeats a fidei commissum otherwise validly created by a deed inter vivos is contrary to the principles of Roman Dutch Law as recognised in Ceylon.

11. In regard to the finding that the beneficiaries have not been sufficiently designated, it is further respectfully submitted:

- (a) that it is a well recognised principle of Roman Dutch Law that a fidei commissum is induced by a prohibition against alienation out of the family because the legal implication of such a prohibition is that it is for the benefit of the descendants of the donor or of the particular generation or generations of them indicated in the prohibition; and 10
- (b) that Exhibit P1 (irrespective of the differences in the two translations in the Record) contains such a prohibition. 20

12. It is respectfully submitted that the decision of the learned District Judge in regard to compensation for improvements is wrong because -

- (a) he failed to consider or apply the rules relating to the nature of the improvements and quantum of compensation;
- (b) the burden of proving the right to compensation and the quantum of compensation was upon the Respondent; 30
- (c) there was no evidence to support the finding that the Respondent was entitled to compensation in a sum of Rs.9,000/2 or in any sum whatsoever; and
- (d) the learned Judge was wrong in holding that the Respondent was entitled to compensation on the principle of acquiescence, particularly in view of their minority.

13. The Appellants appealed, and the Supreme Court (H N G Fernando J and Herat J) dismissed, 40

without reasons, the appeal with costs on June 1 1962.

14. It is respectfully submitted that this appeal should be allowed, with costs throughout, for the following, among other

R E A S O N S

1. BECAUSE the construction placed upon deed No. 21891 by the learned District Judge is wrong in law.
- 10 2. BECAUSE the learned District Judge erred in regard to the onus of proof, of the right to compensation and has failed to consider or apply the relevant rules relating to the ascertainment of the nature of improvements and to the quantum of compensation.
3. BECAUSE the deed No. 21891 creates a valid fidei commissum in favour of the 2nd and 4th Appellants.
4. BECAUSE the 2nd and 4th Appellants are entitled to the subject matter of the action.
- 20 5. BECAUSE the judgment of the District Court is wrong in so far as it decides against the Appellants the issues relating to the construction of deed 21891 and compensation for improvements.
6. BECAUSE the judgment of the District Court is wrong on the issue of prescription.
7. BECAUSE the judgment and Decree of the Supreme Court dated June 1 1962 is wrong and should be reversed.

No. 55 of 1964

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT
OF CEYLON

B E T W E E N :

1. AMBALAVANAR KANAYSON and Wife
2. SELVAKKANMANIAMMAL
3. SANGARAPILLAI PARAMESWARAN
4. NAGARAJESWARI
Plaintiffs - Appellants

- and -

ERAGUNATHAR PONNU RASIAH
Defendant - Respondent

CASE FOR THE APPELLANTS

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Fos. 65

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