



1.

IN THE PRIVY COUNCIL

No.7 of 1965

O N A P P E A L
FROM THE SUPREME COURT OF CEYLON

B E T W E E N

THANKACHCHIAMMAH (1st Defendant-Appellant)
(Widow of MARIMUTTU)

Appellant

- and -

- | | | | |
|----|---|---|---|
| | 1. AMBALAVANAR GANESHAN | | |
| 10 | 2. SELVAKKANMANIAMMAL
(Wife of No.1) | } | (Plaintiff-
Respondents) |
| | 3. SANGARAPILLAI PARAMESWARAN | } | |
| | 4. NAGARAJESWARY
(Wife of No.3) | } | |
| | 5. VAIRAVI SINNIHAH | } | |
| | 6. MAHILAMMAH (Wife of
No.5) | } | (2nd and 3rd
Defendants-
Respondents) |

Respondents

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C A S E FOR THE RESPONDENTS

(No 164)

1. The above named Appellant appeals from the Judgment and Decree of the Supreme Court of Ceylon dated the 13th July 1962 dismissing with costs the Appellant's appeal against the Judgment and Decree of the District Court of Jaffna dated the 25th August 1962, whereby the District Court gave judgment against the Appellant, declaring the 2nd and 4th Plaintiffs-Respondents

p4511-p46110

p27125-p35125
p35126-p36148

above named to be entitled to the land which formed the subject matter of the action.

p911-p1.7131

2. In an action filed on the 16th June 1959 in the District Court of Jaffna, the Plaintiffs-Respondents above named (hereinafter called the Plaintiffs) sued the Appellant and the 5th and 6th Respondents above named for a declaration that the 2nd and 4th Plaintiffs be declared entitled to an undivided half-share of a certain land described in the plaint, for the ejectment of the Appellant therefrom and for an order for damages against the Appellant for unlawful possession. The 1st and 2nd Plaintiffs were joined in the action as the husbands of 2nd and 4th Plaintiffs, respectively. The 5th and 6th Respondents above named were added as party-defendants to give them notice of the action as they were co-owners of the land.

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p111135-49

p111121-27

3. The Plaintiffs' claim was based on a deed of Donation No. 21891, dated the 3rd March 1921 (Exhibit P1) which, according to the Plaintiffs, created a fidei commissum in their favour.

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pp61-63

p1811-p20126

4. In her answer, filed on the 20th August 1959, the Appellant denied the Plaintiffs' claim and claimed title upon a transfer by the Administrator of the estate of Kathirvetpillai, the father of the 2nd and 4th Plaintiffs (who, according to the Plaintiffs, was the fiduciary under P1) to her predecessor in title and upon prescription.

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5. The principal question to be decided in this appeal is whether the deed of donation No. 21891 created a fidei commissum in favour of the Appellants.

6. The relevant facts, briefly stated, are as follows:-

p91130-35
p181128-29.

(a) Vinasithamby Murugesapillai who was at all times the admitted owner of the land in dispute, donated a large number of lands, including the land in dispute to his sons Kumaravetpillai and Kathiravetpillai by deed No. 21891 of March 3rd

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LEGAL STUDIES
18 MAR 1966
25 RUSSSELL SQUARE
LONDON, W.C.1.

1921 subject to the following among other conditions:

- 10 "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, otto 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." p621118-29
- 20 The original of the deed was in Tamil (the language of the people of Jaffna) and the passage reproduced above is from the translation accepted by the learned trial Judge.
- (b) Kumaravetpillai died issueless in the lifetime of his father and the deceased's share devolved, by the law of inheritance applicable to Jaffna Tamils, on his father Venasithamby free of the bond of fidei commissum. p91143-44
p1181128-29
- (c) When Venasithamby died on August 27th, 1921, the surviving son Kathiravetpillai inherited the half-share referred to in sub-paragraph (b) above. p6711-p68115
- 30 (d) Kathirvetpillai sold the half-share referred to in sub-paragraph (c) above by deed No.18637 of November 16th, 1929 to one Vallipuram. pp70-74
- 40 (e) Kathirvetpillai died on October 20th, 1940 and his estate was administered in D.C. Jaffna Testamentary Case No. 1042. His lawful heirs are the 2nd and 4th Plaintiffs who are his daughters. p76110-p80134
- (f) The predecessor in title of the Appellant obtained a deed of transfer from the administrator of the estate of deceased Kathirvetpillai. This deed was attacked by the p92121-p96122
p25112-22

Plaintiffs on the ground that Administrator had no legal authority to sell the property.

pp23-25

p34124-
p35128

7. The issues raised and accepted at the trial were answered by learned District Judge as follows -

1. Did Kathirevetpillai become entitled to half share of the land described in the schedule to the plaint subject to a fidei commissum in favour of his children by virtue of deed No. 21891 of 3.3.21? 10

Yes.

2. Did the said half share pass to the 2nd and 4th Plaintiffs by virtue of the said deed No.21891 on the death of the said Kathiravetpillai?

Yes.

3. Damages?

(Damages agreed upon at Rs.50/- special damages and Rs.10/- per month from the date of action)

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Rs.50/- special damages and Rs.10/- per month from date of action as agreed upon.

4. Does the said deed No.21891 create a valid fidei commissum?

Yes.

5. Even if issue No. 4 is answered in the affirmative was the half share conveyed by deed No. 224 of 3rd February, 1943, and attested by Mr. V. K. Subiramaniam subject to a fidei commissum? 30

Yes.

6. If issue 4 or issue 5 is answered in the negative can the plaintiffs maintain this action?

Does not arise.

7.(a) Was the Administrator of the estate of Murugesapillai Kathiravetpillai in Testy Case No. 1042 D.C. Jaffna authorised by this court by order dated 5.2.43 to sell and convey to S. V. Sanmugampillai an undivided half share of the said land?

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(a) Did the 2nd and 4th Plaintiffs consent to the said sale by writing dated 20.12.42?

(b) The Court purported to authorise the administrator in case No. 1042 Testy. to sell an undivided half share of the land, but this was not a valid order.

(d) The 2nd and 4th plaintiffs purported to consent but they were incompetent to give such consent.

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8. Did the said Administrator by deed No. 224 referred to above sell and convey the said half share to the said S. V. Sanmugampillai?

Yes.

9. If issue 7 (a) or 7 (b) is answered in the affirmative are the 2nd and 4th Plaintiffs estopped from denying the validity of the said deed No. 224?

Does not arise. I would add that the 2nd and 4th plaintiffs are not estopped from denying the validity of deed 1224.

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10. Was the entire land referred to in the schedule annexed to the plaint amicably partitioned among the co-owners in or about the year 1943?

Yes.

11. By virtue of the said partition was a divided extent of 15 Lms. P.C. on the South of the entire land allotted to the said S.V. Sanmugampillai?

Yes.

12. Have the said Sanmugampillai and his successors-in-title acquired prescriptive right and title to the said divided 15 Lms. P.C. on the south?

No.

14. Did S. V. Sanmugampillai on deed No. 3021 of 6.2.54 convey a divided 8 Lms. P.C. and 7 Kls. on the east to Marimuthu and his wife Thankachchiammah (1st Defendant).

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- 14.(a) Has that devolved on the 1st Defendant by deed No. 3080 of 18.10.54?

Yes.

15. Has the 1st Defendant acquired prescriptive title to it?

No.

19. Did Kathirevetpillai convey the half share, which he inherited from his father to certain V. Vallipuram by deed No. 18637 of 16.11.29?

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Yes.

20. Has that half share passed to the 3rd and 4th Defendants?

Yes.

21. Was the half share which Kathirevetpillai was entitled to by virtue of the said deed No. 21891 part of the estate of the said Kathirevetpillai?

No.

22. If not, could deed No. 224 convey any title to the said half share?

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No.

23. Were the 2nd and 4th Plaintiffs properly represented in Testy. Case No. 1042 of this Court?

No.

24. Was the order Nisi or the Letters of Administration in Testy, Case No. 1042 Testy of this Court duly published?

No.

10 25. If either issue 23 or 24 is answered in the negative, were the proceedings and orders in the said case No. 1042 Testy bad in law?

Yes.

26. Have the 2nd and 4th Plaintiffs been divested of their title to the said half share by virtue of the execution of the said deed No. 224?

No.

20 (It is admitted that the 2nd and 3rd Defendants are entitled to half share on deed No. 18637 of 16.11.29).

29. Does the order making the Order Nisi absolute in Testy Case No. 1042 D. C. Jaffna constitute a decree in rem binding the Plaintiffs?

No.

30. If so, are the Plaintiffs barred and estopped in law from maintaining this action?

Does not arise.

30 8. The Learned District Judge gave judgment as prayed for with costs except that damages were awarded as agreed upon by the contesting parties

p351115-20

9. The grounds for the Learned District Judge's decision were as follows:

- p321144-45
p321145-52
- (a) In regard to the issue whether the deed in question created a fidei commissum, the learned Judge preferred the translation attached to the plaint but went on to hold that, on either translation, the deed created a fidei commissum because there was a prohibition against alienation in favour of the members of a family.
- p34111-10
- (b) As to issue of prescription, the learned Judge referred to the minority of the Appellants during the relevant period and held that the Respondents did not prescribe to the land. 10
- (c) In regard to the purported authorisation by Court of the sale of the land in dispute, the learned Judge held that the authorisation was bad on either of the following grounds:
- p331144-51
- (i) The relevant provisions of the Civil procedure were not followed: and 20
- p331152-55
- (ii) because the property in dispute did not form part of the deceased Kathirvetpillai's estate, the fiduciary interest having ceased on death.
- p37120-
p44120
10. The Appellant appealed to the Supreme Court and on the 13th July 1962 (Sansoni J and Silva J) the Court, after hearing Counsel for the Appellant, dismissed the appeal with costs. 30
- p4511-
p46110
11. In addition to the reasons given by the learned District Judge, the Plaintiffs respectfully submit the following reasons in support of the judgment of the District Court:
- (a) The fidei commissum created by Pl falls into the class of tacit fidei commissum in favour of a family (in the particular case, a specified generation) induced by a prohibition against alienation; and all the 40

requisites of this particular class of fidei commissum are present.

(b) that the words "in any other document" used at the end of the provision prohibiting alienation catch up all forms of alienation including alienation by Last Will.

10 (c) the decision of the District Court is supported by the unreported decision of the Supreme Court, dated 15th September 1949, in which the deed in question was held to create a valid fidei commissum and by the decision in Mohideen Hadfiar v. Ganesham (55 New Law Reports 421) in which Pl was again interpreted by the Supreme Court as creating a valid fidei commissum.

20 (d) Even if the deed of donation Pl does not create a fidei commissum, the Appellant does not have a valid title because the sale to her predecessor in title was bad for the reasons given by the learned District Judge. This finding of the learned District Judge is further supported by the circumstance that Kathirvetpillai's minor son, who was the sole heir under Kathirvetpillai's Will, had died before the Administrator (cum testamento annexo) of Kathirvetpillai's estate sought to obtain the permission of Court to sell the land in question.

30 (e) Even if the deed of donation does not create a fidei commissum, the Plaintiffs, who are the heirs of their deceased brother Murugesapillai, are entitled to the land in view of the findings of the learned District Judge referred to in sub-paragraphs 9(b) and 9(c)(i) above.

12. It is respectfully submitted that the appeal should be dismissed with costs for the following among other

R E A S O N S

1. BECAUSE the decision of the learned District Judge that the deed No.21891 creates a fidei commissum in favour of the Plaintiffs is right.
2. BECAUSE the learned District Judge has rightly decided that the Appellant and her predecessors in title have not prescribed to the land,
3. BECAUSE (apart from the fidei commissum) the Appellant's predecessor in title not having obtained a valid transfer from the Administrator, the title to the land remained with the Plaintiffs.
4. BECAUSE a decree for the Partition of a land burdened with a fidei commissum does not destroy the fidei commissum.

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(Wife of No.3)
5. VAIRAVI SINNIAH } (2nd and 3rd
6. MAHILAMMAH } Defendants-
(Wife of No.5) } Respondents)

Respondents

C A S E FOR THE RESPONDENTS

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