

IN THE PRIVY COUNCILNo. 14 of 1965ON AN APPEALFROM THE SUPREME COURT OF CEYLONB E T W E E N :-

1. AMBALAVANAR GANESHAN and wife
2. SELVAKANMANTIAMMAL both of Vaddukoddai
East (now residing in Singapore)
appearing by their Attorney the
3rd Plaintiff
3. SANGARAPILLAI PARAMESWARAN and wife
4. NAGARAJESWARY both of Vaddukoddai
East.

Plaintiffs - Respondents

 Appellants

- and -

1. RAJARATNAM ARULPRAGASAM and wife
2. WALLIAMMAI both of Anaicoddai Road,
Kokuvil West, Kokuvil.

1st & 2nd Defendants -
Appellants

 Respondents

3. VAIRAVI SINNHIAH and wife
4. MAHILAMMAH both of 74/1 Kasturuar Road,
Jaffna.

3rd & 4th Defendants -
Respondents

 Respondents

RecordCASE FOR THE APPELLANTS

- This is an appeal by the Plaintiffs- Respondents- Appellants abovenamed (hereinafter called the Appellants) from the judgment and decree of the Supreme Court dated 3rd September 1963 whereby the Supreme Court, on an appeal by the 1st and 2nd Defendants-Appellants- Respondents above-named (hereinafter called the Respondents) set aside the decree of the District Court of Jaffna dated August 22nd 1960 which had upheld the Appellants claim to an undivided half-share of a certain land. 10
2. In the action, in which this appeal arises, the Appellants sued the Respondents in the District Court of Jaffna for a declaration that the 2nd and 4th Appellants be declared entitled to an undivided half-share of a certain land, for the ejectment of the 1st and 2nd Respondents therefrom and for an order for damages against the 1st and 2nd Respondents for unlawful possession. The 1st and 3rd Respondents joined in the action as husbands of the 2nd and 4th Respondents. The 3rd and 4th Respondents, who did not dispute the Appellants' claim, were joined in the action as they were co-owners of the undivided share not claimed by the Appellants 20
3. The Appellants' claim was based on a deed of donation No. 21891 dated March 3rd 1921 (exhibit P1) which, according to the Appellants, created a fidei commissum in their favour. 30
4. The 1st and 2nd Respondents denied the Appellants' claim and claimed title upon a transfer by the administrator of the estate of Kathirvetpillai, the father of the Appellants (who, according to the Appellants, was the fiduciary under the said deed P1) to their predecessor in title and upon prescription. They also claimed compensation for improvements in the event of the Appellants being declared entitled to the subject matter of the action. 40
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.

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

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- 10 (a) Vinasithamby Murugesapillai who was at all relevant 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 1921 subject to the following among other conditions:
- 20 "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".
- 30 The original of the deed was in Tamil (the language of the people of Jaffna) and the passage produced 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.
- 40 (c) When Venasithamby died on August 27th, 1921, the surviving son Kathiravetpillai inherited the half-share referred to in sub-paragraph (b) above.
- (d) Kathirvetpillai sold the half-share referred to in sub-paragraph (c) above by deed No. 18637 of November 16th, 1929 to one Vallipuram.

p.18.11.35-36

pp. 73-74

p.73.1.37-p.74.1.4.

p.42.11.1-3.

p.9.11.36-43

p.79.1.9

pp.81-84.

Record
p.89.1133-35.

(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 Appellants who are his daughters.

p.99.11.p.101
1.25

(f) The predecessor in title of the 1st and 2nd Respondents obtained a deed of transfer No. 224 dated February 3rd, 1943 from the administrator of the estate of deceased Kathirvetpillai. This deed was attacked by the Appellants on the ground that Administrator had no legal authority to sell property.

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

p.22.1.37-p.24 Q.
1.40
p.44.1.13-p.45
1.17

1. Did Kathirvetpillai 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?

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A: 1. Yes.

Q: 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 Kathirvetpillai?

A: 2. Yes.

Q: 3. Damages.

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

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A: 3. Rs. 50/- special damages and Rs. 10/- per month from date of action as agreed upon.

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

A: 4. Yes.

- Q: 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. Subramaniam Notary, subject to a fidei commissum?
- A: 5. Yes.
- Q: 6. If issue 4 or issue 5 is answered in the negative can the plaintiffs maintain this action?
- 10 A: 6. Does not arise.
- Q: 7. (a) Was the Administrator of the estate of Murugesapillai Kathirvetpillai in Testamentary 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?
- (b) Did the 2nd and 4th plaintiffs consent to the said sale by writing dated 20.12.42?
- 20 A: 7. (a) The Court purported to authorise the administrator in case No. 1042 Testamentary to sell an undivided half share of the land, but this was not a valid order.
- (b) The 2nd and 4th plaintiffs purported to consent but they were incompetent to give such consent.
- 30 Q: 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?
- A: 8. Yes.
- Q: 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?
- A: 9. Does not arise. I would add that the 2nd and 4th plaintiffs are not estopped

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from denying the validity of deed 1224.

- Q: 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?
- A: 10. Yes.
- Q: 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? 10
- A: 11. Yes.
- Q: 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?
- A: 12. No.
- Q: 13. (a) Did the said Sanmugampillai improve the said land by erecting buildings, sinking wells, constructing parapet walls and filling the land with earth? 20
- (b) Did the said Sanmugampillai effect the said improvements at a cost of RS. 80,000/00 or any other sum?
- A: 13. (a) Yes.
- (b) - At less than Rs. 25,000/-.
- Q: 14. Did the said Sanmugampillai by deed No. 5459 of 4.12.54 attested by Mr. S. Thirunavukarasu, Notary, convey by way of dowry to the 2nd defendant a divided 5 lms. p.c. and 7 kls. on the west out of the said divided extent of 15 lms. p.c. with five shop buildings, well and other appurtenances as represented by lot 1 in survey plan No. 344 of 8.3.52 made by Mr. A. Lazarus, Licensed Surveyor? 30

A: 14. Yes.

Q: 15. Has the 2nd defendant acquired prescriptive right and title to the said divided extent of 5 Ims. p.c. and 7 Kls. in terms of section 3 of the Prescription Ordinance?

A: 15. No.

10. Q: 16. Was the said Sanmugampillai a bona fide purchaser for valuable consideration without notice of the alleged fidei commissum?

A: 16. No.

Q: 17. If the above issue is answered in the affirmative have the said Sanmugampillai and his successors in title acquired valid right and title to the said half share free of the alleged fidei commissum?

A: 17. Does not arise.

20. Q: 18. If issue 13 is answered in the affirmative and the event of the court holding that deed No. 21891 created a valid fidei commissum and that the 2nd and 4th plaintiffs are entitled to the said land, are the said plaintiffs liable to pay the 2nd defendant a sum of Rs.80,000.00 or any other sum by way of compensation for improvements?

A: 18. No.

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

A: 19. Yes.

Q: 20. Has that half share passed to the 3rd and 4th defendants?

A: 20. Yes.

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- Q: 21. Was the half share which Kathiravetpillai was entitled to by virtue of the said deed No. 21891 part of the estate of the said Kathiravetpillai?
- A: 21. No.
- Q: 22. If not, could Deed No. 224 convey any title to the said half share?
- A: 22. No.
- Q: 23. Were the 2nd and 4th plaintiffs properly represented in Testamentary Case No. 1042 of this court? 10
- A: 23. No.
- Q: 24. Was the Order Nisi or the Letters of Administration in Case No. 1042 Testamentary of this Court duly published?
- A: 24. No.
- Q: 25. If either issue 23 or issue 24 is answered in the negative, were the proceedings and orders in the said Case No. 1042 Testamentary bad in law? 20
- A: 25. Yes.
- Q: 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?
- A: 26. No.
- Q: 27. Was Sanmugampillai a male fide possessor?
- A: 27. Yes. 30
- Q: 28. Were the improvements alleged to have been effected by the said Sanmugampillai necessary improvements?
- A: 28. No.

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8. The Learned District Judge gave judgment as prayed for with costs except that damages were awarded as agreed upon by the contesting parties. Record
p.45.11.17-23

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

- 10 (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. p.42.11.1-3
p.42.11.9-14
- (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. p.43.1.44-p.44.1.3
- 20 (c) In regard to compensation for improvements claimed by the Respondents, the learned Judge held that the Respondents were mala fide possessors and were therefore entitled only to necessary improvements the value of which he held to be below Rs.25,000/- p.43.1.38-p.44.1.3
- (d) 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 because -
- 30 (i) The relevant provisions of the Civil procedure were not followed: and p.42.1.18-p.43.1.3
- (ii) because the property in dispute did not form part of the deceased Kathirvetpillai's estate, the fiduciary interest having ceased on death. p.43.11.4-7
- 40 10. The 1st and 2nd Respondents appealed and the Supreme Court (Abeysondere J. and Herat J) allowed the appeal holding that the deed of Donation No.21891 did not create a fidei commissum. The grounds for their decision were: p.47.1.22-p.53.1.45

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p.56.11.11-38
p.56.11.11-38

(a) That the translation produced by the Appellants and accepted by the trial Judge was incorrect and the words "should allow the land to devolve on their children by way of mudusom" appearing in that translation should be altered to "may allow the lands to devolve on their children by way of mudusom".

p.56.1.39-p.57
1.8

(b) That upon the altered translation, the deed contained no prohibition of disposal by last will; and

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p.57.11.9-15

(c) That the provision allowed the donees to alienate the property after a period of 25 years commencing with the death of the donor indicated that he had "no intention of determining the persons to whom the donated property shall pass after his death".

11. It is respectfully submitted that the decision of the Supreme Court is wrong for the reasons:

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(a) The question whether the correct word to use was "may" or "should" was not raised at the trial and the view expressed by the Supreme Court depended upon inferences drawn from evidence given in regard to other, though related, matters. Where a translation does not (and presumably cannot for differences in idiom and syntax) follow the arrangement of words in the original text, it was dangerous and wrong for the learned Judges who are Senhalese and unacquainted with the Tamil language, to vary a translation accepted by a Court in Jaffna where the Judge and counsel who are Tamils must be taken to have understood the language of the document. Further this question was not put to the expert witnesses at the trial.

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(b) The words "in any other document", occurring as they do at the end of the provision prohibiting alienation and

after the word "transfer, donation, dowry",
 catch up alienation by last will. This
 submission is supported by the words "and
 may only give the said lands to their
 children....."

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10 (c) As to ground (c) in paragraph 10 above,
 it is respectfully submitted that the
 absence of an intention of determining the
 persons to whom the property should pass on
 the death of the donees if their deaths should
 occur after the period of 25 years is not
 adverse to the Appellants' contention:
 The prohibition against any act preventing
 devolution on the children (as indeed the
 other prohibited acts of alienation) were
 expressed to operate only for the period
 of 25 years commencing with the death of the
 donor and the fidei commissum arising from
 such prohibition was similarly limited in
 20 its operation to that period.

(d) In any event, the absence of a provision
 prohibiting alienation by last will does not
 prevent a fidei commissum being induced by
 the express prohibitions against alien-
 ation provided in the deed.

30 (e) Even if the property in dispute was
 not subject to a fidei commissum, the
 1st and 2nd Respondents have no title to
 the property by prescription or otherwise,
 in view of the findings of the learned
 trial judge referred to in sub-paragraphs
 9(b) and 9(d)(i).

40 12. It is respectfully submitted that the
 learned District Judge is right in his decision
 on the issue of fidei commissum and on the
 other issues in the case. It is supported by
 the Judgment of the Supreme Court in Mohideen
 Hadjiar v. Ganeshan et al (55 New Law Reports
 421) and the decision of the Supreme Court in
Kahayson et al v. Thankachiammal an appeal
 from which decision is pending before Your
 Lordships' Board (Appeal No. 7 of 1965). In
 each of these cases, the decision was based on
 the finding that the deed of donation in question
 created a fidei commissum.

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It is respectfully submitted this appeal should be allowed with costs throughout, and the Judgment and decree of the District Court restored for the following among other

R E A S O N S

1. BECAUSE the Supreme Court was wrong in basing its decision on a translation different from that accepted by the learned Trial Judge.
2. BECAUSE deed No. 21891 creates a fidei commissum even if the translation adopted by the Supreme Court were correct. 10
3. BECAUSE the decision of the District Judge that deed No. 21891 creates a fidei commissum in favour of the Appellants is right for the reasons given in his Judgment.
4. BECAUSE the findings of the District Judge on the issues other than the issue of fidei commissum are right for the reasons given in his judgment. 20
5. BECAUSE apart from the question of fidei commissum, paper title to the property is in the 2nd and 4th Appellants while the 1st and 2nd Respondents have not proved prescription.

WALTER JAYAWARDENA

IN HER MAJESTY'S PRIVY COUNCIL

ON AN APPEAL FROM THE SUPREME
COURT OF CEYLON

B E T W E E N :-

1. AMBALAVANAR GANESHAN and wife
2. SELVAKANMANIAMMAL
3. SANGARAPILLAI PARAMESWARAN
and wife
4. NAGARAJESWARY both of
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Plaintiffs - Respondents

Appellants

- and -

1. RAJARATNAM ARULPRAGASAM and wife
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