

Privy Council Appeal No. 55 of 1964

Ambalavanar Kanayson and others - - - - *Appellants*

v.

Eragunathar Ponnu Rasiah - - - - *Respondent*

Privy Council Appeal No. 7 of 1965

Thankachchiammah - - - - *Appellant*

v.

Ambalavanar Ganeshan and others - - - - *Respondents*

Privy Council Appeal No. 14 of 1965

Ambalavanar Ganeshan and others - - - - *Appellants*

v.

Rajaratnam Arulpragasam and others - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 7TH JUNE 1967

Present at the Hearing :

VISCOUNT DILHORNE

LORD HODSON

LORD GUEST

LORD UPJOHN

SIR HUGH WOODING

[*Delivered by LORD UPJOHN*]

These three appeals were heard successively before their Lordships but it will be convenient to deliver one judgment in all three for the principal issue is the same in each of them. This issue is whether a deed executed on 3rd March 1921 and numbered 21891 (the Deed) by Vinasithamby Murugesapillai (the donor) whereby he gave certain lands to his two sons as donees subject to conditions imposed for a term of 25 years from the death of the donor was effective to create a valid *fidei commissum* binding on those donees, for that term of years.

The relevant facts may be quite shortly stated and where it is necessary to differentiate between the three appeals they will be referred to their number of Record before the Board.

At the date of the Deed, as was recited, the donor had two sons Murugesapillai Kathiravetpillai and Murugesapillai Kumaravetpillai.

He gave to them extensive lands specified in 28 clauses in the Deed and amounting to the total value of Rs.77,570.00 a very large sum indeed by relevant standards.

Murugesapillai Kumaravetpillai died shortly thereafter without issue in the lifetime of his father, the donor, who himself died on 27th August 1921.

It is not in dispute that the half share donated to Murugesapillai Kumaravetpillai passed to his father as his heir at law and thence on the father's death to Murugesapillai Kathiravetpillai free of any *fidei commissum* so that this appeal is concerned only with the half share donated to Murugesapillai Kathiravetpillai who will henceforth be referred to as the donee.

It appears that during his lifetime the donee sold some of the lands subject to the Deed to different purchasers absolutely but not subject to the conditions imposed on him by the Deed. The donee died on 20th October 1940, that is within 25 years of the death of the donor leaving as his heirs two daughters (the daughters) the 2nd and 4th appellants in appeals 1964/55 and 1965/14 and the 2nd and 4th respondents in appeal 1965/7. The parties joining with them in these appeals are their respective husbands, as is required by the rules of procedure in Ceylon. The donee also had a son who, it appears, died in early infancy and nothing arises thereon.

The daughters claim to be *fidei commissaries* under the Deed and as such to be entitled to the lands sold or disposed of by their father, the donee, in his lifetime. They have therefore instituted a number of actions against those in possession of some of such lands, claiming declarations of title as owners accordingly.

Three of such actions are those under appeal before their Lordships. There are others to which reference will be made later.

Before referring to the Deed or the principles of law that must be applied to it there is one troublesome matter to which their Lordships must refer.

The Deed was written in Tamil, the local language, but as the language of the Courts is English, the party tendering such a document as evidence must present a translation signed by a translator qualified to do so by sections 118 and 119 of the Civil Procedure Code. However this does not prevent another party from calling expert evidence (not necessarily a person qualified as prescribed by section 118) to challenge that translation nor the propounder of the translation from calling further expert evidence in rebuttal. In practice, their Lordships were informed, the qualified translator is seldom called as a witness and if his translation is challenged it is a matter for the Court to draw its conclusion as to the proper translation as a matter of fact upon the whole of the evidence tendered to it. It is not a matter on which the Court itself should use its knowledge of the language to assist in the translation of the document. See *Francisco v. Swadeshi Industrial Works, Ltd.* 53 N.L.R. 179 at 180/181 where earlier decisions of their Lordships on this point were quoted.

In all the cases except appeal 1964/55 the daughters tendered in evidence translations which corresponded very closely with each other but differed in a material respect from the translation tendered in that appeal.

Their Lordships think this is regrettable but for the reasons which can more easily be explained when their Lordships have examined the relevant principles of law, they propose to accept as the true translation that tendered by the daughters in appeal 1964/55. That translation is, as will appear, less favourable to the daughters than the alternative translation which they submitted in the other proceedings.

The relevant part of the Deed is as follows:

“For and in consideration of the love and affection which I have and bear unto them, I do hereby give and grant by way of donation

unto them in equal shares the aforesaid lands together with their appurtenances valued at the said sum of Rs.77,500.00, subject to the following conditions:

The Conditions are as follows:

There should be full authority and power for me to alienate by way of transfer, donation, dowry and any other documents, or to encumber by way of mortgage, otty, security or by way of other instruments, during my lifetime according to my wish, the said properties or to revoke this donation.

I do hereby bind them and declare that they should not alienate the said lands by any instruments such as transfer, donation, dowry or any other documents and should not encumber the same by document such as mortgage, otty, security or any other instruments, within 25 years after me except giving and granting the same to their children by way of mudusom or dowry and that the said lands shall not be liable for any debts which may be incurred by them.

I do hereby nominate and appoint their grandfather Ilanthalaivasinga Iragunathamudaliyar Thillainather of Vannarponnai east and Saravanamuttu Ambalavaner of Vaddukkodai east after me and give them power to jointly and severally look after and manage the said properties and to utilize the produce and income thereof for the food, clothing and education of the said Kathiravelupillai and Kamaravelupillai and for their wives and children during the said period."

The word "mudusom" requires some explanation. It is defined quite strictly by section 15 of the Jaffna Matrimonial Rights and Inheritance Ordinance as property devolving on a person by descent at the death of his or her parent or of any other ancestor in the ascending line, but it has a colloquial meaning closely equivalent to dowry or the acquisition of property by a son or daughter before marriage. See *Nalliah v. Ponnamah* 22 N.L.R. 198 at p. 204 per De Sampayo J. Having regard to the collocation of the words "by way of mudusom or dowry" their Lordships can feel no doubt that the word "mudusom" was used by the donor in its colloquial sense.

The principles to be applied when considering whether a Deed or Testament creates a valid *fidei commissum* are well settled but it should perhaps be stated that a *fidei commissum* has virtually nothing in common with the law of trusts (see Professor Lee's Introduction to Roman Dutch Law fifth edition p. 374. *Abeyawardene v. West* [1957] A.C. 176). Roman Law did not provide for trusts and could only attempt to fetter the enjoyment of the donee in favour of another by putting on him some obligation which in fact cut down the gift to him.

So the first well settled principle is that a *fidei commissum* being essentially the divesting to some extent of an absolute gift so as to cut down that absolute gift is regarded with disfavour by the Court. "Before the Court can construe a testamentary disposition to be a *fidei commissum* it must be satisfied beyond a reasonable doubt that the Testator intended to burden the bequest with a *fidei commissum*" see per Wessels J.A. in *Brits v. Hopkinson* 1923 S.A.L.R. 492 at 495, a principle equally applicable to a Deed and see to the same effect *Ex p Sadie* 1940 S.A.L.R. 26 at 30; so also the civilian writers Van Leeuwen (1625-1682) Commentaries on Roman Dutch Law p. 376 (the 2nd edition of Sir John Kotze), Voet (1647-1713) Commentary on the Pandects (Ganes Translation 1956) p. 446 s. 72. See also Lee (supra) at p. 376. But once the intention to create a *fidei commissum* is established mere difficulty of construction of the words used does not prevent its creation. The law

was in their Lordships' view summed up by Lord Thankerton in delivering the judgment of their Lordships' Board in *Abdul Hameed Sitti Kadija v. de Saram* [1946] A.C. 208 at p. 216;

"The authorities as to the rules of construction which apply to the present question are fully quoted by the learned judges of the Supreme Court, and their Lordships do not find it necessary to repeat them, but the following general principles may be derived from them. In the first place, where there is doubt whether a *fidei commissum* has been created, that construction should be preferred which will pass the property unburdened, but, if the language of the will is such as to show clearly an intention to create a *fidei commissum*, mere difficulty of construction will not prevent its being upheld. Doubt as to whether a valid *fidei commissum* has been created includes such doubt as to the identity of the beneficiaries as will prevent their ascertainment by a court of law. However difficult their application may be in a particular case, these general rules of construction appear to be well established."

No special words are necessary to create a *fidei commissum* though it must necessarily start with some prohibition against alienation of the thing already donated; it may be expressed on the one hand or implied or as it is more usually termed "tacit" on the other.

If express, e.g., "if my heir happens to die without children I wish him to allow the property derived by him from me to pass to such of my next of kin as may then be alive" then no difficulty arises (Huber (1636-1699) *Jurisprudence of My Time* (Ganes Translation) p. 189 para. 45); it being remembered that such words as "wish" or "desire" were by Roman Law treated as words of command and not of permission (though this seems to be doubtful by Roman Dutch Law).

Counsel for the daughters does not, however, rely on any express *fidei commissum* but founds himself on a tacit *fidei commissum*.

Where there is a prohibition on alienation but there is no express *fidei commissum* it is a question of construction as to its legal effect. If the prohibition is imposed without indicating the purpose of such prohibition or the persons for whose benefit the prohibition is imposed then it is said to be a "nude" prohibition and will be disregarded and the absolute gift to the donee will remain.

But if upon the proper construction of the Deed the purpose of the prohibition can be seen and there is a clear indication of a person or class of person for whose advantage the prohibition is imposed a tacit *fidei commissum* will be created in respect of such person or class of person. See Huber (supra) p. 190 paras. 51-54 also Voet (supra) p. 346-7 who gives a number of examples, the third is particularly relevant.

Van Leeuwen (supra) at p. 377 s. 6 says that a prohibition with the intention that his inheritance shall remain in his blood or family creates a valid *fidei commissum* in favour of the nearest of his family or blood relations. See also Sande (1577-1638) "Restraints on Alienation" (1892 translation) p. 171 para. 7. Lee (supra) at p. 376 sums it up in this way:

"An implied *fideicommissum* is created in many ways, for example, by prohibition of alienation general or to specified persons, provided that there is some clear indication of a person or class of persons for whose advantage the prohibition is imposed. Where there is such an indication, the prohibition takes effect as a *fideicommissum* in favour of the person or class of persons indicated. Where there is no such indication, the prohibition is 'nude' and wholly inoperative. If the heir is forbidden to alienate the property out of the family the law raises a conditional *fideicommissum* in favour of the intestate heirs, so that the heir is not free to dispose of the property out of the family either by act *inter vivos* or by will."

In one of the earlier cases in Ceylon *Robert v. Abeywardene* (1912) 15 N.L.R. 323 De Sampayo A.J. said at 324 "Now a prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a *fidei commissum* in favour of members of the family" and that seems to accord with the views of the civilians to some of whose writings reference has already been made.

The decision of their Lordships' Board in *Josef v. Mulder* [1903] A.C. 190 is also consistent with this view.

With these principles in mind their Lordships must examine the conditions contained in the Deed in detail, for it is a pure question of construction, a question which has, however, given rise to much difference of opinion in the Courts of Ceylon, where the Deed has been much litigated. Their Lordships must refer to those decisions upon it.

In so far as their Lordships are aware the Deed was first the subject of litigation in 1949 when in September of that year the Supreme Court in case S.C. 257 (reversing the District Judge) held in effect that the Deed created a valid *fidei commissum* in favour of the donee's children.

Then some years later the daughters mounted attacks against those in possession of other lands disposed of by their father with the following results. On 1st June 1962 the Supreme Court in appeal 1964/55 affirmed without giving any reasons, the decision of the District Judge that the Deed did not create any valid *fidei commissum*.

The two cases appeals 1965/7 and 1965/14 were heard successively before the same Judge of the District Court who delivered judgments on 25th August 1960 and 22nd August 1960 respectively in nearly identical terms holding that the Deed created a valid *fidei commissum*. In appeal 1965/7 on 13th July 1962 the Supreme Court upheld his decision without giving any reasons.

In appeal 1965/14 the case was argued nearly a year later and a reserved reasoned judgment was delivered by the Supreme Court (differently constituted from appeal 1965/7) on the 3rd September 1963 allowing an appeal and deciding that no valid *fidei commissum* was created by the Deed.

Finally although a week earlier in time, on 27th August 1963 in *Mohideen Hadjar v. Ganeshan* reported in 65 N.L.R. 421 the Supreme Court yet again differently constituted delivered a reasoned judgment dismissing an appeal from the District Judge holding that the Deed did create a valid *fidei commissum*.

It is to be noted that in two of these cases the Supreme Court dismissed appeals from opposing decisions in the District Court on the legal effect of the Deed without giving any reasons.

Their Lordships must assume that the earlier decisions were not brought to the attention of the Supreme Court in the subsequent cases for it is unthinkable that they would not have been referred to in the later judgments, but even so in a case where there is room for doubt their Lordships think it is regrettable that no reasons were expressed in the Supreme Court in either of those cases. A reasoned judgment gives much guidance for the future, not merely to the parties but to the general public where, as in this case, an important question involving a number of land owners arises.

Nor can their Lordships understand how the advisers of the daughters who were parties to every proceeding mentioned above failed to draw to the attention of the Court all the relevant earlier decisions; this seems to their Lordships most extraordinary, particularly in the case of appeal 1965/14 where appeal 1965/7 and the 1949 case do not seem to have been mentioned.

In this state of affairs their Lordships think that they must approach this matter in the first place without reference to these decisions though they will notice one or two of the reasons given in these judgments *passim*.

The conditions alleged to create the *fidei commissum* are contained in the three paragraphs already set out and may be treated as numbered 1, 2, 3.

By condition 1 the Deed reserved a power of revocation to the Donor during his life, a circumstance relied upon by the District Judge in appeal 1964/55 as tending against the creation of a valid *fidei commissum*. Before their Lordships counsel for the respondents in that appeal did not rely on this circumstance and referred to the case before their Lordships' Board of *Weerasekera v. Peiris* 34 N.L.R. 281 where there was such a power of revocation but no point was taken thereon at any stage in those proceedings. With all respect to the District Judge their Lordships are of opinion that there is no substance in it.

By condition 2, which is the all important condition, the Donor imposed upon the Donee a restriction against alienation for 25 years in terms that "they should not alienate the said lands by any instruments such as transfer, donation, dowry or any other documents".

Upon this, two points are taken against the daughters; first that the reference to "other documents" must be construed as *ejusdem generis* with the other modes of transfer referred to, which were *inter vivos* and so exclude a prohibition against alienation by will during the term of 25 years. If right, this would be strong support for the view that the prohibition was "nude" for the donee could entirely defeat any alleged *fidei commissum* either by surviving 25 years when the condition terminated in any event and he would take the property absolutely or by dying within that time and disposing of the property to any one he pleased by will. As a matter of construction their Lordships cannot accept this view. The words of prohibition could hardly be wider and seem apt and indeed directed to include a prohibition of alienation by will. This seems to be clear as a matter of words but if authority be wanted for it it is to be found in *Sande* (supra) p. 191 para. 21.

The second point taken was that in a tacit *fidei commissum* the limitation of 25 years is so short that the condition cannot have been intended to have been imposed for the benefit of the donee's children. This limitation of time was, it appears, the principal ground upon which the Supreme Court in appeal 1965/14 reached the conclusion that no *fidei commissum* was created but their Lordships cannot agree. In the case of an express *fidei commissum* it had, on authority, to be conceded that such a limitation would not defeat an otherwise valid *fidei commissum* (see for example *Huber* (supra) p. 192 para. 62) and their Lordships cannot see how a tacit *fidei commissum* (if otherwise valid) can fail to be such because of that limitation of time.

Those points being out of the way the question for their Lordships is therefore whether these conditions were imposed:

- (1) merely as a "nude" prohibition or
- (2) merely for the purpose of supporting the powers of the appointed persons in regard to the disposition of income during the term or
- (3) for the purpose of benefiting the donee's children so that there is a tacit *fidei commissum* in their favour on their father's death within 25 years.

Having regard to the general structure of the clauses of conditions their Lordships cannot accept the view that the restriction was imposed solely to support condition 3 (alternative 2 just mentioned). It would have been quite unnecessary for this purpose to empower the donee to make grants to his children by way of mudusom or dowry.

The whole scheme of the Deed, as it appears to their Lordships, was to provide for the donee's family for the term of 25 years. During that term the income was available for the support of the donee, his wife and children. He could only dispose of the property by giving or transferring it to his children. The property was, during this period, not to be liable for the donee's debts; that provision is quite inconsistent with the hypothesis that the condition was "nude".

In their Lordships' opinion the plain inference is that in the event of the donee's death within 25 years the donor intended that the property should devolve on the donee's children and that he created a valid tacit *fidei commissum*. Nor with all respect to the judgment of the District Judge in appeal 1964/55 can their Lordships see any doubt or uncertainty as to the designation or description of the children who are to take on the donee's death within 25 years. Had it not been for the divergence of opinion upon the construction of this Deed in Ceylon their Lordships would have been content to say merely that they agree with the very careful judgment of Weerasoonya S. P. J. in *Mohideen Hadjar v. Ganeshan* (supra). Starting with *Robert v. Abeywardene* (supra) he discussed the subsequent cases in Ceylon and reached the conclusion, by a process of reasoning with which their Lordships entirely agree, that the authority of that case is unimpaired by subsequent decisions; applying it, he reached the correct conclusion. He treated the matter as one of a tacit *fidei commissum* although at a later stage of his judgment it is true that he did state that the Deed *required* the donees to allow the land to devolve on their children. Their Lordships however do not read this as being the decisive point in the learned judge's judgment and indeed it is inconsistent with his treatment of the Deed as conferring only a tacit *fidei commissum* on the donee's children.

However before concluding their judgment their Lordships must return to the matter of differences in translations of the Deed in the various cases.

In appeals 1965/7 and 1965/14 condition 2 was translated as follows:

"2. I do hereby declare and enjoin that the donees shall not within a period of 25 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."

The principal difference is the introduction of the phrase "that they should allow the said lands to devolve on their children by way of mudusom" which does not appear in the translation in appeal 1964/55.

The phrase "should allow" is ambiguous; it may mean "must allow" or "may allow". If the former this would be a most material difference for it would convert the disposition into one of an express *fidei commissum*.

But for this construction Counsel for the daughters does not contend. Moreover upon the expert evidence of translators before them the Supreme Court in appeal 1965/14 reached the conclusion, with which their Lordships agree, that "should" ought to be read as "may" so this difference of translation makes no difference to the sense of the condition in that it remains, as a matter of express language, merely the conferment of a power or permission upon the donee and does not expressly require or compel him to do anything; the rules of the ancient Roman Law already mentioned being no longer acceptable. Accordingly upon this construction there is no material distinction between the translation in appeal 1964/55 and the other cases.

In their Lordships' judgment the daughters are entitled to succeed in their claim that as their father died within 25 years of the Donor the purchasers held their respective properties as fiduciaries for the daughters as *fidei commissaries*.

It is not in doubt that, upon the footing that the daughters establish a *fidei commissum*, they are bound to make compensation to the fiduciaries for improvements the latter have made to the lands. The basis of such compensation however depends on whether the fiduciaries were

bona fide or mala fide improvers. It is however unnecessary to pursue this further for during the hearing of these appeals the parties have been able to come to certain terms upon this aspect of the matter as follows.

In appeal 1964/55 compensation is agreed at Rs.9,000. In appeal 1965/7 compensation was not claimed and the point does not arise.

In appeal 1965/14 Counsel for the daughters did not feel able to support the District Judge's conclusion that compensation should be assessed on the footing that the fiduciaries were *mala fide* as in fact they purchased *bona fide* under an order of the Court and it has been agreed that the question must go back for assessment by the District Court on the footing that they were *bona fide* improvers.

Accordingly their Lordships will humbly advise Her Majesty that:

In appeal 1964/55 the appellants' appeal be allowed; the second and fourth appellants be declared entitled to the land agreed between the parties to be the subject matter of the action namely Lot 3, mentioned in the District Judge's judgment; the respondent be ejected from the said lot and the second and fourth appellants be placed in peaceful possession thereof; and there be judgment on the counterclaim for agreed compensation in the sum of Rs.9,000.

In appeal 1965/7 the appeal be dismissed.

In appeal 1965/14, the appellants' appeal be allowed, and the decree dated 22nd August 1960 of the District Judge restored, save that on the respondents' counterclaim it be referred to a District Judge to ascertain the compensation payable to the respondents for improvements on the footing that they were *bona fide* improvers.

As to costs.

In appeal 1964/55 the respondent must pay to the appellants their costs here and in the courts below, save that the appellants must pay the costs of the counterclaim before the District Judge.

In appeal 1965/7 the appellant must pay to the first four respondents (who alone appeared) their costs of this appeal.

In appeal 1965/14 the first two respondents (who alone appeared) must pay to the appellants their costs here and in the Supreme Court. The costs of the reference to be reserved to the District Judge.



In the Privy Council

AMBALAVANAR KANAYSON AND
OTHERS

ERAGUNATHAR PONNU RASIAH
v.

THANKACHIAMMAH

AMBALAVANAR GANESHAN AND
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DELIVERED BY
LORD UPJOHN