

20, 1961

IN THE PRIVY COUNCILNo. 30 of 1960

ON APPEAL FROM
THE SUPREME COURT OF THE ISLAND OF CEYLON

B E T W E E N :

KANAGASUNDERAM NADESAN
 (Plaintiff) Appellant

- and -

VAITHILINGAM RAMASAMY
 (Defendant) Respondent

UNIVERSITY OF LONDON
 W.C.I.
 1 SEP 1961
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

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CASE FOR THE APPELLANTRecord

1. This is an appeal by the Plaintiff-Respondent-Appellant (hereinafter called "the Appellant") from the judgment and decree of the Supreme Court of Ceylon dated the 2nd November, 1956 whereby the Supreme Court (Basnayake, C.J. and De Silva, J.) on an appeal by the Defendant-Appellant-Respondent (hereinafter called "the Respondent") set aside the judgment and decree of the District Court of Point Pedro, dated the 2nd April, 1954 and dismissed the Appellant's action with costs.
2. The principal questions arising for consideration in this appeal are -
- (a) The interpretation of a clause (Exhibit P.2A) in a deed of gift creating a Fidei commissum.
- (b) Whether the Supreme Court was justified in reversing the findings of fact by the trial judge.
3. The Appellant instituted the action in which this Appeal arises in the District Court of Point Pedro on the 15th January, 1952 praying for a declaration of title to an undivided one-tenth share of

p.103, 1.13 to
p.106, 1.35.p.75, 1.36 to
p.90, 1.10.

p.165, 11.23-38.

pp.18-23.

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a divided extent of 67a.2r.6 $\frac{3}{4}$ p. (hereinafter called "Lot 3") from and out of a larger land described in Schedule 1 to the plaint, for the ejection of the Respondent therefrom, and for damages for unlawful possession.

4. In the said plaint the Appellant pleaded, inter alia -

- p.18, 11.10-19. (a) That Arumugam Nagamuttu, his paternal grantfather had donated by Deed No. 8942 dated the 19th March, 1928 (Exhibit P.2) an undivided one-fourth share of the land described in Schedule 1 of the plaint to his father Nagamuttu Kanagasunderam subject to a fidei commissum in favour of the donee's "descendants". 10
- p.163, 1.32 to p.165, 1.21.
- p.18, 11.25-32. (b) That Nagamuttu Kanagasunderam with intent to defraud his descendants of the benefits of the said fidei commissum, fraudulently, collusively, and without consideration executed a deed of transfer (Deed No. 76 dated 11th October, 1941, Exhibit P.24) in favour of Ponnambalam Vytilingam alone, who thereafter filed a partition action and obtained a partition decree (Exhibit D.5 dated 13th June, 1944) allotting to him Lot 3 in lieu of the undivided one-fourth share transferred to him by the Appellant's father. 20
- p.200, 1.1 to p.203, 1.10.
- p.226, 1.25 to p.228, 1.40.
- (c) That the said Vytilingam transferred (Deed No. 657 dated 22nd August, 1945, Exhibit P.34) Lot 3 to the Respondent who was at the time of the said transfer aware of the fidei commissum and of the Appellant's rights thereunder. 30
- p.241, 1.1 to p.243, 1.24.
- (d) That the Appellant was one of ten children of his deceased father and was entitled to a one-tenth share of Lot 3.
- p.21.
- (e) The Respondent's wrongful possession of Lot 3 caused the Appellant loss and damage assessed at Rs. 200/- per annum. 40
- p.19, 11.1-8.
- p.24, 1.1 to p.26, 1.20. 5. The Respondents filed answer on the 9th April, 1952 denying the Appellant's claim and pleaded, inter alia -

- (a) That the deed of gift (Exhibit P.2) in favour of the Appellant's father did not create a fidei commissum in favour of the donee's "descendants". Record
p.163, 1.31 to
p.165, 1.22
- (b) That Kanagasunderam, exercising the power reserved to him by the deed of gift P.2, had gifted by deed No. 1610 of 6th September, 1934 (Exhibit P.18), his share in the lands in Schedule 1 to the plaint to his daughter Vadivelambikai whose interests thereafter devolved on Ponnumbalam Vyttilingam. p.173, 1.33 to
p.178, 1.12.
- 10
- (c) That the Respondent was a bona fide purchaser for value without notice of the fidei commissum (if any) and his title to Lot 3 is absolute and indefeasible by virtue of the Partition Decree. p.25, 11.4-10.
- (d) That the Respondent is a bona fide possessor and is in any event entitled to compensation for improvements. p.25, 11.17-21.
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- (e) That the Respondent had prescribed to the land. p.25, 11.22-28.
6. In the Replication filed by the Appellant on the 19th September, 1952, the Appellant pleaded that the gift of Vadivelambikai pleaded in the answer and the subsequent deeds in the alleged chain of title were all executed fraudulently and collusively to defraud the plaintiff and others of the benefit of the fidei commissum. p.28, 1.18 to
p.29, 1.8.
- 30 7. The fifteen issues raised at the trial were answered by the learned trial judge as follows - pp.77 & 78.
p.87, 1.31 to
p.88, 1.18.
1. Did deed No. 8942 dated 10.3.1928 attested by V. Sabaratnam, N.P., create a valid fidei commissum in favour of the descendants of the donee Nagamuttu Kanagasunderam?
- Answer: Yes.
2. If so, does deed No. 1610 of 6.9.1934 attested by S. Appadurai convey good title to the donee Vadivelambikai?
- 40 Answer: No.

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Amended Issue 3(a). Is the plaintiff one of the children of Nagamuthu Kanagasunderam the donee of the said deed No. 8942 of 1928?

Answer: Yes.

(b) If issue No. 2 is answered in the negative and issue No. 3(a) is answered in the affirmative is the plaintiff entitled to 1/10th of 1/4th share of the land described in Schedule 1 to the plaint?

Answer: Yes.

(c) If so, is the plaintiff entitled to a 1/10th share of the land described in Schedule No.2 to the plaint?

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Answer: Yes.

4. (a) Were deed No. 1610 dated 6.9.34 and all succeeding deeds relied upon by the defendant executed fraudulently and collusively with intent to defraud the plaintiff and the other beneficiaries under the said deed No. 8942 of 1928?

Answer: Yes.

Amended Issue 4(b). If issue No. 4(a) is answered in the affirmative, was the said deed executed in the exercise of the powers reserved to the donee by the said deed No. 8942 of 1928?

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Answer: No.

5. If issue No. 4(a) is answered in the affirmative and/or if issue No. 4(b) is answered in the negative is the plaintiff entitled to an undivided 1/10th share of the land described in Schedule No.2 to the plaint?

Answer: Yes.

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6. Is the plaintiff entitled to be placed in possession of the 1/10th share of the land?

Answer: Yes, only after he pays Rs. 1,500/- as compensation to defendant and defendant would be entitled to jus retentionis till then.

7. What damages is the plaintiff entitled to?

Answer: Rs. 25/- and continuing damages from date of plaint at Rs. 25/- per annum.

8. Was Nagamuthu Kanagasunderam entitled to execute deed No. 1610 of 1934 in favour of his daughter Vadivelambikai by virtue of the power reserved in his favour in deed No. 8942 of 1928?

Answer: No.

9. Is the defendant a bona fide purchaser for value and without notice of a fidei commissum, if any?

Answer: No.

10 10. If so, is the defendant entitled to the land described in the Schedule to the answer free from any fidei commissum?

Answer: Does not arise since issue No. 9 is answered in the negative.

11. (a) Was the land which Nagamuthu Kanagasunderam owned on the said deed No. 8942 of 1928 the subject-matter of partition action No. 17810 D.C. Jaffna?

Answer: Yes.

20 11. (b) Was the said land the subject-matter of Final Partition decree in the said case No. 17810 D.C. Jaffna?

Answer: Yes.

11. (c) Was Ponnambalam Vythilingam allotted by the said partition decree in case No. 17810 D.C. Jaffna lot 3 in Plan No. 424A of 20.3.44 prepared by V. Arumugam, licensed surveyor, free from any fidei commissum?

Answer: Yes.

30 12. If issues 11(a), 11(b) and 11(c) are answered in the affirmative, have Ponnambalam Vythilingam and/or his successor in title, the defendant, acquired absolute and indefeasible title by virtue of the said partition decree in case No. 17810 D.C. Jaffna?

Answer: No, the fidei commissum attaches itself to such title.

13. Has the defendant acquired prescriptive title to the said Lot 3 in the said Plan 424A?

40 Answer: No.

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14. Has the defendant improved the said land by way of new planting, clearing, sinking wells and fertilising after the purchase, on deed No. 657 of 22.8.45?

Answer: Yes, necessary improvements to the extent indicated herein.

15. In the event of the Court holding that the defendant is not entitled to Lot 3 in the said Plan No. 424A -

(a) Is the defendant entitled to compensation for improvements and/or jus retentionis? 10

Answer: Yes, for necessary improvements only, cost of which is assessed at Rs. 15,000/- and to jus retentionis to the extent of a sum of Rs. 1,500/- payable by the plaintiff to defendant.

(b) What amount of compensation is the defendant entitled to on that account?

Answer: Rs. 1,500/-.

p.36, 1.22 to
p.57, 1.24.

8. At the trial the Plaintiff gave evidence and called as witnesses Sivakamypillai, his mother, Ponnambalam Vytilingam, the plaintiff in the partition action, and Nagamuttu Subramaniam, a brother of Nagamuttu Kanagasunderam. The Defendant gave evidence and called as witnesses Murugesu Rajaratnam, Karalasingham, the Proctor who acted for the Plaintiff in the partition case, the village Headman who spoke to the improvements on Lot 3 and Sithamperapillai Sinnathamby, who had held Lot 3 on an informal lease from Nagamuttu Kanagasunderam. 20

p.57, 1.40 to
p.70, 1.9.

9. Evidence was led by the Plaintiff in proof of the following facts - 30

(a) Nagamuttu Kanagasunderam had three brothers, namely Nagamuttu Tharmalingam, Nagamuttu Subramaniam and Nagamuttu Sivapiragasm, each of whom had received from their father by deeds of gift No. 4 of 7th February, 1923, Exhibit P.3; No. 8944 dated 19th March, 1928, Exhibit P.5; and No. 8943 dated 19th March, 1928, Exhibit P.4, respectively, an undivided quarter share of the lands described in the schedule 1 to the plaint subject to a condition similar in terms to the condition appearing in 40

pp.153-156.
p.161, 1.1 to
p.163, 1.30.
p.166, 1.1 to
p.168, 1.30.

the deed of gift to Nagamuttu Kanagasunderam.

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- 10 (b) Vadivelambikai, in whose favour Nagamuttu Kanagasunderam executed the deed of gift No. 1610 dated the 6th September, 1934 was married in 1932 and had been dowried by her father by deed of gift No. 12688 dated the 1st September 1933 (Exhibit P.39) and further that she had inherited a half share of her deceased mother's estate. p.46, 11.32-33. p.172, 1.1 to p.173, 1.31.
- (c) In 1934 Nagamuttu Kanagasunderam had five children apart from Vadivelambikai and a sixth child was born within two months of the date of the deed of gift No. 1610. p.36, 11.24-31. p.49, 11.16-17. p.185, 1.10.
- 20 (d) At the time of the execution of the said deed of gift Nagamuttu Kanagasunderam was in financial difficulties and could not find anyone who would accept a mortgage of the property gifted to him by his father because of the fidei commissum in the deed of gift (Exhibit P.2). p.46, 11.14-20.
- (e) The brothers of Nagamuttu Kanagasunderam, particularly Nagamuttu Sivapiragasam, were also anxious to be rid of the fidei commissum created by the gifts in their favour respectively, and had discussed with members of the family the device of a formal gift to a child. p.48, 11.17-19. p.55, 11.1-2. p.55, 11.21-26. p.56, 11.10-15.
- 30 (f) On the same day on which the deed of gift was executed in favour of Vadivelambikai the deed of transfer No. 1611 of the 6th September, 1934 (Exhibit P.19) was executed by her in favour of Mailarumperumal, her maternal grandfather who by arrangement was to act as the agent of Kanagasunderam for the purpose of obtaining a loan by mortgaging the properties. p.178, 1.12 to 182, 1.7. p.46, 1.34 to p.47, 1.4. p.51, 11.32-34.
- 40 (g) Of the Rs. 2000/- raised by Mailarumperumal by mortgaging the said lands, Rs. 500/- was given to Vadivelambikai and the balance was appropriated by Nagamuttu Kanagasunderam. The Rs. 2400/- for redeeming the mortgage was provided by Kanagasunderam and the lands were thereafter re-transferred by Mailaruperumal to Nagamuttu Kanagasunderam p.47, 11.16-19.

Record
pp.186-189.

by deed No. 1970, dated the 16th November, 1936 (Exhibit P.21). The consideration for the re-transfer P.21 was on the face of the deed stated to be Rs. 10,000 but only Rs. 2,400 was certified by the notary as having passed in his presence.

- p.48, 11.6-14. (h) The Respondent was a relation and a neighbour, and had, prior to his purchase of Lot 3 from Ponnambalam Vytilingam, made offers for the purchase of Lot 3 from Kanagasunderam and the Respondent had discussed with Nagamuttu Sivapiragasm and Nagamuttu Subramaniam the fidei commissa in the deeds of gift P.2 and P.4 and the device of making a formal transfer to a child of the donee's for the purpose of defeating the fidei commissum. 10
- p.55, 11.21-25.
- p.241, 1.1 to p.243, 1.23. (i) By deed No. 657 dated 22nd August 1945 (Exhibit P.34) the Respondent purchased Lot 3 from Ponnambalam Vytilingam and Lot 2, the divided extent decreed to Nagamuttu Sivapiragasm by the Partition Decree D.5. Although the Respondent had agreed to buy Lot 2 from Nagamuttu Sivapiragasm the actual transfer P.34 was executed by Sivapiragasm's son Pasupathy to whom Sivapiragasm gifted Lot 2 by deed No. 656 (Exhibit P.35) executed at the same time and place as P.34. 20
- p.65, 11.2-5.
- p.243, 1.26 to p.245, 1.40. (j) Even after the execution of the deed of gift in favour of Vadivelambikai and of the deed of transfer in favour of Ponnambalam Vytilingam, Nagamuttu Kanagasunderam continued to exercise rights of ownership in respect of his share in the property in question. 30
- p.55, 11.16-17.

p.84, 1.36 to p.85, 1.4. The facts set out above were spoken to by Nagamuttu Subramaniam and Sivakamypillai, the widow of Nagamuttu Kanagasunderam. The learned trial Judge accepted her evidence and also the evidence of Nagamuttu Subramaniam. 40

p.61, 11.2-8. 10. The Defendant led no evidence relevant to the facts set out in paragraph 9 above except on the question whether he was aware of the fidei commissum at the time he purchased Lot 3 from Ponnambalam

	<u>Record</u>
	p.66, 11.16-27.
	p.62, 11.29-31.
10	p.64, 11.12-14. p.65, 11.20-21. p.65, 11.17-19.
	p.65, 11.31-40.
	p.26, 1.31.
20	p.29, 1.22.
	p.85, 11.18-24.
30	p.87, 11.15-30.
	p.89, 1.1 to p.90, 1.10.
40	p.90, 1.13 to p.97, 1.40. p.103, 1.13 to p.106, 1.5.
	p.104, 11.23-27.

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p.104, 11.37-42.
p.105, 11.34-38.

the power did so empower Kanagasunderam. The Supreme Court having expressed the view that fraud must be distinctly proved as alleged held that Kanagasunderam having purchased the property free of the fidei commissum had the right to sell to Vytilingam and that the evidence in the case failed to establish that Kanagasunderam sold the land to defraud his other children. The Supreme Court did not examine the evidence in the case relating to the question whether the necessity to exercise the power had arisen or to the question whether the gift to his daughter Vadivelambikai and the contemporaneous sale to Mailaruperumal were a device adopted by Kanagasunderam to defeat the fidei commissum for his own benefit.

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13. The relevant findings of fact in the judgment of the learned trial Judge relating to the exercise by Kanagasunderam of the said power were not even referred to, nor was the evidence supporting the findings examined by the Supreme Court. It is submitted that the conclusions reached by the Supreme Court on the issue of fraud were not justified.

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14. The evidence led in the case established that the said power was not genuinely exercised for the benefit of Vadivelambikai and that it was exercised by Kanagasunderam fraudulently to further his own interests to detriment of his "descendants". Further, the Respondent has failed to prove that the condition for the exercise of the said power, namely, the necessity to make the donation, had been fulfilled. Indeed the evidence in the case establishes the contrary.

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p.173, 1.33 to
p.178, 1.12.
p.165, 11.23-38.

15. It is respectfully submitted that in the deed of gift P.18, Kanagasunderam does not purport to exercise the power secured to him by P.2A and that the said deed P.18 operates only as a conveyance of his fiduciary interest in the property.

p.103, 1.13 to
p.106, 1.36.

16. It is respectfully submitted that the judgment and decree of the Supreme Court dated the 2nd November 1956 should be set aside and the Judgment and decree of the District Court of Point Pedro restored with costs throughout for the following among other

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R E A S O N S

1. BECAUSE the fiduciary, Nagamuttu Kanagasunderam, was not empowered by the terms of the deed of

gift P.2 dated the 19th March, 1928, to dispose of the property to an individual fidei commissary (namely, his daughter Vadivelambikai) to the exclusion of his other "descendants":

2. BECAUSE the fidei commissum in favour of Nagamuttu Kanagasunderam's descendants created by the said deed P.2 was not defeated by the execution of the deed of gift dated the 6th September, 1934 in favour of Vadivelambikai -

- 10 (a) for the reason set out in (1) above;
- (b) for the alternative reason that the gift to Vadivelambikai operated only as a conveyance to her of Kanagasunderam's fiduciary interest;
- (c) for the reason that there is no evidence that the necessity arose for Kanagasunderam to exercise the power alleged to have been conferred on him;
- 20 (d) for the reason that, even if the alleged power of disposition did exist, it was not exercised genuinely or in good faith for the benefit of Vadivelambikai;
- (e) for the reason that the alleged power of disposition was exercised by Nagamuttu Kanagasunderam fraudulently and to further his own interests to the detriment of his descendants:

30 3. BECAUSE the fidei commissum in favour of the Appellant and the other "descendants" of Nagamuttu Kanagasunderam attached to Lot 3 allotted to Ponnambalam Vytilingam, the Respondent's vendor, under the Final Decree for Partition in action 17810 of the District Court of Jaffna and an undivided 1/10th share therefore became vested in the Appellant on the death of his father Nagamuttu Kanagasunderam in January 1948:

40 4. BECAUSE the learned District Judge correctly answered in favour of the Appellant all the relevant issues of fact and law and the Supreme Court was not justified in setting aside the judgment and decree of the District Court dated the 2nd April, 1954.

E.F.N. GRATIAEN.

WALTER JAYAWARDENA.

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CASE FOR THE APPELLANT

Lodged the 5th December 1960

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