

IN THE PRIVY COUNCIL

No. 30 of 1960

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON  
W.C.I.  
19 FEB 1961  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

B E T W E E N :-

KANAGASUNDERAM NADESAN  
(Plaintiff) Appellant

63684

- and -

VAITHILINGAM RAMASAMY  
(Defendant) Respondent

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CASE FOR THE RESPONDENT

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 2nd November, 1956, allowing, with costs, an appeal from a Judgment and Decree of the District Court of Point Pedro, dated the 2nd April, 1954, whereby, in an action for a declaration that the Plaintiff (present Appellant) is entitled to a share of certain land in the possession of the Defendant (present Respondent) as a bona fide purchaser for value it was held, inter alia, that the Plaintiff, who based his claim as a beneficiary under a fidei commissum, was entitled to the declaration prayed for.

Record  
pp.103, 106.

pp. 75, 89.

p.89, 11.18-20.

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2. The main questions for determination on this appeal are whether or not, in an action which was instituted nearly five years after the fiduciary's death, it was sufficiently established that the fiduciary, in donating his interests in certain land to his daughter, acted in fraud of a fidei commissum so as to invalidate the title of a subsequent bona fide purchaser for value without notice which the present Respondent claims to be.

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3. The facts are as follows:-

By deed No. 8942, dated the 19th March, 1928 (Ex. P2) one Arumugam Nagamuttu gave to his son

Record

Nagamuttu Kanagasunderam, by way of irrevocable donation, an undivided one-fourth share in certain land known as "Sadaiyakadu" situate in the District of Jaffna, subject to the following conditions:-

Ex.P2, p.164,  
11.8-16.  
Ex.P2A, p.165.

"I declare that the donee should not encumber the said lands by way of documents such as any transfer, otty, mortgage, donation and dowry etc. or encumber the same in any other way or alienate the same but possess the same during his lifetime and die leaving behind the same to devolve on his descendants but if found necessary he may dispose the same by way of donation or dowry to his descendants and will have no right to make these properties or property or any part of the properties or property bound for any kind of debts and would not be liable even for the penalties of Courts."

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(These conditions were, at the trial of this action in the District Court, said by the Plaintiff to create a fidei commissum in favour of all the descendants of the donee (or fiduciary) and not in favour of any one of them - an argument which was, however, abandoned on appeal in the Supreme Court where it was conceded by the present Appellant that it was open to the donee to donate his interests in the said lands to any one of his descendants).

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Ex.P18, p.173.

4. On the 6th September, 1934, the said Nagamuttu Kanagasunderam, by deed No. 1610 (Ex. P18) gave to his daughter (by his first wife) Vadivelambikai, wife of one Kanapathipillai Balasubramaniam, as an irrevocable gift or donation, his interests in certain lands included among which was the said land known as "Sadaiyakadu".

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Ex.P19, p.178.

On the same day the said daughter and her husband, by deed No. 1611 (Ex. P19) sold and assigned all their interests in the said lands to one Ponniah Mailerum Perumal, grandfather of the said daughter Vadivelambikai, for the sum of Rs.5000/-. Subsequently, on the same day, the said grandfather mortgaged (Ex. P20) the subject-matter of his said purchase to one Parupathipillai, wife of M. Soma-sunderam, for the sum of Rs.2,000/-.

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Ex.P20, p.182.

Ex.P21, p.186;  
p.188, 1.10.

5. On the 16th November, 1936, the grandfather, by deed No. 1970 (Ex. P21) sold the said interests "free from all incumbrances", to the said Nagamuttu

Kanagasunderam (the original donee) for the sum of Rs. 10,000/-.

Record

- 10 On the 7th December, 1936, Nagamuttu Kanagasunderam and his second wife (Sivapakiam or Sivakamipillai), by deed No. 1605 (Ex. P22) mortgaged the said interests to one Ponnambalam Vythilingam for the sum of Rs. 6,000/-; and, on the 11th October, 1941, by deed No. 76 (Ex. P24), they sold the said interests "free from any incumbrance whatsoever" to the said Vythilingam for the sum of Rs. 5,000/-.
- 20 6. The said Vythilingam subsequently instituted a partition action in the District Court of Jaffna (D.C. Jaffna, Case No. 17810; Exs. P30, P31, P32) praying for partition of the "five pieces of land", his interests in which the said Nagamuttu Kanagasunderam (the original donee) had, by the said deed No. 1610 (see paragraph 4 hereof), donated to his daughter Vadivelambikai. Final decree in this action (Ex. D5) was entered on the 13th June, 1944, and thereby the said lands in "lot 3" were allotted to, and declared the absolute property of, the said Vythilingam in lieu of his undivided one-fourth share.
- 30 On the 22nd August, 1945, Vythilingam and another, by deed No. 657 (Ex. P34) sold lands inclusive of the said "lot 3" "free from all incumbrances" to the present Respondent, Vaithilingam Ramasamy, for Rs. 13,500/-.
7. The said original donee (or fiduciary) Kanagasunderam died in January, 1948.
- In 1952 the Appellant (hereinafter also referred to as "the Plaintiff"), one of the several children of the said Kanagasunderam by his second wife, instituted the present Suit against the Respondent (hereinafter also referred to as "the Defendant") in the District Court of Point Pedro.
- 40 8. By his plaint, dated the 15th January, 1952, the Plaintiff said that: as one of the ten children of the said Kanagasunderam he was entitled to an undivided one-tenth of the one-fourth share of the said lands which share was the subject of a fidei commissum in favour of Kanagasunderam's descendants; "the said Kanagasunderam however with intent to defraud his children and descendants of the benefits

Ex.P22, p.191.

Ex.P24, p.200.

p.201, 11.7-8.

Ex.P30, p.209.

Ex.P31, p.213.

Ex.P32, p.215.

Ex.D5, p.226.

Ex.P34, p.241;  
p.242, 11.17-18.

p.18, 1.21.

p.18.

pp.18-20.

p.18, 11.15-24.

p.18, 11.25-32.

- Record of the said fidei commissum fraudulently and collusively and without consideration executed a transfer deed for the said lands in favour of one ..... Vythilingam in spite of the said fidei commissum, got the said ..... Vythilingam to file an action for partition for the said lands ..... and obtained Final Partition Decree therein ignoring the fidei commissum"; the said Partition Decree had not extinguished his rights; and that the Defendant was aware of the said fidei commissum before he purchased the said lands from Vythilingam. 10
- p.18, 11.33-36.
- p.19, 11.1-4.
- p.19, 11.12-15. The Plaintiff prayed, inter alia, for a declaration that he was entitled to a one-tenth share of the said land; and that he should be put in possession thereof and the Defendants be evicted therefrom.
- pp.24-26.
- p.24, 11.13-20. 9. By his Answer, dated the 9th April, 1952, the Defendant denied that the gift to the said Kanagasunderam (the original donee) was subject to a fidei commissum in favour of his children or descendants or that his interests were fiduciary or that on his death any share of the property in question devolved on the Plaintiff. 20
- p.24, 11.21-29.
- p.24, 1.37 to
- p.25, 1.3. On the subject of his title, the Defendant referred briefly to the various transactions stated in paragraphs 4 to 6 hereof and denied that any fidei commissum attached to the interests which, on partition, were allotted to the said Vythilingam from whom he had purchased the same. He said also that he is a "bona fide purchaser for value without notice of a fidei commissum, if any, and that his title to the said lot is absolute and indefeasible by virtue of the said partition decree." Further, 30
- p.25, 11.7-10.
- p.25, 11.11-16. he denied that there was any fraud or collusion in the obtaining of the said partition decree or that he was a party to a fraud. He denied that (1) he was aware of the terms of the said deed No. 8942 (the original donation to Kanagasunderam by his father - see paragraph 3 hereof); or (2) that the said deed created any rights in favour of the Plaintiff. 40
- p.25, 11.30-33. The Defendant's prayer, inter alia, was for the dismissal of the action but, in the event of it being held that the Plaintiff was entitled to a share he claimed the sum of Rs. 30,636.22 as compensation for improvements he had effected and to a jus retentionis.

10. In his Replication, dated the 19th September, 1952, the Plaintiff said that "deed No. 1610 of 6.9.34" [see paragraph 4 hereof] "and the subsequent deeds in the chain of the alleged title of ..... Vythilingam and the Defendant were all executed fraudulently and collusively with intent to defraud the Plaintiff and others of the benefit of the fidei commissum referred to in paragraph 2 of the plaint."

Record  
pp.28-29.  
p.28, 1.32 to  
p.29, 1.2.

10 11. Issues framed at the trial were, after a consideration of the oral and documentary evidence adduced by both sides, answered thus by the learned District Judge:-

"1. Did deed No. 8942 dated 10.3.1928 ..... create a valid fidei commissum in favour of the descendants of the donee Nagamuttu Kanagasunderam?"

p.77, 11.4-6.

Answer: "Yes".

p.87, 1.32.

"2. If so, does deed No. 1610 of 6.9.1934..... convey good title to the donee Vadivelambikai (Kanagasunderam's daughter)?"

p.77, 11.7-8.

20 Answer: "No".

p.87, 1.33.

"3. (a) Is the Plaintiff one of the" (ten) "children of Kanagasunderam the donee of the said deed No. 8942 of 1928?"

p.77, 11.9-16.

"(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  $\frac{1}{4}$  share of the land" (the share of his father Kanagasunderam) "described in Schedule I to the plaint?"

30 "(c) If so, is the Plaintiff entitled to a 1/10th share of the land described in Schedule II to the plaint?"

Answers to 3(a), 3(b) and 3(c): In each case, "Yes".

p.87, 11.34-36.

"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?"

p.77, 11.17-23.

40 "(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?"

Answer: to 4(a) "Yes"; to 4(b) "No".

p.87, 11.37-38.

Record  
p.77, 11.24-27.

"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?"

p.87, 1.39.

Answer: "Yes".

p.77, 11.28-29.

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

p.87, 11.40-43.

Answer: "Yes, only after he pays Rs. 1,500/- as compensation to Defendant and Defendant would be entitled to jus retentionis till then." 10

p.77, 1.30.

"7. What damages is the Plaintiff entitled to?"

p.87, 11.44-45.

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

12. Other Issues were answered thus by the learned District Judge:-

p.77, 11.31-33.

"8. Was ..... 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?" 20

p.88, 1.1.

Answer: "No".

p.77, 11.34-35.

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

p.88, 1.2.

Answer: "No".

p.77, 11.36-37.

"10. If so, is the Defendant entitled to the land described in the Schedule to the Answer free from any fidei commissum?"

p.88, 11.3-4.

Answer: "Does not arise since Issue No. 9 is answered in the negative". 30

p.77, 1.38 to  
p.78, 1.6.

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

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

"(c) Was ..... Vythilingam allotted by the said partition decree ..... lot 3 in Plan No. 424A of 20.3.44 ..... free from any fidei commissum?

Record

Answers to 11(a), 11(b) and 11(c): In each case, "Yes".

p.88, 11.5-7.

10 "12. If Issues 11(a), 11(b) and 11(c), are answered in the affirmative, have ..... Vythilingam and/or his successor in title, the Defendant, acquired absolute and indefeasible title by virtue of the said partition decree .....?"

p.78, 11.7-10.

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

p.88, 11.8-9.

The remaining Issues Nos. 13 (prescriptive title of Defendant), 14 (improvements effected by Defendant) and 15 (Defendant's right to compensation for improvements and/or a jus retentionis) and Answers thereto will be found on pages 77 and 88 of the Record.

20 13. By his Judgment, incorporating the said Answers to Issues, dated the 2nd April, 1954, the learned District Judge held inter alia, that the Plaintiff was entitled to a declaration that he had a right to a one-tenth share of the land described in Schedule II to the plaint and to possession of the same, and that the Defendant should be ejected therefrom.

pp.75-88.

p.88, 11.19-22.

30 On the subject of the said fidei commissum the learned District Judge held that the relevant clause in deed No. 8942 (see paragraph 3 hereof) created a valid fidei commissum in favour of all the descendants of the donee (or fiduciary) Kanagasunderam and not in favour of any one of them whom the donee might select; and that, therefore, Kanagasunderam had not conveyed a good title to his daughter to the property in question by the said deed No. 1610 of 1934.

p.83, 11.13-32.

40 14. Reviewing certain portions of the evidence (and unduly influenced, it is respectfully submitted, by the testimony of the Plaintiff's mother whom he himself described as a "partisan witness" and by the fact that the said donation and sale deeds had followed each other in rapid succession - a circumstance to which no secrecy attached and which, it

p.83, 1.41 to

p.84, 1.24.

Record

- p.84, 11.20-24. is submitted, has no bearing upon an interpretation of the express terms of the fiduciary's power) the learned District Judge found that the Plaintiff had established his allegation of fraud. He said that "the deed No. 1610 of 1934" (whereby the donee or fiduciary Kanagasunderam had donated his interests to his said daughter) "and the succeeding deeds relied on by the Defendant must be held to have been executed fraudulently and collusively with intent to defraud the Plaintiff as a beneficiary under deed No. 8942 of 1928" (the donation to Kanagasunderam by his father). He held that Kanagasunderam had not validly donated his interests in the lands in question to his daughter in exercise of the power of alienation reserved to him by the said deed of 1928. 10
- p.84, 11.25-27.
- p.84, 1.32 to  
p.85, 1.17. Basing his view on certain portions of the testimony of the Plaintiff's mother (Sivakampillai) and on that of a brother of the said Kanagasunderam (Nagamuttu Subramaniam) the learned Judge said that there was "much and free contact" between Kanagasunderam and his creditor, the said Vythilingam (to whom Kanagasunderam had finally sold his interests and from whom the Defendant had purchased the same) and that the Defendant himself was interested in the sale of the said interests. Thus the learned Judge arrived at his conclusions that "the Defendant was aware of the fidei commissum and had constructive notice of this fact", and that the partition decree in the said partition action D.C. Jaffna No. 17810 which allotted Kanagasunderam's share to Vythilingam was not free of the fidei commissum which still attached to the land in question. On the entire evidence before him the learned Judge found that the Defendant, who had taken part in a "collateral transaction" associated with the one under review, was not a bona fide purchaser of the said land. The "collateral transaction" to which the learned Judge referred related, it would seem, to transactions following other donations to Kanagasunderam's brothers by their father - evidence of which was, in the present Respondent's submission, wrongly admitted at the trial, and wrongly regarded by the learned District Judge as evidence which supported the Plaintiff's allegations of fraud. 20
- p.85, 11.18-19.
- p.85, 11.25-35. 30
- p.85, 11.88-41.
- p.84, 11.9-13.  
p.85, 1.41 to  
p.86, 1.5. 40
- p.89. 15. A decree in accordance with the Judgment of the learned District Judge was entered on the 2nd April, 1954, and from the said Judgment and decree



the Defendant appealed to the Supreme Court of Ceylon on the grounds stated in his petition of appeal which is printed on pages 90 to 95 of the Record.

Record

16. The appeal was heard in the Supreme Court by a Bench consisting of Basnayake C.J. and K.D. de Silva J. who, by their Judgment, dated the 2nd November, 1956, allowed the appeal with costs in both Courts.

pp.103-106.

10 17. Delivering the main Judgment of the Supreme Court Basnayake C.J. (with whom K.D. de Silva J. agreed), after referring to the relevant transactions which followed Kanagasunderam's donation to his daughter by deed No. 1610 (Ex. P18), said:-

Ex.P18, p.173.

20 "The only question for decision is whether the gift made by Kanagasunderam to his daughter is a valid gift and one which he had the power to make. The gift is impugned by the Plaintiff in this case on the ground that it is not authorised by deed P2" (No. 8942, the donation to Kanagasunderam by his father) " and was executed in fraud of the fidei commissum.

p.104, 11.15-19.

30 "It was contended at the trial that the power of donation given to Kanagasunderam was a power to give the property to all the children and not to one of them, and the learned Trial Judge upheld that contention and gave judgment for the Plaintiff; but in appeal learned Counsel for the respondent" (present Appellant) "abandoned that position and conceded that it was open to Kanagasunderam to give the property to one of his children, but he contended that the gift was bad because it was made in order to evade the fidei commissum created by the instrument."

p.104, 11.19-27.

40 18. The learned Chief Justice next referred to the allegations of fraud in the plaint and to the submission, made on appeal on behalf of the Respondent (now the Appellant), that the gift by Kanagasunderam to his daughter and the transactions which followed resulting in the sale to Vythilingam and to the institution by him of the partition action "were all part of a planned fraud to release the property from the fidei commissum imposed."

p.104, 11.27-36.

Rejecting the submission the learned Chief

Record

Justice said that -

p.104, 1.37 to  
p.105, 1.13.

"A person who alleges fraud must clearly and distinctly prove the fraud he alleges. Even in a civil action the standard of proof required where fraud is alleged is higher than that required for proving other matters. This higher standard of proof is required because of the presumption of good faith and validity of transactions. As was observed in the case of Vatcher v. Paull (1915) A.C. 372 at p.382:-

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'The general presumption which the law makes is in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known facts and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long been dead and cannot therefore defend themselves.'

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"Here the allegation is that there has been a fraud on the power granted by P2" (the donation to Kanagasunderam by his father; see paragraph 3 ante). "In Vatcher v. Paull (supra) it was stated that:-

'The term "fraud" in connection with frauds on a power does not necessarily denote any conduct on the part of the appointer amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of, or not justified by, the instrument creating the power.'

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p.105, 11.14-29. 19. The learned Chief Justice then referred to a passage from MacGregor's translation of Voet (36.1.54) p.118 which had been relied upon by Counsel for the respondent (present Appellant). In this passage Voet expresses the view that donations "fraudulently made by the fiduciary for the sake of curtailling the fidei commissum and defrauding the fidei commissary" should be "disallowed". In the learned Chief Justice's view the citation was of no avail in the present case. He said:-

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"Even Voet agrees in the same title that clear proof ought to be adduced by him who alleges that he has been defrauded and that when there is doubt the fiduciary must not be presumed to have intended to frustrate the fidei commissum."

20. The learned Chief Justice (with whom K.D. de Silva J. agreed) said in conclusion:-

10 "This action was instituted about five years after Kanagasunderam's death. The right to sell to Vythilingam was a right he had by virtue of his purchasing the properties from Mailerum Perumal without the burden of a fidei commissum. p.102, 11.33-36.

"The evidence in the case fails to establish that Kanagasunderam sold the land to Vythilingam in order to defraud his children by Sivapakiam" (his second wife). p.105, 11.36-38.

20 "We are therefore of the opinion that the learned Trial Judge was wrong when he held that the deed was executed by Kanagasunderam in fraud of the power he had under the instrument. He had the power to do what he did and the donation is valid." p.105, 11.39-42.

21. A decree in accordance with the Judgment of the Supreme Court was entered on the 2nd November, 1956, and against the said Judgment and decree this appeal is now preferred to Her Majesty in Council, leave to appeal having been granted to the Appellant by two decrees of the Supreme Court granting Conditional and Final Leave and dated, respectively, the 3rd July, 1958, and the 24th September, 1958. p.106.  
pp.136, 139.

In the Respondent's respectful submission this appeal should be dismissed with costs throughout for the following among other

#### R E A S O N S

1. BECAUSE the Respondent as a bona fide purchaser for value has a good and valid title to the property claimed by the Appellant.
2. BECAUSE the said Kanagasunderam had an unrestricted power to donate the said property to his daughter and this he validly did by

deed No. 1610 (Ex. P18) in exercise of the power conferred upon him by deed No. 8942 (Ex. P2).

3. BECAUSE having again acquired the said property - this time by purchase - Kanagasunderam had an unrestricted power to sell the same to Vythilingam the Respondent's predecessor-in-title.
4. BECAUSE Vythilingam's title and, therefore, the Respondent's title, to the said property, was made absolute and indefeasible by the said Final Partition Decree in D.C. Jaffna, Case. No. 17810. 10
5. BECAUSE there was no evidence of any fraud or any plan (fraudulent or otherwise) to defeat the conditions of the fidei commissum alleged to attach to the said property and it could not, by the relevant law, and in the circumstances of this case, be presumed against the fiduciary (Kanagasunderam) that by his said donation to his daughter he intended to frustrate the said fidei commissum. 20
6. BECAUSE even assuming that the said property was subject to a valid fidei commissum yet on any reasonable interpretation of the same the fiduciary thereunder (i.e. Kanagasunderam) must be regarded as having been empowered (as indeed was conceded by the present Appellant in the Supreme Court) to dispose of the property by way of donation or dowry to any one of his descendants and not necessarily to all of them. 30
7. BECAUSE for the reasons stated therein the Judgment of the Supreme Court was right.

DINGLE FOOT.

R.K. HANDOO.

No. 30 of 1960

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME  
COURT OF CEYLON

B E T W E E N :

KANAGASUNDERAM NADESAN  
(Plaintiff) Appellant

- and -

VAITHILINGAM RAMASAMY  
(Defendant) Respondent

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CASE FOR THE RESPONDENT

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