**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

SC Appeal No. 15/2012
SC (HCCA) LA No. 456/2011
HCCA Sabaragamuwa (Ratnapura)
Appeal No. 77/2009
D.C. Pelmadulla Case No. 20/L

Rev. Bengamuwe Dhammadinna Thero
Purana Rajamaha Viharaya
Pelmadulla.

**PLAINTIFF**

Vs.

1. Pallage Karunaratna Perera
   No. 79, Ratnapura Road,
   Pelmadulla.

2. D. P. Kariyawasam
   No. 79, Ratnapura Road,
   Pelmadulla.

**DEFENDANTS**

**AND BETWEEN**

1. Pallage Karunaratna Perera
   No. 79, Ratnapura Road,
   Pelmadulla.

**1st DEFENDANT-APPELLANT**

Vs.

Rev. Bengamuwe Dhammadinna Thero
Purana Rajamaha Viharaya
Pelmadulla.

**PLAINTIFF-RESPONDENT**

2. D. P. Kariyawasa
No. 79, Ratnapura Road,
Pelmadulla.

**2nd DEFENDANT-RRSPONDENT**

**AND NOW BETWEEN**

Rev. Bengamuwe Dhammadinna Thero
Purana Rajamaha Viharaya
Pelmadulla.

**PLAINTIFF-RESPONDENT-APPELLANT**

1. Pallage Karunaratna Perera
No. 79, Ratnapura Road,
Pelmadulla.

**1st DEFENDANT-APPELLANT-RESPONDENT**

2. D. P. Kariyawasa
No. 79, Ratnapura Road,
Pelmadulla.

**2nd DEFENDANT-RRSPONDENT-RESPONDENT**

**BEFORE:** S.E. Wanasundera P.C., J.
Anil Gooneratne J. &
Prasanna S. Jayawardena P.C., J

**COUNSEL:** B.O.P. Jayawardena with Oshada Rodrigo and
Nirosha Wickramasinghe for the Plaintiff-Respondent-Appellant

Z.A. Ameen Hussain instructed by Hussain Ahamed
For the 1st Defendant-Appellant-Respondent

**ARGUED ON:** 26.01.2017

**WRITTEN SUBMISSIONS TENDERED ON:**
05.03.2012 (by Plaintiff-Respondent-Appellant)
28.03.2012 (by 1st Defendant-Appellant-Respondent)

**DECIDED ON:** 14.03.2017

**GOONERATNE J.**

This was an action filed by the Plaintiff-Respondent-Appellant against the 1st Defendant-Appellant-Respondent and the 2nd Defendant-Respondent-Respondent for a declaration of title to the property described in the schedule to the Plaint, ejectment of the Defendants and for a declaration that the Defendant occupy the land described in the schedule under Leave and Licence of Plaintiff. It is the case of the Plaintiff that the 1st Defendant entered the disputed premises with the Leave and Licence of the predecessor of the Appellant, namely Rev. Mudduwe Pagnasekera Thero with a promise that he would not alienate possession of the property to a third party and vacant possession would be handed over on request. However at a subsequent stage

1st Defendant denied the Appellant's (Plaintiff's) title illegally and leased the property to the 2nd Defendant-Respondent on lease Bond No. 19489 of 16.10.2002. 2nd Defendant did not file answer and trial proceeded ex-parte against him. However learned District Judge held with the Plaintiff by Judgment of 07.05.2009 and granted relief prayed for in the plaint. The 1st Defendant aggrieved by the said Judgment, appealed to the Civil Appellate High Court, and that court allowed the appeal on 04.10.2011 and set aside the Judgment of the District Court.

Supreme Court on 24.01.2012 granted Leave to Appeal on the following questions of law which revolve on law of fideicommissum.

(i) Have the learned High Court Judges erred in law in concluding that the conditions imposed in the deed bearing No. 1341 (P2) do not create a fideicommissum.

(ii) Have the learned High Court Judges erred in law in not considering the provisions of the abolition of fideicommissum Act No.20 of 1972.

At the trial before the District Court the corpus was admitted and execution of lease Bond referred to above No. 19489 of 16.10.2002, was also admitted. Parties proceeded to trial on 16 issues. Plaintiff-Respondent-Appellant had adduced documentary evidence in support of his case of title and possession of the corpus. Plaintiff-Respondent-Appellant leading in evidence produced documents P1 to P12 and closed the case of the Plaintiff. The

Defendant did not lead any evidence. I also find that on perusal of the proceedings several documents produced by the Plaintiff party, had not been objected to by the Defendant. Learned District Judge has answered all issues raised by the Plaintiff, in favour of the Plaintiff.

In the submissions of learned counsel for Plaintiff-Respondent-Appellant he takes up the position that the documentary evidence led on behalf of the Appellant was neither challenged nor rebutted by the 1st Defendant-Appellant-Respondent. At the trial Appellant produced deed P1 No. 4143 dated 27.10.2000 in respect of his title. By deed P1 the Appellant acquires title to the property from his teacher Rev. Mudduwe Pagnasekera Thero. The said Rev. Pagnasekera Thero acquired title from his teacher Haldanduwana Dhammarakkhitha Thero by deed of gift No. 1341 of 25.03.1964 produced as P2 at the trial. The subject matter of this case is depicted as P3 in the survey plan No. 5759 dated 14.09.2005. Appellant also had produced documents marked P4, P5, P7 & P8 to establish his predecessor's title and possession, to the property in dispute. A document marked P6 was produced and led at the trial. This document was produced by the Appellant to establish the fact that the 1st Defendant-Appellant-Respondent entered the property in dispute as a tenant under Appellant's predecessor who was the Viharadhipathi of the relevant time.

Document P6 like the other documents were never challenged at the trial. It is also alleged by the Plaintiff-Respondent-Appellant that the 1st Defendant-Respondent in violation of lease document P6, wrongfully executed deed of lease No. 19489 of 16.10.2002 (P9) and alienated possession of the premises to the 2nd Defendant-Respondent.

Learned counsel for the 1st Defendant-Appellant-Respondent's position was that under and in terms of the deed of gift no. 1341 and marked and produced as P2, (High Court brief refer to it as P8) the title of the donor Rev. Dhammarakkitha Thero did not pass to the donee Rev. Mudduwe Pagnasekera Thero but with his demise (donor) title vested with the temple. He further argued that in view of the conditions imposed in the said deed, Rev. Mudduwe Pagnasekera Thero could not have conveyed title of the corpus to the Plaintiff by the deed No. 4143. I also note the portion dealing with this argument as contained in the written submissions of the 1st Defendant-Appellant-Respondent. It was submitted that the case is a case of declaration of title and the Appellant has failed to discharge that burden. In the chain of title pleaded by the Appellant in deed P2 (No. 1341) given by the donor Dhammarakkhitha Thero title did not pass to the donee Rev. Pagnasekera Thero. It is repeated that with the demise of Rev. Dhammarakkhitha Thero title vested in temple (Pelmadulla Purana Vihara Rajaman Viharaya), in view of the conditions

appearing in the said deed. As such Rev. Mudduwe Pagnasekera Thero could not have conveyed title by deed No. 4143 (P1) to Plaintiff.

In any event the important question of law revolve on the point, whether deed P2 No. 1341 create a fideicommissum, and the effect of the abolition of fideicommissum Act No. 20 of 1972. My attention has been drawn to the case of *Pablina Vs. Karunaratne 50 NLR 169 at pg. 170*. Held for creation of 'fideicommissum' the language used must clearly show.

(1) That the gift is not absolute to the donee.
(2) Who are the person to be benefited.
(3) When are they to benefit.

In another well-known text, *'Laws of Ceylon – Walter Perera* deals with fideicommissum. I find variety of views and several expression of this topic are considered. I note the following:

The writer states no satisfactory test appears to be available to be applied to the question whether any particular words in a particular document have the effect of creating a fideicommissum and the best course perhaps, is to give summaries of the different decision which the Supreme Court has pronounced.

At pgs. 436/437

A provision in a will that the property "shall forever remain unsold and undivided, and the profits thereof be divided among the heirs collectively" was held to amount to a fidei commissum, the word "heirs" not necessarily meaning the children of the testator. Similarly, provision that the survivor should possess the common estate as he or she pleases, and that after the death of both, whatever is left should be divided among the children, constitutes a fideicommissum as to the residue. The survivor can alienate or encumber the property, but he or she should not needlessly spend, give away, or squander the estate in prejudice of the heirs on whom it is entailed. Under the Roman-Dutch Law it must not, in any case, be diminished by more than three-fourths.

A gift of land to A comprising a provision that the land "shall be possessed and enjoyed only by A, her children and their children in perpetuity, but shall not be sold, mortgaged, or gifted to anyone," was held to create a valid fideicommissum. .....

No set form of words is necessary for creating a valid fideicommissum. Prohibition of alienation out of the family coupled with a clear indication of the person to whom the property, in the event of alienation, is to go over, constitutes a good fideicommissum without formal words. So also in the case of Vansanden v. Mack, it was held by Bonser C.J that no special words were necessary to create a fideicommissum, but effect was to be given to the intention of the testator, if it could be collected from any expressions in the instrument that he intended to create a fideicommissum. In the same case Browne A.J. was of opinion that the expression "my children and their descendants" different in nowise from "my children and my descendants"; and it was also held by the court that whatever had been the intention of the testator as to the creation of a fideicommissum, where the will had been construed by the parties as if the testator had impressed a fideicommissum on the property, and such construction had formed the basis of family arrangements for a long period, it should not be disturbed. .....

The following words in a will – "I hereby direct that and his posterity (paramparawe) should possess the following lands, & c. Except such possession, there lands or any part thereof shall not be sold, mortgaged, or made over in any other manner or seized for his debt" were held to create a fideicommissum. The word paramparawe was interpreted to mean lineal descendants of the testator. It was further held in this case that in construing a will the intention of the testator was of paramount importance, and where the intention to name a fidei commissary was expressed, or might be gathered by necessary implication from the language of the will, a fideicommissum was constituted. No particular form of words was necessary to create it, and in cases of doubt the inclination of the court was not to put any burden upon the inheritance.

Principles of Ceylon Law - Hon. H.W. Tambiah Q.C
Pg. 320.

The view taken is that in the case of a fideicommissum by deed there is a contract. The persons to whom the obligation is due are the creditors during the pendency of the condition, a principle which is contrary to the rule obtaining in the case of legacies. This concept is based on the principle that a person who makes a stipulation subject to a condition, transmits the expectation under the contract to his heirs if he dies before the fulfilment of the condition (Voet 36.1.67; Magregor 1.4.5; Mohamed Bhai v. Silva (1911) 14 N.L.R 193; Thiagarajah v. Thiagarajah (1921) 22 N.L.R 433; Balkis v. Perera (1927) 29 N.L.R 284; Ariyasathumma v. Retnasingham (1946) 47 N.L.R 180.

The learned District Judge has arrived at his conclusion based on deed P1 and P2. That P1 is a deed of transfer, and deed P2 is a deed of gift. The question of a fideicommissum was not an issue before the original court. There is no doubt that the 1st Defendant was a lessee of the Plaintiff. As such the law would not permit the 1st Defendant to contest Plaintiff's title. Material made available suggest that the 1st Defendant in violation of lease document P6

wrongfully/illegally executed deed of lease P9 and alienated possession of the premises to the 2nd Defendant. Learned District Judge has carefully considered the above position. I do not think the Judgment of the learned District Judge could be faulted in any respect as the Judgment had been delivered based on the issues raised before the original court.

The learned High Court Judge considered the position of a fideicommissum and reject the position of the Plaintiff-Respondent-Appellant and state deed P2 does not create a fideicommissum as P2 does not pass title on the demise of Dhammarakkhitha Thero and the subject property becomes sanghika property. On this aspect the authorities referred to above express the view that no satisfactory test could be utilised to decide on the fideicommissum but one has to gather such intention from the words used in the deed.

Therefore the views expressed by the learned High Court Judge cannot be considered as a test to be applied and adhered to determine whether deed P2 created a fideicommissum. P2 no doubt suggest that the gift is not absolute to the donee, and the donee would benefit by deed P2 during his life time. P2 deed executed in the year 1964, contains a prohibition on the donee to mortgage or provide P2 as security or any alienation. There are some important features in a fideicommissum, which suggest continuation of possession from one to another on the demise of the donee.

I am in agreement with the submissions of the learned counsel for Plaintiff-Respondent-Appellant that deed P2 create a fideicommissum but with the enactment of, abolition of fideicommissum and Entails Act No.20 of 1972 the fideicommissum becomes ineffective and the donee in deed P2 becomes the absolute owner of the property without any encumbrances. By the said Enactment the fideicommissum or any restraint or alienation, limit or curtailment got wiped out and the donee would get title and no other named in the deed would acquire title (Section 2 and 4 of the Act No. 20 of 1972).

Upon a consideration of all the facts and circumstances discussed above, I set aside the Judgment of the High Court and affirm the Judgment of the learned District Judge. I answer the two questions of law on which leave was granted as 'Yes'. In the creation of a fideicommissum it is not necessary to use special language or an adoption of a particular form. What is required is the manifestation of an intention to create it, and the presence of a condition or happening of an event for fideicommissum to take effect. There should be a clear indication as to who will benefit. Deed P2 fulfil all above, requirements.

The words used in deed P2 is clear. There is nothing wrong in expressing the view that the property in dispute should be considered as

pudgalika property. As such I set aside the Judgment of the High Court and allow this appeal with costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Prasanna S. Jayawardena P.C., J.

I agree

JUDGE OF THE SUPREME COURT