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1952 *Present:* **Gratiaen J. and Pulle J.**

B. J. H. BAHAR, Appellant, *and* T. K. BURAH *et al.*, Respondents

S. C. 481—D. C. Tangalle, 5,838

Administration of estates—Property belonging to estate—Prescriptive claim by administrator—Conditions necessary for such claim—Fiduciary relationship of administrator—Trusts Ordinance, s. 111—Prescription Ordinance, s. 3—Civil Procedure Code, ss. 540, 741.

An administrator who enters in that capacity upon any property belonging to the estate of a deceased person cannot commence acquiring prescriptive title to that property for himself against the intestate heirs until he has divested himself of his representative character by "completing the administration" within the meaning of section 540 of the Civil Procedure Code.

An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination, and, so long as that fiduciary relationship subsists, the law will not permit him to say, for purposes of prescription, that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection.

APPEAL from a judgment of the District Court, Tangalle.

H. V. Perera, Q.C., with *J. M. Jayamanne* and *J. N. David*, for the plaintiff appellant.

N. E. Weerasooria, Q.C., with *C. V. Ranawake*, for the defendants respondents.

Cur. adv. vult.

August 7, 1952. GRATIAEN J.—

The facts which arise for consideration on this appeal are beyond dispute. A young married woman named Dhane Bahar died intestate on October 18, 1926, leaving her husband (who is the first defendant) and two infant children (who are the second and third defendants). The learned trial Judge has held that according to the Muslim law which is applicable the deceased's parents—namely, the late Mr. B. J. H. Bahar and his widow the fourth defendant—also became her intestate heirs in addition to the first, second and third defendants. No arguments

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were addressed to us in this Court to suggest that this conclusion was wrong, and I must assume for the purpose of this appeal that it is correct.

The late Mr. Bahar himself died intestate shortly afterwards, leaving as his heirs his widow (the fourth defendant) and his three sons (the plaintiff and the fifth and sixth defendants) who thereby succeeded to his interests in his daughter's estate.

Dhane Bahar's estate was duly admitted to administration in Testamentary action No. 995 of the District Court of Tangalle, and letters of administration were issued without opposition to the first defendant by virtue of his undoubted preferential claim to the appointment as the deceased's widower. The property which is the subject matter of this action, comprising 10 allotments of land slightly exceeding 78 acres in the aggregate, were correctly inventorised as forming part of the deceased's estate, and the learned District Judge has held that, subject to the issue of prescription, the plaintiff and the first to the sixth defendants inclusively were, in accordance with the Muslim law, co-owners of the property in the proportions set out in paragraph 11 of the plaint. The plaintiff instituted this action on September 17, 1948, for the partition of the property on this basis. The 7th to the 26th defendants intervened in the action to obtain recognition of their admitted interests as planters who had improved the property.

The learned District Judge, after hearing the evidence, dismissed the plaintiff's action on the ground that the title of the plaintiff and of the fourth, fifth and sixth defendants had been defeated by prescription before the action commenced. He held that the first defendant who, as administrator and as an heir of his deceased wife's estate, had consistently and unequivocally refused to acknowledge her parents' claims to heirship, had since about the year 1930 possessed the property on behalf of himself and his minor children on the footing that the property belonged exclusively to them. The learned Judge accordingly decided that, by virtue of the provisions of section 3 of the Prescription Ordinance, the original rights of the first, second and third defendants as intestate heirs of Dhane Bahar became enlarged into full joint ownership at the expense of the other co-owners.

I have examined the evidence led at the trial, and I am satisfied that if the nature of the possession of the property by the first defendant which commenced in 1930 could properly be regarded as that of a co-owner *simpliciter* or as that of a mere agent, there was probably sufficient proof of an " overt ouster " to support the plea of prescription in accordance with the rules laid down by the Privy Council in *Corea v. Appuhamy*[1] and in *Nagenda Marikar v. Mohammad*[2] respectively. But the issue in the present case is complicated by the circumstance that the first defendant had in the first instance not entered into possession of the property *in his own right* but by virtue of the statutory powers and duties vested in and imposed on him *as the duly appointed administrator of his wife's estate.* Admittedly his *de facto* possession of the property has continued without interruption ever since, but at no stage did he divest himself of the representative character in which he first entered

[1] *(1911) 15 N. L. R. 65.* [2] *(1903) 7 N. L. R. 91.*

upon the land in such a manner as the law would consider sufficient to relieve him of the fiduciary obligations attaching to his office. In that state of things, he cannot, in my opinion, be heard to say that there arose some point of time when his possession *qua* administrator became converted into possession *ut dominus* to the detriment of the other co-heirs to whom he stood in a position of fiduciary relationship.

The first defendant did not choose to take any of the elementary precautions available to him under the Civil Procedure Code. He could very well have taken steps to protect his own interests in the property which had come into his hands as administrator so as to prevent any conflict between his subsequent possession with the responsibilities attaching to his office. Having first settled, out of the assets available to him, the claims of the creditors which had been brought to his notice, he should have applied for and obtained a judicial settlement of his accounts and then proceeded, after an *inter partes* adjudication as to the disputed claims of his parents-in-law to heirship, to obtain a decree under section 741 for the distribution of the estate (including the property in dispute) among the heirs. In that event, he could properly have claimed that, as far as the property in dispute was concerned, he had " completed the administration " within the meaning of section 540 and thus become free to possess his share of the property and that of his minor children in his own right and on their behalf.

So much for what the first defendant might have done. Let us now consider what he did in fact. On September 23, 1929, he purported to file what is popularly but somewhat loosely described as a " final account " whereby he " charged " himself *qua* administrator with a sum of Rs. 28,435 (including the inventorised value of the property in dispute) and " credited " himself with various expenses and disbursements amounting to Rs. 2,806·46 " leaving "—to quote his signed statement P13—" *a balance of Rs. 25,629 to be distributed to those entitled thereto* ". He did not however obtain a judicial settlement of his account or even have it " passed " by the Court in accordance with some less formal procedure which, though not sanctioned by the Code, seems to have gained increasing popularity with executors and administrators in recent years. Nor did he invite the Court to inquire into the disputed claims to heirship which had been notified to him and to the Court by Mr. Bahar and the fourth defendant. Instead, he continued, exactly as he had previously done, to possess the property in dispute until the present action commenced. Can he now be heard to say that he had long since divested himself of the character of an administrator by reason of what the learned District Judge seems to regard as a " *de facto* distribution " of the property to himself on his own account and on account of his two children ? As I understand the law relating to the duties and responsibilities attaching to the office of an administrator, I think that, for the reasons which I shall now proceed to set out, this is an entirely untenable position.

We must not permit ourselves, by a process of loose reasoning or by an imperfect appreciation of the *ratio decidendi* of certain earlier rulings of this Court, to assume that an administrator who has failed to obtain

a judicial settlement of his accounts or to secure a decree for payment and distribution of assets under section 740, can too readily be regarded as having divested himself of his fiduciary status. The question whether an estate has been "closed" or not, and whether the assets in the administrator's hands have been distributed or not, is always a question of fact to be determined with special reference to the particular circumstances of a given case. For instance, when a creditor sues an administrator for the recovery of a debt alleged to have been incurred by the deceased, the administrator can successfully plead *plene administravit* if he proves that he has already parted with the assets in his hands by the settlement of the claims of other creditors or by their distribution among the heirs. *Arunasalem Chetty v. Mootatamby*[1]; *Ramalingam v. Kalasipillai*[2] and *Ramalingampillai v. Adguwad*[3]. In such cases the maintainability of the plea of *plene administravit* is not necessarily concluded by the administrator's failure to protect himself by obtaining a formal judicial settlement of his accounts. Indeed, the real issue arising upon the plea is whether or not the administrator still retains assets out of which the creditor's claim can be met wholly or in part. *Suppramanian Chetty v. Palainappa Chetty*[4]. If, to take a situation of a different kind, an administrator who claims to have closed the administration *de facto* is subsequently confronted with a claim by an heir for judicial settlement or for some other form of relief in the testamentary proceedings, different considerations would apply according to the circumstances of the particular case. *In re Baban*[5], *Valipillai v. Ponnasamy*[6] and *Perera v. Simno*[7]. Mr. Weerasuriya argued that, in the testamentary action with which we are now concerned, the time for an adjudication as to Mr. and Mrs. Bahar's claims to heirship had long since passed. I do not agree. These claims had been duly notified to the Court and to the administrator, and the time for their adjudication would only have arisen if and when a decree for distribution among the heirs was applied for. Indeed, a consideration of that issue at an earlier stage, being immaterial to the question as to who should be appointed to administer the estate, would have been premature. *Fernando v. Fernando*[8]. The contrary opinion expressed by Lyall Grant J. in *Nonohamy v. Punchiappuhamy*[9] is at best an *obiter dictum*, for in that case Dalton J. and Lyall Grant J. were merely considering the validity of a belated claim to heirship by a person who was, in fact, held not to be an heir.

The present action is not concerned with the claim of a creditor or an heir in respect of assets belonging to the estate which have ceased to remain in the administrator's hands. On the contrary, it is concerned with the claims of certain intestate heirs to a declaration as to their title to the deceased's property which had in the first instance come into the hands of the administrator *qua* administrator, and which still remained in his possession and under his control when the action commenced. His defence is that he had defeated that title by his adverse prescriptive

[1] *(1906) 2 A. C. R. 90.*
[2] *(1942) 43 N. L. R. 425.*
[3] *(1942) 43 N. L. R. 361.*
[4] *(1904) 3 Bql. 57.*
[5] *(1891) 1 C. L. Rep. 41.*
[6] *(1913) 17 N. L. R. 126.*
[7] *(1915) 4 Bal. N. C. 77.*
[8] *(1914) 18 N. L. R. 24.*
[9] *(1929) 31 N. L. R. 220.*

enjoyment, partly in his own right and partly as the natural guardian of his minor children, commencing at some date after he had taken possession of it *qua* administrator.

In the circumstances of this case, the first defendant's plea of prescription under section 3 of the Prescription Ordinance is incompatible with the character in which he commenced to occupy the land. In the words of Bowen L.J. in *Soar v. Ashwell* [1] " his possession of the property was . . . . coloured from the first by the trust and confidence in virtue of which he first received it. He never can discharge himself except by restoring (to the beneficiaries, *i.e.*, the true intestate heirs of Dhane Bahar's estate) the property which he has never had otherwise than upon this confidence ". The duration of the status of an administrator in relation to property which he has taken over in the exercise of his powers of administration *and which he still retains in his hands* is indicated in the provisions of section 540 of the Civil Procedure Code. His office, and the fiduciary relationship attaching to it, endures until the death of the administrator or the completion of the administration, whichever first occurs. In the present case, neither of those events having taken place, the first defendant's possession of the property in dispute has not yet ceased to be possession *qua* administrator. To my mind, this circumstance effectively disposes of the plea of prescription.

Even before the Trusts Ordinance was enacted, this Court has declared that, as in England, prescription does not run between trustee and *cestui que trust*. *Antho Pulle v. Christoffel Pulle* [2]. In that case Clarence J. pointed out that " the Court would watch jealously any proposal to divest the trustee of his fiduciary character ". In *Fernando v. Fonseka* [3] Middleton J. and Grenier J. decided that " so long as a fiduciary relationship continues, a trustee cannot set up a plea of prescription in bar of a claim by the *cestui que trust* ", and Middleton J. said, " the fact that the trustee had not strictly carried out his obligations under the trust deed . . . . cannot be relied upon by him as proving a termination of his fiduciary position ". Both these decisions were concerned with *express trusts*, and the same ruling was authoritatively laid down by the Privy Council in *Arunasalam Chetty v. Somasunderam Chetty* [4] where the Judicial Committee, after referring to *Soar v. Ashwell* [1], indicated that the position would be different in the case of a bare constructive or resulting trust which could not in the special circumstances be equated to an express trust.

After the Trusts Ordinance came into operation in 1918, Bertram C.J. held *inter alia* in *Supramaniam v. Erampakurukal* [5] that section 111 (5) was intended to incorporate in statutory form the English rule laid down in *Soar v. Ashwell* [1]. Section 111 expressly declares that a claim to recover " trust property " shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance, and section 111 (5) extends the operation of this rule to constructive trusts *in cases where such trusts are " treated as express trusts by the law of England "*.

[1] (*1893*) *2 Q. B. 390 at p. 397.*
[2] (*1889*) *1 N. L. R. 120.*
[3] (*1912*) *15 N. L. R. 398.*
[4] (*1920*) *21 N. L. R. 389.*
[5] (*1922*) *23 N. L. R. 417.*

Whenever an administrator enters in that capacity upon property belonging to the deceased's estate, the law requires him " to act in a fiduciary relation in regard to it, and a Court of Equity will impose upon him all the liabilities of an express trustee and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to the beneficiaries for all such property *without regard to lapse of time* ". *Per* Lord Esher M.R. in *Soar v. Ashwell* [1] at page 394. Similarly, Giffard L.J. said in *Burdick v. Garrick* [2], " where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time ". These words, if I may say so with respect, perfectly describe the responsibilities imposed on the first defendant in relation to the property in dispute, and I would therefore reject his claim to have acquired prescriptive title, either for himself or for his children, to the shares which it was his duty to distribute among the other heirs. The long established rule that " possession is never considered adverse if it can be referred to a lawful title " applies with special and, indeed, with uncompromising force where a trust is impressed upon such possession.

I had suggested to Mr. H. V. Perera in the course of the argument that some distinction might perhaps be drawn between the case of the first defendant (whose plea of prescription on his own account must necessarily fail) and that of his minor children (who could not themselves be regarded as affected by any obligation in the nature of an express trust). Mr. Perera conceded, and I am satisfied, that the position of the second and third defendants would have been different if they had effectively received from the administrator certain shares in excess of what they were legally entitled to as heirs, for in that event they could thereafter have relied on their possession *ut dominus* of those additional shares for purposes of prescription. But in the present case, as Mr. Perera points out, it was the administrator and the administrator alone who purported by his own acts of possession to enlarge the rights of himself and his children to the detriment of the others. I agree that this circumstance makes all the difference to the issue of prescription. An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination, and, so long as that fiduciary relationship subsists, the law will not permit him to say that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection.

I would set aside the judgment under appeal, and hold that the pleas of prescription set up on behalf of the first, second and third defendants cannot be sustained. The property in dispute belongs to the parties in undivided shares as set out in paragraph 11 of the plaint, and the record must go back to the lower Court with a direction that a decree for partition should be entered allotting shares to the plaintiff and to the first, second, third, fourth, fifth and sixth defendants on this basis, subject to the interests and claims of the seventh to the twenty-sixth defendants upon which the learned District Judge, after the inquiry, must proceed to adjudicate according to law.

[1] *(1893) 2 Q. B. 390 at p. 397.* [2] *L. R. 5 Ch. 233.*

The first defendant must pay to the plaintiff the costs of this appeal and of the contest in the Court below. All other costs will be in the discretion of the learned District Judge.

PULLE J.—I agree.

Judgment set aside.