1951 *Present:* **Gratiaen J. and de Silva J.**

MARIAM BEEVI *et al.*, Appellants. *and* RUQQIAH UMMA, Respondent

S. C. 40—D. C. Puttalam, 806

Administration of estates—Letters of administration with will annexed—Competing claims—Right of widow of testator—Civil Procedure Code, ss. 519 (1) and (2), 523.

Other considerations being equal, a Court should, in granting letters of administration with the will annexed, exercise its discretion with due regard to the claims and wishes of those legatees or devisees who have the greatest interest in the estate to be administered. The provisions of Section 523 of the Civil Procedure Code which confer upon the spouse of a deceased person a preferential right to the grant of letters of administration are applicable only in cases of intestacy.

APPEAL from a judgment of the District Court, Puttalam.

H. V. Perera, K.C., with *S. Nadesan*, for the 4th to 12th appellants.

N. K. Choksy, K. C., with *Cyril E. S. Perera* and *Naina Marikar*, for the respondent.

Cur. adv. vult.

June 12, 1951. GRATIAEN J.—

This appeal relates to a competition between claims for the grant of letters of administration, with the will annexed, in respect of the estate of A. H. M. M. Faluloon Marikar who died on January 3, 1947, leaving property of considerable value. Mr. L. E. David, Proctor, was the executor named in the will. He applied for probate, and order *nisi* in his favour was entered on November 5, 1947.

Under the deceased's will certain properties of the aggregate value of approximately Rs. 15,000 were devised to his widow Ruqqiah Umma, subject (with one exception) to a *fidei commissum* in favour of one or other of their two surviving children (i.e., their son Abdul Hameed Marikar

and their married daughter Samsunnehar). To the daughter Samsunnehar certain other properties, of the aggregate value of only Rs. 5.900 were devised subject to a *fidei commissum* in favour of " her child or children according to Muslim Law, the males taking two shares and the females one share ". Apart from a few minor charitable bequests, the bulk of the estate, valued at about Rs. 200,000, was devised by the testator to his son Abdul Hameed Marikar, sujbect to *fidei commissa* in favour of either his male or his female descendants upon the conditions stipulated in the will. Provision was also made that the remaining property, which had not been specially devised, should be sold for the payment of debts and that the residue should devolve upon Abdul Hameed Marikar and Samsunnehar, the former taking two shares and the latter one share.

The son Abdul Hameed Marikar died intestate pending the testamentary proceedings on November 10, 1949, leaving as his heirs his widow and 7 minor children. On Mr. David's application these heirs were added as parties to the action, and the 9th appellant was appointed guardian *ad litem* of the minors. The 9th appellant is the father of Abdul Hameed Marikar's widow and, incidentally, is also the brother of the testator's widow. It is common ground that, upon Abdul Hameed Marikar's death, the bulk of the testator's estate passed, mainly under the terms of the will but to a limited extent under the Muslim Law to Abdul Hameed Marikar's children and widow who, as interested parties, had now been joined in the action as interested parties.

On July 27, 1950, the executor Mr. David died. and it therefore became necessary for the Court to appoint someone else to administer the estate in terms of the will which had been propounded. The testator's widow Ruqqiah Umma claimed that the grant of letters of administration with the will annexed should be made in her favour, and her claim was supported by her daughter Samsunnehar. This application was, however, strenuously opposed on behalf of the heirs of Abdul Hameed Marikar who, being the persons admittedly possessing the largest interests in the estate to be administered, claimed that letters should be issued to their nominee. the 9th appellant.

A somewhat half-hearted attempt was made by each claimant to suggest that the other was, for one reason or another, disqualified on personal grounds from being entrusted with the responsibilities of administering a large estate. These allegations were discounted by the learned trial Judge, and at the closing stages of this appeal learned counsel agreed that the dispute should be decided solely with reference to the question whether in the circumstances of the present case, Ruqqiah Umma (though vested with a comparatively small interest in the estate) should in law be regarded as having a preferential claim, *as widow* of the testator, over that of a person selected or nominated by those who now stood in the place of the devisee to whom the largest interests in the estate had passed under the testator's will.

The case for the widow was presented in the lower Court on the basis that, in terms of section 523 of the Civil Procedure Code, her claim " should be preferred to all others " in the sense in which these words

have been interpreted by a Divisional Bench of this Court in *Sethukavalar v. Alvapillai* [1]. In my opinion the learned Judge was right in rejecting this contention. Those provisions in section 523 which confer upon the spouse of a deceased person a preferential right to a grant of letters of administration are expressly stated to apply on *in cases of intestacy*. The present dispute, on the other hand, relates to a grant of letters where, owing to the failure of an executor, the Court is required to appoint someone other than the executor to administer the estate *according to the tenor of the testator's will*. In such cases, the principles of the English Law would be applicable under the Charter of 1833 except to the extent, if any, to which they are found to be inconsistent with the provisions of our local statutes. Section 519 (1) of the Civil Procedure Code directs a Court, in exercising its discretion, to pay regard to considerations of " consanguinity, amount of interest, the safety of the estate, and the probability that it will be safely administered ". Section 519 (2) clearly has no application except that it introduces certain rules and regulations which come into force *after* but not before a grant has been made. The only other relevant statutory provision is to be found in the earlier part of section 523 which provides that " the claim of a creditor shall be postponed to the claim of a residuary legatee or devisee under the will ". Indeed, these express statutory directions seem to be in accord with the guiding principles of the English Law on the subject, and I would hold, in accordance with what is admitted to be well-accepted practice, that, *other considerations being equal*, a Court should, in granting letters of administration with the will annexed, exercise its discretion with due regard to the claims and wishes of those legatees or devisees who have the greatest interest in the estate to be administered. *Williams on Executors (12th Edition), Volume 1, page 322.* In the words of Sir John Nicholl in *Atkinson v. Barnard* [2] " the residuary legatee is the testator's choice, he is the next person in his election to the executor ". When the persons with the largest interest in the estate are minors who in consequence lack the capacity to administer the property themselves, there is precedent for making a grant of letters with the will annexed to someone *for their benefit. In re Gardiner* [3]. In the present case the 9th appellant was, on the application of the original executor and by consent of parties, appointed by the Court as a fit and proper person to protect the minor's interests in the administration proceedings, and, in the absence of good grounds for rejecting his present appointment, I think that, as the person nominated by those who have by far the largest interests in the estate, his claim should prevail over that of the testator's widow whose interests are by comparison of small extent. If one rejects the argument that the widow has, irrespective of the extent of her vested interests in the estate, a preferential right such as she could have put forward in the case of an intestacy, one cannot lose sight of the fact that a Muslim lady in purdah is not ideally qualified to administer a valuable estate of the gross value of Rs. 300,000 saddled with debts to the extent of Rs. 100,000.

[1] *(1944) 36 N. L. R. 281.* [2] *2 Phill. 316 at 318 (161 E. R. 1156).*
[3] *L. R. 9. Q. B. D. 66.*

I would set aside the order of the learned District Judge dated January 25. 1951, and direct that the record be returned to the lower Court with a direction that a grant of letters with the will annexed be made in favour of the 9th appellant K. T. M. M. Mohamed Ismail Marikkar. subject to such terms and conditions as to security and otherwise as the learned District Judge may in his discretion deem necessary. I would order that in the circumstances of this case, the costs of the parties both in this Court and in the contest in the Court below should be borne by the deceased's estate. I would further direct that some other person should be appointed as the guardian *ad litem* of the minors when the 9th appellant enters upon his appointment as administrator.

DE SILVA J.—I agree.

Order set aside