1945

Present : **Rose J.**

SUFFIYAN, Appellant, *and* ANDRIS APPU, Respondent.

17—C. R. Matara, 469.

Fidei commissum—*Devise to children and descendants—Rule of intestate succession not applicable—Muslim Last Will.*

Where a Muslim devised property to his two children " to be always possessed by the said two children and their descendants..... "

Held, that on the death of a devisee his child would take according to the general Law and not according to the rule of intestate succession applicable to Muslims.

Jameel v. Haniffa et al. (*42 N. L. R. 470*) distinguished.

APPEAL from a judgment of the Commissioner of Requests Matara.

L. A. Rajapakse, K.C. (with him *A. Seyed Ahamed*), for the second defendant, appellant.

N. E. Weerasooria, K.C. (with him *M. I. M. Haniffa*), for plaintiff, respondent.

M. I. M. Haniffa, for third defendant, respondent.

Cur. adv. vult.

December 6, 1945. Rose J.—

The substantial point raised in this appeal is as to the interpretation of a certain clause in the last will of one Meerakandu which was executed in 1826. The clause in question in so far as it is material reads as follows :—

" It is further directed that the immovable property bequeathed to my said two children and enumerated in the seventh and eighth paragraphs of the account hereunto annexed be always possessed by my said two children and their descendants . . . . ".

The second defendant-appellant, who is the only child of one Ahamed Lebbe Marikkar who was in the direct line of succession from Meerakandu

claims that she is entitled to a 2/8th share of the property in question which is the full share owned and possessed by her deceased father. The respondents contended at the trial, which view was adopted by the learned Commissioner, that the appellant is only entitled to a ⅛th share being one half of the share held by her late father, since the rule of intestate succession applicable under the Muslim law should be applied to her case and that therefore she would take half of her father's share, the remaining half being divided among her father's brothers and sisters. Mr. Rajapakse concedes that the respondent's view would be correct if the clause referred to " heirs " instead of " descendants", a view which is supported by *Jameel v. Haniffa et al* [1] but he argues that the word " descendants " demands a different interpretation. With this view I am in agreement and consider that it was the testator's intention, adequately implemented by the language used, that it should be the children only and not all the heirs who should benefit. There is one matter, however, which requires consideration and that is that the appellant's father, Ahamed Lebbe, who was one of seven children and the only male, succeeded to a 2/8th share of the property, each of his six sisters receiving a ⅛th share, the parties apparently acting on the assumption that the rule of intestate succession applicable under the Muslim law applied. As Mr. Haniffa for the respondent contends, it would seem to be inequitable that the Muslim law of intestate succession should be applied to one generation and not to another and he suggests that, even though estoppel cannot be said to operate against the present appellant, I should have regard to this consideration. In all the circumstances I am of opinion that this is the fair attitude to be taken in this matter and I am, therefore, of opinion that the share to which the appellant is properly entitled is 1/7th of the property, which is what Ahamed Lebbe her predecessor in title would have received had Mr. Rajapakse's argument been accepted by the parties when the division came to be made among Ahamed Lebbe and his sisters.

In the result therefore the amount of Rs. 30 awarded to the plaintiff on the basis that the appellant was only entitled to a ⅛th share of the property must be varied to accord with the new fraction. There will be no costs of this appeal.

Decree varied.

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[1] *42 N. L. R. p. 470.*