1957 *Present:* **Sansoni, J., and L. W. de Silva, A. J.**

G. ABEYGUNAWARDENA *et al.*, Appellants, *and* K. DEONIS SILVA *et al.*, Respondents

S. C. 315—D. C. Tangalla, 5,990

Fideicommissum—Will—Devise to two sons—Prohibition against alienation except to specified persons—Indication of fideicommissaries—Effect of alienation between the specified persons.

Construction of Deeds—Two deeds executed contemporaneously—One single transaction.

Muslim Law—Inheritance—Residuaries—Sisters and paternal uncle of deceased—Their rights to claim as residuaries.

By his last will a Muslim testator devised certain property to two of his sons in equal shares. He permitted alienation by the devisees between his sons, but all other alienations were forbidden. He further provided that if a prohibited alienation took place, the lands so alienated should devolve on the children of the respective devisees.

Held, (i) that the will created a valid fideicommissum. The prohibition against alienation did not stand by itself, for the beneficiaries to whom the lands should pass in the event of a breach of it were clearly indicated.

(ii) that if one devisee transferred his share to his brother, the transferee would not be bound, in respect of that share, by the prohibition against alienation—unless the transferee was used by the transferor as a tool in order that the transferee might contemporaneously execute a transfer to a stranger and thus evade the condition imposed by the will.

One of the devisees died leaving a widow and three daughters, and had not alienated any of the lands devised to him.

Held, (i) that the devolution of the devisee's share was governed by the terms of the will and not by the Muslim law of inheritance. Accordingly, the property devolved on the three daughters in equal shares. But the Muslim law of inheritance would apply to the devolution of the share of any of the three daughters when she died.

(ii) that, under the Muslim law of intestate succession, a full sister of a deceased woman would be entitled to inherit as a residuary only if there is also a brother or if there is a female descendant of the deceased. In the absence of full sisters who can claim to inherit as residuaries, the paternal uncle of the deceased is a residuary.

APPEAL from a judgment of the District Court, Tangalla.

A. L. Jayasuriya, with *A. M. Ameen* and *S. H. Mohamed*, for the plaintiff and 2nd and 3rd defendants-appellants.

H. W. Jayewardene, Q. C., with *T. P. P. Goonetilleke* and *D. R. P. Goonetilleke*, for the 4th, 5th and 6th defendants-respondents.

Cur. adv. vult.

June 27, 1957. SANSONI, J.—

It is common ground between the parties to this action that one Asana Marikkar was the owner of a $\frac{1}{6}$ share of the land called Vederalage Meegahawatte, the entirety of a land called Polgaswelawatte, and 2/3 share of a land called Kopiwatte at the time of his death.

By his last will (P 4) of 1922 Asana Marikkar devised his interests in these three lands to two of his sons Hashim and Samadu (2nd defendant) in equal shares. He also devised certain other lands to another son named Sadakathula. These devises were subject to the condition that they (the devisees) " shall not be at liberty to lease the said premises for a period exceeding 4 years, and they shall not be at liberty to sell, mortgage or gift the said premises or alienate the same to any outsider except the said brothers, and if any such alienation, mortgage, or lease exceeding 4 years became necessary, the same shall be done to and with the said brother, or brothers, and on the contrary all the alienations, mortgages and leases exceeding 4 years done to and with any outsider shall become totally null and void and the said premises shall become entitled to his or their lawful child or children who shall be at liberty to do whatever therewith ".

When Asana Marikkar died he left surviving him by his first wife those two sons Hashim and Samadu (2nd defendant) and two daughters, namely, Ayesha and Pathumma. He also left his son Sadakathula and a daughter Eknieth Umma who were born to him by his second wife.

The first question which arises for decision is the effect of the condition in the last will which I have already set out. It contains a prohibition against alienation except to certain specified persons, and it also provides what is to happen in the event of the breach of that condition. It seems to me that while the testator permitted alienation by the devisees amongst themselves, all other alienations were forbidden. He further provided that if a prohibited alienation took place, the lands so alienated should devolve on the children of the respective devisees. The prohibition against alienation therefore does not stand by itself, for the beneficiaries to whom the lands should pass in the event of a breach of it have been clearly indicated. Obviously it was the testator's intention that the lands, other than those which had been validly alienated, should ultimately pass to the children of the respective devisees. I am therefore of the opinion that the clause containing the condition in question was sufficient to create a valid fidei commissum. In this respect the will is different from those considered in *Kirthiratne v. Salgado*, [1] *Narina Lebbe v. Marikkar* [2] and other cases where there was only a bare prohibition without a designation of any person to whom the property should pass if there was an alienation in breach of the prohibition.

[1] *(1932) 34 N. L. R. 69.*

[2] *(1921) 22 N. L. R. 295.*

The devisee Hashim died leaving a widow Amina Umma and three daughters, namely, the 4th and 6th defendants and one Mahakumath Umma, surviving him. Hashim did not alienate any of the lands devised to him and I would hold that his share of those lands devolved, under the terms of the last will, on his three daughters in equal shares. I am unable to agree with the view put forward for the appellants that the devolution of Hashim's share is governed by the Muslim law of inheritance, for the will showed clearly what the testator's intention regarding that share was. But that law would apply to the devolution of Mahakumath Umma's share when she died leaving her mother and two sisters (4th and 6th defendants) and her paternal uncle Samadu. It is not disputed that her mother inherited a $\frac{1}{6}$ share and her two sisters a $\frac{1}{3}$ share each of Mahakumath Umma's estate as sharers.

Another question which was argued before us was as to who inherited the remaining $\frac{1}{6}$ share of that estate. The appellants contend that it devolved on the 2nd defendant Samadu exclusively as sole residuary; the respondents contend that it devolved on the two sisters exclusively as joint residuaries. I have no difficulty in holding that the appellants' contention is right. Residuaries are divided into three classes, viz. (1) Residuaries *in their own right*, who are all males " in whose line of relation to the deceased no female enters " ; (2) residuaries *in the right of another* who only take as such in company with a male ; and (3) residuaries *with* others, who only take as residuaries with daughters or sons' daughters. A full sister, such as the 4th and 6th defendants are, can therefore only be a residuary if there is also a brother or if there is a female descendant of the deceased.

Authority for this view will be found in Tyabji's Principles of Muhammedan Law (2nd edition) page 873 and Wilson's Anglo-Muhammedan Law (6th edition) pages 270 and 277. The paternal uncle in this case is a residuary in the absence of full sisters who can claim to inherit as residuaries. The rule that preference is given to propinquity to the deceased, on which the respondents rely, only applies " when a person dies leaving behind him several relations who may be classed as residuaries of the different kinds mentioned ", in which event " the residuary with another when nearer to the deceased than the residuary in himself, would come first ". See Syed Ameer Ali's Muhammedan Law (6th edition) Vol. 2 page 55. But the person claiming to inherit must first satisfy certain essential conditions before he can even claim to be classed as a residuary, and the 4th and 6th defendants fail in this respect. Therefore that $\frac{1}{6}$ share out of Mahakumath Umma's $\frac{1}{3}$ share out of Hashim's $\frac{1}{2}$ share of Asana Marikkar's interests in the three lands in question devolved, on Mahakumath Umma's death, on her uncle Samadu (2nd defendant). The interests which thus devolved on the 2nd defendant were not subject to any restrictions as regards alienation, and he was free to deal with them as he pleased. Those interests were transferred by him to his brother Sadakathula who in turn transferred them to the 3rd defendant, who is now entitled to them.

Samadu (2nd defendant) also purported to transfer the interests which he obtained under his father's last will by those same deeds to his brother Sadakathula. He was entitled to do so under the will, but the matter does not end there. The interests which Sadakathula obtained in that way in Vederalage Meegahawatte and Polgaswelawatte were transferred by him by a contemporaneous deed to the 3rd defendant. Sadakathula has given evidence which clearly shows that he was being used by the 2nd defendant and the 3rd defendant as a tool in order that the condition imposed by the will might be evaded. It is difficult to see any other purpose for which these two lands were transferred by the 2nd defendant to Sadakathula and immediately thereafter by the latter to the 3rd defendant. Under these circumstances the two deeds in question (P 14 and P 15) have the same effect as if they were one deed—see *Dingiri Naide v. Kirimenike* [1].

In effect, then, the second defendant contravened the condition of the last will as regards alienation to an outsider. Whether his interests in those two lands which he derived under the will did, or did not, pass to the 3rd defendant, can only be decided after it has been ascertained whether Samadu has any children. On this point the parties have failed to lead any evidence, and apart from evidence that Samadu is married the question remains at large.

With regard to the interests which the 2nd defendant derived under the will in Kopiwatte, different considerations apply. He transferred those by deed P 20 in 1941 to his brother Sadakathula as he was entitled to do under the will. Title passed to Sadakathula who was entitled to do what he pleased with those interests, since there is nothing in the will restricting his power to alienate those interests once he has acquired them—see *Kirthiratne v. Salgado* [2]. The 3rd defendant claims to have purchased those interests from Sadakathula by deed P 21 of 1952, but the title recited therein is not deed P 20 but another deed which is said to have been executed on the same day as deed P 21. That deed has not been produced in evidence. It is therefore not possible to hold that the 3rd defendant became the owner of the 2nd defendant's interests in Kopiwatte derived under the last will. We are unable to say on the material before us who owns those interests. But the transfers by the 2nd defendant in favour of Sadakathula, and by the latter in favour of the 3rd defendant, are sufficient to vest title in the 3rd defendant so far as the interests which the 2nd defendant inherited from his niece Mahakumath Umma are concerned.

It has been proved that the remaining ½ share of Kopiwatte also formerly belonged to Asana Marikkar. He by deed P 17 of 1914 sold that share to Kadija Umma, who by deed P 18 of 1946 leased that ½ share to the 3rd defendant for 7 years commencing from 1st January 1945.

The plaintiffs came into court in this case claiming that the 2nd and 3rd defendants by deeds of lease P 13 and P 16 of 1949 leased certain specified shares of the 3 lands in question to the 2nd plaintiff for 5 years

[1] *(1956) 57 N. L. R. 559.* [2] *(1932) 34 N. L. R. 69.*

commencing from 1st March, 1949, and that the 2nd plaintiff by deed P 22 of 1949 assigned those leasehold rights to the 1st plaintiff. The action was brought against the 1st defendant who claimed on a deed of lease 1 D 1 of 1945 executed in his favour by the 4th, 5th, and 6th defendants leasing $\frac{1}{3}$ of Kopiwatte, $\frac{1}{2}$ of Polgaswelawatte, and 1/12 of Vederalapadinchivasitiyawatte (which is another name for Vedera'age Meegahawatte) for 8 years commencing from 25th December 1945. The 4th, 5th and 6th defendants were added as parties to this action after they had been noticed to warrant and defend as lessors, and they pleaded that the deeds of lease relied on by the plaintiffs were invalid, and that the 4th and 6th defendants, and nobody else, were the heirs of Mahakumath Umma. They asked that the plaintiff's action be dismissed with costs.

When this case came up for trial, issues were framed at the instance of the lawyers appearing for the respective parties (2nd and 3rd defendants had also been added as parties by then) and those issues required the court to determine exactly what rights the parties had in these lands.

I have answered the questions as far as is possible on the material before us. But we have no evidence as regards Samadu's children, nor as regards the state of the title in regard to the interests of Samadu in Kopiwatte which he derived under the will: it is not possible, therefore, to say what the correct shares of the parties in all three lands are, even to the extent of the interests which Asana Marikkar formerly owned.

The learned District Judge declared the plaintiffs entitled to possess the leasehold interests of certain shares of the three lands respectively, and ordered the 1st defendant to pay the plaintiffs damages. The 1st defendant has not appealed, but the plaintiffs were dissatisfied with the judgment and filed this appeal, claiming that they were entitled to possess larger shares of the three lands than the judgment gave them. The 4th, 5th, and 6th defendants have filed a cross appeal complaining that the devolution of title as found by the learned Judge was incorrect. It was also submitted on their behalf that this action must fail in any event because all the co-owners of the land have not been joined. We do not agree with this submission. The issues framed show that all the parties at the trial invited the trial judge to make such a decision. But they have not given him the assistance he was entitled to expect.

The shares of the respective parties, except with regard to certain interests already mentioned, can be arrived at on the basis of the findings in this judgment. The plaintiffs fail in their appeal because they have not shown that their lessors owned larger shares than the judge has awarded them. The 4th, 5th and 6th defendants have failed in part and succeeded in part in their cross appeal. I would therefore dismiss the appeal with costs and make no order as to the costs of the cross appeal.

L. W. de SILVA, A. J.—I agree.

Appeal dismissed.