[IN THE PRIVY COUNCIL]

1961 *Present :* **Viscount Radcliffe, Lord Evershed, Lord Devlin, Lord Pearce, and Sir Terence Donovan**

HUSSAIMA (wife of Yoosuf Jallaldeen) and others, Appellants, *and* A. L. UMMU ZANEERA (*alias* Shamsunnahar) and others, Respondents

PRIVY COUNCIL APPEAL NO. 53 OF 1961

S. C. 260—D. C. Colombo, 6970/M

Co-owners—Prescriptive possession by a co-owner—Adverse title—Burden of proof—Fideicommissum for four generations—Burden of proof regarding termination of successive interests and of any disability—Prescription Ordinance, ss. 3, 13.

A deed of gift executed on the 16th July, 1872, in respect of certain property in the business district of Pettah, Colombo, was alleged by the plaintiff to have created a *fidei commissum* which continued in operation after the death of the grantor's wife in favour of the descendants for four generations. In the present proceedings for partition of that property the plaintiff was the great-great-grand daughter of the grantor's wife and there were numerous other parties. The 13th defendant was a grandson of the grantor's wife, his father having been one of her three children and her only son. He denied that the deed of gift created a *fidei commissum,* and claimed to have acquired exclusive title to the entirety of the property by prescriptive possession. This claim was resisted by the plaintiff and all other defendants who particularly relied on the proviso to section 3 and also on section 13 of the Prescription Ordinance.

The 13th defendant accepted the trial Judge's finding that the deed of gift created a *fidei commissum* and he accepted also that, having regard to their ages of minority, he could not succeed against the plaintiff or the first or second defendant. It was also shown that the trial Judge wrongly placed on the 13th defendant the burden of proving the exact dates when the successive interests of the other parties determined and when any disability came to an end.

On the issue of prescription it was admitted by all parties other than the 13th defendant " that the 13th defendant's father has been in possession from prior to 1916 and that the 13th defendant came into possession in 1916 ". It was also admitted, in cross-examination, by the 2nd defendant, who was called by the plaintiff that the 13th defendant " is occupying these premises " and that " he has rented the use and has collected the entire rent ". At the end of the record of the plaintiff's evidence there was also again recorded the plaintiff's admission "that from 1916 the 13th defendant collected the rents". The 13th defendant did not himself give any evidence.

Held, that the evidence that the 13th defendant " collected the rents " for 37 years from 1916 till the time of the present action in September 1953, was not by itself sufficient to prove that a possession originally that of a co-owner became adverse at some date more than ten years before the institution of the action. The language of the admission and evidence upon the face of it and according to its ordinary sense was limited to the actual receipt or collection of the rents and was silent as to their application. The point should also be noted that of a Muslim family the 13th defendant was the son of the only son of the original grantor's wife. Such facts, unsupplemented, fell short of anything that amounted to an adverse title the onus of proving which, by the terms of section 3 of the Prescription Ordinance, lay on the 13th defendant.

2*——R 11745 (8/63)

APPEAL from a judgment of the Supreme Court reported in *(1959) 61 N. L. R. 261.*

Hanan Ismail, **for Appellants.**

M. Markhani, with *John Baker*, for 5th to 8th Respondents.

Cur. adv. vult.

May 9, 1961. [*Delivered by* LORD EVERSHED]—

In their Lordships' opinion this appeal is one of considerable difficulty and the question involved very much upon the borderline ; but after careful consideration of the arguments submitted to their Lordships by learned counsel their Lordships have come to the conclusion, not for reasons later appearing, without some regret, that they should humbly advise Her Majesty to dismiss the appeal.

The appeal arises out of proceedings for partition begun nearly ten years ago. The claim of the plaintiff, who has since died, was that she was entitled to a share of certain property in the business district of Pettah, Colombo, by virtue of a Deed executed by one Ibrahim Lebbe Mohammadu Lebbe on the 16th July, 1872. The main question at the trial was whether the Deed created an effective *fidei commissum* and if so whether such *fidei commissum* continued in operation after the death of the grantor's wife in favour of her descendants for four generations. The plaintiff was a great-great-granddaughter of the grantor's wife and, as might be expected, there were numerous other parties to the proceedings. The 13th defendant was a grandson of the grantor's wife, his father having been one of her three children and her only son. The 13th defendant has died since the trial and the appellants before the Board are his four children, who were substituted in the proceedings for the 13th defendant before the case came to be heard by the Supreme Court of Ceylon. In addition to the question concerning the *fidei commissum* the 13th defendant before and at the trial claimed to have acquired an exclusive title to the entirety of the property by prescriptive possession pursuant to section 3 of the Ceylon Prescription Ordinance No. 22 of 1871. This claim was resisted by the plaintiff and all the other defendants who particularly relied on the proviso to section 3 and also on section 13 of the Ordinance. The proviso and section referred to are set out in the judgment of the Chief Justice of Ceylon. For present purposes the relevance of these terms of the Ordinance is that if the *fidei commissum* be established and there was consequently a series of successive interests in the property corresponding in substance to successive beneficial interests under an English Trust then the period of the prescription (unless it has then run its full course) starts afresh on each transmission of interest and moreover does not run against a beneficiary becoming entitled so long as he or she is under a disability, such as infancy.

These being the issues raised in the action, it appears from the record of the proceedings that when in due course the issues involved came to be framed an admission was made by counsel for the plaintiff. The admission was " that the 13th defendant's father has been in possession from prior to 1916 and that the 13th defendant came into possession in 1916 ". When, after the evidence had been called, counsel made their final addresses it was stated by the learned counsel for the 13th defendant that " on the first day the case came up for trial all the parties agreed to the admission made by " counsel for the plaintiff. There was some discussion before their Lordships whether in truth all the parties had so agreed, but it appears reasonably clear from the judgment of the District Judge and the judgments of the Supreme Court that the admission was regarded as having been accepted by all the parties other than the 13th defendant.

In the meantime the evidence had been given but in fact only two witnesses were called. On the plaintiff's part, her brother the second defendant gave evidence in support of the claim of *fidei commissum*. In cross-examination on behalf of the 13th defendant the following two questions and answers were recorded :—

Q. " You know who is occupying these premises ?

A. . . . . . . the 13th defendant is occupying these premises.

Q. Has he not rented the use to anybody ?

A. He has rented the use and has collected the entire rent. "

The only other witness called was the 11th defendant, whose evidence was immaterial upon the question before the Board.

The 13th defendant did not himself give any evidence. At the end of the record of the plaintiff's evidence there is also again recorded the plaintiff's admission " that from 1916 the 13th defendant collected the rents ".

Their Lordships have referred to the precise terms of the admission and of the two questions and answers given in evidence because, as things have fallen out, it is upon the proper inference to be drawn therefrom that the decision of this appeal must rest. As their Lordships will later notice, the Chief Justice in the Supreme Court (before which the 13th defendant's appeal came in 1959) drew the inference that the admission and evidence quoted justified the conclusion that from 1916 the 13th defendant had in fact enjoyed undisturbed and adverse possession of the property within the meaning of the Prescription Ordinance. The majority of the Supreme Court, however, did not share the Chief Justice's view and held that the 13th defendant had not proved such possession as section 3 of the Prescription Ordinance required.

Their Lordships think it most unfortunate, as things have turned out, that the exact extent and meaning of the admission by counsel was not clarified either at the time when it was made or later when the case was before the District Judge, and not the less so since it was first made, as previously stated, when the issues in the case were being formulated. The

relevant issues so formulated were in fact those numbered 3 (b) and 4 and were to the effect—Had the 13th defendant been in exclusive possession and acquired a prescriptive title to the entirety of the property or to the shares therein of the plaintiff and the other several defendants? The learned District Judge could undoubtedly have caused the scope of the admission to be made clear but unfortunately did not do so, and having regard to the view which the learned District Judge took it may fairly be said that it was not necessary for his decision that he should.

As already stated, the main question was that relating to the alleged *fidei commissum* in 1872 and, as regards the claim of the 13th defendant, the extent of the admission was in the event immaterial because, in the view of the District Judge as expressed in his judgment in February, 1956, it was having regard to the terms of the proviso to section 3 of the Ordinance for the 13th defendant to prove as regards each share in the trust property what were the exact dates when the successive interests therein determined and when any disability came to an end. The District Judge held that the *fidei commissum* had been validly established but he also held that the claim of the 13th defendant wholly failed because he had not at all discharged the onus which the learned Judge thought lay upon him of proving the several dates above mentioned.

The 13th defendant then appealed to the Supreme Court of Ceylon. He accepted the District Judge's finding of the creation of a *fidei commissum* and its extent and he accepted also that, having regard to their ages, he could not succeed against the plaintiff or the first or second defendant. The main argument before the Supreme Court was whether the District Judge had been right in the view taken by him as regards the burden of proving the several dates above mentioned. Upon this point the 13th defendant succeeded. Thereupon, and for the first time, the scope and meaning of the admission and the two questions and answers earlier quoted became vital to the conclusion of the appeal. It was, however, made quite clear before their Lordships that neither side then asked for a retrial or for any order designed to obtain further clarification of the admission and evidence. Each side was content to rest upon the terms of the admission and of the answers given by the second defendant as they were recorded, and the argument therefore was as regards the proper inference to be drawn therefrom.

The judgments of the learned Judges in the Supreme Court contain a careful review of authorities both English and Ceylonese upon the proper application of the relevant terms of the Prescription Ordinance in the case of one claiming a prescriptive title whose occupation of the property in question was or should be originally attributed to his interest as co-owner; particularly of the judgment of Lord Mansfield in the English case of *Doe d Fisher v. Prosser*[1] and the judgment of Bertram, C.J. in the Ceylonese case of *Tillekeratne et al. v. Bastian et al.*[2]. Their Lordships are content to accept the principles applicable as they were expounded in the Supreme Court. Nor, indeed, were the principles really

[1] *1 Cowp.: 217.* [2] *(1918) 21 N. L. R. 12.*

in dispute before their Lordships. The question, and the very difficult question, has been of their application. In the circumstances their Lordships are content to found themselves for present purposes upon two passages in the judgment of Bertram, C. J. at pp. 23 and 24 of the latter of the cases above mentioned : " It may be taken, therefore, that . . . it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse." " It is, in short, a question of fact wherever long continued exclusive possession by one co-owner is proved to have existed whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought." As already observed, the learned Chief Justice in the present case felt able to draw from the admission and the questions and answers of the second defendant the requisite inference in favour of the 13th defendant. In the course of his judgment he said : " It would appear, therefore, that on the facts of the instant case the co-owners cannot claim the benefit of the appellant's possession as he had possession not on their behalf but for himself without giving them their share of the rent ". And again : " There is no evidence that till the time of this action in September, 1953, anyone has ever questioned the appellant's right to take the rent during these 37 years." In other words, it was the view of the learned Chief Justice that in the absence of any other evidence on either side than that quoted, the proper inference to be drawn from such evidence and the admission was that the 13th defendant not only received and collected the rents but applied them for his own purposes without any accounting to any other members of the family. As their Lordships have also stated, De Silva and Fernando, JJ. were unable to accept the conclusion which had appealed to the Chief Justice. In each of their respective judgments forcible attention was drawn to the fact that the 13th defendant (on whom by the terms of section 3 of the Ordinance the onus of proof lay) had forborne to give evidence himself and to the absence of any evidence regarding such matters as the amount of the rents received or outgoings discharged or to the existence of any document or writing executed by the 13th defendant consistent with his claim to be exclusive owner of the property. Mr. Ismail for the appellant, stressed, naturally enough, the great length of time during which, on any view, according to the admission and evidence, the 13th defendant and his father had clearly in fact been in receipt of and collected the rents : and if (as he said) the 13th defendant had failed to give negative evidence that he had never accounted to any other members of the family, there had been on the other side no positive evidence from or on the part of any one of the other parties that he or she or any other members of the family had at any time received anything from the property or made any claim in respect thereof. Mr. Ismail also criticised (in their Lordships' opinion justly) the view of the majority of the Supreme Court that if the admission of counsel had been meant to have the scope and meaning for

which the appellants contended there would have been no point in going on with the trial. Such a view, as their Lordships venture to think, loses sight of the fact that at the trial the relevant question which the District Judge had to decide was concerned with the dates of the coming into existence of the successive interests in the property, having regard to the terms of the Prescription Ordinance which prevent time running against persons under a disability and which require or may require time to begin to run again whenever a new interest comes into existence.

Their Lordships have been very conscious of the force of Mr. Ismail's contentions, but since, as already stated, both sides before the Supreme Court were content to rest upon the ordinary meaning and inferences to be drawn from the admission and the second defendant's two answers, they have felt unable to conclude that the majority of the Supreme Court were not justified in refusing to draw from the admission and the answers such an extended scope and meaning as the appellant's case inevitably requires. After all the language of the admission and evidence upon the face of it and according to its ordinary sense was limited to the actual receipt or collection of the rents and was silent as to their application. Their Lordships have noted also the point made by De Silva J. that of this Muslim family the 13th defendant was the son of the only son of the original grantor's wife. Such facts unsupplemented, fall short of proving anything that amounted to an adverse title.

Their Lordships repeat, none-the-less, that they have felt some regret at reaching a conclusion based as it is upon the inference proper to be drawn from such meagre premises as the recorded admission by counsel and the two short answers given by the second defendant in cross-examination—particularly since their Lordships cannot help feeling that the true facts might at the time of the trial have been so easily discovered. Their Lordships were therefore disposed at one stage to think that in the interests of justice a new trial should be ordered. On the whole, however, their Lordships have decided against such an Order. In reaching their final conclusion their Lordships have attached weight to these considerations : first that before the Supreme Court, both sides were content deliberately to take their stand upon the admission and evidence as they stood : second that the 13th defendant is now dead : third, that it is now ten years since this litigation began and if the matter were reopened upon a fresh trial, the value of the property, situated though it is in a business quarter of Colombo, appears on the material before their Lordships not to be very great and to be therefore somewhat disproportionate to the costs that would or might be incurred in addition to those incurred already ; and finally their Lordships have in mind that the appellants are in any case entitled to a one-third interest in the property (to which should be added the sum of Rs. 1,000 which is conceded to be payable to them out of the proceeds of sale of the property by way of recoupment of moneys spent by the 13th defendant upon drainage works) and have conceded before the Board (as they did before the Supreme Court) that their claim cannot be sustained in respect of one-fourth of another one-third share in the property.

In all the circumstances therefore their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs before the Board.

Appeal dismissed.