1948 *Present :* **Jayetileke S.P.J. and Nagalingam J.**

WIJESEKERE *et al.*, Appellants, *and* JAYAWARDENE *et al.*, Respondents

S. C. 33–34—D. C. Kalutara, 22,308.

Family arrangement—Heirs of deceased Muslim—Division of property according to Roman-Dutch law—Possession.

Where the intestate heirs of a deceased Muslim divided his estate according to the Roman-Dutch law of succession, and possession for a long period of time followed on that basis—

Held, in a partition action, that shares should be allotted on the basis of the Roman-Dutch law of succession.

APPEAL from a judgment of the District Judge, Panadure.

E. B. Wikramanayake, for sixteenth defendant-appellant in No. 33 and sixteenth defendant-respondent in No. 34.

H. W. Jayewardene, for eighth, ninth, twentieth and twenty-second defendants, appellants in No. 34 and respondents in No. 33.

N. K. Choksy, K.C., with *A. C. Gooneratne*, for second plaintiff and second and twenty-fourth defendants, respondents in both appeals.

A. C. Gooneratne, for fifth and sixth defendants, respondents in both appeals.

Cur. adv. vult.

[1] *(1945) 46 N. L. R. p. 390.*
[2] *(1946) 47 N. L. R. p. 175.*
[3] *(1921) 22 N. L. R. at p. 392.*
[4] *Voet 36–1–6, Sande Restraints. 3–7–10.*

July 27, 1948. NAGALINGAM J.—

There are two appeals in this action which is one for the partition of an allotment of land called Puwakwatte depicted in plan filed of record marked Z.

The first appeal is one that arises between the sixteenth defendant-appellant on the one hand and the second plaintiff-respondent on the other and involves the construction of a deed of gift which admittedly creates a *fidei commissum*. It is common ground that one Podihamy who had certain interests in this land under Deed P3 of 1901 gifted those interests by Deed 16 D1 of 1911 (or P4) to her three children, Jayawardena the second plaintiff, Sampo Nona and Alice Nona, subject to certain conditions of which in the events that have happened those that need be noticed are the following :—

> "And I do hereby enjoin . . . . that the said property herein donated shall be held and possessed by the said three donees in any manner they please up to the end of their lives but shall not be sold, mortgaged, exchanged, gifted or in any wise alienated or shall be subject to a lease of more than four years and that after the death of the said three donees their respective legitimate children shall have and hold the said property or to do whatever they like with the same.
>
> And I do hereby further enjoin that should anyone of the said three donees die unmarried or without any lawful issues after marriage the share of the property accruing to such a one shall belong in entirety to the remaining two of the said donees or their respective children."

The donee Alice Nona died unmarried leaving her surviving her brother the second plaintiff and her sister Sampo Nona. Sampo Nona was married to the sixteenth defendant and she died leaving her surviving her husband the sixteenth defendant and a child. That child survived its mother only for a period of days, and on its death its heir was its father, the 16th defendant.

It appears to have been contended on behalf of the second plaintiff in the lower Court that on Sampo Nona's death her interests accrued to the second plaintiff by the rule of *jus accrescendi* and that the sixteenth defendant therefore acquired no interest in the property. Learned Counsel for the second plaintiff-respondent has not been able to support this view. A reading of the conditions above set out can leave no room for doubt that on Alice Nona's death, by virtue of the direction that in the event of anyone of the donees dying unmarried the share of such a one should belong in entirety to the remaining two, her $\frac{1}{3}$ share vested in her co-donees, the second plaintiff and Sampo Nona, each of whom thereupon became entitled to a just half. Sampo Nona could not have dealt with the interests that vested in her because of the prohibition against alienation and of the further condition that on her death the property should devolve on her legitimate children. On her predeceasing, therefore, her child, the interests to which she was entitled devolved on the child, which took those interests absolutely. On the child's death, the sixteenth defendant being its legitimate heir inherited those interests.

The sixteenth defendant, therefore, is entitled to a half share of the land and of all the other interests in buildings, plantations, &c., that have been allotted to the second plaintiff. The decree entered by the learned District Judge will be modified in this wise. The second plaintiff-respondent will pay to the sixteenth-defendant appellant the costs of appeal and of the contest in the lower Court.

The second appeal relates to the devolution of title, the contestants being the eighth, ninth and twentieth-defendants appellants on the one side, and the fourth, fifth, twenty-fourth and twenty-fifth defendants on the other. A question also does arise with regard to the ownership of a bakery and of a foundation which are claimed by the twentieth defendant adversely to the fifth.

All the parties derive their title from one Thamby Seiyadu Lebbe who became the owner of the property from one Bastian Silva by virtue of deed P1 of 1885. Seiyedu Lebbe died leaving as his heirs his widow, Pathumma Nachchia, and three children, Samsudeen, Sothumma and Habibu Nachchia. There can be little doubt that according to the law of intestate succession that would govern these parties, who are Muslims, the widow would have been entitled to a $\frac{1}{8}$ share, the son Samsudeen to 7/16 and each of the daughters Sothumma and Habibu Nachchia to 7/32 shares.

The case for the appellants is that, by a family arrangement either entered into deliberately or in ignorance of the true legal position, the rule of succession applicable to those governed by the Roman-Dutch law was applied, the widow taking a half share and each of the children a $\frac{1}{8}$ share and that possession of the property has followed on this basis.

As early as 1894, the widow, Pathumma Nachchia, leased by indenture 8 D1 not a $\frac{1}{8}$ share, which would have been the share she would have been properly entitled to under the Muslim law, but a half share of the land; and she expressly states that the other half share had been excluded for the children. This lease which embodies in documentary form the first dealing with the property by anyone of the heirs of Seiyedu Lebbe clearly supports the contention of he appellants that the land was divided between the mother and children in equal shares. In the following year Pathumma Nachchia, following the basis of division set out in the lease, sold a half share of the land by deed 20 D4 of 1895, and this deed of sale is more than of ordinary interest in view of the contest between the parties, as in this deed she assigns to the vendee her right in the indenture of lease 8 D1 under which the rent reserved had to be paid annually, only the first year's rent having been paid at the time of the execution of the lease, the full term of which was a period of eight years. It is therefore manifest that the lease was acted upon by the lessee entering into possession of the half share, thus establishing that possession in regard to a half share of the property was first with Pathumma Nachchia, then with her lessee and thereafter with the purchaser from her. Had the indenture of lease and the deed of sale stood by themselves, they would no doubt be open to the attack that the one-sided action on the part of the widow in purporting to deal with larger interests than she was entitled to cannot indicate a family arrangement, much less bring home to her co-heirs knowledge that she was claiming more than her due share in the property.

But we find that prior to the sale by the widow and subsequent to the indenture of lease executed by her, her son, who would have been the major shareholder according to the Muslim law of intestate succession, sells only a $\frac{1}{6}$ share by deed 3 D1, and three years later her daughter, Sothumma, also sells again a $\frac{1}{6}$ share by deed P2 of 1898.

It has been urged that as both the son and daughter were each entitled to more than a 1/6 share of the land they should be presumed to have intended to reserve to themselves the excess interest to which they were entitled, especially as in 1899 both Samsudeen and Sothumma conveyed those excess interests to the predecessor in title of the respondents by deeds 25 D1 and 25 D2 both of 1899. While, no doubt, this argument as an argument is possible, I am not impressed by it in view of the other special circumstances in this case. If the deeds 25 D1 and 25 D2 were acted upon and possession followed on them, one would have expected that a conflict would have arisen at that date as between the lessee under 8 D1 and the transferee Cassim under those deeds, but there is no evidence that any dispute arose at that time. There is, however, clear evidence that after the execution of deeds 8 D1 of 1894, and 20 D4 and 3 D1 both of 1895 and P2 of 1898, no Muslim ever possessed this land and Cassim, the purchaser under 25 D1 and 25 D2 of 1899, was a person resident at Alutgama, which is far away from the area where the land is situate. Besides, the widow, belonging to a community whose womenfolk are very conservative, would have been guided entirely by her son who appears to have been a major himself at that date, and it is impossible to believe that the widow would have acted in opposition to her son in regard to the execution both of the lease and of the deed of sale by her. That the deeds 25 D1 and 25 D2 were not acted upon is further established by the purchases made by the fifth defendant, Ariyawansa. Ariyawansa by deed 5 D1 of 1936 appears to have made a purchase of certain interests supposedly devolving from Cassim. If Ariyawansa had possession under that deed, he would have known that Sothumma had already parted with her title to the excess, amounting to 5/96 over and above the $\frac{1}{6}$ which she conveyed by P2, and that Sothumma had no further interests in the land ; but in 1940 we find that Ariyawansa by deed 5 D2 obtained from Sothumma herself a deed of conveyance for the identical 5/96 share. This clearly proves that deed 25 D2 had not been acted upon.

I am therefore of opinion that the contention of the appellants is entitled to prevail, namely, that on Seiyedu Lebbe's death the property was divided equally between the widow on the one hand and the three children, Samsudeen, Sothumma and Habibu Nachchia, on the other. The shares must therefore be allotted on this basis. The decree of the District Judge is therefore varied accordingly and the shares will be allotted anew on this footing by the District Court.

In regard to the bakery and the foundation, there is ample evidence which supports the finding of the learned District Judge, and I am therefore not prepared to disturb his finding in regard to them. The foundation, which does not appear to have been built upon for a number of years by or on behalf of the fifth defendant, appears to have been subsequently built upon by the 20th defendant without any protest.

In these circumstances, the foundation and the building standing thereon will be allotted to the twentieth defendant who, however, will pay compensation in respect of the foundation to the fifth defendant.

As the appellants have succeeded substantially, I direct that the fourth, fifth, twenty-fourth and twenty-fifth defendants-respondents do pay to the eighth, ninth and twentieth defendants the costs of appeal and of the contest in the lower Court.

JAYETILEKE S.P.J.—I agree.

Appeals allowed.