1927.

*Present:* Fisher C.J. and Drieberg J.

BALKIS *v.* PERERA *et al.*

*117—D. C. (Inty.) Colombo 21,117.*

Fidei commissum—*Death of fiduciary*—Spes successionis—*Transmission of interest—Muslim law.*

Where a Muslim donated property to his wife in the following terms: "For and during the term of her natural life, if she should survive me and so long as she shall remain my widow and unmarried; and after her death or in the event of her second marriage whichever shall first happen, to my eldest son T for and during the term of his natural life, and after his death to his eldest son or eldest male heirs absolutely, and in the event of his having no son or male heir, then to his daughter or daughters absolutely . . . ."

*Held*, that, on the death of T before the donee, the *fidei commissum* created by the deed did not lapse, and that the *spes successionis* passed to the heirs of T.

A fideicommissary gift to which Muslims are parties must be construed according to the principles of the Roman-Dutch law.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the judgment of Drieberg J.

*Hayley, K.C.* (with *Tisseveresinghe*), for 10th defendant, appellant.

*H. V. Perera* (with *Wijewardene*), for 1st and 2nd plaintiff, and 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th defendants, respondents.

*James Joseph* (with *Marikar*) for added defendant, respondent.

November 1, 1927. DRIEBERG J.—

This is an action brought for the partition of certain premises which admittedly were owned by Bakinan Tuan who by a deed 884/899 of August 30, 1880, and February 10, 1881 (P 2), gifted them to his wife Nona Packir Umma; the gift was subject to a *fidei commissum* and was in these words:—

"I . . . . do hereby give, grant, and assure as a gift absolute and irrevocable unto her the said Nona Packir Umma, but subject to the conditions and restrictions hereinafter mentioned the following property . . . . to have and to hold the said premises, together with all the appurtenances thereunto appertaining or used or enjoyed

therewith, unto her said Nona Packir Umma for and during the term of her natural life, if she should survive me the said Mohamed Saphie Bakman Tuan and so long as she shall remain my widow and unmarried, and after her death or in the event of her second marriage, whichever shall first happen, to my eldest son Mohamed Thajoodeen (otherwise called Tuan Kitchill) for and during the term of his natural life and after his death to his eldest son or eldest male heirs absolutely, and in the event of his having no son or male heir, then to his daughter or daughters absolutely, their heirs, executors, administrators, and assigns. "

Thajoodeen died in 1917 and Packir Umma in 1926. Thajoodeen had seven children: Sahoordeen who predeceased him leaving his wife the 9th defendant and the 7th and 8th defendants his children; Thajoodeen who predeceased him leaving as issue. Brahanudeen who died in 1920, the 1st plaintiff and the 3rd and 5th defendants-respondents.

Thajoodeen's eldest son or male heir at the time of his deah was Brahanudeen. The added defendant-respondent is a brother of Thajoodeen.

The 10th defendant-appellant purchased the interests of Packir Umma by deed 10D1 of April 17, 1920. He contends that as Thajoodeen died before Packir Umma the *fidei commissum* lapsed and Packir Umma had full ownership on the death of Thajoodeen.

Mr. Hayley, for the appellant, also claimed that in any case the *fidei commissum* was invalid as the parties were Muhammadans and that the effect of P 2 was to vest the property absolutely in Nona Packir Umma.

Assuming that the *fidei commissum* is binding the appellant must in any case fail.

The learned District Judge held that the interest of Nona Packir Umma was only usufructuary; if this was so, the case would present no difficulty because possession only and not the vesting of title in him would be affected by the death of Nona Packir Umma. But regarding her interest as a fiduciary one the death of the fidei-commissary Thajoodeen did not result in a failure of the *fidei commissum* but the *spes successionis* passed to Thajoodeen's heirs who would succeed, this being the law in the case of a *fidei commissum* created by a donation unlike one created by will (*Mohamad Bhai et al v. Silva et al.* (Full Bench).[1]

Mr. Hayley drew out attention to certain observations of Bertram C.J. in *Carlina Hamy v. Juanis et al.*,[2] that the rule in *Voet, XXXVI., 1, 67* on which the judgment in *Mohamed Bhai et al v.*

[1] *(1911) 14 N. L. R. 193.*

[2] *(1924) 26 N. L. R. 129.*

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*Silva et al.* (*supra*) is based applies to the case of the death of the last fideicommissary and not to a fideicommissary who is also a fiduciary as Thajoodeen was. This point did not there arise for decision, for Guruwa (whose interest was under consideration in that case) did not predecease Donsina, and no question arose of his transmitting his *spes successionis* to his heirs (Bertram C.J., on page 139). It is not possible to regard this as qualifying the general rule laid down in *Mohamed Bhai et al. v. Silva et al.* (*supra*).

If the reason for the rule is as stated by Voet, that those to whom property is so left by a fideicommissary donation are regarded as creditors in respect of that debt, and that a man who makes a contract subject to a condition transmits the expectation of what is due to him to his heirs, if, before the condition comes into effect, he is overtaken by death (*Voet, XXXVI. 1, 67*), it is not easy to see why Thajoodeen is not within this rule.

Mr. Hayley contends that Thajoodeen was not a contracting party to P 2, as the gift was accepted only by Nona Packir Umma; this objection must fail, for when a gift is made in favour of a family acceptance by the first donee is sufficient (*John Perera v. Avoe Lebbe Marikar* [1]).

But the rule regarding the lapsing of a *fidei commissum* is not an inflexible one. Speaking of Wills where the rule is more strict, Lord de Villiers said:—

> " Although there is a presumption in the case of a *fidei commissum* that a testator intended a fideicommissary legatee to have no transmissible rights unless he survived the fiduciary legatee, such presumption will have to yield to other clear indications in the will of an intention to the contrary."

(*Samaradiwakera v. de Saram* [2] on page 326.)

In *Strydom v. Strydom's Trustee* [3] which is quoted in *Nathan, 1906 ed., Article 1888, pp. 1909 and 1910*, de Villiers C.J., after observing that in such a case the clear intention of the testator must prevail, said:—

> " On the other hand the fact that the prior interest is in the nature of a *fidei commissum* is not conclusive proof that the testator intended to postpone the vesting until the termination of the prior interest. A *fidei commissum* may be so purely in the nature of what the English law terms a trust as not to interfere with the vesting of the fideicommissary legatee's interest even before the arrival of the time for the payment of the legacy."

[1] *(1884) 6 S. C. C. 138.*

[2] *(1911) 14 N. L. R. 321.*

[3] *4 S. C. 28*

The intention of the donor is clear. He desires that the property should remain in his family so as to benefit in the first instance his wife Nona Packir Umma, then his eldest son Thajoodeen and after him, Thajoodeen's eldest son or male heir and on failure of such his daughters the 1st, 3rd, and 5th defendants, and his intention should not be defeated because the death of his wife and of Thajoodeen occurred in a sequence which he did not anticipate.

Mr. H. V. Perera in seeking to establish the rights of the 1st, 3rd, and 5th defendants as well as the 7th and 8th, was obliged to adopt a view of the donation which is not the simplest possible.

If Nona Packir Umma's interest was a purely fiduciary one and the rights of the fideicommissaries did not begin until hers had ended, then the property would have vested at her death in 1926 in the 1st, 3rd, and 5th defendants. This would exclude the 7th and 8th defendants, but the 1st, 3rd, and 5th have agreed to share the property with the 7th and 8th defendants and this cannot effect the appeal which is only concerned with the question whether Nona Packir Umma passed title to the property by deed 10D1; whichever view is taken the appellant must fail.

The contention that as a fideicommissary donation is not known to and opposed to the principles which govern donations in Muhammadan law, P 2 must be regarded as an unconditional gift to Nona Packir Umma, cannot succeed. While pure donations are regulated by the Muhammadan law the right of Muhammadans to create *fidei commissa* by last will and by deed has been recognized (see *D. C. Colombo, No. 59,578* [1] where the question was expressly raised and decided.) I am not aware of any later case in which this decision was questioned except that of *Saidu v. Samidue* [2]; that was a case of a *fidei commissum* created by deed and the objection was taken in the District Court that the restriction on alienation was invalid and that the document should be treated as a simple deed of gift. Bertram C.J. in his judgment stated that counsel at the hearing of the appeal " quite properly admitted that if the intention of the document was to create a *fidei commissum* it would be governed not by the Muhammadan law but by the Roman-Dutch law."

There is a long series of cases in which *fidei commissa* created by Muhammadans by deed of gift and last will have come before this Court for consideration and which have been construed according to the Roman-Dutch law without any question being raised as to their validity according to Muhammadan law. These cases are *Aysa Umma v. Noordeen,*[3] *Kadija Umma v. Meera Lebbe,*[4] *Asiathumma et al. v. Alimanachy et al.,*[5] *Aysa Umma v. Noordeen et al.,*[6] *Pootwatchy et al. v. Marikar et al.,*[7] *Wijewardene v. Abdul Hamid et*

[1] *(1873) 3 Grenier 28.*
[2] *(1922) 23 N. L. R. 506.*
[3] *(1902) 6 N. L. R. 173.*
[4] *(1903) 7 N. L. R. 23.*
[5] *(1905) 1. A. C. R. 53.*
[6] *(1905) 8 N. L. R. 350.*
[7] *2 A. C. R. 67.*

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*al.*,[1] *Marikar et al. v. Marikar et al.*,[2] *Sulaikaummah v. Ahamadu Levvai*,[3] *Naina Marikar v. Amarasooriya*,[4] *Usoof v. Raimath*,[5] *Hadjie v. Fernando*,[6] *Naina Lebbe v. Marikar et al.*,[7] *Hadjiar v. Meyappa*,[8] *Sango Umma v. Meyappa Chetty*,[9] *and John Perera v. Avoe Marikar* (*supra*). In *Rahiman Lebbe et al. v. Hassan Ussan Umma and another*,[10] an ante-nuptial contract with reciprocal promises containing a provision that all the present and future property of the wife should vest in the husband and after his death it should vest in the children on their attaining majority, was considered and held to be valid. Schneider J. there said—

> "The principles of Muhammadan law as found in treatises have been adopted as governing Muhammadans here in the matter of pure donations, because since 1862 there has been evidence that the custom of the Ceylon Muhammadan recognized those general principles. But in the construction of deeds, wills, *fidei commissa*, and in ordinary matters of contract the principles of the ordinary general law and not of the Muhammadan law are always applied."

The appeal is dismissed with costs.

*Appeal dismissed.*

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[1] *(1909) 12 N. L. R. 241*
[2] *(1916) 2 C. W. R. 79*
[3] *(1917) 19 N. L. R. 473*
[4] *(1918) 5 C. W. R. 60*
[5] *(1918) 20 N. L. R. 225*
[6] *(1919) 6 C. W. R. 367*
[7] *(1921) 3 C. L. Rec. 61*
[8] *(1922) 23 N. R. R. 333*
[9] *(1922) 4 C. L. Rec. 113*
[10] *(1916) 3 C. W. R. 88*