[In the Privy Council.]

1944 *Present:* **Lord Atkin, Lord Porter and Sir George Rankin.**

MEERA SAIBO AHAMADO NORDEEN, Appellant, *and* MEERA SAIBO MOHAMED BADURDEEN *et al.*, Respondents.

Fidei commissum—Muslim's gift to daughter—Reservation of income to donee—On failure of issue property to devolve on paternal relatives entitled to inherit—Intention of testator—Husband's share set apart—Death of husband before donee—One entire fidei commissum.

Where the last will of a Muslim, in disposing of certain properties, contained words to the following effect:—After my death to my daughter Pitchammal [the property stated] (I) give as a gift in writing to enjoy the income; after her to her child or children, but if she have no children, according to religion the husband's share having been removed, the balance to relatives in the paternal line or agnates, who are entitled to inherit,—

Held, that the will created a valid *fidei commissum* and that on the death of Pitchammal without issue, her husband having predeceased her, the entire property devolved on the relatives in the paternal line.

[Delivered by Lord Porter.]

January 27, 1944.

The three appeals consolidated in this case are brought from a judgment and decree of the Supreme Court* of the Island of Ceylon in a partition action in which the plaintiff is the appellant in the first appeal and the five defendants are respondents. In the second appeal the fourth defendant is appellant and the plaintiff-appellant and the remaining four defendants are respondents. In the third appeal the fifth defendant is appellant and the plaintiff-appellant and the remaining defendants are respondents.

The questions at issue turn upon the true construction and effect of the will made by one Meera Saibo Meera Neina dated January 7, 1891. By that document the testator disposed of certain other properties in addition to those now in issue but the particular right in dispute is the title to lands and buildings formerly bearing assessment No. 32 and now

* *42 N. L. R. 393.*

bearing municipal assessment Nos. 94, 96 and 98, situate at Second Cross street, Pettah, Colombo. These premises were disposed of by the will and are claimed both by the appellant and by the fourth respondent and in part also by the fifth respondent.

The testator died on January 22, 1891, leaving one child only, a daughter, by name Pitchammal, who died on September 20, 1937, leaving no issue. He was one of a family which originally consisted of himself, two brothers and a sister. At the time of the making of the will and of his death both brothers were dead, each leaving male issue—the sister was still alive and had two sons and a daughter: the elder son married Pitchammal but predeceased her, dying on June 9, 1935. On the testator's death the property admittedly passed to his daughter, but the rights in it thereafter are in dispute, the main contention being as to whether Pitchammal was or was not the absolute owner or at least entitled to dispose of it.

Mrs. Othman, the fourth respondent to the first appeal and appellant in the second, succeeds to the property if and only if Pitchammal was either absolute owner or entitled to dispose of the property. Her claim was based upon two deeds, the first dated May 20, 1937, by which Pitchammal purported to give the property in dispute to Mrs. Othman's husband, and the second dated October 7, 1937, by which he purported to transfer his rights to his wife. She claimed that the effect of the will was to devise the right to dispose of the property to Pitchammal absolutely and that there was no fidei commissum attached to it or that, at any rate, if there had ever been a fidei commissum it had failed, with the result that Pitchammal became absolute owner. The appellant and all the other parties contended that the will gave Pitchammal a life interest only with a *fidei commissum* in favour of her children (if any) but, if she had none, with a further *fidei commissum* as to one half of the estate in favour of her husband if he survived her and the other half to the testator's relatives entitled to inherit; if however her husband predeceased her the whole was to go to these relatives.

Admittedly these relatives were Meeran Saibo Mohideen Abdul Cader and Meeran Saibo Mohamed Abdul Raoof, who were grandsons of the testator's younger brother Kidar Mohammado. If entitled they would share equally. Abdul Cader claiming to be entitled to his half purported to convey it by deed dated November 2, 1937, as to one half to the appellant, as to one quarter to the first respondent, and as to the other quarter to the second respondent. Abdul Raoof by deed dated November 24, 1937, disclaimed any right to the property, and it was contended that his property therefore passed to his brother Abdul Cader, who by deed dated December 20, 1937, purported to convey it to the third respondent.

As against this claim a complication arises from the fact that Abdul Raoof is alleged to have been an undischarged insolvent at all material times. The fifth respondent was the assignee in the insolvency and claimed that Abdul Raoof's half share had vested in him and had been sold by him. At the trial the parties agreed that the Court should first deal with the effect of Meera Naina's will and that all other matters should stand over pending the decision of this question. Abdul Raoof's rights therefore were not in issue before their Lordships, save in so far

as those of the third and fifth respondents were dependent upon his. The third respondent was not represented at the hearing before their Lordships' Board.

In order to resolve the questions in dispute it is necessary in the first place to ascertain what the terms of the will are, and having reached a conclusion on this matter to determine their legal effect.

The document is written in somewhat illiterate Tamil, and the claim concerns only its first portion. This has been translated by the District Judge word for word in the following way:—

1.	En Kannukku piraku	(after my death)
2.	en makal Pitchamma likku	(to my daughter Pitchammal)
3.	Pira kotte rendam Kurukku theru	(Pettah 2nd Cross street)
4.	32 number Kittangivum	(No. 32 Godown/Kittangi)
5.	Kompany Thiru	(Slave Island)
6.	70 numberveedum	(house No. 70)
7.	irandaium Rupai 11000	(both) (Rs. 11,000/-)
8.	perumathi poddu	(having valued at)
9.	nakodaiyai eluthiyum	(give as a gift in writing)
10.	varumanam thinkavum	(to enjoy the income)
11.	avalukku piraku	(after her)
12.	aval pillaikki	(to her child)
13.	allathu	(or: if not)
14.	markam pol	(according to religion)
15.	purusannakku panku poka	(husband's share having been removed)
16.	Meetham	(the balance)
17.	thakappanai serntha sokkaranakku	(to relative on father's side)
18.	Upayokapadavum	(for (his or their) benefit or use)

Originally there was controversy about the meaning of phrases numbered *12*, *13*, and *17* above. *Before their Lordships, however, it was conceded* that, though the word was in the singular, " pillaikki " might be used to mean children and would properly be construed in the will as meaning " to her child or children ". So also it was originally contended that " allathu " meant " or " and that the gift being alternative was ambiguous and of no effect. That point, too, has, as their Lordships think, rightly been given up, and it is now admitted that its proper meaning is " but if she have no children ". It was, however, strenuously and forcibly maintained that " sokkaranakku " meant " relatives ", merely, as the District Judge translated it and not " relatives entitled to inherit " as the Supreme Court has held.

It was said on behalf of respondent number four that the evidence gave four possible meanings:—

(1) Relatives;
(2) Relatives entitled to inherit;
(3) *Male relatives on the father's side entitled to inherit;*
(4) Agnates;

and that in these circumstances there was at least some uncertainty in the class entitled to inherit, and that the uncertainty is increased inasmuch as the person whose heirs are to inherit is not specified and the time at which the class was to be ascertained is left undecided.

Except as to the meaning of " sokkaranakku " there is no dispute between the District Judge and the Supreme Court so far as concerns the translation of the words used. Admittedly this difference must be resolved by a consideration of the evidence of the expert witnesses called on either side as to the true translation of the phrase.

Three witnesses were examined on behalf of the appellant and they respectively translated this part of the will as follows:—

(1) If she dies leaving no children her husband shall have whatever share he will be entitled to according to the religion and the balance shall devolve on the heir on her father's side.

(2) In the absence of children, except the portion that should go to her husband according to religion, the residue should accrue to the heir (or heirs) in the paternal line.

(3) In case she leaves no issue, then her husband shall have a share in this property according to Islamic law; and the rest shall be inherited by her father's agnates.

The fourth defendant's expert on the other hand translated it—

(4) The property to devolve on . . . . father's relation less the husband's share according to Islamic faith.

But in giving evidence he agreed that " sokkaran " means relations who have the right to get the property. " There may be," he said, " any number of relations to the father, but the ' sokkaran ' means relative or relatives who have the right to get the property."

It is true that one witness in his translation and others in evidence used the word " agnates " as representing the meaning of sokkaran, but it is clear that in so translating it, they mean the male relatives entitled to inherit.

Their Lordships agree with the Supreme Court in holding upon the evidence that sokkaran means relatives entitled to inherit and that " Thakappanai serntha sokkaranakku " means relatives in the paternal line or agnates who are entitled to inherit. The argument that sokkaran bears this meaning gains strenght from the reference to the Muslim religion, which immediately precedes the words whose meaning is in dispute.

If it were not that the District Judge had for some reason which is not set out in the record reached the conclusion that the collocation of the words in Tamil prevented him from holding that " markam pol ", " (according to religion) " could not qualify both " husband's share " and also qualify the expression " relatives in the paternal line and entitled to inherit ", their Lordships would have read it as qualifying both. But accepting the Judge's view, there is still the antecedent reference to religion, a reference which helps to show the persons meant to be included in the class of relatives who are to take.

Their Lordships have considered the exact translation of " sokkaran " at length because the first and main argument on behalf of the fourth defendant centred upon its true meaning.

According to the contention put forward on her behalf and accepted by the District Judge the class designated to inherit after the husband's death or after the husband had received his share was indefinite or at any rate not certainly defined; and in such circumstances it was said that whatever the effect upon an English trust might be no *fidei commissum* would be created under the system of Roman-Dutch law.

There is no doubt that under that system the creation of a *fidei commissum* will not lightly be implied and requires both exact language and certainty as to the intention of the testator and as to the persons to be benefited in order to effect its creation. The principle is to be found in many authorities, but it is enough to quote Van Leeuwen's *Roman-Dutch Law*, 2nd Edn., Vol I, 1921, p. 376, Book III, Ch. VIII, Section 4, where it is said:—

> " Any words or mode of expression may be used if only the intention of the testator can be shown for, in an inheritance by way of *fidei commissum*, the intention of the testator must chiefly be examined. But this is taken very strictly and where there is the slightest doubt the construction will be in favour of a free inheritance and against the incumbrance; for all incumbrances by will are odious and admit of no extension."

Words to the like effect are to be found in (amongst other authorities) Burge's *Foreign and Colonial Laws* (1914), Vol. IV, Part I, p. 745, and Pereira's *Laws of Ceylon* (2nd Edn.), Vol. II, p. 442. The learned District Judge seems to have thought that in the absence of a prohibition of alienation the gift would be absolute unless it is clear that the gift is made subject to the condition that on her death it should pass to her children or in accordance with the alternative provision. He quotes no authority for this opinion and it is contrary to the decision in *Perera v. Perera*[1]. Even if, however, he meant only that the words " subject to the condition " are required in order to constitute a *fidei commissum* the authorities do not seem to support his view.

In *Vyramattu v. Mootatamby* (quoted by the Supreme Court), 23 N. L. R. 1, it was held that a *fidei commissum* was created by the words " the share of A shall be possessed and enjoyed by him during his lifetime and after him the same shall go to the children of the other two sisters."

An even stronger authority is to be found in *Udùmalevvai v. Mustapha*[2] (also quoted by the Supreme Court), where the wording was: " They shall possess and enjoy the said properties as their own from this day for ever, and in case any one of them happens to die without issue the shares will have to go to all my male children. I do hereby give by way of donation the above-named properties to my sons and their heirs, executors, administrators and assigns. They shall possess and enjoy the said properties as their own from this day for ever." Having regard to these authorities their Lordships do not think it necessary to consider whether the suggestion, contained in *Perera v. Perera* (*supra*), that the law of Ceylon may not strictly follow the Roman-Dutch law, but has been modified by the impact of English legal thought, can be supported or not.

[1] *20 N. L. R. 463.*

[2] *34 New L. R. 46.*

Difficulty of construction alone would not prevent the creation of a *fidei commissum*. To bring about that result doubt is required, either as to whether such a condition has been created or who are the recipients of the bounty.

As they have indicated their Lordships do not think that there is any doubt that the testator intended to create a *fidei commissum*. It is true that as a general rule a class too wide for ascertainment as in *Dias v. Kaithan*[1], or too vaguely described as in *Amaratunga v. Alwis*[2], would prevent a *fidei commissum* from attaching and it may well be that in the present case such a result would have followed if the translation adopted by the learned District Judge were correct. But if the translation which was approved by the Supreme Court be followed, there is a definite and easily ascertained class and indeed one whose limits are more clearly drawn than were those of the recipients in *Perera v. Perera* (*supra*).

In the present case their Lordships think that the meaning of the will when properly translated is clear and the designated class ascertained. The real difficulty lies in the meaning to be attributed to " sokkaran ", and once that word is held to bear the meaning given to it by the Supreme Court, the doubt which would otherwise exist perishes.

It was, however, argued and was the view of the District Judge that however " sokkaran " was translated no *fidei commissum* was created because it was not made clear that the property was subject to the condition that it should go to the children of Pitchammal or, in default, to the later devisees. In his opinion, the testator gave it to Pitchammal absolutely and merely indicated a wish as to its devolution in case she did not deal with it in her lifetime or by will. A grant of this type is referred to in Voet (*XXXVI. 1, 5*) and is commonly referred to as " simplex *fidei commissum* ".

Their Lordships cannot so construe the wording of this will. It is plainly indicated that Pitchammal is to enjoy the income and its subsequent devolution is carefully provided for. There does not appear to be any reason for disregarding the testator's expressed intention that the income alone, not the corpus, should go to his daughter.

There remains the question as to the time at which those entitled to inherit are to be ascertained, since if this is doubtful, it is at least arguable that the class ultimately to benefit is not clearly ascertained and therefore though the gift to Pitchammal takes effect, yet the condition attached to it cannot hold good for want of certainty.

In their Lordships' view, the answer is not in doubt. Abdul Cader and Abdul Raoof were, as has been stated, the nearest male relatives of Pitchammal on her father's side at the time of her death and they would be the persons to take rather than those alive at the testator's death. Voet (*XXXVI. 1, 32*) and *Sinchinona v. Anagihamy*[3], supports the contention of the appellant and Voet (*XXXVI. 1, 31*) though it was relied upon by the fourth defendant, appears to be to the like effect, where it says " From all of which it is to be concluded " that generally proximity to the person charged rather than to the person charging, in case of doubt is to be preferred ".

[1] *2 N. L. R. 233.*

[2] *(1939) 40 N. L. R. 363.*

[3] *6 Leader L. R. 58.*

These considerations are sufficient to dispose of the cross appeal of the fourth defendant, but there remains to be dealt with the original appeal of the plaintiff appellant which turns upon the construction to be put upon the words at the end of this portion of the will, viz., " according to religion, husband's share having been separated what is left to relatives in the paternal line are entitled to inherit ".

In the submission of the fourth defendant the *fidei commissum* (if there was one) in favour of the relatives entitled to inherit covered only half the estate. The wording it was contended showed that the share of a husband (*i.e.*, one half) had first to be deducted and then and only then would the ultimate balance go to the relatives entitled to inherit.

The District Judge indicated that if necessary he would have been inclined to take this view, and the Supreme Court accepted the argument.

It is common ground that, under Muslim law, a husband, predeceasing his wife, would get nothing, but it is said that the language used in this will indicate that a husband's share, viz., one half, not this particular husband's share which would be nothing, was to be deducted before the ultimate beneficiaries received anything. Both Courts were inclined to think or thought that there were two separate *fidei commissa*, one in respect of a half share in favour of Pitchammal's husband and the other in respect of the remaining half in favour of the group of " sokkaran ". In the view of the Supreme Court the words in their natural meaning were intended to create and did create two *fidei commissa*, though they described as attractive the argument on behalf of the appellant that the deduction of a husband's share according to religion meant only the deduction of such share as, in the circumstances, the Muslim law would in fact deduct; a share which in the case of a husband predeceasing his wife would never become payable.

The result of the interpretation given by both Courts is to leave the half share which would have been the husband's if he had lived undisposed of. Admittedly in such a case it would become the absolute property of Pitchammal, of which she was free to dispose and of which she purported to dispose of in favour of the husband of the fourth defendant.

Their Lordships, however, do not find themselves able to accept this construction of the language of the will. In their opinion, the natural meaning of the words is that the husband is to get his share if entitled thereto by Mohammedan law, the balance is then to go to the heirs-at-law. If, however, by Mohammedan law the husband would get nothing, there is no deduction to be made, and what is left is the whole property which was devised to Pitchammal. On this portion of the case their Lordships find themselves constrained to differ from the Supreme Court, whilst they agree with it on the main part of the claim.

They will humbly advise His Majesty that the plaintiff-appellant's appeal be allowed and the fourth respondent's appeal dismissed and that it ought to be declared that Meera Saibo Ahamado Noordeen is entitled to one-quarter and Meera Saibo Mohamed Badurdeen and Meera Saibo Mohamed Kamaldeen are each entitled to one-eight of the property in dispute being the godown or business quarters (Kittangi) Nos. 94, 96 and 98 situated at 2nd Cross street and that it ought further to be declared, without prejudice to the questions in issue between Muna Kavenna

Navenna Mohamadu Samsudeen Makki Saibo and A. R. A. Suppiah Pillai that on the death of Pitchammal on September 20, 1937, Meeran Saibo Mohamed Abdul Raoof became entitled to the other half of the said property, and that the case be remitted to the District Court to deal further with the matter in accordance with this declaration.

The 4th respondent must pay the appellant's and the 5th respondent's costs of the three Appeals before their Lordships' Board and in the Courts below.