1939 *Present:* **Moseley A.C.J. and Wijeyewardene J.**

SINNAN CHETTIAR *v.* MOHIDEEN *et al.*

116—D. C. Colombo, 549.

Fidei commissum—*Intention of testator expressed or implied*—Fidei commissa *and trusts—Vesting of property in fideicommissary—Death of fiduciary—Right of fideicommissary to sue.*

Where a last will contained the following clauses:—

(1) I hereby will and desire that my wife . . . . children . . . . and my father . . . . who are the lawful heirs and heiresses of myl estate shall be entitled to and take their respective shares according to my religion and Shafie sect to which I belong but they nor their issues or heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens . . . . and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only that they may receive the rents, income of the said lands, &c., without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities; and out of such income, produce, and rents, after defraying expenses for their subsistence and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party and, out of such surplus, lands should be purchased for the benefit and use of their children and grandchildren as hereinbefore stated.

(2) I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the movables and immovables of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions.

***Held*, that the will created a valid *fidei commissum* and that the testator intended that the property should devolve on the immediate devisees and their children subject to a *fidei commissum* in favour of the grandchildren of the immediate devisees.**

The event on the happening of which the property devolves on each succeeding set of fideicommissary heirs is the death of the immediate previous fiduciary who last entered into the possession of the property.

The prohibition against alienation contained in the will does not operate to make the alienation of the property, in spite of such prohibition, the event which determines the vesting of the property.

THE plaintiff-respondent claimed to be the owner of certain premises and sought for a declaration of title to them and for damages.

The premises originally belonged to one Isubu Lebbe Idroos Lebbe Marikar, who by his last will P 1 devised the premises and several other premises to his father, to his wife, and to his children.

The last will was admitted to probate (P 2) after the testator's death on May 8, 1876. The executors in terms of the last will by deed P 3 of 1878 conveyed the property in question to the testator's daughter, Amsa Natchia, who by deed P 4 of 1912 gifted the same to her daughter Majida at her marriage. Majida and her husband by deed P 5 of 1925 sold and transferred the premises to the first defendant-appellant and to one Suppiah Chetty. Suppiah Chetty by deed 1 D 1 of 1932 transferred his interests to the first defendant-appellant. The plaintiff-respondent and the second, third, and the fourth defendants-respondents are the children of Majida.

The plaintiff-respondent claimed that P 5 executed by Majida was in violation of the terms of the last will P 1 and that upon the execution of P 5 the property vested in the plaintiff-respondent and his sisters, the second, third, and fourth defendants-respondents. He further asked for damages for the wrongful possession of the first defendant-appellant from 1925 up to the time the plaintiff-respondent was himself put in possession.

The District Judge held that P 1 created a *fidei commissum* binding for four generations, that P 5 was in violation of the terms of P 1 and that on the execution of P 5 the property vested in the plaintiff, respondent and his three sisters.

C. Thiagalingam (with him *T. H. Curtis*), for the first defendant, appellant.—The last will created no *fidei commissum.* The will was intended to create and did create a "trust". Under our system both *fidei commissa and trusts were recognized at all times.* The trust created here, however, is bad as it offends the rule against perpetuities. The case of *Sabapathy v. Yusoof* [1] was wrongly decided.

The *fidei commissum,* if any, was created by the executor's conveyance and not by the last will. The last will gave directions to the executors whereby executor's conveyances were to be made out subject to the *fidei commissum* indicated in the last will. The document of title is not the last will but the executor's conveyance. The executor's conveyance was executed in 1878 after the Entail and Settlement Ordinance, No. 11 of 1876, came into operation. In the result, the *fidei commissum,* if any, created by the executor's conveyance cannot bind anyone who was not in existence or *en ventre sa mere* at the same time such conveyance was executed. Thus Majida got absolute title to the property free from all burdens.

In construing a last will one is concerned with giving effect to the intention of the testator. The testator desired to benefit each successive group of his descendants. The property is given to the immediate devisees and their heirs and issues. The prohibition against alienation is the usual notarial adjunct found in Ceylon deeds creating a *fidei commissum.* Nothing is to happen on a breach of this prohibition. In the

[1] *37 N. L. R. 80.*

absence of express words indicating when the fideicommissaries are to take the inheritance the dominium must be deemed to pass on the death of the fiduciary heirs.

See *Saidu v. Samidu* [1], *Sitty Naina v. Gany Bawa* [2], *Rodrigo v. Perera* [3], and *Voet 36.1.62.*

The claim is for damages consequent on wrongful possession. This falls under section 9 of the Prescription Ordinance, No. 22 of 1871. Minority does not suspend the running of prescription against a person who is entitled to sue for damages. (See sections 13 and 14.) Therefore the plaintiff-respondent cannot sue for damages for more than two years prior to the date of institution of the action. (*1871 Vander Straaten 212.*)

N. Nadarajah (with him *M. M. I. Kariapper*), for the plaintiff, respondent.—A valid *fidei commissum* was created by the last will P 1 and by the executor's conveyance P 3. The Supreme Court has decided this by construing the same will in two earlier cases. *See 37 N. L. R. 80.* (*Sabapathy v. Yusoof.*)

The *fidei commissum* is created by the last will P 1 and not by the executor's conveyance P 3. P 3 is merely the formal conveyance by the executors. The testator died in May, 1876, before the Entail and Settlement Ordinance came into operation. Therefore Majida took the property subject to a *fidei commissum* in favour of her children, the plaintiff-respondent and his three sisters.

When a fiduciary alienates property in violation of the terms of the instrument under which he took, the fideicommissaries are called to the inheritance immediately, even though there is no express stipulation to that effect. Therefore the first defendant-appellant is not entitled to Majida's life-interest in the property. See *Sande on Restraints, p. 224; Voet 36.1.4; Walter Pereira, p. 431.*

In a case of wrongful possession the claim is one for mesne profits or rent and not one for damages. The claim will not fall under section 9 of the Prescription Ordinance, No. 22 of 1871. The case reported in *1871 Vander Straaten 212* was decided before the introduction of Ordinance 22 of 1871.

C. Thiagalingam, in reply.—The view taken in *Sabapathy v. Yusoof* (*supra*) as to when the fideicommissary heirs are called to the inheritance is wrong. The determination of the questions raised in that case did not involve a finding on this point. In a later case, however—D. C. Colombo, 50,221—S.C.293 (F)—(where again the point was not specifically raised) a different view was taken.

There is a difference of opinion among Roman-Dutch jurists as to the effect of a breach, by a fiduciary, of a prohibition against alienation. McGregor in his note to *Voet 36.1.4* says that the South African courts have in no instance followed what seems to be *Voet's* or *Sande's* view. Walter Pereira, however, quotes *Sande* with reference to the case of a *fidei commissum* conditioned to take effect on the breach of a prohibition against alienation. Here we have the case of an ordinary *fidei commissum* in favour of a family with no indication as to what is to happen on the act of alienation by the fiduciary.

[1] *23 N. L. R. 506.*

[2] *24 N. L R. 420 at p. 424.*

[3] *32 N. L. R 155.*

The fact that *1871 Vander Straaten 212* was decided before Ordinance No. 22 of 1876 and under the old Prescription Ordinance in no way whittles down the effect of that decision. The difference drawn there was between mesne profits and damages. The difference still exists. As between landlord and tenant one speaks of rent, as between co-owner and co-owner one speaks of mesne profits, as between trespasser and true owner one speaks of damages. A claim for damages as distinguished from a claim for rent or mesne profits is barred in two years.

Cyril E. S. Perera (with him *Dodwell Gunewardana*), for the second to fifth defendants, respondents.

Cur. adv. vult.

October 16, 1939. WIJEYEWARDENE J.—

The questions that arise for determination on this appeal depend on the construction of the last will of Isubu Lebbe Idroos Lebbe Marikar dated December 12, 1872.

The relevant provisions of the last will P 1, are as follows:—

"(*a*) I hereby will and desire that my wife . . . . and my children . . . . and my father . . . . who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie sect to which I belong, but they nor their issues or heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens . . . . and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses, only that they may receive the rents, income and produce of the said lands, houses, gardens, and estates without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities and out of such income, produce, and rents after defraying expenses for their subsistence and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus, lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated . . . .

"(*b*) I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the movable and immovable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

The last will P 1 was duly proved in Testamentary Case No. 3,909 of the District Court of Colombo and probate P 2 was issued to the surviving executor on May 29, 1876. Acting in terms of the provisions of clause (*b*) of the last will P 1, the executor conveyed the property forming the subject-matter of the present action to the testator's daughter Amsa Natchia by deed P 3 of February 19, 1878, subject to the terms and conditions contained in the last will. By deed P 4 of November 22, 1912, Amsa Natchia purported to gift the property to her daughter Majida Umma who by deed P 5 of January 3, 1925, conveyed her interests

under P 4 to the first defendant and one Suppiah Chetty. By deed 1 D 1 of June 3, 1932, Suppiah Chetty conveyed his interests to the first defendant.

Amsa Natchia died leaving three children, one of whom is Majida Umma who is still alive. The plaintiff and the second, third, and fourth defendants are the children of Majida Umma.

The plaintiff contends that the last will P 1 created a *fidei commissum* and that the first defendant is not, therefore, entitled to the property as against him.

The District Judge held that the last will P 1 created a *fidei commissum* and entered judgment in favour of the plaintiff for an undivided share of the property and for damages from January 3, 1925, and costs. The present appeal is preferred by the first defendant against that judgment.

The appellant's contention is that the last will created a trust and not a *fidei commissum,* that the trust so created is void as it offends the rule against perpetuities and that, therefore, he became entitled to the property under deeds P 5 and 1 D 1.

The last will P 1 was executed before the Entail and Settlement Ordinance 1876 (Legislative Enactments, Volume 2, Chapter 54), came into operation on June 15, 1877. The question whether a *fidei commissum* is created by the last will has therefore to be determined according to the principles of Roman-Dutch law.

There are no particular words necessary for the creation of a *fidei commissum* (*vander Linden 1.9.8*). It matters not what words are used provided they express the legally valid intention of the testator who desires to create a *fidei commissum.* In a *fidei commissum* the only thing that is taken into account is the intention of the testator and it is not only his verbally expressed intention that is looked to but also that intention which is tacit and may be deduced from the words used as a necessary or manifest consequence (*Censura Forensis 1.3.7.7.8*). Our Courts have adopted the principle that the document should be looked at as a whole in order to ascertain whether a *fidei commissum* was created and that, where the intention to create a *fidei commissum* was clear, effect should be given to such intention though the document might contain expressions inconsistent with a *fidei commissum* [vide *Wijetunge v. Wijetunge* [1] and *Mirando v. Coudert* [2]]. This principle should be followed all the more readily when the document which has to be construed is a last will.

Now clause (*a*) of the last will set out by me earlier in the judgment shows that the testator intended that his estate should in the first instance devolve on his heirs according to the Muslim law to which he was subject but that such heirs should not get the estate absolutely. This limitation of the rights of the immediate devisees is evidenced by the provision that they shall not sell, mortgage or alienate the properties and could only receive the rents, income, and produce of the properties for their maintenance. The last will further indicates the persons who, according to the testator, should succeed the immediate devisees in the enjoyment of the property. The persons prohibited from alienating the property are not only the immediate devisees but "their issues or heirs" and in the penultimate paragraph of clause (*a*) the position is made

[1] (*1922*) *15 N. L. R. 493.*

[2] (*1916*) *19 N. L. R. 90.*

all the clearer when the testator provides that out of the surplus income derived from his estate the immediate devisees should buy lands for the benefit of "their children and grandchildren as hereinbefore stated". The last will, moreover, indicates in unambiguous language that the grandchildren of the immediate devisees should be regarded as the ultimate beneficiaries. I have no doubt that the testator intended that the property should devolve on the immediate devisees and their children subject to a *fidei commissum* ultimately in favour of the grandchildren of the immediate devisees. The children of the immediate devisees would not, of course, be regarded as being called to the inheritance along with the immediate devisees but would succeed them in the same order as observed in intestate succession (*Censura Forensis 1.3.7.17*). I think the last will sets out the position with sufficient clearness, though perhaps the intention of the Muslim testator was expressed rather clumsily by the Sinhalese notary in a language that was foreign to both of them. It was pointed out by de Sampayo J. in *Craib v. Loku Appu*[1] that in construing documents of this nature it was necessary to bear in mind that the draftsman was a Sinhalese notary who was endeavouring to imitate conveyancing phraseology without duly considering its relevancy to the matter in hand and that it would not be wrong to attribute any apparent incoherence to the notary's want of care and skill rather than to any uncertainty on the part of the person executing the instrument.

I am not prepared to attach any importance to the use of the words "shall be held in trust" and regard the words as indicative of an intention on the part of the testator to create a trust as known to the English law. In Henry's translation of *vander Linden* among the different kinds of *fidei commissa* are mentioned (*a*) a reciprocal *trust* when two persons are each mutually effected with a *trust* for the other, and (*b*) a *trust* of the residue as when the heir is charged, in case he died without issue, to suffer the residue of the property at his death, to pass to a third person. Again in discussing the difference between a *fidei commissum* and a usufruct we find the following passage in Walter Pereira's *Laws of Ceylon (1904 ed.), vol. II., p. 340* :—

> "An heir affected with a trust has a real though burdened right of property and thus differs from him who has a mere usufruct in the subject of which the naked right of property is in the meantime left to another."

Our local reports themselves contain decisions of this Court where the Judges have used the terms "*fidei commissa*" and *trusts* as interchangeable terms.

It is no doubt true that in the ordinary course of development of our law to meet the requirements of modern life the English Law of Trusts was received into the law of the country, but it is equally true to say that the people of this country showed little or no inclination to have recourse to the system of trusts as known to the English law when they proceeded to execute instruments, which were generally of a testamentary nature, to regulate the devolution of their estates. It would be taking an unreal view of the circumstances under which P 1 was executed if we were to assume on the slender ground furnished by the use of some

[1] *(1918) 20 N. L. R. 449.*

terms in the last will, that the notary who was perhaps less ignorant of the law of *Fidei Commissa* than of the Law of Trusts brought his mind to bear on the special significance of the terms of conveyancing he used and deliberately selected the word "*trust*" with the idea of creating a trust as defined in our Trust Ordinance, No. 9 of 1917, in order to give legal effect to the instructions given to him by the testator. Moreover, if there is a need to justify the use of the term "trust", it is perhaps not difficult to discover a reason in the fact that the immediate devisees under the last will and their chidren were required by the testator to accumulate the surplus income from the lands and invest such surplus in the purchase of property to be held on the terms and conditions set out in the last will.

The last will P 1 has been construed by this Court in two earlier cases (*Sabapathy v. Mohamed Yusoof et al.*[1] and in *293 D. C. Colombo No. 50,221 (Supreme Court Minutes, June 29, 1938)* and, if I may say so, I respectfully agree with the learned Judges who expressed the view in these cases that the last will P 1 created a valid *fidei commissum.*

There remain however further questions to be considered. Has the first defendant obtained no interest whatever in the property by virtue of P 5 and 1 D 1 even though the last will created a *fidei commissum* as decided by me? Has the plaintiff any such interest in the property as will enable him to maintain the present action? The answers to these questions involve the determination of the question as to the time when the fideicommissary interest created by the joint operation of the last will P 1 and the executor's conveyance P 3 would devolve on the plaintiff.

The last will P 1 as I have already stated operates to give the properties first to the immediate devisees, then their children and ultimately the grandchildren who would get the properties absolutely. In terms of the last will, deed P 3 was executed giving the particular property in question to Amsa Natchia subject to the terms and conditions set out in the last will. Therefore Amsa Natchia and her daughter Majida Umma would, during different periods, be the fiduciaries while the plaintiff and others claiming on the same footing as himself would be the ultimate beneficiaries of the property. Now the last will provides that Amsa Natchia and her issues and heirs shall not alienate the property but that out of the income she and her issues or heirs shall "defray expenses for their subsistence and maintenance of their families" and the property shall be held in trust for the grandchildren of Amsa Natchia. The event on the happening of which the property devolves on each succeeding set of fideicommissary heirs is the death of the immediate previous fiduciary who last entered into the possession of the property. The prohibition against alienation contained in the last will does not operate to make the alienation of the property in spite of such prohibition, the event which determines the time of vesting of the property. If the alienation of the property was the event on which the *fidei commissum* was to take effect, then if in fact there was no alienation the property would not have vested on the ultimate beneficiaries but would have formed a part of the estate of the fiduciary on the death of the fiduciary. The plaintiff

[1] *(1935) 37 N. L. R. 70.*

himself would not say that such a result flows from the absence of any alienation by the fiduciary in the present case. The position is clearly set out in the following passage from Walter Pereira's *Laws of Ceylon (1904 ed.), vol. II. pp. 320, 321* :—

"When anything is alienated against the express prohibition of the testator, those persons in whose interest the prohibition has been made are immediately called to the *fidei commissum* (*Sande de Proh. al 3.6.1*).

"This proposition is liable to be misunderstood. The *fidei commissum* here referred to is a *fidei commissum* induced by a prohibition against alienation coupled with an indication of a person to benefit in the event of such prohibition being disregarded. Ordinarily there need be no prohibition against alienation for the purpose of constituting a *fidei commissum,* although in the creation of a *fidei commissum* in Ceylon such prohibitions are usually inserted. I give my property to A subject to the condition that it is become B's property after the death of A, I create a complete and effectual *fidei commissum.* In such a case a prohibition against alienation is a mere superfluity, because A cannot interfere with B's right, and he cannot therefore alienate the property. All that he can alienate is his own interests in it which terminates at his death. In such a case if A executes a deed purporting to alienate the property, B may recover it from the purchaser as soon as his right accrues, that is, after the death of A whatever length of time may elapse since the alienation, no prescription beginning to run against him until the accrual of such right (*Voet 36. 1. 64 : Marsh 192.* See proviso to section 3 of Ordinance No. 22 of 1871). If however I give my property to A prohibiting him from alienating it, and providing that in the event of alienation the property is to go to B, here too a *fidei commissum* will be created, but the event on the happening of which the property is to vest in B is not the death of A but the alienation of the property by A. *If A does no act in contravention of the prohibition against alienation, the property will never vest in B. It will go to A's heirs after his death;* but the moment A does such an act, B would *ipso facto* become the owner of the property. The reference in the passage cited above from *Sande's* to such a *fidei commissum*".

Though therefore the deeds P 5 and 1 D 1 have been executed in violation of the condition which prohibited the alienation of the property, yet the first defendant is entitled to possess the property during the lifetime of Majida Umma and no right to the property vests in the plaintiff until the death of Majida Umma. The plaintiff therefore cannot maintain the action.

I would therefore allow the appeal, dismiss the plaintiff's action, and order the plaintiff to pay the first defendant the costs of the appeal and the costs of the proceedings in the District Court.

MOSELEY A.C.J.—I agree.

Appeal allowed.