1942 *Present :* **Keuneman and Cannon JJ.**

KADER *v.* MARRIKAR *et al.*

266—D. C. Matara, 5,304.

Res judicata—*Action against fiduciary—Binding on fideicommissary—Roman-Dutch Law.*

Under the Roman-Dutch Law a fideicommissary is treated as a privy of the fiduciary or a person claiming under him for the purpose of the law of *res judicata.*

Usoof v. Rahimath (20 N. L. R. 225) not followed.

THIS was an action for partition in which the dispute related to a one-fourth share of the land which originally belonged to Abdulla Miskin. According to plaintiff Abdulla Miskin mortgaged this share to

Lokuhamy by deed P 5 of 1886, and in execution of a mortgage decree obtained by Lokuhamy it was purchased by the latter in 1890, from whom the land devolved on Habeebu Natchiya, who purchased the remaining three-fourth share. From him the plaintiff claims the land. According to the respondents, Abdulla had prior to the mortgage gifted the one-fourth share to his son, Miskin Bawa, and his three children, Isuwa, Cassim, and Rahiman, subject to a *fidei commissum.* When Lokuhamy put the bond in suit in Court of Requests, Matara, among the parties-defendants were Miskin Bawa, Isuwa, and Cassim, who claimed the property, but judgment was entered for the plaintiff. After the sale of the mortgaged property the three defendants resisted the claim of Lokuhamy, who brought a second action for declaration of title (District Court, Matara, 82). The District Judge held that the defendants were estopped by the decree in Court of Requests, Matara, No. 46,791. The main question argued in appeal was whether the decree obtained against the fiduciaries was binding on the fideicommissaries.

N. E. *Weerasooria,* K. C. (with him *Haniffa*), for plaintiff, appellant.—This appeal should succeed on two grounds (*a*) *res judicata,* (*b*) prescription.

(*a*) The general principle is that the doctrine of *res judicata* binds only the parties and their privies.

In this case there are two decrees, C. R. Matara, 46,791, and D. C. Matara, 82 (P17), which bind the fiduciaries, Miskin Bawa, Isuwa Umma and Cassim. The fideicommissaries are privies of the fiduciaries and they are bound by these decrees.

The Roman-Dutch Law is clear on the point—*Voet 2.15.8 Pandects.* Compromises made by fiduciary bind the fideicommissary unless they are entered into *mala fide.*

This is more so when a *fidei commissum* is left generally and not to a certain person.

Compromises of the fiduciary bind the fideicommissaries—*Vide Peregrinus de fidei commissis 53.49.*

In *Usoof v. Rahimath* [1], Bertram C.J. held that the doctrine of *res judicata* did not extend to the fideicommissaries. In this case *Voet* was not cited, and this decision is contrary to rulings in Privy Council cases.

Charles v. Nonahamy [2] is opposed to the ruling in *Usoof v. Rahimath.*

Voet's opinion is in accord with the decision of the Privy Council in Indian cases, viz., *Katama Natchair v. Rajah of Shivagunga* [3], *Pertabnarian Singh v. Trilokinath Singh* [4].

(*b*) Rahiman died without issue, the *fidei commissum* never came into operation, the respondents derived title as heirs of Rahiman and have been out of possession for over 30 years.

N. Nadarajah, K.C. (with him *Dodwell Gunawardana*), for eleventh to sixteenth respondents.—The fideicommissary is not a privy of the fiduciary.

(*a*) The judgment in *Usoof v. Rahimath* (*supra*) is binding. Bertram C.J., in a considered judgment, stated emphatically that the doctrine of *res*

[1] *20 N. L. R. 225.*
[2] *25 N. L. R. 233.*
[3] *(1863) 9 Moore's I.A. 563.*
[4] *(1884) 11 Cal. 186.*

judicata cannot be extended to the fideicommissaries. *Charles v. Nonahamy*[1] is not a decision contrary to *Usoof v. Rahimath*[2]. Garvin J. did not adopt the same line of reasoning as Jayawardene J.

The Roman-Dutch Law is not free from doubt; note caution by *Voet* regarding compromises.

> "The fiduciary heir will mostly act more prudently in the meantime and more safely if he abstains from all compromise and allow all controversies to be decided by judgment according to the rigors of law." *Voet. 2.15.8.*

The Indian cases do not apply, as they deal with widows and reversionary heirs of the husband. Under the Hindu Law the property vests in the widow and she has a right of alienation in certain circumstances.

(*b*) Prescription was a question of fact. The learned District Judge's finding on it is correct and should not be disturbed.

O. L. de Kretser (*jnr.*) for eighth defendant, respondent—*Usoof v. Rahimath* (*supra*) is binding on the question whether a fideicommissary is the privy of the fiduciary.

Jayawardene J's observations in *Charles v. Nonahamy* (*supra*) are *obiter*.

It is fair to assume that the authorities given in *Charles v. Nonahamy* (*supra*) were before the Judges who decided *Usoof v. Rahimath* (*supra*), for Justice Jayawardene who was then at the bar appeared for the appellants and claimed to fully present the authorities—*vide Usoof v. Rahimath*. The Indian cases decided in the Privy Council relate to the rights of Hindu widows and have no application to the case of a fideicommissary who derives title not from the fiduciary but from the deed.

Cur. adv. vult.

May 22, 1942. KEUNEMAN J.—

This action was brought by the plaintiff to partition the premises described in the plaint between the plaintiff and the first defendant. There is no dispute as regards a three-fourth share of the premises. The balance one-fourth originally belonged to Abdulla Miskin. According to the plaintiff, Abdulla Miskin mortgaged this share to Lokuhamy by deed P 5 of 1886. The share was subsequently sold under mortgage decree and purchased by Lokuhamy by Fiscal's Transfer P 6 of 1890, and sold by her on P 7 of 1893 to Habeebu Natchiya, who also acquired the balance three-fourth share. From Habeebu Natchiya the premises have devolved on the plaintiff and the first defendant.

According to the respondents, Abdulla Miskin had, prior to the mortgage P 5, gifted this one-fourth share by deed 8D1 of 1876 to his son, Miskin Bawa, and the latter's children, Isuwa, Cassim, and Rahiman. Miskin Bawa died, leaving as his descendants, the eighth defendant, the fifth defendant and the sixth defendant. The last mentioned defendant died, and his representatives are the eleventh to the sixteenth defendants. Isuwa and Rahiman died unmarried and without issue, and their shares are said to have devolved on the eighth defendant. Cassim died, leaving his son, the eighth defendant. The respondents claim the one-fourth share, originally the property of Abdulla Miskin.

[1] *25 N. L. R. 233.* [2] *20 N.L. R. 225*

The respondents also asserted that the deed 8D1 created a *fidei commissum* in favour of the children and grandchildren of the four named donees. In the Court below, it was not denied that the effect of the deed was to create such a *fidei commissum*, and I think it is clear from the deed that such a *fidei commissum* was in fact created. But the validity of the deed was assailed on the ground that no possession was given to the donees, and that the deed was only to take effect after the demise of the donor. In view of the decision in *Weerasekera v. Peris*[1], and the five-Judge *decision in Abuthahir v. Mohamed Sally*[2] this objection cannot be sustained. This case has to be decided on the footing that the deed 8D1 is a valid deed creating a *fidei commissum*. It will be necessary later to consider the nature of the *fidei commissum* created.

The principal points which were argued before us were—

(1) whether the respondents were barred by two decrees, which will be detailed in due course, and

(2) whether prescription has run against the respondents.

As regards the plea of *res judicata* the facts are as follows. When Lokuhamy put the mortgage bond P 5 in suit, the mortgagor, Abdulla Miskin, was dead. The action was Court of Requests, Matara, No. 46,791 (P 18), and among the parties-defendants in that case were Miskin Bawa, Isuwa and Cassim, three out of the four donees mentioned in the deed 8D1, who were joined as the representatives of Abdulla Miskin. These three defendants claimed in their answer that they were entitled to the property mortgaged upon the deed 8D1 of 1876, but in spite of this defence, judgment and decree were entered for the plaintiff Lokuhamy. It is claimed by the plaintiff that not only the three fiduciaries, but also their fideicommissaries are bound by this decree.

Matters did not remain there. After the sale under the mortgage decree, the three defendants continued in possession and resisted the claims of Lokuhamy, who brought a second action for declaration of title (*District Court Matara, No. 82*) (P 17) against them. In this case also these three persons filed answer, pleading title to the one-fourth share of the premises on the deed 8D1 of 1876, and denied that they were the heirs and representatives of Abdulla Miskin. After trial, the District Judge held that these three persons were estopped by the decree in Court of Requests, Matara, No. 46,791 (P 18), and decree was entered for the plaintiff as prayed for. This decree is also pleaded as *res judicata* against the fideicommissaries.

There can be no doubt that three of the named fiduciaries, viz. :—Miskin Bawa, Isuwa Umma, and Cassim—are bound by the two decrees in question. But does the principle of *res judicata* extend to their fideicommissaries also ? The question is not free from difficulty. It was raised in the case of *Usoof v. Rahimath* (*supra*) and emphatically answered in the negative by Bertram C.J. and Shaw J.—

> " These children are not claiming through Abdul Cader (the fiduciary), but on the deed. It is certainly singular that it should be open to successive generations of persons claiming under the same *fidei commissum* to litigate questions already the subject of a

[1] *34 N. L. R. 281.* [2] *43 N. L. R. 193.*

judicial decree. But it is clear that, just as no agreement of Abdul Cader could affect the rights of his children, they are equally unaffected by any judgment against him to which they were not parties" (per Bertram C.J.).

Unfortunately, in this case, no authority was cited in support of this expression of opinion, except the general principle that a *res judicata* binds only parties and their privies. It has been pointed out by Jayawardene A.J. in *Charles v. Nonahamy* (*supra*) that this ruling is opposed to what is laid down in the Roman-Dutch Law and appears to be in conflict with the ruling in certain Privy Council decisions. The case of *Charles v. Nonahamy* (*supra*) cannot be regarded as a decision contrary to *Usoof v. Rahimath* (*supra*), for the other Judge, Garvin J., has not adopted the particular line of reasoning, but the reasoning of Jayawardene A.J., though it may be an *obiter dictum*, is worthy of consideration.

The whole matter has been fully argued by *Voet in bk. 2.15.8 of the Pandects*. It has to be remembered that what *Voet* was dealing with was the matter of compromises by the fiduciary, and whether such compromises will operate against the fideicommissaries. *Voet says*—

"It seems to accord with the reason of the law that it should be so: provided only that the (remitted) right was clearly doubtful, and provided that no *mala fides* appears on the part of the fiduciary heir, and no remission of a manifest right".

To reinforce this opinion, *Voet* adds—

"In the same way that a lawsuit begun (*lis mota*) by the fiduciary before restitution injures the fideicommissary, not that suit which is only begun after restitution, ... nor does this the less appear from the argument taken from a *compromissum* (mutual promise), for since the fideicommissary heir is bound to uphold this when made by the fiduciary, ... there is no reason why he should not also make a valid compromise also".

Voet adds that while the condition of the *fidei commissum* is suspended, it is uncertain whether anything will come to the fideicommissary heir, who in the meantime cherishes only "a fleeting and uncertain hope of acquiring the *fidei commissum*," and adds "and much more does this hold good when a *fidei commissum* is found left, not to a certain person, but *generally* 'to those who will be nearest related on the arrival of the suspended day or condition'". Finally, *Voet* sums up his opinion as follows:

"Lastly, even a sentence passed against a fiduciary will injure the fideicommissary, unless the condemnation has come by the fault of the fiduciary: . . . . . whether the lawsuit has been commenced, as to a particular thing, or as to the whole inheritance before restitution, ... ; and for this reason, lest otherwise the ownerships of things should be uncertain, and judicial decisions should be uncertain, as in more fully shown in *Peregrinus de fideicommissis art. 53. num. 49. et seq.* If, therefore, a fiduciary can injure a fideicommissary both by way of payment by expenses *bona fide* incurred, and by a "denunciation" made to himself, there is no reason why, by a *bona fide* compromise,

made without grace or disgrace, he cannot also prejudice him; especially if we remember that a compromise is as much intended for settling a law suit as a judgment, and that its authority is not less than that of a judgment ".

Voet adds later—

" . . . . the right of the fideicommissary heirs is clearly the same as the right of the fiduciary, and all the advantages and disadvantages simply pass from the fiduciary to the fideicommissary, whatever they are; hence it is commonly disputed whether you succeed to the burdener or the burdened by *fidei commissum* : . . . . ".

He adds this caution—

" The fiduciary heir will mostly act more prudently in the meanwhile and more safely, if he abstains from all compromise, and allows all controversies to be decided by judgment, according to the rigor of the law, ... ".

(The translations used are from Buchanan's *Voet on Transactions.*)

This very high authority of *Voet* does not appear to have been cited in the case of *Usoof v. Rahimath* (*supra*) and is opposed to the opinion expressed by the Judges of that case. *Voet* accepts without question the proposition that a judicial sentence passed against a fiduciary will injure the fideicommissary, unless the condemnation has come by the " fault " of the fiduciary, and on the proposition, he argues, that a compromise by the fiduciary will also be binding on the fideicommissary in a like case. Further, the later argument of *Voet* throws considerable doubt on the *finding in Usoof v. Rahimath* (*supra*) that the fideicommissaries do not claim through the fiduciary. In fact, no reasons are given in that case, and no authorities are cited.

It has to be remembered that the matter in controversy in the cases P 18 and P 17 was the effect of the deed 8D1, and the question whether 8D1 was superior to the mortgage P 5 in effect. The finding in the case was that the mortgage P 5 and the Fiscal's Transfer P 6 was superior and prevailed over the claims of the donees under 8D1. The donees were accordingly litigating the very existence of their rights under 8D1, and the decrees negatived their claim. This is certainly a case where it is undesirable that these judicial decisions should speak with an uncertain voice, and where the ownership of the thing which is the subject of litigation should remain in uncertainty. Further, the litigation was carried on with vigour by the three fiduciaries and the decision of the Court was given after full argument and trial. There is nothing to show that " the condemnation has come by the fault " of the fiduciaries.

The opinion of *Voet* is in accord with certain decisions of the Privy Council with regard to the position of a Hindu widow in relation to the reversionary heirs of her husband. The rule laid down in *Katama Natchair v. The Rajah of Shivagunga*[1] has a significant application to our law.

" The whole estate would for the time be vested in her absolutely for some purposes, though in some respects for a qualified interest;

[1] *(1863) 9 Moore's I. A. 563.*

and till her death it would not be ascertained who would be entitled to succeed. The same principle, which has prevailed in the Courts in this country as to tenants in tail representing the inheritance, would seem to apply to the case of the Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow ".

This principle was held applicable where a Hindu widow was granted the estate under a will which gave her the power to nominate a successor *vide Pertabnarain Singh v. Trilokinath Singh* [1]. There are other decisions in the same direction.

I think the language used by the Privy Council aptly fits the case of a fiduciary in relation to fideicommissaries and that a fiduciary can be regarded as "representing the inheritance". The argument of *Voet* deals very fully with this aspect of the case. The words "fairly and properly" used in the rule laid down by the Privy Council is in accord with *Voet's* language, that the condemnation should not come by the "fault" of the fiduciary.

I think, on all these authorities, it can be held that under the Roman-Dutch Law a fideicommissary is treated as a privy of the fiduciary, or a person claiming under him for the purpose of the law of *res judicata,* and that we are not constrained to follow the decision in *Usoof v. Rahimath,* in view of the fact that no reasons were given for that decision, and that the authorities cited to us are in conflict with that decision.

This finding disposes of the claims of the respondents in respect of the shares vested under the deed 8D1 in Miskin Bawa, Isuwa, and Cassim. There remains the share vested in Rahiman, who was not a party to the action P 18 and P 17. If Rahiman was alive at the time of these actions, it is strange that he was not made a party, but I do not think it is open to us to assume that Rahiman was dead at the time. In the absence of any evidence to that effect, Counsel for the appellant argues that, in view of the fact that Rahiman died without issue, the *fidei commissum* imposed never came into operation, and that the respondents derived title not under the *fidei commissum* but as heirs of Rahiman. Now, it is in evidence, and this has been accepted by the District Judge, that Habeebu Natchiya, the predecessor in title of the plaintiffs, and the first defendant have been in sole possession of the premises in question since 1893, *i.e.,* for a period in much excess of 30 years, and under section 13 of the Prescription Ordinance such a possession is conclusive proof of title, notwithstanding such a disability as minority.

I think the argument of Counsel for the appellant is correct, and it does not matter whether the possession of Habeebu Natchiya started in the lifetime of Rahiman or not. I do not think the respondents can be regarded as persons claiming estates in remainder or reversion, under section 3, and hold that their rights, if any, have been extinguished by prescription. I may add that with regard to prescription the position of Ishuwa is the same as that of Rahiman, but it is unnecessary to deal with her case, in view of the earlier finding with regard to *res judicata.*

[1] *(1884) 11 Cal. 186.*

The appeal succeeds and is allowed as prayed for with costs, and the judgment of the District Judge is set aside. The appellant is also entitled to the costs of contest in the Court below.

CANNON J.—I agree.

Appeal allowed.