1959 *Present :* **Basnayake, C.J., and Pulle, J.**

M. M. MOHAMED, Appellant, *and* SITTI CADIJA *et al.*, Respondents

S. C. 292—D. C. Colombo, 7841/L

Fideicommissum created by will—Posthumous child born to testator—Testator's lawful heirs designated as entitled to take their respective shares according to the Shafie sect—Testator's children's grandchildren designated as ultimate fideicommissaries—Division of properties between testator's widow and children including posthumous child—Validity of conveyance to posthumous child—Prescription against a fideicommissary—Burden of proof—Prescription Ordinance (Cap. 55), proviso to s. 3.

A fideicommissum by will executed on 12th December 1872 by a testator (a Muslim) who died in 1876 provided as follows :—

" I do hereby will and desire that my wife—, and my children—(5 sons and 2 daughters), 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 heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held

[1] *(1935) 37 N. L. R. 57.*

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 expense 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 herein before stated, but neither the executors herein named or any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy.

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. "

A " posthumous " child was born to the testator after the execution of the will and before his death. The testator's father predeceased the testator.

In the testamentary case following the death of the testator, a division of the properties of the testator was effected in 1878 by the executor between the widow and children of the testator, with the sanction of Court. In that division the property, which was the subject matter of the present action, was conveyed to the eighth and posthumous child of the testator on the basis that each of the six sons (including the posthumous child) was entitled to 2/16th of the estate according to the rules of intestate succession under the Muslim law. From 1878 onwards the posthumous child and his heirs were in possession of the premises as owners.

Held, that the conveyance by the executor of a share of the estate to the posthumous child, represented by the property in suit, was not in direct opposition to the terms of the will. Even assuming that those charged with the division of the estate might have been wrong in placing the posthumous child in the same class of beneficiaries as his brothers, it was too late now to impugn the conveyance effected by the executors in 1878 with the sanction of the Court.

Held further, that prescriptive possession cannot commence against a fideicommissary until the date on which full title vests in him. Under the proviso to section 3 of the Prescription Ordinance the burden of proving the date of vesting of such title is on the fideicommissary.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *B. A. R. Candappa* and *Miss Maureen Seneviratne*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke* and *C. P. Fernando*, for the defendants-respondents.

Cur. adv. vult.

March 4, 1959. PULLE, J.—

The appellant is the plaintiff who sought a declaration of title to 1/42 share of a property bearing assessment Nos. 35/37, Queen Street, Fort, which he has valued at Rs. 357,000. He also prayed for judgment against the three defendants in a sum of Rs. 900 being his share of the mesne profits from 1st April, 1953, to the date of action and damages at the rate of Rs. 25 per month. Admittedly the original owner of the property was one Isboe Lebbe Idroos Lebbe Marikar who died on 8th May, 1876, leaving a last will No. 7130 dated 12th December, 1872, which was duly proved. This will had given rise to much litigation, the principal controversy being whether it created a fideicommissum or not. The question was finally resolved by the Privy Council in an action affecting the very property wherein it was held that the will did create a fideicommissum.

The plaintiff is a grandchild of one Mohamed Usboe, a son of the testator, and claims to be entitled to a share of the property as one of the ultimate fideicommissaries. The defendants claim under another son of the testator named Abdul Hameed to whom the entirety of the property in suit was conveyed by deed P2 dated 19th February, 1878, in the course of a division of the properties of the testator between his widow and children. In regard to this deed P2 the position of the plaintiff is that it was inoperative for the reason that Abdul Hameed was not a beneficiary under the will and that those who purported, in the course of the division referred to, to convey any of the testator's properties to Abdul Hameed did so in excess of their powers and that, therefore, the property in suit could not pass to the successors in title of Abdul Hameed. The case for the plaintiff rests principally on the fact that at the time of the execution of the will in 1872 Abdul Hameed was not born. He is described as the posthumous child of the testator. It is undisputed that since 1878 the property has been in the possession of Abdul Hameed and his heirs. The learned District Judge held that the defendants had acquired a title by prescription. He held further as follows :—

" Moreover the division effected in 1878 has been acted upon by all the parties up to date and that division should not now be disturbed. (vide *1 N. L. R. 311*). That division was with the consent of court and the acquiescence of all the heirs and heiresses will now be binding on all the parties and the heirs. "

The beneficiaries expressly named in the will are the widow of the testator, his father Uduma Lebbe Usboe Lebbe and the seven children living at the execution of the will. The portion of the will relevant to this appeal is as follows :—

" I do hereby will and desire that my wife Assenia Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Selma Lebbe, Abdul Rahiman, Mohamadoe Usboe, Amsa Natchia, and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, 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 heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present or which I might acquire hereafter, 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 expense 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 herein before stated, but neither the executors herein named or any Court of Justice shall require to receive them or ask for account at any time or under any circumstances, except at times of their minority or lunacy.

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. "

For the present it suffices to state that Abdul Hameed, the eighth and posthumous child, is not named as a beneficiary and that the seven named children and the testator's wife and father are to be entitled to and take their respective shares " according to my religion and Shafie sect ". Had the testator not made a will both his widow and his father, if surviving, would have been co-heirs with the children according to Muslim law.

The will was admitted to probate on the 19th May, 1876, and the administration of the estate of the deceased was committed to the sole surviving executor, Mohamed Mohideen, the second son named in the will—3 D1. The testator's father, Uduma Lebbe Usboe Lebbe, predeceased him.

The events leading up to the execution of the conveyance P2 in favour of Abdul Hameed are set out in that deed. Three persons said to be competent and respectable and of the same station in life as the testator along with the surviving executor were commissioned by court on the 14th June, 1877, to effect a division of the estate on the basis that the widow was entitled to 2/16ths, each of his six sons (i.e. including Abdul Hameed) to 2/16ths and each of his two daughters to 1/16th. By its order dated 11th September and 5th October, 1877, the executor was "ordered and empowered" to pass conveyance to the heirs in terms of the scheme of distribution drawn up in pursuance of the commission issued on 14th June, 1877. The deed P2 while conveying the property to Abdul Hameed embodied verbatim the trusts and conditions set out in the will.

Whether P2 created a fideicommissum or not arose for decision in connexion with the execution of a mortgage bond executed by Abdul Hameed as security for a loan given by one Peter de Saram. Pursuant to a sale in exeuction of the mortgage decree the property was purchased by the legal representatives of de Saram who had been substituted in his place. The 1st defendant in the present case and other descendants of Abdul Hameed refused to give possession of the property to the purchasers on the ground that the mortgagor had no more than a fiduciary interest. The case went ultimately to the Privy Council which held, as stated previously, that the will created a fideicommissum. The question whether Abdul Hameed was a beneficiary under the will was not in question for the obvious reason that it was in the interests of Peter de Saram not to challenge the validity of the conveyance P2. The finding of the trial Judge in the present case is that Abdul Hameed was not a beneficiary under the will. He stated,

> "The defendants' father Abdul Hameed is not named in the last will. He cannot be considered as heir under the Last Will—vide (*1876*) *3 Chancery Division 300.* But whether he was an heir or not he had been allotted a 2/16 share in the scheme of distribution 3 D2 and he has been given a deed in his favour in respect of the premises—P.2. From 1878 onwards admittedly Hameed and his heirs have been in possession of the premises as owners. The question arises whether the defendants can claim the premises in dispute by right of prescription."

On the issue of prescription he reached a finding adverse to the plaintiff on the following basis. Under the will the rights of the grandchildren of the testator's children, as *fideicommissarii* accrued on the death of the children of the testator. The grandfather of the plaintiff, Mohamed Usboe, died in 1906 and, therefore, prescription began to run against him from this year and not from the death of his father in 1952. As the defendants had proved that they had been in possession for 10 years before the institution of the action, the plaintiff could succeed only on proof that his title accrued within this period of 10 years. He relied on the decision of the Privy Council in *Mohamedaly Adamjee v. Hadad Sadeen.*[1] This action, D. C. Colombo case No. 5951/L, related to a property which had, in the division of the testator's estate, been conveyed in 1888 by the executor to Savia Umma, a daughter of the testator. In D. C. Colombo case No. 5706/L the grandchildren of Savia Umma obtained a decree for sale under the Partition Ordinance, No. 10 of 1863, without making the person in possession, namely, the plaintiff in case No. 5915/L a party. Savia Umma had mortgaged the property and in pursuance of a decree to enforce the mortgage it was sold in execution and purchased by one Leonara Fonseka through whom the plaintiff in case No. 5915/L claimed title. The plaintiff in case No. 5915/L then instituted the action to have the decree in case No. 5706/P set aside. In the alternative he claimed damages which he estimated at Rs. 100,000. It was found that the decree in the partition action had been obtained fraudulently and collusively and the question which fell ultimately to be determined was the

[1] (*1957*) *58 N. L. R. 217.*

quantum of damages, which again rested on the question whether the plaintiff in case No. 5915/L had at the institution of the partition action acquired a title by prescription. There was no evidence as to time at which the parties to the partition action as fideicommissary heirs of the testator, acquired title. In the absence of such evidence the Privy Council construing section 3 of the Prescription Ordinance stated (*58 N. L. R. at p. 227*)—

> " Looking at the matter first as a question of construction they think that once parties relying upon prescription have brought themselves within the body of section 3 the onus rests on anyone relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession at some time within the period of ten years. "

The position taken up by the plaintiff in the present case is that his rights as a fideicommissary accrued to him on the death of his father, Mohamed Munsoor, in 1952. I accept the contention on behalf of the plaintiff that his right under the will fell into possession on the death of his father and not on the happening of any earlier event. The question whether the grandchildren of the testator's children succeeded as the only fideicommissaries or as the *ultimate* fideicommissaries did not arise for decision in any of the reported cases in which the will had to be interpreted. The main dispute was whether the will created a trust which offended the rule against perpetuities. Once a trust in favour of the grandchildren of the testator's children is ruled out it is difficult to resist the conclusion that the testator intended his children's children to be in the position of fiduciaries in relation to their own children. There are valuable dicta in the reported cases which point to the correctness of this conclusion. In the Privy Council decision of *Sitti Kadija et al. v. De Saram et al.*[1] it is stated (p. 176)—

> " Bearing in mind that the Mohamedan law only includes the nearest generation when referring to heirs, their Lordships are clearly of opinion that the words ' they nor their heirs ' in the clause prohibiting alienation cover two generations only, viz., the devisees *and their heirs*, and that there is no room for the suggestion that the prohibition may be construed as a perpetual one. "

If there was a prohibition against alienation imposed on the children of the testator's children, then clearly a fiduciary interest devolved on the plaintiff's father on the death in 1906 of Mohamed Usboe.

There are several passages in the dissenting judgment of Keuneman, J., which together with the judgment of Wijeyewardene, J., was restored

[1] *(1946) 47 N. L. R. 171.*

by the Privy Council in *47 N. L. R. 171* which make it clear that on the death of Mohamed Usboe the *plenum dominium* devolved on the plaintiff's father. At p. 286 of *45 N. L. R.* Keuneman, J., states,

> "The persons to be benefited are not only the grandchildren but also the children of the devisees." Later,
>
> "I think the will shows an intention to benefit three classes of beneficiaries, the devisees, their children, and their grandchildren."

The same is implicit in the judgment of Wijeyewardene, J. He said in a previous case arising out of the same will, *Sinnan Chettiar v. Mohideen and others* (41 N. L. R. 225 at 230)—

> "I have no doubt that the testator intended that the property should devolve on the immediate devisees and their children subject to a fideicommissum ultimately in favour of the grandchildren of the immediate devisees."

It, therefore, follows that the relevant date for reckoning the period of prescriptive possession is from 1952, the year of the death of plaintiff's father. I am unable to gather from the judgment of the Privy Council in *58 N. L. R. 217* that if the position is that the children of the testator's children were not beneficiaries section 3 of the Prescription Ordinance can stand in the way of the plaintiff in resisting a claim based on prescriptive possession.

We come now to the question whether on a consideration of the terms of the will and the distribution of the estate by the conveyance granted by the executor to the devisees, save the father of the testator who predeceased him, and to Abdul Hameed, the deed P2 of 1878 must be regarded as having conveyed good legal title to Abdul Hameed.

In support of the case for the defendants it was submitted to us—

(*a*) that the devisees named in the will were not entitled to take a larger fractional share than upon the basis of an intestate succession according to Muslim law as at the date of the death of the testator.

(*b*) that the father of the testator as the recipient of a legacy burdened with a fideicommissum could transit his interests to his heirs of whom Abdul Hameed was undoubtedly one.

(*c*) that the conveyance of the property in suit being part of a family arrangement sanctioned by court which has remained unquestioned for over eighty years should not now be disturbed.

I think it must be ruled out upon any interpretation of the will that on the death of the testator Abdul Hameed succeeded on a basis of equality with his brothers. However, the will is explicit that the devisees "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 . . . ". If another heir not contemplated by the testator

was alive at his death, could his existence be ignored in determining the fractional shares to which the named devisees would be entitled according to the rules of intestate succession under the Muslim law ? My opinion is that the answer to this question must be in the negative. I do not think *In re Emery's Estate, Jones v. Emery* [1] referred to in the judgment under appeal, concludes the question in favour of the plaintiff. Each will has to be interpreted on its own terms and the wording of the will we are concerned with points in a reasonably clear way that while the testator was content that his estate should pass to his heirs in the ordinary course as on an intestacy, he was primarily concerned with tying up his landed property for the ultimate benefit of the grandchildren of his children. The naming of his own father as a devisee in my view supports this conclusion. It is undoubtedly true that where a person makes a will purporting to dispose of the whole of his estate one ought not lightly to presume that as to a part thereof an intestacy has resulted. But the will is in several respects badly drafted and has been the subject of unfavourable comments in some of the judgments which had to construe it. Having regard to the manifold difficulties it has given rise to it is not surprising that the result of giving effect to the words that the devisees were to become entitled to " their respective shares " according to Muslim law was to create an intestacy in respect of a part of the estate. On this basis it cannot be said that a conveyance by the executor of a share of the estate to Abdul Hameed, represented by the property in suit, was in direct opposition to the terms of the will.

In regard to the devise to the testator's father it was submitted on the authority of *Livera et al. v. Gunaratna* [2] that although he predeceased the testator the fideicommissum did not lapse and that his interests were transmitted, on the death of the testator, to his heirs of whom undoubtedly Abdul Hameed was one. In the will the testator's father is described as one of his lawful heirs, there is a prohibition against alienation by him or his heirs and a trust is created not only for the benefit of the grandchildren of his children (by which I am content to assume that the testator meant the children who were alive at the execution of the will) but also the grandchildren of the testator's father of whom again one would be Abdul Hameed. The testator undoubtedly contemplated that if he predeceased his father the latter would, under the division directed by the will, get specific portions of the immovable property. In the view I take of the terms of the will the devise to the testator's father did not lapse on his death nor did his share accrue jointly to the benefit of the widow and the children named in the will.

If Abdul Hameed did not get any right whatsoever to a share of the estate on the death of the testator, the bare fact that on a division of the estate with the sanction of court a part of it was conveyed to him by the executor would not of itself suffice to defeat the title of the grandchildren of the testator's children. In my opinion the position is different. Those charged with the division of the estate might have been wrong in placing Abdul Hameed in the same class of beneficiaries as his brothers

[1] *(1876) 3 Chancery Division 300.* [2] *(1914) 17 N. L. R. 289.*

but I am unable to say that the conveyance effected by P2 was necessarily bad. It is too late now to impugn it on the ground that the executor ought not in 1878 to have admitted Abdul Hameed, not named in the will, to a status of equality with those who were named. The reasons for not disturbing the division are compelling and I would dismiss the appeal with costs.

BASNAYAKE, C.J.—

I have had the advantage of reading the judgment prepared by my brother Pulle. I agree that this appeal should be dismissed with costs. The scheme of distribution of the property left by Isubu Lebbe Idroos Lebbe Marikar made in pursuance of the Commission issued to " three competent and respectable persons " as directed by the will has endured far too long to be disturbed. Those to whom the property was distributed and their successors have dealt with the property and all litigation up to now has proceeded on the basis that the distribution was valid in law.

Besides, on the material before me I am not prepared to say that the construction placed on the will by the court which sanctioned the division is wrong either according to the rules of interpretation of wills (Jarman on Wills, Vol. 3 p. 1698 8th Edn) or according to the principles of Roman-Dutch Law (Voet Bk. I Tit. 5 s. 5 ; Bk. XXVIII Tit. 2 ; Bk. XXXVII Tit. 9 s. 1). There being no indication in the will that the testator intended to disinherit the child who was born after he made the will, it appears to have been rightly construed so as to include him.

A circumstance which is not entirely irrelevant is that the testamentary proceedings were before Judge Berwick who was noted both for his legal erudition and for his thoroughness. There is substance in the contention of learned counsel that the words " 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 " negative any intention to disinherit the last child. The learned Judge calls him a posthumous child ; but it would appear that he is a " quasi-posthumous " child for such is the description in Roman-Dutch Law of a child born after the execution of a will, but before the death of the testator.

Even if the view put forward by the appellant were the only and true view the inconvenience that would be caused by unsettling and disturbing the title to so many valuable properties both in Colombo and elsewhere after this lapse of time is so great that I think it would be proper to persevere in the error that has been made originally if error it be.

Appeal dismissed.