1954 *Present:* **Gunasekara J. and Fernando A.J.**

M. M. NUHMAN *et al.*, Appellants, *and* ABDUL NAKEEM *et al.*, Respondents

S. C. 134—D. C. Colombo, 6,094 L

Fideicommissum—" Power of appointment ".

A fideicommissary deed of gift in which the *fideicommissarii* were all the children of the *fiduciarius* and their descendants, contained the following Proviso :—

" Provided always that nothing herein contained shall prevent the said I. M.S. (the *fiduciarius*) by Deed or Testamentary disposition to give and grant the said premises or any part thereof to any person or persons whomsoever he pleases but the same must be given and granted strictly under and subject to all the restrictions as are hereinbefore expressed ; otherwise such grant shall be null and void. "

Held, that the Proviso did not create a " power of appointment " within the recognised meaning of that expression, but only conferred on the *fiduciarius* a right of disposition which in certain eventualities would have the effect merely of postponing the enjoyment of the fideicommissary interests.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *L. G. Weeramantry* and *E. R. S. R. Coomaraswamy*, for the 8th-13th defendants appellants.

H. W. Tambiah, for the plaintiff respondent.

H. W. Jayewardene, Q.C., with *M. L. de Silva* and *M. S. M. Nazeem*, for the 1st–7th defendants respondents.

Cur. adv. vult.

September 7, 1954. FERNANDO A.J.—

We are called upon in this appeal to interpret a deed of gift executed in 1866 by one Lebbena Marikar in favour of his son Samsudeen. Set out below are relevant extracts from the provisions of the deed :—

"I do hereby give, grant, assign, transfer, and set over unto the said Lebbena Marikar Samsudeen his heirs, executors, administrators and assigns as a gift absolute and irrevocable, but under and subject to the terms and conditions hereinafter set forth and described the following premises to wit. . . . "

"To Have and Hold the said premises with all and singular the appurtenances thereunto belonging valued at one thousand five hundred pounds unto him the said Lebbena Marikar Samsudeen his heirs executors administrators and assigns for ever on the following conditions to wit : that the said property hereby given and granted or any part or portion thereof shall not be sold, mortgaged or otherwise alienated, by the said Lebbena Marikar Samsudeen but that the same shall be held possessed and enjoyed by the said Lebbena Marikar Samsudeen during his lifetime and that after his death by his children lawfully begotten and their descendants under the bond of Fidei Commissum and shall never in any manner be alienated. That the rents issues and profits of the said property shall not be liable to be attached seized or sold for any debt or other liabilities of the said Lebbena Marikar Samsudeen nor for the debts or liabilities of any other person or persons who may succeed thereto.

Provided always that nothing herein contained shall prevent the said Lebbena Marikar Samsudeen by Deed or Testamentary disposition to give and grant the said premises or any part thereof to any person or persons whomsoever he pleases but the same must be given and granted strictly under and subject to all the restrictions as are hereinbefore expressed ; otherwise such grant shall be null and void. "

In purported pursuance of the powers conferred on Samsudeen by the Proviso in the deed, he subsequently by deed P2 (No. 1532 of August, 1910) made a gift of a portion of the land to his son Nakeem subject to the condition " that the same shall be held possessed and enjoyed by the said Samsudeen Hadjiar Mohamed Nakeem during his lifetime and after his death by his children lawfully begotten and their descendants under the bond of Fidei Commissum and shall never in any manner be alienated and that the rents issues and profits of the said property shall not be liable to be attached seized or sold for any debt or other liabilities of the said Samsudeen Hadjiar Mohamad Nakeem nor for the debts or liabilities of any other person or persons who may succeed thereto and subject also to the said life rent or possessory interest of the said Lebbena Marikar Samsudeen Hadjiar ".

Samsudeen (the fiduciary) had six sons and five daughters and he apparently executed the deed P2 upon the footing that the Proviso in the deed P1 entitled him to nominate any one of his children to hold the property and that in that event the Fidei Commissum would continue to attach for the benefit only of the descendants of the chosen nominee.

Nakeem (the donee on P2) died in 1944. The plaintiff and the 1st-6th defendants, all of whom are children of Nakeem, seek to partition among themselves the portion of land gifted to Nakeem by P2 ; but the 8th-13th defendants who are some of the other grandchildren of Samsudeen contend that despite the execution of the deed P2 all the children of Samsudeen and the descendants of those children became entitled to the land on the death of Nakeem.

The learned District Judge has held that the deed P1 created a valid Fidei Commissum but that the Proviso enabled Samsudeen " to select from the class mentioned therein certain Fideicommissaries whom he wished to appoint " and that accordingly the deed P2 by which Samsudeen made a gift to the chosen son Nakeem subject to a fideicommissum in favour of Nakeem's descendants was valid. This would mean of course that the interests of the other children of Samsudeen and their descendants were extinguished upon the execution of P2.

Mr. Perera has argued *firstly* that the deed P1 created a valid fideicommissum in favour of all the children of Samsudeen and their descendants, and that the Proviso cannot be construed in such a manner as to defeat the conditions imposed in the fideicommissary clause : and *secondly* that the Proviso can be given an interpretation consistent with the intention of Lebbena Marikar to create an interest in favour of all Samsudeen's children and their *descendants*. There are undoubtedly cases in which a deed creating a fideicommissum does contain a provision under which the fideicommissum can be extinguished or become inoperative, for example, where the donor authorises the fiduciary or some other person to exclude one of the fideicommissary heirs in the event of marriage without consent or abandonment of religion. But Mr. Perera's contention is that such a power of exclusion to be effective must be clearly and unambiguously expressed, and that the Proviso in the deed under consideration is not so expressed. Mr. Perera has also relied on the case of *Hadjie v. Fernando* [1] in which this Court dealt with a deed executed by the self-same Lebbena Marikar also in 1866 which was in terms identical with P1. In that case also one fiduciary made a gift in pursuance of the Proviso, but she there expressly declared that the gift would be subject to the conditions imposed by the original deed of 1866 in her favour. In the result in that case, the effect of her deed was only to create a temporary interest in the property, and not to exclude permanently any of the designated fideicommissary heirs.

Mr. H. W. Jayewardene, who appeared for the 1st-7th defendants respondents, rightly pointed out that the judgment in the case cited, only incidentally interpreted the effect of the Proviso, for the reason that the person to whom the fiduciary there transferred the property and the successors in title of that person had in any event acquired prescriptive title effective against the single individual who came within the category of the designated fideicommissary heirs. Nevertheless the judgment of de Sampayo J. in so far as it purported to interpret the conditions in Lebbena Marikar's deed is of great persuasive value.

[1] *(1919) 6 C. W. R. 367.*

The Proviso which enabled the fiduciary " by Deed or Testamentary disposition to give and grant the premises to any person whomsoever ", makes it clear that the grant must be "strictly under and subject to all the restrictions as are hereinbefore expressed, otherwise such grant shall be null and void ". The view taken by the learned District Judge was that the Proviso conferred on the fiduciary a power of appointment and both he as well as the two counsel who argued the case for the respondents at the appeal appeared to think that it was a power to select from among the designated class of fideicommissary heirs, i.e., the children of Samsudeen. Professor Nadaraja in his book " The Roman Dutch Law of Fideicommissa " at p. 57 refers to the various forms of the so-called " Power of appointment " in the following terms :—" The power of appointment conferred on the fiduciary may be either general, without limitations on his choice, or special, where the power can only be exercised in favour of certain persons or a class. Special powers may be of different kinds. Thus, the testator may designate the fideicommissaries himself leaving the fiduciary only the power of determining the distribution among those indicated, or he may designate a number of individuals or a class or classes from which the fiduciary may choose the actual beneficiaries, or he may leave to the fiduciary the power not only of choosing the beneficiaries out of those indicated but also of determining the shares of the beneficiaries so chosen. Where the power is general with no express limitations on the fiduciary's choice of the fideicommissaries, he may nevertheless not appoint himself ".

It seems to me that the Proviso which we have to construe does not fall within any of the forms there mentioned ; nor does the Proviso amount to a power of disinherison or revocation which falls to be regarded as akin to a power of appointment.

De Sampayo J. in the case to which I have already referred was of opinion that the transfer by the fiduciary in pursuance of the Proviso would have the effect either of enabling the transferee to hold the property during the lifetime of the transferor or (presumably for the reason that the Proviso refers to a transfer by *testamentary disposition*) a right to hold the property during the transferee's lifetime, and that in either event the property would ultimately vest in the children and descendants of the fiduciary, i.e., in the designated fideicommissary heirs. He seemed to prefer the view that the transfer would be effective during the lifetime of the transferee and not merely during the lifetime of the transferor. I have with great respect come to the same conclusion. The deed P1 contains language which unambiguously expresses an intention to create a fideicommissum and the form in which the fideicommissary clause has been drawn is almost impeccable. There is a clear gift over, to be effective on the death of Samsudeen and an equally clear designation of the fideicommissaries, i.e., the children of Samsudeen lawfully begotten and their descendants. There is then a prohibition against alienation and a provision (even though ineffective) that the property is not to be liable to attachment or seizure. Having regard then to the fact that the Proviso itself explicitly preserves in force the restrictions previously expressed it can properly be regarded only as an exception to the prior prohibition

against alienation. Samsudeen was given the right despite the prohibition against alienation to give or grant the property strictly under the restrictions, which would, despite a transfer by Samsudeen remain in full force. Whether the transfer would be effective to postpone the interests of the fideicommissary heirs only until Samsudeen's death or else until the death of the chosen transferee, is not material in the present case, for the reason that this action has been filed after the death of Nakeem who was the transferee on P2. All the descendants designated in P1 as fideicommissary heirs had a right to succeed to the property at the latest on the death of Nakeem. It is to my mind quite clear that the Proviso created no "power of appointment" within the recognised meaning of that expression, but only conferred a right of disposition which in certain eventualities would have the effect merely of postponing the enjoyment of the fideicommissary interests.

For these reasons I am of opinion that the deed P2 was null and void in so far as it purported to deprive the designated fideicommissary heirs of their interests in the property. The judgment and decree appealed from must be set aside and the case remitted to the District Court in order that a decree may be entered, after such further steps as may be necessary, in accordance with the interpretation given to the deed P1 in this judgment. The plaintiff must pay to the 8th–13th defendants their costs of appeal and costs of contest in the District Court. Other costs will be in the discretion of the District Court.

GUNASEKARA J.—I agree.

Judgment set aside.