1957 *Present :* Weerasooriya, J., and Sansoni, J.

SINNEPILLAIPODY, Appellant, *and* MUHAMADUTHAMBY *et al.*, Respondents

S. C. 602—D. C. Batticaloa, 534/L

Fideicommissum *by last will—No personal benefit conferred on* fiduciarius—*Validity—Trusts Ordinance (Cap. 72), s. 3 (a).*

There can be a *fideicommissum* without any conferment of rights on the *fiduciarius* to enjoy the fruits and profits of the fideicommissary property.

A testatrix left a will dated 21st May 1902 appointing A—, one of her brothers, as " executor " to look after her five lands and " to collect the income derived from them and to hand them over " to her child, who was 5 days old when the will was made. The will proceeded :—" And so my brother A— shall accept these properties and the child from this day until she becomes a major, and in the meantime to take the income and to spend same for the use of the said child according to his own wish reasonably, and to preserve the balance income and the properties and when the child becomes major to give these as dowry to the child and the bridegroom . . . . And if the child happens to die before this, the said A— shall give away these properties to my brothers or their heirs ". The testatrix died in 1902 and her child died in 1904.

Held, that the will created a valid *fideicommissum*. According to the will, the executor was the *fiduciarius*, and the *fideicommissarius* was the daughter of the testatrix ; in the event of the daughter's death before she attained majority, the brothers of the testatrix became *fideicommissarii*.

APPEAL from a judgment of the District Court, Batticaloa.

H. V. Perera, Q.C., with *C. Ranganathan* and *M. Shanmugalingam*, for the defendant-appellant.

E. B. Wikramanayake, Q.C., with *E. A. G. de Silva* and *M. Rafeek*, for the plaintiffs-respondents.

Cur. adv. vult.

April 4, 1957. WEERASOORIYA, J.—

I have had the advantage of seeing the judgment prepared by my brother Sansoni and I am in complete agreement with it. The facts and the material parts of the will are set out in that judgment.

In my opinion it is not possible to construe the will as creating a trust, as we were requested to do by Mr. Perera. I have come to this conclusion because, while it is true that the executor, who is the immediate devisee, is not given the beneficial enjoyment of the property, neither is it given to the successive groups of beneficiaries as represented by the child and her husband, and (in the event of the child dying before her marriage) the brothers of the testator. On this point it is clear that, except in so far as it is provided that a portion of the income may be expended for the use only of the child (and that too in the discretion of the executor and not as a matter of right in the child) the beneficial enjoyment of the properties is postponed to the point of time when the properties themselves will vest in the beneficiaries. There is, therefore, absent in this settlement a concurrent ownership of the legal title in the executor and of the beneficial interest in the other persons, or in those persons jointly with the executor, which according to the definition in Section 3 (*a*) of the Trusts Ordinance (Cap. 72) is of the essence of a trust.

If a trust is excluded, the question is what was the intention of the testator as far as can be gathered from the (implied) prohibition against alienation and the express designation of the persons to whom the properties should go on the happening of the events contemplated. As pointed out in *Wijetunga v. Wijetunga*, [1] an important test to be applied in considering whether a will or other instrument creates a fideicommissum is whether any provision or stipulation expressed in it can be regarded as having been inserted for any purpose other than that of "inducing" a fideicommissum. In the view I have already taken this question must be answered in the negative in respect of the provisions to which I have just referred.

The further question, then, is whether we should hold that the intention of the testator to create a fideicommissum is frustrated because no personal benefit has been conferred on the executor as the fiduciary. A somewhat similar question arose in *De Saram v. Kadijar* [2] which came up before a bench of five Judges. In that case the will contained a provision that the fiduciaries should accumulate the balance of the income and profits from the properties devised (after defraying expenses for the subsistence and maintenance of their families) in a fund for the benefit of the fideicommissaries. It was contended that the fact that the fiduciaries did not have the whole of the beneficial interest stood in the way of the construction of the instrument as creating a fideicommissum. In dealing with this contention Hearne, J., observed that if the intention of the testator was to create a fideicommissum the only way of dealing with a clause which deprives the fiduciary heirs of their beneficial interest, and to that extent inconsistent with the Roman Dutch

[1] *(1912) 15 N. L. R. 493.* [2] *(1944) 45 N. L. R. 265.*

law conception of the position and rights of a fiduciary, would be to ignore it. Wijeyewardene, J., was of the same view and, alternatively, but without examining the matter in detail as has been done by my brother Sansoni, he stated that he did not see why such a provision alone should be a ground for holding that no fideicommissum was created. Keuneman, J., was of the opinion that the provision referred to should be construed as merely expressing the wish of the testator regarding the use of the income and profits which was not legally binding on the fiduciaries.

In the appeal subsequently taken in the same case before the Judicial Committee of the Privy Council from the decision of this Court, their Lordships expressed the opinion [1] that the provision as regards the use of the income and profits should be interpreted as being only of a precatory nature and not legally binding on the fiduciaries.

While the present case is somewhat different in that no part of the beneficial interest falls to the fiduciary, I think that the same construction can be applied to the provision in the will dealing with the income and profits.

For these and the other reasons stated in the judgment of my brother the appeal should be dismissed with costs.

SANSONI, J.—

This appeal concerns the interpretation of the last will, dated 21st May, 1902, of a woman named Pathumma. Having described five lands to which she was entitled she went on to say in it :—" As I am at present seriously ill and am at the point of death and as I am having the five properties mentioned and a daughter 5 days old I do hereby appoint as executor to this last will Moheideenbawa Ahamadulevvepody, who is my brother and who looked after me when my mother died when I was very young, and who rendered every assistance to me to purchase the fourth property, and who gave me dowry out of his own earnings, to look after this baby and adopt her, and also to look after the said properties and to collect the income derived from them and to hand them over to this child ". Pausing there, it seems clear that the testator did not by these words give the dominium of the lands to the executor.

The will then proceeds :—" And so my brother the said Ahamadulevvepody shall accept these properties and the child from this day until she becomes a major, and in the meantime to give the produce of the second and third properties for this year only to my husband M.A. Ahamadulevvepody for the purpose of the debt incurred by us, and to take the rest of the income and to spend same for the use of the said child according to his own wish reasonably, and to preserve the balance income and the properties and when the child becomes a major to give these as dowry to the child and the bridegroom ". This clause emphasises the limited powers which the executor was given in respect of these lands. He is

[1] *(1946) 47 N. L. R. 171 at 176.*

to accept them in the same way as a donee accepts a donation; but as regards the income from them, he is enjoined to collect it and to accumulate it for the benefit of the child and her bridegroom when she married.

The only other provision in the will to which I need refer is that which follows the clause last quoted. It runs: "And if the child happens to die before this, the said Ahamadulevvepody shall give away these properties to my brothers or their heirs". No separate reference is made here to the income, but presumably it was intended to follow the lands, for the executor is not even in this eventuality given any share of it.

Pathumma died in 1902 and her child died in 1904. Pathumma was survived by her four brothers, Mohideenbawa Ahamadulevvepody (the executor) who died in 1928, Mohamadu Thamby, Meeralebbepody and Adamlebbepody. Meeralebbepody died in 1924 leaving two children, who are the plaintiffs in this action, while Adamlebbepody is the defendant.

The plaintiffs in their plaint pleaded that Pathumma devised the five lands to her only child with a condition that if the child died before she became a major the lands were to devolve on Pathumma's four brothers. The plaintiffs sued for a declaration of title to 1/4th share of three of the lands on this basis. They pleaded that the defendant was in wrongful possession of the three lands, and asked that he be ejected from them.

It is not clear what position the defendant adopted at the trial in regard to the interpretation of the will, but in his answer he denied almost every averment in the plaint. Since this is an action rei vindicatio the plaintiffs were bound to establish their title to the ¼th share claimed by them. Issues (1) and (2) framed at the trial raised the questions whether the will created a fideicommissum in favour of the four brothers, and, if so, whether the plaintiffs are entitled to 1/4th share of the lands.

The District Judge in a judgment which is not very helpful held that the will did create a fideicommissum. He gave the plaintiffs the relief they claimed, except in regard to ejectment as he found that the defendant is a co-owner.

The defendant has appealed, and Mr. Perera for him submitted that the will did not create a fideicommissum, but a trust, the trustee being the executor who was directed to hold the lands devised for a limited purpose and to use the income from them in a particular way. He submitted that the child cannot, in any view of the matter, be considered a fiduciary, nor could even the executor, since the latter never had a beneficial interest in the property devised, while in a fideicommissum there is a succession of full ownership passing from the fiduciary to the fideicommissary.

Mr. Wickremanayake for the plaintiffs respondents conceded that the child was not a fiduciary. He contended, however, that the last will created a fideicommissum, the executor being the fiduciary, and the

fideicommissary being the daughter; in the event of the daughter's death before she attained majority, Pathumma's four brothers would be fideicommissaries. He emphasised that the intention of the testator was the paramount consideration, and that her intention was to create a fideicommissum. He relied strongly on the South African case of *Kemp's Estate v. Mc. Donald's Trustee* [1].

Now that was a case where a testator bequeathed property to trustees to be held by them in trust for his three sons and their issue. The sons were to get their share of the income for life. The grand-sons who attained majority were to get their shares absolutely, while the grand-daughters were to get their share of the income for life, and after their death their children who attained majority were to get their shares absolutely.

Solomon, J. A., said that it was quite possible to discover the intention of the testator without translating the English legal terms of the will into the corresponding expressions of South African Law. He added :— "Were it necessary to do this I think that we should have to speak of the trustees as fiduciary heirs or legatees and of Susannah (a grand-daughter) as a fideicommissary legatee. In doing so, however, we should be using the terms fiduciary and fideicommissary in a wider sense than they have hitherto been employed in any of our reported cases. For in these cases a fiduciary heir or legatee has invariably meant a person who himself had a beneficial interest, usually a life interest, in the property bequeathed to him while the fideicommissary has been one in whom the dominium of the property has *ipso facto* vested on the death of the fiduciary, or on the happening of any other event which terminates the rights of the fiduciary. In the present case, however, the trustees have no beneficial interests in the store dealt with in clause 10 of the will, nor could the dominium ever have passed to Susannah. On principle, however, there seems to be no reason why a fiduciary should necessarily have any beneficial interest in the property bequeathed to him, nor does there appear to be any reason why he should not be directed to convert the property into money before handing it over to the fideicommissary. So that it would be possible, in my opinion, to say that the trustees under the will are fiduciary heirs in whom the store vested on the death of testator, and that they are burdened with a fideicommissum to pay the rents and profits as directed in the will, and after the death of the wife of the testator to convert the store into money and dispose of it to the persons indicated by the testator ".

Maasdorp, J.A., said : "The mere circumstance that the testator did not intend to confer any personal benefit upon the trustees does not prevent their being treated legally and technically as fiduciary heirs ".

Innes, C.J., referring to the trustees in the will, said that they were vested with the legal ownership but that the testator never intended that they should have any beneficial interest—" they were instituted not to enjoy but administer the property ". He then went on to say :— " A testamentary trust is in the phraseology of our law a fideicommissum

[1] *(1915) A. D. 491.*

and a testamentary trustee may be regarded as covered by the term fiduciary. In modern practice 'fiduciary' is most frequently used to denote an heir or legatee who holds the bequeathed property as owner and for his own benefit subject to its passing to fideicommissaries upon the happening of a certain condition. But it does not follow that the element of personal benefit on the part of the first holder is essential to the condition of a fideicommissum or the character of a fiduciary. It was an element which (as distinct from the statutory right of deduction) was frequently absent in the testamentary trusts of Civil Law. And seeing the wide and comprehensive conception of such trusts entertained by the lawyers of Holland, one would expect Dutch practice to be even more elastic in this regard ".

With regard to this last statement of the learned Chief Justice, Mr. Frere-Smith in his " Manual of South African Trust Law ", at p. 49, says :— " Diligent search has failed to disclose the uncited authority in support of the Chief Justice's statement in *Kemp's case* (at p. 499), that the lawyers of Holland recognised a fiduciary administrator bare of personal benefits ". He adds :—" The possibility of a fiduciary burdened with administrative duties, without having any rights of enjoyment for himself, seems to have sprung from obiter dicta of de Villiers C. J., (afterwards Lord Villiers) in *Strydom v. Strydom's Trustee* (1894) 11 S. C. 425, which were based upon a mistranslation of D. 36. 2.26.1 (recording what is called Papinian's case). The interpretative error is attributed to Voet. Reference to the passage in the Digest shows that Papinian, who was one of the greatest of Roman lawyers, if not the greatest, was dealing directly with vesting, not administration ".

Professor Nadaraja in his book " The Roman Dutch Law of Fideicommissum " at pages 233—238 deals with the fideicommissum purum and the much more familiar fideicommissum conditionale. I do not think it is necessary to go further into the character of the fideicommissum purum as no question of vesting arises on this appeal. But the terms of the will under consideration seem to me to create a fideicommissum conditionale, an example of which is given by Innes C. J. in his judgment. If there is a bequest " to A for the use and benefit of B, if and in case the latter attained majority, in which case he is to receive interest until the age of 25 and thereafter the capital ; and in the event of B's death during minority the capital to another son C, such a fideicommissum would not be pure but conditional ".

In Appendix (2) of Mr. Frere-Smith's book, the author reproduces an opinion of Professor Fischer of Leyden University on the question: Can the opinion that a trust in modern Roman-Dutch Law is to be regarded as a fideicommissum be supported by what we know about the law and practice in respect to fideicommissa in the 18th century Law of Holland ? Professor Fischer first deals with the fideicommissum purum and says that he has not found any proof of the use of that fideicommissum in the practice of that time and adds : " I think Nadaraja is quite right, when he writes in his Roman-Dutch Law of Fideicommissa 'It seems better to let that form of fideicommissum lie, buried and

forgotten as a historical curiosity relevant only as having played an important part in the origin of fideicommissa and not to seek to revive it by identifying the trust with it' ".

But Professor Fischer also deals with " the fideicommissum prescribing that the fiduciary shall restore to the fideicommissary not only the fideicommissary property itself but also all its fruits and profits ". Regarding this type of fideicommissum he says :—" This form of fideicommissum is not quite the same as the fideicommissum purum. A fideicommissum with a provision to restore all the fruits and profits to the fideicommissary, and thus without any benefits for the fiduciary, is mentioned in Digesta, 36.1 19 (18) and recognised as part of the Roman-Dutch Law by Van Zutphen S. v. Fideicommis, nr. 16, and by Voet Ad Pandectas, 36.1.49. Voet adds that such a provision may be implied, e.g., when the fideicommissum is created only to save a minor heir or legatee from tricks of his intestate successors or from the administration of an unacceptable guardian. It seems, however, that these fideicommissa were very uncommon in Holland, not only because Voet does not refer to other authorities than Roman legal texts, but chiefly because in the sources of the legal practice of Holland such fideicommissa cannot be found. In the abovementioned Observationes tumultuariae of Van Bynkershoek I have not encountered one case of a fideicommissum where the fiduciary was not entitled to take for himself the fruits and profits of the fideicommissary property during the time he was in possession of it. In 1806 Van der Linden wrote in his Rechtsgeleerd, Practicaal, en Koopmanshandboek :—' Further it is an incident of a fideicommissum that so long as the fiduciary is entitled to hold the property he can take the fruits '. If there had been an exception from this rule in general use in Holland, Van der Linden would have said so. In conclusion, the view that in Holland, especially during the eighteenth century, a fiduciary became an owner of fideicommissary property for one or more fideicommissaries—not exceptionally under special arrangements to avoid an unacceptable guardian's administration, but generally—cannot, as far as I see, be supported by the sources of the eighteenth century law of Holland ".

Mr. Perera pressed on us the submission that the judges in the South African case were faced with the difficulty arising from the fact that the English Law of Trusts found no place in the law of South Africa, and that their decision sought to give effect to the testator's intention by fitting the provisions of the will into the framework of a fideicommissum. There is much to be said for this view, but although that case seems to have decided for the first time that there can be a fideicommissum without any rights of enjoyment, the opinion quoted supports the decision. We have not been referred to any local case in which this particular question has been considered. I see no reason why, having regard to the terms of the will under consideration, we should not hold that it contains a valid fideicommissum. I would therefore dismiss this appeal with costs.

Appeal dismissed.