Privy Council Appeal No. 39 *of* 1945

Abdul Hameed Sitti Kadija and another - - - *Appellants*

v.

Frederick John De Saram and others - - - - *Respondents*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1946

Present at the Hearing:

VISCOUNT SIMON
LORD THANKERTON
SIR JOHN BEAUMONT

[*Delivered by* LORD THANKERTON]

This appeal arises out of an action of ejection by the first two respondents against the appellants and the other four respondents. The action was dismissed by a judgment and decree of the District Court of Colombo, dated the 23rd March 1942, which were set aside by a judgment and decree of the Supreme Court of the Island of Ceylon, dated the 26th May 1944, whereby decree of ejection and for damages were granted in favour of the first two respondents, by a majority of three Judges to two.

The question at issue arises on the proper construction of the will, dated the 12th December 1872, of one Isboe Lebbe Idroos Marikar, who died on the 8th May 1876, and whose said will was admitted to probate on the 29th May 1876. The relevant portions of the will are as follows:—

" I do hereby will and desire that my wife Assenia Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Abdul Ryhiman, 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 hereinbefore 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 moveable and immoveable 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 testator was survived by his widow and the seven children named in the will; his father had predeceased him, but an eighth son, Abdul Hameed, had been born after the date of the will, and also survived the testator. The parties are agreed that the case should proceed on the footing that the will applied to Abdul Hameed, as if he had been named by the testator along with his other children in the will.

The moveable and immoveable estates of the testator were duly divided as directed in the last clause of the will, and by deed dated the 19th February 1878, the then surviving executor conveyed to Abdul Hameed, subject to the trusts and conditions of the will, which were repeated *verbatim* in the deed, the properties which are the subject matter of the present suit, as Abdul Hameed's share of the immoveable properties of the testator. Abdul Hameed died on the 20th July 1931, and the appellants are the only two of his children who survive. The 3rd, 4th, 5th and 6th respondents are grandchildren of Abdul Hameed, children of a deceased sister of the appellants.

On the 15th May 1931, Abdul Hameed had executed a mortgage of the properties now in suit in favour of one Peter de Saram in consideration of a loan of Rs. 30,000. Peter de Saram subsequently brought an action on the mortgage in the District Court of Colombo against the legal representative of Abdul Hameed, and, on Peter de Saram's death on or about 23rd April 1937, the present first two respondents continued the action as substituted plaintiffs, and, on the 26th November 1937, the Court entered a hypothecary decree in their favour. At the sale pursuant thereto the property was bought by the first two respondents, and a conveyance was executed in their favour by the Secretary of the District Court on the 7th July 1938. Their right to possession of the property having been disputed by the descendants of Abdul Hameed on the ground that it was the subject of a *fideicommissum* under the will of the testator, and that Abdul Hameed had no interest in the property which he was capable of mortgaging except an interest which terminated on his death, the first two respondents instituted the present action on the 30th January 1931 for a declaration that they were entitled to the property in suit, for decree of ejection and for damages.

The main question in the appeal is whether under the will a valid *fideicommissum* of the property in suit was created, which disabled Abdul Hameed from mortgaging any interest in the property after his death, or whether Abdul Hameed had an absolute interest in the property, which has become vested in the first two respondents by sale. The appellants maintain that a valid *fideicommissum* was created by the will, which the first two respondents deny, maintaining (*a*) that the terms of the will do not suffice to create a valid *fideicommissum*, (*b*) that the terms of the will, at best, rather contemplate the creation of a trust, which would contravene the rule against perpuities, than the creation of a *fideicommissum*, and (*c*) in any event, that uncertainty as to ascertainment of the beneficiaries and the time of the vesting of their interests renders it impossible to give effect to any *fideicommissum*.

This particular will has already been the subject of judicial construction in four cases, in the first three of which it was held that it created a valid *fideicommissum*; in the fourth case, though it was decided on a different point, Soertz J., on a review of the previous decisions, found difficulty in agreeing with them, and, if it had been necessary, would have asked for reconsideration of them by a full bench. In the present case, the District Judge, though he appears to have favoured a different view, felt bound by the previous decisions to decide in favour of a *fideicommissum*. On appeal by the first two respondents, an order was made for a hearing

before five judges, and on the 26th May 1944, the appeal was allowed by a majority of three judges (Howard C.J., Soertz J., and Hearne J.) to two (Keuneman J. and Wijeyewardene J.), and judgment was entered for the first two respondents. In view of that diversity of opinion, their Lordships find unnecessary to refer to the four earlier cases, as Wijeyewardene J. was a party to the decision in the third case, and Soertz J., as already stated, was the judge in the fourth case, and also because it appears that the terms of the will, as they were submitted to the Court in at least the first three cases, included the words " issues or heirs " in the clause prohibiting alienation, and there is no mention of issue in the will as submitted in the present appeal.

Howard C.J. held (*a*) that there was a doubt whether there was or was not a prohibition in perpetuity against alienation, (*b*) that there was no certainty with regard to the beneficiaries, the class being too wide for ascertainment and too vaguely described, for which reason alone the learned Judge held that it had not been established that the testator intended to create a *fideicommissum*, and (*c*) that he agreed with the opinion of Soertz J. that there was a further difficulty with regard to the time of vesting. Soertz J. held (*a*) that there was a failure to designate or indicate sufficiently the recipients of the testator's bounty, and that the attempted *fideicommissum* failed *in limine*, (*b*) that the time of vesting was also wrapped in similar doubt, and (*c*) that the language of the will rather contemplated a perpetual trust, which would fail because of the rule against perpetuities and also because of the uncertainty as to the beneficiaries and the time of vesting. Hearne J. arrived at the conclusions (*a*) that it was impossible to hold from the language of the will that the testator intended to create a *fideicommissum*, (*b*) that, if he did, he failed to achieve his object, the requisites of a valid *fideicommissum* not having been satisfactorily set out, (*c*) that the wording of the will, and the effect of its provisions strongly suggested an attempt to create a trust, in which attempt, if it was consciously made, the testator failed.

Of the two learned judges who formed the minority, Keuneman J. held (*a*) that the intention of the testator to creat a *fideicommissum* had been expressed with sufficient clearness, (*b*) that the will showed an intention to benefit three classes of beneficiaries, vizt. the devisees, their children and their grandchildren, that the testator devised the immoveable property to the devisees, burdened with a *fideicommissum* in favour of their children and grand-children in successive generations; and that the *fideicommissum* was to become operative on death in each case, and (*c*) that the interest given to the devisees more closely resembled the interest of a fiduciary as known to the Roman-Dutch law than the interest of a trustee as known in England, the occurrence of the word " trust " in the will being inconclusive, and that he was not disposed to accept the argument that the will created a trust as known in England. Lastly, Wijeyewardene J. held that by the opening clauses of the will the *plena proprietas* was given to the immediate devisees, a prohibition against alienation being then imposed, such burden being in favour of their heir or heirs and grandchildren, the grandchildren being the ultimate beneficiaries, the clause as to the rents income and produce being merely explanatory of the preceding clauses, and that by these clauses a valid *fideicommissum* was created, there being nothing in the subsequent clauses to prevent the Court from holding in favour of a *fideicommissum*—in particular, the clause as to disposal of the surplus rents, produce and income not being legally binding on the devisees; the learned Judge further held that the testator should not be taken to have intended to create an English trust.

The authorities as to the rules of construction which apply to the present question are fully quoted by the learned Judges of the Supreme Court, and their Lordships do not find it necessary to repeat them, but the following general principles may be derived from them. In the first place, where there is doubt whether a *fideicommissum* has been created, that construction should be preferred which will pass the property unburdened, but, if the language of the will is such as to show clearly an intention to create a *fideicommissum*, mere difficulty of construction will not prevent

ns being upheld. Doubt as to whether a valid *fideicommissum* has been created includes such doubt as to the identity of the beneficiaries as will prevent their ascertainment by a court of law. However difficult their application may be in a particular case, these general rules of construction appear to be well established.

In the first place, their Lordships will dispose of the suggestion that the will suggests an attempt on the testator's part to create a trust as known in England. Their Lordships agree with Wijeyewardene J. that the use of the word " trust " in the will is quite inconclusive, as it is as commonly used by writers in relation to *fideicommissa,* as to the English type of trust. In the opinion of their Lordships the leading clauses of this will are typical of a *fideicommissum,* and are inconsistent with the structure of an English trust. The main differences between *fideicommissa* and English trusts are correctly set out, in the opinion of their Lordships, in Professor R. W. Lee's Introduction to Roman-Dutch Law (3rd ed. 1931) at page 372, vizt., " (1) the distinction between the legal and the equitable estate is of the essence of the trust; the idea is foreign to the fideicommissum. (2) In the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive; in the fideicommissum the ownership of the fideicommissary begins when the ownership of the fiduciary ends. (3) In the trust, the interest of the beneficiary, though described as an equitable ownership, is properly ' jus neque in re neque ad rem ', against the *bona fide* alienee of the legal estate it is paralysed and ineffectual; in the fideicommissum the fideicommissary, once his interest has vested, has a right which he can make good against all the world, a right which the fiduciary cannot destroy or burden by alienation or by charge." Professor Lee adds a fourth difference, which is not material here.

In the opinion of their Lordships the learned Judges, who formed the majority, have not given sufficient weight to the language of the leading clause, under which the testator's heirs and heiresses according to the Mahomedan law are to be entitled to and to take their respective shares under the law. In the opinion of their Lordships, the terms of the clause, along with the inclusion of the moveable estate in the devise, which the devisees take absolutely, point clearly to a devise of the *plenum dominium* of the immoveable estate to the devisees, subject to the restrictions so far as binding under the law of Ceylon, and make clear that there is not any attempt to constitute a trust as known to the law of England, but that there is an attempt to constitute *fideicommissa,* and the last clause which directs the separate ascertainment, after the death of the testator, of the shares to which the heirs and heiresses are entitled, points to a separate *fideicommissum* in the case of each devisee. The present case relates to the share of Abdul Hameed, which was so ascertained, and conveyed to him.

In order to ascertain, if possible, who are the fiduciaries and who are the fideicommissaries, it is convenient to read the next two clauses together:— " 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, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only. . . ." One of the learned Judges relates the final word " only " to the succeeding clause, but, while their Lordships do not think that it matters very much, they take the view that it more naturally qualifies the antecedent clause. Bearing in mind that the Mohamodan 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, vizt. the devisees and their heirs, and that there is no room for the suggestion that the probibition may be construed as a perpetual one. In the next clause, the word " they " clearly relates to the immoveable property, and the beneficiaries, in the opinion of their Lordships, relate to the third generation in the case of all the devisees. the testator's wife, as well as his children; the fact that the first words " grandchildren of my children " might have been satisfied by the words which follow—" grandchildren of my heirs and heiresses "— does not materially affect the construction of the clause as stated by their

Lordships. So far, their Lordships find language in the will apt for the constitution of a valid *fideicommissum*, and a sufficient statement of the beneficiaries and the benefits to be taken by them.

It is suggested that the succeeding clause as to the rents, income and produce of the immoveable property makes it difficult to uphold the creation of a valid *fideicommissum*, but their Lordships are of opinion that it is not legally binding on the fiduciaries, to whom alone it relates, and is therefore of a precatory nature; in this they agree with the views expressed by Keuneman and Wijeyewardene J.J. As regards the construction of the clause, their Lordships are of opinion (*a*) that it applies to the devisees and their heirs, who are referred to in the clause which prohibits alienation, (*b*) that it relates only to surplus rents income and produce, and to their incumbrance, and (*c*) that the purchase of the surplus lands " for the benefit and use of their children and grandchildren as hereinbefore stated," sufficiently clearly expresses the desire that the surplus lands should be held on the same terms as the original shares of the testator's immoveable property were to be held. It is clear on the whole terms of the will that each of the fiduciaries was only to take an interest in his share during his life. The next clause as to a demand for accounts, whether effective or not, cannot affect the valid creation of a *fideicommissum*.

Finally, their Lordships agree with Wijeyewardene J. that such questions as whether the share held by Abdul Hameed as fiduciary would pass on his death to his heirs as a joint *fideicommissum* or as separate *fideicommissa*, are not destructive of the creation of a valid *fideicommissum* by the will, but are questions as to devolution of the property which commonly arise for settlement by the Court on the proper construction of the will. Their Lordships agree with the reasoning of the learned Judge on this point.

It follows that in the opinion of their Lordships Abdul Hameed took his share of the immoveable property subject to a valid *fideicommissum*, and that, accordingly, Abdul Hameed could not mortgage any interest in the property after his death, and that the first and second respondents' suit fails and should be dismissed.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the Supreme Court should be set aside, and that the judgment and decree of the District Court should be restored. The first and second respondents will pay the appellants' costs of the appeal and their costs before the Supreme Court.

(47393) Wt 8077—36 170 2/46 D.L. G. 358

In the Privy Council

ABDUL HAMEED SITTI KADIJA
and ANOTHER

v.

FREDERICK JOHN DE SARAM
and OTHERS

DELIVERED BY LORD THANKERTON

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1946