1926.

Present: Lyall Grant J. and Jayewardene A.J.

ABDUL CADER *et al.* v. HABIBU UMMA *et al.*

356—D. C. Colombo, 12,904.

Prescription against fiduciarius—*Minority of* fidei commissarii—*Accrual of right of possession*—Bona fide *division of estate by fiduciary heirs—Binding effect on* fidei commissarii—*Section 14 of Ordinance No. 22 of 1871.*

Possession which commenced before the accrual of a fidei commissary's right is not adverse against the fideicommissary.

The *bona fide* division of property subject to a *fidei commissum* among the fiduciaries is binding on the fideicommissaries.

TWO brothers, having become entitled to property under a will creating a *fidei commissum* in perpetuity, divided the estate and continued in possession of their respective halves. A daughter of one of these was entitled to a one-tenth share of her father's moiety, and on her death this share devolved on her two minor children, the plaintiffs. The defendants resisted the plaintiffs' claim to their mother's share on the ground of continued and exclusive possession for a period of over thirty years. It was further sought to restrict their rights, if any, to a one-twentieth of their grandfather's moiety on the ground that the balance should come out of the half belonging to the other branch of the family. The plaintiffs attained their age of majority in 1921 and 1924, respectively. The learned District Judge held against the defendants.

Hayley (with him *Choksy*), for defendants, appellant.—Section 14 of Ordinance No. 22 of 1871 excludes minority. As prescription had already run against the mother, prescription against her is prescription against her heirs.

[JAYEWARDENE A.J.—Section 14 does not apply to *fidei commissa;* the heirs do not claim from their mother, but derive their rights from the will.]

The proviso to section 14 stands by itself, unqualified by the proviso to section 3, which is advisedly not reproduced in section 14; the latter section is intended to serve a special purpose.

[JAYEWARDENE A.J.—The ruling in *Casim v. Dingihamy* [1] does not support such a construction.]

That decision did not relate to a question of minority or any disability, but to the point of time when the right in dispute vested and prescription commenced. In section 14 prescription is considered entirely from the point of view of the person claiming its benefit, and not from that of the person against whom it operates.

Keuneman, for plaintiffs, respondents (not called upon).

[1] *(1906) 9 N. L. R. 257.*

July 19, 1926. Lyall Grant J.—

This is an appeal from the District Court of Colombo. The plaintiffs claim a declaration of title to an undivided one-tenth share of the premises bearing Nos. 70 and 71 situate at Main street, Pettah. One Pathumma Nachia was the original owner of the properties. She by last will No. 10,893 dated July 2, 1859 (P1), devised this property amongst others in equal shares to her two sons, Casse Lebbe and Segu Lebbe, to be possessed by them and their heirs from generation to generation in perpetuity under the bond of *fidei commissum*. At a partition of the property devised by the will, the premises Nos. 70 and 71, now in question, were allotted to Segu Lebbe. Segu Lebbe was first married to Meyadeen Nachia, who died leaving five children—Omer, Habibu Umma, Hansa Umma, Hanifa Umma and Amina Umma. Habibu Umma is the 1st defendant and is the mother of the 2nd to 8th defendants. Hansa Umma's children are the 9th and 18th defendants, and Haniffa Umma was the mother of the 19th to the 23rd defendants. Amina Umma was married to Abdul Careem, who has given evidence in this case, and she died leaving two children, who are the 1st and 2nd plaintiffs in this case.

Segu Lebbe was married a second time to Aiyasha Umma and had three children by her—Moomina Umma, Alia Marikar, and Isanath Umma. Amina Umma was entitled to a one-tenth share, and the plaintiffs now claim that share. The last will of Pathumma Nachia created a *fidei commissum* in perpetuity, and the only question that arises for decision is whether the contesting defendants have acquired a prescriptive title to the interests of the two plaintiffs. The plaintiffs admit that they never had occupation of the premises in question and that the contesting defendants have had occupation for many years—at any rate since 1889.

The learned District Judge decided the case on the footing that the issue narrowed itself into this: Whether the 1st and 2nd plaintiffs were minors at any time during the ten years previous to the institution of action. He held that by Ordinance No. 22 of 1871, section 14, if they were minors at any time within that period there could be no prescription against them. On this issue of fact he decided in favour of the plaintiffs, declaring them entitled to an undivided one-tenth share of the premises described in the plan, and gave decree for agreed damages.

It was argued in appeal that the question whether the 1st and 2nd plaintiffs were minors at any time during the ten years previous to the institution of action was irrelevant. Reliance was placed upon the last proviso to section 14 of Ordinance No. 22 of 1871.

It was admitted that the defendants had been in undisturbed possession of property for thirty years, and, under the last proviso

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of section 14 of the Ordinance, it was said that this should be conclusive proof of title notwithstanding the disability arising from the minority of the plaintiffs.

It appears to us, however, that this argument overlooks the fact that the thirty years' possession mentioned in section 14 must be adverse possession, and also the effect of the proviso to section 3 of the Ordinance which provides that the prescriptive period only begins to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute. It seems to us clear on the Ordinance that a *fidei commissarius* does not become an adverse claimant under the second proviso of section 14 until he acquires a right of possession. If this is so, there is no adverse possession as against the present plaintiffs for thirty years, and there is nothing to take the case out of the ordinary rule that the ten years required to establish a prescriptive possession do not begin to run until the adverse claimant has attained majority.

This principle underlies the Full Bench decision in *Casim v. Dingihamy* (*supra*). In that case the defendants had been in possession for sixty-four years on a title granted by a *fidei commissarius*. On the death of the *fiduciarius* this possession was held to be of no avail against a claim by a *fidei commissarius*.

It was further argued that even if the plaintiffs were entitled to succeed in respect of Segu Lebbe's half of the estate, they were not entitled to succeed as regards the other half, which in 1869 had been conveyed to him by his brother Casse Lebbe. We are unable to accept this argument. The deed of 1869 was a deed of partition between two brothers of an estate to which they had succeeded, all of which is subject to a *fidei commissum*. Any property burdened with a *fidei commissum* which is dealt with by arrangement between themselves would still remain under the burden.

This was clearly laid down in the case of *Babcy Nona v. Silva*.[1]

The appeal is dismissed, with costs.

JAYEWARDENE A.J.—

The facts leading up to this action and appeal are set out in the judgment of my brother Lyall Grant. Three questions, two of law and one of fact, were argued before us for the appellants. On the question of fact, it would no doubt have been more satisfactory if the birth certificates of the plaintiffs had been produced. But the plaintiffs' father says that he was unable to trace the birth certificates of his sons and failed to obtain them from the Registrar-General's Office. He did not register their births. He was in the Government Medical Department and was stationed in various outstations in the Island, and his wife came to Colombo, where her

[1] *(1906) 9 N. L. R. 251.*

parents resided, for her confinements. If the births had in fact been registered, it is strange that the defendants, whose rights to property of considerable value are at stake, did not themselves produce the certificates to defeat the claim of the plaintiffs. They were close relations of the plaintiffs, and must have been aware of the locality in which the defendants were born and their births registered. These considerations lead me to think that there has been a failure to register the births of the defendants. On the evidence on record, the learned District Judge has come to a right conclusion on the issue regarding the minority of the plaintiffs.

As regards the issue of prescription, it is contended that under section 14 of the Prescription Ordinance of 1871 the rights of the plaintiffs have been extinguished. It was admitted that the contesting defendants have been in possession since the year 1889, that is for a period of thirty-five years. The plaintiffs' rights to the land in dispute accrued in 1905, when their mother died; at that time they were minors, and the first plaintiff attained the age of majority in 1921, and the second plaintiff in 1924, the year the action was instituted. The appellants have had possession for ten years after the rights of the plaintiffs accrued. Mr. Hayley, for the appellants, contends that for the purpose of calculating the thirty years' possession required by section 14, twenty years' possession before the plaintiffs' right accrued, can be added to the ten years' possession after the accrual of such right as the adverse possession commenced before the accrual of their right was not interrupted by their minority. Now, it has been held by our Courts that prescription does not begin to run against a fideicommissary until after the death of the fiduciary, and that the principle that prescription, when it once begins to run, is not interrupted by the death of the owner does not apply in such a case (*Geddes v. Vairavy.*[1]) The reason is that the fideicommissary does not claim under the fiduciary, but under the will or deed by which the *fidei commissum* in his favour is created. The fiduciary can during his lifetime deal with the property as he likes, but the rights created by him terminate at his death and cannot prejudice the fidei commissary. Otherwise by ten years' adverse possession against the fiduciary the rights of fideicommissaries not in existence at the time might be extinguished. It has also been held by a Full Bench of this Court in *Cassim v. Dingihamy* (*supra*), when the point arose directly that section 14 and its proviso in no way affect the proviso to section 3 of the Ordinance, which enacts that the period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute, and that thirty years' possession did not give prescriptive title against parties whose right to possession had not accrued. So that however long

[1] *(1906) 9 N. L. R. 126.*

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the period of possession during the lifetime of the fiduciary may be, and in the case just referred to the claimant had possession for a period of sixty-five years, the rights of the fideicommissary are unaffected, unless there has been ten years' possession after his rights accrued. Mr. Hayley's argument requires that adverse possession commenced before the accrual of the fideicommissary's right should be regarded as adverse possession against the fideicommissary himself. That would certainly be a contravention of the principle laid down in *Cassim v. Dingihamy* (*supra*). Mr. Hayley contends that the point raised by him is not covered by that case, as there the fideicommisary was of full age when his right accrued. I am unable to appreciate the distinction. The rule of prescription against a fideicommissary must follow the ordinary lines. If he is of full age when his right accrues, then he loses his right after ten years' adverse possession; if he happens to be a minor at the time, then there must be ten years' adverse possession after he has attained the age of majority. To hold otherwise would be to deprive a minor fideicommissary of the benefit of the disability which the first proviso to section 14 creates in favour of minors. I would therefore hold that the rights of the plaintiffs have not been extinguished by prescription, and that the decision of the learned District Judge on the point was correct.

It is then contended that the plaintiffs are entitled, not to a one-tenth, but to a one-twentieth share of the land, as the *fidei commissum* was created in favour of two persons, and the plaintiffs are the heirs of one of them. The original fiduciaries divided the properties devised by will, and each took separate properties instead of having a half share in all of them. This division, it is said, does not bind the heirs. But this Court, following the Roman-Dutch law, has held otherwise in *Babey Nona v. Silva* (*supra*). *Voet* (*10, 2, 38*) says that if a fiduciary heir, pending the fulfilment of the fiduciary condition, proceeds to a division of the estate with the co-heirs, the fideicommissary heir cannot, after the fulfilment of the condition annexed to the *fidei commissum,* sue for a fresh division and have the previous one set aside, and is bound by that which the fiduciary heir has done *bona fide* whether the estate was divided under legal proceedings or by private agreement. There is no suggestion in this case that the division effected by the fiduciaries was otherwise than *bona fide*. The division, therefore, binds the fiduciaries and the succeeding fideicommissaries. This contention also, must, therefore be over-ruled.

I agree that this appeal should be dismissed, with costs.

Appeal dismissed.