Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Middleton.

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POOWATCHY UMMA *et al. v.* CASSIM MARICAR *et al.*

D. C., Colombo, 20,468.

Direction to executors to sell property and purchase others—Failure to do so—Rights of heirs—Action against executors by creditor—Fiscal's sale—Validity—Rights of purchasers at Fiscal's sale—Prescription by minor.

K.S. by his will dated 27th June, 1888, directed his executors to sell the property in dispute, and after payment of debts, to purchase other properties which were to be divided between his children and held subject to a *fidei commissum*. The executors did not sell the property; and on a judgment obtained against them *qua* executors the property was sold by the Fiscal and purchased by A. C. in 1890, who in the same year conveyed it to the added defendant, who was then a minor. M. H. (a grandson of the said K. S.) conveyed a half share of the property to the plaintiffs on 10th April, 1902; and the said M. H. and the plaintiffs instituted an action to compel the executors to execute a conveyance in favour of M. H. Judgment having gone against the executors, and they having failed to execute a conveyance, the District Judge, under section 332 of the Civil Code, executed it on 14th July, 1904.

In an action by the plaintiffs for a declaration of title to a half share of the property,—

Held, that the plaintiffs had no title as against the purchaser at the Fiscal's sale held in 1890 against the executors.

LASCELLES A.C.J.—The authority of Fiscal's sales would be gravely impaired, if it be held that purchasers at such sales are bound to assure themselves that the proceedings on which the judgment is based are free from error in law or in fact.

Observations of the Privy Council in *Rewa Mahton v. Ram Kishin Singh* (1) referred to.

Held, also, that the Prescription Ordinance (No. 22 of 1871) does not prevent a minor from obtaining title by prescription through agency.

Thomas v. Thomas (2) followed.

THIS was an action *rei vindicatio*. The plaintiffs alleged that Kider Saibo Kader Saibo Hadjiar was the owner of the premises in question under and by virtue of deeds Nos. 2,954 and 2,955,

(1) *I. L. R.* 14 *Cal.* (P. C.) 25. (2) *K. and J.* 79.

both dated 16th March, 1880; that the said K. S. C. S. Hadjiar died on 18th August, 1888, leaving a last will and testament dated 27th June, 1888, which was proved by the executors therein named on 9th October, 1888, in case No. 4,871 of the District Court of Colombo; that the said K. S. C. S. Hadjiar by his said will desired that the said property and some others should be sold for the payment of his debts, and that the balance proceeds, if any, should be divided equally among his children Kader Saibo Mohamado Cassim and Kader Saibo Saffa Umma, the second defendant and wife of the third defendant, and that out of each such share of the said division the executors should buy and transfer severally in favour of each of the said two children one or more land or lands subject to the condition that each child to whom the same should have been transferred as aforesaid should not sell or mortgage the same or any part thereof or lease or otherwise alienate the same, but should only enjoy the rents and profits thereof, and that the same should not be liable to be sold in execution for any of his or her or their debt or debts, and at his or her or their death the same should devolve on his, her, or their lawful child or children; that all the debts of the said K. S. C. S. Hadjiar were paid and settled by the sale of properties other than the one in question, which was not sold by the executors, and that the two children mentioned in the will became entitled to the same in equal shares; that the said Kader Saibo Mohamado Cassim died on 24th August, 1893, leaving an only child Mohamed Cassim Mohamed Haniffa, who by deed No. 7,079, dated 10th April, 1902, transferred his interest to the first plaintiff, the wife of the second plaintiff; that the executors of the will on 14th July, 1904, transferred an undivided half share of the property in dispute to the said Mohamed Cassim Mohamed Haniffa. The plaintiffs, averring that the first defendant has been in the forcible and unlawful possession since the purchase by the first plaintiff, prayed for a declaration of title, ejectment. and damages.

The defendants pleaded that under writ issued in case No. 2,514 of the District Court of Colombo against the said executors for the recovery of a sum of Rs. 2,002.50 due by the said K. S. C. S. Hadjiar, the testator, the premises in question were sold by the Fiscal and were purchased by Adinamalay Chetty, the judgment-creditor, who obtained Fiscal's transfers Nos. 4,528 and 4,529, dated 7th June, 1890, therefor, and who by deeds Nos. 3,058 and 3,059, dated 26th July, 1890, conveyed the same to Mohisina Umma, the added defendant, who was then a minor.

The added defendant also pleaded prescriptive title.

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The Additional District Judge (F. R. Dias, Esq.) held as follows:—

"In my order of the 29th May last I have sufficiently referred to the facts of this case. I then held that it was not competent for the plaintiffs to seek to prove in these proceedings that the debt for which Kader Saibo's executors were sued, and in satisfaction of which the two houses in claim were sold by the Fiscal, was not a debt of Kader Saibo's estate, but a personal debt of the executors. The Appeal Court being of opinion that that ruling does not finally dispose of the matters in issue, it has become necessary for us to consider the other two issues framed at the first trial, viz., whether any *fidei commissum* has been impressed on these properties by Kader Saibo's will, and whether the added defendant has acquired a valid title by prescriptive possession. A further issue has now been proposed by plaintiff's counsel, and accepted, as to whether or not the plaintiffs are entitled to succeed by reason of the prior registration of their deed P2 from Mohamed Haniffa.

"The first and last of these issues depend entirely on the answer to the question, What was the interest in these two houses which Mohamed Haniffa had under his grandfather Kader Saibo's will? It will be remembered that the testator did not devise these houses to any of his children, so as to enable any of them to claim any title under the will. What he intended to do, and clearly expressed in his will, was to vest these particular properties and five other in his executors, as trustees for a specfic purpose, viz., to sell them and with their proceeds pay off his debts and liabilities. If any balance was left over after payment of those debts, he directed his executors to divide it into two and invest it in the purchase of one or more lands for his two children Mohamed Cassim and Saffa Umma (the second defendant), to be possessed by them during their lives, and thereafter to pass to their respective children. The two houses in claim were never sold by the executors, nor did they transfer them to the testator's two children, nor do any act by which they divested themselves of the title vested in them by the will. Mohamed Cassim died in 1893, never having obtained any title or possession, and left an only child, Mohamed Haniffa, who attained his majority in 1901. In April, 1902, this young man, professing to have title under his grandfather's will, conveyed a half share of these two houses to the first plaintiff by his transfer P2, which has been registered in July, 1903. This is the title which the plaintiffs are now claiming as against the added defendant, who in addition to a title by prescription is asserting a title derived through the executors themselves. It appears that in an action of this Court, No. 2,514C, brought by a Chetty against the two executors in their

representative capacity, both these houses were sold by the Fiscal so far back as 1890, and conveyed to the purchaser, the Chetty, by the two transfers D1 and D2. These two deeds have never been registered. In July of the same year the Chetty sold them to the added defendant by the deeds marked D3 and D4, registered in November, 1890. From these circumstances it is perfectly clear that there can be no competition between Mohamed Haniffa's deed relied on by the plaintiffs, and those relied on by the added defendant, for the simple reason that the interests involved are not identical, nor are the grantors the same, and consequently no question of prior registration can arise.

" It should also be noted that neither Mohamed Cassim nor his son Haniffa had any title to these houses under the will, so that the latter's conveyance P2 to the first plaintiff conveyed no title at all. The title always remained in the executors until such time as they sold the properties for the purposes named in the will. The utmost that Mohamed Cassim or Haniffa was entitled to do was to compel the executors to sell the lands, pay the debts, and buy fresh lands for them in terms of the will. But that is not, and cannot possibly be, the same thing as a freehold interest in these houses, which Haniffa professed to convey to the first plaintiff. On the other hand, the Fiscal's sale in execution against the two executors under a solemn decree of Court had the effect of transferring all the right, title, and interest of those executors, and of their testator, to the purchaser, whose rights have since July, 1890, been vested in the added defendant. It has been proved conclusively, and practically admitted by the plaintiffs, that from the Fiscal's sale in 1890 up to the present time neither the executors, nor Mohamed Cassim, nor Haniffa, have had a single day's possession of the premises, which have been continuously possessed and enjoyed by the added defendant. She is still a minor, and her possession has been exercised through her grandfather Uduma Lebbe and her own father (both of whom are now dead) till 1894, and ever since then through her uncle and guardian, the first defendant. These men have been regularly renting out the houses, recovering their rents, and paying their taxes, for and on behalf of the added defendant, and at this moment the first defendant is in quiet possession on her account, so that her title by prescription is abundantly established. It has been urged that no prescription could have begun to run against Mohamed Haniffa until he had attained his majority in 1901, as he was under legal disability at the time the houses vested in him in terms of the *fidei commissum* created by the will.

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"I am unable to subscribe to any such construction of this will, which in my opinion makes no pretence of impressing a *fidei commissum* on any of the lands directed to be sold. Even if we can put such a forced construction on this document, from the fact that the testator directed his executors to buy fresh lands and subject them to a *fidei commissum* in favour of his grandchildren, it seems to me that the plaintiffs must still fail. Rightly or wrongly, the Fiscal sold these houses in 1890 as against the executors, in whom title was then vested, and possession at once passed from their hands into those of the Chetty and of the added defendant. From that moment prescription began to run as against the executors and all those who could derive any title through them as representatives of Kader Saibo's estate, and the minority of the beneficiary Mohamed Haniffa was of no avail to interrupt that prescription.

"In my opinion the added defendant has established a perfect title both on paper and by prescription. It was contended that under the Roman-Dutch Law a minor cannot acquire property by prescriptive possession, but in question of prescription we do not at the present day look to that law. We are governed solely by our local Ordinances relating to prescription, which have swept away all the antiquated Roman-Dutch Law on the subject (*vide* Pereira's Laws of Ceylon, vol. II., p. 268, and cases there cited). There is nothing in either of our Ordinances which places a minor defendant in an action in a less advantageous position than if he were a major, if the question involved relates to prescriptive possession.

"I dismiss the plaintiffs' action with all costs from the commencement."

The plaintiffs appealed.

Walter Pereira, *K.C.*, *S.-G.*, for appellants.—The defendants founded their title on a Fiscal's conveyance consequent on a sale under a writ issued against the executor. The debt in respect of which execution was issued was not a debt of the testator, but a debt on a promissory note contracted by the executor. The executor had no power to bind the estate by contracting debts. That is quite clear from the case of *Farhall v. Farhall* (1). The case of *Gavin v. Hadden* (2) has in no way effected the ruling in *Farhall v. Farhall* (1). The order in the later case that the district Judge relied upon was an order made prior to the judgment in *Gavin v. Hadden* (2), but the order relied upon by the appellants was one made after the case of *Gavin v. Hadden* (2), and it could not therefore be affected by the case of *Gavin v. Hadden* (2). As the executor could not

(1) *I. L. R. 7 Ch. Ap.* 125.

(2) (1871) 8 *Moore's P.C. cases (N.S.)* 90.

bind the estate by his contract, the estate could not be bound by the sale in execution consequent on that contract. True, a purchaser at a Fiscal's sale was not, as a general rule, prejudiced by the judgment having been erroneously entered; but surely there was a difference where the action was against an administrator or executor. There, the property sought to be sold not being the property of the defendant individually, it was the duty of the would-be purchaser to inquire whether the law allowed judgment being entered against the estate. Then, registration gave the deed in favour of the plaintiff priority and the District Judge was wrong in refusing to frame an issue. No doubt, the deed was registered after the institution of the action, but the Code allowed issues being framed and added to at any time before judgment. The objection to the framing of the issue suggested was too technical. On the question of prescription it is submitted that prescription could not run against the minor for two reasons—first, because she was a minor; and secondly, because her right to possession under the *fidei commissum* accrued within the last ten years. The proviso to section 3 of Ordinance No. 22 of 1871 is the authority for that. Of course, the question yet remained as to whether there was a *fidei commissum*. Kader Saibo directed that all his property be sold and his debts paid, and other property be purchased from any balance left and settled on his children subject to a *fidei commissum*. It was found unnecessary to sell all the property to pay debts, and some property only was sold. The remaining property then stood exactly in the same position as property purchased with any balance that would have remained had all the property been sold. That was a common sense view to take. There was some mention of the doctrine of equitable conversion by the other side. That was a doctrine under the English Law, and had nothing whatever to do with matters governed exclusively by the Roman-Dutch Law. The common sense underlying that law could not tolerate such a ridiculously useless proceeding as selling the whole estate of the testator for the payment of debts and investing the balance in other property to be settled on the children when the debts at the date of the testator's death were not so heavy as to necessitate the sale of the whole estate and they might be paid by a sale of a portion only, leaving the remainder of the estate to be settled on the children. On all points urged the appellant was entitled to judgment.

Sampayo, K.C. (with him *Bawa*), for the respondents.—The judgment in the previous case being against the executors in their representative capacity, the validity of the sale of the property of the

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testator in execurtion of the judgment cannot be questioned in this case. If the debt for which judgment was obtained was a personal debt of the executor, those claiming under the will should look for their remedy in some proceeding against the executors themselves, and not against the *bona fide* purchaser. The principle of the English Law that the executors should first be personally sued on their contract and the assets of the estate should then be reached in a separate proceeding at equity does not prevail in Ceylon, and therefore the case of *Farhall v. Farhall* is not applicable. Courts in Ceylon are Courts both of law and of equity, and, as decided by the Privy Council in *Gavin v. Hadden*, not only may judgment be obtained against executors as such for debts incurred on behalf of the estate, but the assets of the estate may be sold directly in execution of such judgment. As regards registration, the plaintiff must establish his title as at the date of the action, and therefore subsequent registration does not avail him. Moreover, the plaintiff's deed is not one for consideration, but a mere transfer by the executors in favour of a supposed beneficiary under the will, and registration therefore does not apply. It is submitted further that the defendant has title by prescription. A minor is not incapable of possessing property (*Voet* 26, 8, 2; Maasdorp's *Law of Persons*, p. 246). Moreover, in this case, a person *in loco parentis* possessed on behalf of the minor. Lastly, it is submitted that, whatever the title of the defendant may be, the plaintiff can only succeed on the strength of his own title, and must therefore prove that a *fidei commissum* was impressed by the testator on this particular property. In this he must necessarily fail, for the testator directed this property as well as others to be sold, and the *fidei commissum* was to attach to some other property to be bought out of the proceeds sale, and no authority has been cited to prove that in such a case, if there be no sale and no new property is bought, the *fidei commissum* would attach to the original property.

Walter Pereira, K.C., S.-G., in reply:—To take the last point urged by counsel of respondent first, the property in question must be deemed to be impressed with a *fidei commissum*. True, the verbal direction in the will is that property bought out of the proceeds sale of the property in question was to be so impressed, but a rational interpretation must be placed on the direction in the will. The testator says: " Sell property A if there be debts to be paid, and out of the balance proceeds buy property B and impress it with a *fidei commissum* in favour of my children." The executor finds it unnecessary to sell the whole of A to pay debts. He sells one half only. Surely the other half then remains exactly in the same place

where the balance proceeds would have been had there been a sale. As regards the power of an executor to bind the estate by contracts, it is submitted that there is no such power, especially as in Ceylon the executor has power over immovable property as well. If such power is once conceded, the executor may in an indirect way dispose of the whole estate to his own advantage.

Cur. adv. vult.

13th August, 1906. LASCELLES A.C.J.—

It is unnecessary to recapitulate the facts of this case, which are fully stated in the judgment of the District Judge. The plaintiff's title is founded upon a conveyance by Mohamed Haniffa dated the 10th April, 1902, of an undivided half share of the two houses in question to the first plaintiff.

Mohamed Haniffa's right to make this conveyance depends upon the contention that under the terms of the will of Kader Saibo (Mohamed Haniffa's grandfather) and in the events which have happened the property in question passed to the testator's children impressed with the character of a *fidei commissum*.

Kader Saibo by his will directed his executors to sell the property now in dispute and with the balance of the proceeds, after payment of debts, to purchase other properties which were to be divided between his children and held by them subject to a *fidei commissum*. The executors failed to sell the property. It is now argued that the property which ought to have been sold should be regarded as standing in the place of that which should have been bought, and as having devolved in the manner and subject to the conditions which the will declared with regard to the property which the executors were directed to purchase.

This is a startling extension of the doctrine of equitable conversion for which no authority was cited. In order to attach the conditions of a *fidei commissum* the intention of the testator to do so must be shown with regard to a definite and specific property.

The heirs of Kader Saibo may have had a right after the executors had failed to carry out the sale to compel the executors to execute a conveyance, as was subsequently done, of this property to them subject to the conditions declared in the will.

But apart from this conveyance, this property has not by virtue of any act or operation of law devolved on the testator's children or their heirs subject to a *fidei commissum*.

The conveyance by Mohamed Haniffa was thus a nullity, Mohamed Haniffa having no title under his grandather's will or otherwise.

The plaintiffs also claim under a conveyance dated the 14th July, 1904.

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During the argument no reference was made to the circumtances in which this deed was executed, but on the following day the Solicitor-General brought to our notice the fact that the deed was executed by the District Judge of Colombo under section 332, of the Civil Procedure Code. Upon reference to D. C., Colombo, No. 18,853, it appears that Mohamed Haniffa and the first and second plaintiffs sued the executors of the will of Kader Saibo, claiming that they should be ordered to convey to him an undivided half share in the two houses now in dispute. The defendants ultimately agreed to execute the conveyance, but failed to do so, whereupon the District Judge executed the conveyance which was registered subsequently to the institution of the present proceedings. I can find in the record no reference to the previous sale of these houses under a writ against the executors in 1890, and it is clear that the existence of this sale was not disclosed to the Court.

The appellants complain of the refusal of the District Judge to frame an issue whether the deed registered on the 15th March, 1905, subsequently to the institution of the action, prevailed against the Fiscal's deed of 1890.

In my opinion the District Judge was right. The deed in question was registered after the pleadings had been closed, the issues fixed, and the hearing had been concluded.

It was not until the 2nd March, after the case had been remitted for re-trial, that application was made to add this issue. I do not think that at that step the District Judge could properly have admitted an additional issue which would have altered the whole scope of the acton.

But the Fiscal's conveyance of 1890 is impeached on the ground that the judgment on which it is founded could not have been lawfully given against the executors in their representative capacity. This objection seems to be disposed of by the judgment of the Privy Council in *Gavin v. Hadden* (1).

Even if we suppose that the principles laid down in the subsequent case of *Farhall v. Farhall* (2) are applicable to Ceylon, and that an executor cannot be sued as executor on a promise made by him, that case is no authority for the proposition that a purchase at a Fiscal's sale *bonâ fide* and for value can be set aside on the ground that the judgment in execution of which the property is sold was improperly given against the defendant in his capacity of executor. A purchaser who buys at a Fiscal's sale under a decree of a competent Court is not bound to assure himself that the proceedings on which the judgment is based are free from error in law or in fact. If it

(1) (1871) 8 *Moore's P. C. cases (N.S.)* 90. (2) *L. R. 7 Ch. Ap.* 125.

were held that purchasers at judicial sales were bound, at their own risk, to make such inquiries, the authority of such sales would be gravely impaired. See on this point the observations of the Privy Council in *Rewa Mahton v. Ram Kishin Singh* (1).

With regard to the claim of the added defendant to have established a title by prescription, the conveyances by Adinamalay Chetty purported to be in consideration of a payment made by the added defendant for and on behalf of the first defendant. Since the date of these conveyances (1890) there is no question but that the rents of the premises have been received on the added defendant's behalf by her grandfather, father, and by her guardian, the first defendant.

I can find nothing in the Prescription Ordinance to support the contention that the minority of the added defendant prevented her from acquiring a prescriptive title.

The possession of the father and grandfather must be presumed to be, and that of the first defendant certainly was, on behalf of the added defendant, *Thomas v. Thomas* (2).

For the above reasons I agree with the judgment of the District Judge, and would dismiss the appeal with costs.

MIDDLETON J.—

The primary intention of the testator in this case was that his property should be sold and his debts paid by the executors; that the balance proceeds should be divided equally amongst his children, converted into immovables and impressed with a *fidei commissum*. Rightly or wrongly, the executors were sued for debt of the testator, and upon judgment writ issued against the property in question it was sold and purchased by the added defendant's predecessor in title in 1890. If that judgment was wrongly given and the sale improperly held, the Court had jurisdiction both to give the judgment and order the sale, and it is not the province of a fresh suit to show irregularity or error of fact or law in another suit, *Gavin v. Hadden* (3). *Prima facie* then the property was sold as the testator intended for the payment of his debts, and could not therefore have been impressed with a *fidei commissum*, which was only to alight on the balance of the proceeds on conversion into immovables. The case of *Rewa Mahton v. Ram Kishin Singh* (1) is also authority for holding that the purchaser was not bound to inquire into either the correctness of the order of execution or

(1) *I. L. R.* 14 *Cal.* (P. C.) 25. (2) 2 *K. & J.* 79.
(3) (1871) 8 *Moore's P. C. cases (N. S.)* 90.

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correctness of the judgment upon which it issued, and there is no question that he purchased *bona fide* for value. The purchaser sold to the added defendant on the 26th July, 1890, and his transfers were duly registered on the 14th November, 1890. The added defendant, though a minor, has been in possession of the property ever since through her uncle and grandfather, who acted as her agents in the colection of the rents, neither the executors nor the heirs of the deceased having interfered. I do not see that the Prescription Ordinance debars a minor from obtaining a title by prescription through agency [see also *Thomas v. Thomas* (1)].

Against this title the plaintiff sets up a double title, (1) title by purchase from Mohamed Haniffa in 1902, registered in 1903. It is sufficient to say that Haniffa had no title to convey, inasmuch as the property had never passed to him by any transfer or operation of law.

The plaintiff further claims title under a conveyance dated the 14th July, 1904, from the executors. The circumstances under which this deed was executed show that it was brought about in ignorance of the existence of the sale in 1890 registered the same year.

In my opinion the added defendant's title must prevail against both those set up by the plaintiff, and I agree that the judgment should be affirmed with costs of the appeal.