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1935 *Present:* **Macdonell C.J. and Koch A.J.**

NOOR UMMA *v.* ABDUL HAMEED

71—D. C. Colombo, 32,287

Plaint—Action rei vindicatio—*Claim that property is subject to* fidei commissum—*Property acquired compulsorily—Amendment of plaint—Declaration that money which represents the immovable property is impressed with* fidei commissum—*Cause of action not a new one.*

The plaintiff sued the defendant for declaration of title to certain premises of which she claimed a half share absolutely and the remaining half share subject to certain conditions contained in a last will, alleged to create a *fidei commissum.*

After the institution of the action the premises were compulsorily acquired by the Municipal Council of Colombo and the sums of money representing the compensation for the property were paid to the defendant.

Thereafter the plaintiff moved to amend the plaint by the addition of a paragraph in which it was pleaded that the sums of money paid to the defendant were subject to the same legal incident as the property itself.

Held, that the amendment proposed did not set up a new cause of action and that it should be allowed.

APPEAL from a judgment of the District Judge of Colombo.

This was an action for declaration of title to premises No. 23 at Layard's Broadway. Plaintiff claims title from a last will admitted to probate of one Saibo Dorai. She claimed a half absolutely and the other half subject to the conditions set up by the will.

The plaint (original) was filed on March 26, 1929. The plaintiff alleged that the defendant purchased the whole land in 1920 from the vendee of Kolanda Umma, the devisee of the last will of Saibo Dorai.

The land was compulsorily acquired by the Municipality under the Land Acquisition Ordinance and compensation was paid on two occasions, April, 1929, and November, 1929.

An amended plaint of May 7, 1934, was filed, where plaintiff prayed that the compensation paid by the Municipality be treated as immovable property subject to the terms contained in the last will.

H. V. Perera (with him *Kariapper*), for defendant, appellants.—The amendment should not have been allowed for the following reasons.

First. The action was first filed on March 26, 1929. The money was received by the defendant from the Municipal Council in April and November, 1929. Therefore, according to the proposed amendment the plaintiff's complaint is that the defendant wrongfully took from the Municipal Council the money which should have been paid to the plaintiff. The alleged cause of action arose after the institution of the action. See *Estakey v. Federated European Bank*[1] and *Muttumenika v. Fernando*[2].

Second. The order allowing the amendment is prejudicial to the defendant. As the amendment dates back to the date of the plaint and the money having been received by defendant, the prejudice lies in the fact that the plea of prescription will not be available to the defendant. There is no prejudice to the plaintiff, if she is referred to a separate action, since she alleges fraud, which was discovered only a few months ago. It has been held both in England and Ceylon that an amendment should not be allowed if the effect of it is to permit a person to set up a cause of action, which would be otherwise barred by lapse of time. See *Weldon v. Neal*[3] and *Ismail v. Noordeen*[4].

Third. The right of parties should have been determined as they stood at the date of action (*Muttumenika v. Fernando* (*supra*)).

Fourth. An action for declaration of title to a land is quite different from an action for a declaration that the money paid by way of compensation should take the place of the land compulsorily acquired. The money paid cannot be subject to the same legal incidents as immovable property. The doctrine of conversion pleaded by the plaintiff in the amended plaint is peculiar to the English law of real property and does not form a part of our law. It cannot apply in a case where the money has been paid out.

N. E. Weerasooria (with him *Haniffa*), for substituted plaintiff, respondent.—The cause of action in both plaints is the same. The right or benefit, pleaded in the plaint, follows upon the true construction of the last will of Saibo Dorai. In both cases the relief or declaration asked for would depend on the fact whether there is a *fidei commissum* created for last will. The Court will have to decide the question of the existence of the *fidei commissum* in the first instance.

If the Court does not declare the money received as compensation subject to the legal incidents as immovable property, the decree of the Court adjudging the plaintiff to a share of the premises in question will not be effective. The decree can be made effective only if the Court has power to make the decree operative over the movable property into which the immovable property has been changed. See *G. A., Sabaragamuwa v. Asirwatham*[5].

Cur. adv. vult.

March 11, 1935. MACDONELL C.J.—

In this case the plaintiff died after the action was brought and the official administrator was substituted as plaintiff for her. She, the original plaintiff, had claimed to be declared entitled absolutely to a half share of the premises bearing assessment No. 23, Layard's Broadway, and also

[1] *(1932) 1 K. B. 254.*
[2] *15 N. L. R. 429.*
[3] *(1887) 19 Q. B. D. 394.*
[4] *12 Ceylon Law Recorder 20.*
[5] *29 N. L. R. 367.*

to be declared entitled to the remaining half share subject to the conditions set out in the last will of Saibo Dorai dated May 30, 1886. The plaintiff claimed that this will created a *fidei commissum* in favour of one Kolondu Umma with a reversion on her death in favour of two nieces of the testator, Ponni Umma and herself. The will contained the further condition that on the death of the plaintiff intestate and without issue, her half share should devolve on her two nieces Satta Umma and Ponnachi Umma. At the date of the institution of the action none of these persons was alive, Kolondu Umma having died on May 7, 1920, Ponni Umma having died in 1915, Satta Umma in August, 1905, and Ponnachi Umma on January 17, 1917.

It will thus be apparent why the original plaintiff claimed an undivided half-share absolutely, the reason being that on the death of Satta Umma and Ponnachi Umma she could claim to be absolutely entitled to that half. With respect to the remaining half, she evidently felt that it would be a contentious matter as to whether on the death of Ponni Umma, Ponni Umma's half share devolved on her (the plaintiff) under the law of *jus accrescendi*, or whether Ponni Umma having died during the lifetime of the *fiduciarius* Kolondu Umma, the former's interests devolved absolutely on the latter. So the original plaintiff, reasonably enough, left the question to be decided by the Court, in terms of the *fidei commissum* already referred to, by praying that she should be declared entitled to that half share, subject to the conditions set out in the will.

On the other hand the defendant, while reciting the terms of the *fidei commissum* in his answer, contends that by reason of the death of the aforesaid four persons the plaintiff was disentitled to any share of the said premises but that Kolondu Umma became absolutely entitled to them and that she thereafter by deed No. 768 of October 12, 1917, conveyed the said premises to one I. L. M. S. Lebbe Marikar Hadjiar who in turn by deed No. 71 dated September 8, 1918, conveyed them to him.

It is thus manifest that the title of both the plaintiff and the defendant depended entirely on the correct interpretation and legal effect of the terms of the *fidei commissum,* which the will apparently creates.

It would appear that defendant had been in possession at least from 1920—the plaintiff said, unlawful possession—until the filing of this action on March 26, 1929. In that same year, 1929, the Colombo Municipality under the powers given it by Ordinance No. 3 of 1876 compulsorily acquired these lands from the defendant and paid him compensation for them, for one the sum of Rs. 17,343.75 in April, 1929, and for the other the sum of Rs. 17,364.84 in November, 1929. The plaintiff seems to have done nothing in respect of this compensation until January 31, 1934, when she filed an amended plaint, the material paragraphs of which are as follows: —

"11. The plaintiff pleads that by reason of the compulsory nature of the said acquisitions, the sums paid as aforesaid by way of compensations are subject to the same legal incidents as immovable property and are to be treated as though no conversion had taken place and as if the said sums continued to be immovable property.

"12. The plaintiff was niether given any notice nor was she aware of the aforesaid acquisition proceedings".

This amendment of the plaint was resisted by the defendant on the ground that it attempted to set up a new cause of action accruing after action brought, and on the further ground that this new cause of action, money received by defendant for the use of the plaintiff, having arisen in April, 1929, and November, 1929, had become prescribed under section 8 of Ordinance No. 22 of 1871 on January 31, 1934, the date of the amended plaint. The learned District Judge allowed the amendment, holding that it did not contain a new cause of action, and from this ruling the present appeal is brought.

The question whether these lands are subject to a *fidei commissum* in favour of the plaintiff is the question raised in the original plaint and awaits decision, but the plaintiff has asserted that these lands are subject to a *fidei commissum* in her favour and she is entitled to have that issue tried. If the decision is that the lands are subject to such a *fidei commissum*, then she claims that she or her representatives can follow the lands subject to that *fidei commissum* into the hands of a purchaser. (It may be mentioned that the purchaser here, the defendant, seems to admit by his answer that he purchased with knowledge of the *fidei commissum.*) The law protects the *fidei commissarius* by impressing the *fidei commissum* upon the property subject to it. But here the properties themselves are no longer available, having been acquired by a third party under statutory powers, and are represented by two sums of money, their value. In, *Kumarihamy v. Kumarihamy*[1] per Bertram C.J. "It is in accordance with the policy of the law that where land which is subject to a *fidei commissum* cannot be properly developed for the advantage of the *fidei commissarii,* it should be freed from the *fidei commissum* by sale and the purchase money deposited in Court for the benefit of those interested"; see also *Sivacolundu v. Noormaliya*[2] and the dictum quoted therein at p. 430 of Cayley C.J. in 3 S. C. C. 103, which asserts the same principle in a different connection. If it is established that a property is subject to a *fidei commissum* and that a person is entitled thereto as *fidei commissarius,* there must be means of preventing a decree establishing these things from becoming nugatory—empty words and no more—and if for some reason the property declared by a decree to be subject to a *fidei commissum* is no longer available to satisfy the claim of the *fidei commissarius*—in argument the possibility was given of its having been swallowed up by the sea or by a river changing its course—but its value is available, then the decree will adjudge that value to the *fidei commissarius.* It would appear that this has been recognized in South Africa, likewise governed by Roman-Dutch law, in the case *Du Plessis v. Meyer's Estate*[3], the report in which case is not available but the head-note of which is as follows:—"Where a testator had by contract *inter vivos* burdened certain of his property with *fidei commissum,* and had thereafter sold certain of the property so burdened. *Held,* that his executors, in lieu of the portion of the properties sold by him, should set aside out of his estate a sum equal to the proceeds of such property and apply it in terms of the *fidei commissum* constituted."

[1] *22 N. L. R. at p. 128.* [2] *22 N. L. R. 427.* [3] *13 C. P. D. 1006*

The immovable property subject to *fidei commissum* is impressed with that *fidei commissum,* and the movables, the moneys which now represent that immovable property, remain to satisfy the *fidei commissum* with which that immovable property was impressed. There is no need to say that the immovable property has been converted into movables, though the term conversion of the same may prove useful and be allowed, provided only that we do not confuse it with the equitable doctrine of conversion in English law which is the outcome of the fact that in that law there are two systems of intestate succession, one for realty, the other for personalty, a complication from which our own law is happily exempt. It is sufficient to point out that this movable property would never have existed at all but for the immovable property impressed with a *fidei commissum ;* it represents that immovable property so impressed and a valid claim thereto as *fidei commissarius* must surely be a valid claim also to the movable property into which it has now been converted, if the expression may be allowed. I would refer again to the undoubted principle that the decree of a Court adjudging to a person certain rights should be effective, and in a case such as the present it can only be effective if the Court has power to make its decree operative over the movable property into which the immovable property burdened with a *fidei commissum,* has been changed. On principle, then, and on authority I cannot see that this claim of the plaintiff to the money which represents the property immovable impressed with a *fidei commissum* can be considered a new cause of action.

The law applicable to compulsory purchase is to be found in Ordinance No. 3 of 1876, sections 36 and 37, which reads as follows :—

" 36. Payment of the compensation shall be made by the Government Agent according to the award to the persons named therein or, in the case of an appeal, according to the decision on such appeal, and after such payment has been made according to such award or such decision no further claim against the Government in respect of compensation for the land so taken shall be allowed at the instance of any person whomsoever. Provided that nothing herein contained shall affect the liability of any person who may receive the whole or any part of any compensation awarded under this Ordinance, to pay the same to the person lawfully entitled thereto.

" 37. When the land taken is subject to any entail, settlement, or *fidei commissum,* the compensation payable in respect thereof shall be subject to the same entail, settlement or *fidei commissum,* so far as the different nature of the property will admit ; and such compensation shall be paid into court to abide its further orders as to the disposal or investment thereof. It shall also be lawful for the District Judge in any case to require the compensation payable in respect of any land to be paid into court to abide its further orders, if the court shall think such course just or expedient ".

It will be seen that section 36 provides for the case of compensation being actually paid to a person not lawfully entitled thereto. If so, he is under obligation to pay over that compensation to the person who is lawfully entitled thereto. Section 37 provides for the case of the land compulsorily

taken being subject to a *fidei commissum*. It must I think include the case of land which is claimed under *fidei commissum*. It would surely render the provisions of section 37 nugatory if the party *primâ facie* entitled to the compensation money as being in possession, were to say that the land taken could not be considered subject to *fidei commissum* until a Court had declared it to be so, and that consequently the money was to be paid to him even though a case might be pending in Court as to whether the land was subject to *fidei commissum*. In such a case, if the Government Agent became aware that there was an action pending as to whether the land taken was subject to *fidei commissum* it would be his duty to pay the compensation money into Court to abide its further orders, in other words to await the determination by the Court of whether the land was subject to *fidei commissum* or not. It was argued on this appeal that section 37 only applied as between *fiduciarius* and *fidei commissarius* but not to cases where land is in the hands of someone who claims *ut dominus* unburdened by *fidei commissum*. It is difficult to accept this interpretation of the section which would open the door to illegality and fraud. The person in possession would only have to claim that the land was his unfettered, to defeat the provisions of the section as to paying money into Court. He would then take the money, possibly to the detriment of the person eventually declared *fidei commissarius*. These sections, in fact, are statutory assertions of the principle laid down in the cases cited above, namely, that the purchase money of land subject to *fidei commissum* is to be deposited in Court for the benefit of those interested, and it is impossible to know who are the persons interested, and to what extent, until the Court has declared on the existence of a *fidei commissum* and its ambit.

The amendment necessary to the plaint is only that the prayer should be in the alternative to that originally pleaded. It prayed that the plaintiff be declared entitled to the land, and all that is necessary is to add as an alternative "or the value of that land", and the value is ascertainable by the amount that the Colombo Municipality has paid in two certain sums to the defendant as its value.

An analogy to the present case is furnished by an action for the vindication of specific movables. Here the proper form of prayer in a plaint is to ask for the delivery of the articles themselves, in fact specific performance of the right to them. The defendant cannot escape the duty to restore, by offering to pay their value. An action *rei vindicatio* is therefore an action for the specific goods themselves. If, however, during the course of the action it appears that for some reason or other the property cannot be specifically restored to the plaintiff, then it is open to him to ask for the value of the goods. He would do so by adding an alternative to his original prayer for the delivery of the articles themselves. But this alternative prayer would clearly not be a new action or a new cause of action, see *Shaik Ali v. Carimjee Jafferjee*[1]. This rule seems to hold good in case generally where the plaintiff asks specific performance. Circumstances may have intervened which prevent him getting a specific performance of the contract, then it is open to him to add in the alternative a prayer to be adjudged the value in money of the specific property

[1] *1 N. L. R. 117.*

which for some reason or another cannot be adjudged to him. But he does not, it would appear, put that alternative prayer in his original plaint because what he is asking for is the property itself. He only asks for the value if for some reason or other the property cannot be delivered to him, but the addition of the alternative prayer, damages in lieu of specific performance, will certainly not be a new cause of action.

I am satisfied therefore that the amended plaint of the plaintiff does not set up a new cause of action, and that the learned District Judge was right in saying that it was merely as a consequence of the amendment asked for that plaintiff's prayer was different from that in the original plaint. The judgment appealed from seems therefore to have been right and must be affirmed, and this appeal must be dismissed with costs.

KOCH A.J.—I agree.

Appeal dismissed.