

42, 1956

No. 24 of 1955.

# In the Privy Council.

UNIVERSITY OF LONDON  
W.C.1

20 FEB 1957

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON.

INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

1. MOHAMEDALY ADAMJEE 2. LUKMANJEE GULAM-  
HUSSEIN 3. TAIYABHAI GULAMHUSSEIN and  
4. ABBASBHOY GULAMHUSSEIN . . . . . Appellants

46098

AND

10 1. HADAD SADEEN 2. ABDUL CARDER SADEEN  
3. HALWAN SADEEN 4. UMMUL KAIR SADEEN  
5. AYNUL MARLIYA SADEEN 6. SITHY LARIFFA  
SADEEN 7. MOHIDEEN SADEEN 8. MOHAMED  
HAMZE MAHROOF 9. MOHAMED MAHROOF  
SITHY NASEEWA 10. MOHAMED MAHAROOF  
MOHAMED KHALID (9th and 10th, appearing  
by their Guardian *ad litem*) 11. M. L. M. M. SHARIFF  
12. NOORUL HIDAYA ABDEEN 13. MUZARIYA  
AKBAR 14. ABDUL MAWAHIB NAKEEN 15. SITHY  
20 SAFIA NAKEEM 16. UMMU VOJEEDA NAKEEM  
17. HASSEN JIFFRY NAKEEM 18. MOHAMED ISMAIL  
NAKEEM 19. MOHAMED SAMSUDEEN NAKEEM  
20. MOHAMED MILHAR NAKEEM (14th to 20th,  
appearing by their Guardian *ad litem*) 21. M. Y. M.  
HAMZA 22. Mrs. NOOR HIMAYA MOHIDEEN  
23. M. AWN MARIKAR 24. M. MOHAMED THAHIR  
25. Mrs. UMMU HAZEEMA MOHIDEEN 26. Mrs. SITHY  
ZAVAHIRA ZUBAIR 27. M. M. NUHMAN 28. M. H.  
30 SAKAF 29. M. Z. F. CASSIM 30. Mrs. UMMU ZULAIHA  
AMEEN 31. Miss H. M. MOHIDEEN 32. MOHAMED  
SAMEER MOHAMED ALVAI 33. Miss S. Z. SAMEER  
(32nd and 33rd, appearing by their Guardian *ad litem*)  
34. M. I. M. SAMEER 35. M. S. FAROOK 36. Miss  
M. R. S. HANOON (35th and 36th, by their Guardian *ad litem*)  
37. M. Z. F. CASSIM 38. HADIJA GHOUSE CASSIM  
39. AYN SAFIA GHOUSE CASSIM 40. SHUHAIB  
GHOUSE CASSIM 41. AMEER FAIZER GHOUSE  
CASSIM 42. FALIH GHOUSE CASSIM (by their Guardian  
*ad litem*) 43. M. GHOUSE CASSIM . . . . . Respondents.

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## Case for the Respondents

Nos. 1 to 8, 12 and 14 to 21.

pp. 110-117.  
pp. 82-99.

1. This appeal is from a Judgment of the Supreme Court of Ceylon, dated the 10th February, 1954, dismissing an appeal from a Judgment of the District Court of Colombo, dated the 4th March, 1952, whereby the Appellants were awarded the sum of Rs.29,687/50 as damages under the proviso to section 9 of the Partition Ordinance but a claim by them to set aside a decree in partition proceedings and for an injunction to restrain a sale of property under the said decree and for other consequential relief was rejected.

p. 259.

p. 126.

2. The proceedings relate to certain immovable property consisting of land with buildings and plantations thereon at Kollupitiya, Colombo, 10 formerly owned by one I. L. Idroos Lebbe Marikar, who died on the 8th May, 1876, leaving a last Will dated the 12th December, 1872. It was decided by the Privy Council in *Sitti Kadija v. De Saram* [1946] A.C. 208 that the said will created a *fidei commissum* in favour of the children and grandchildren of the immediate beneficiaries under the will, i.e., the children of the deceased and his widow.

p. 132.

p. 136.

p. 147.

3. Under a division effected in the terms of the said will the property in question was conveyed by deed to one Savia Umma, a daughter of the deceased; the Respondents are grandchildren of Savia Umma. The property was subsequently sold in execution against Savia Umma and 20 was purchased by one Leonora Fonseka and conveyed to her. Later the property was sold and conveyed by Leonora Fonseka to Adamjee Lukmanjee, the Plaintiffs' grandfather.

4. In the light of the events stated in paragraphs 2 and 3 above, ownership of the property in question is claimed on the one hand by the Appellants by virtue of (*inter alia*) the said conveyance to Adamjee Lukmanjee and subsequent devolution of his title upon the Appellants, and on the other hand by the Respondents as the surviving grandchildren of Savia Umma (all her children being dead) they being the ultimate *fidei commissarii* under the will. And the principal issues to be determined 30 on this appeal are :—

p. 259.

(1) Whether the decree in certain partition proceedings between the Respondents, which is necessarily in conflict with the Appellants' alleged title to the property, can be set aside and declared null and void on the ground that the Appellants were not given notice of the said proceedings and were not parties thereto and/or on the ground that there was no proper investigation of title before such decree was made.

(2) Assuming that the decree in the partition proceedings cannot be set aside or declared null and void on the said grounds, 40 whether by reason of non-registration of the probate of the will and of the conveyance to Savia Umma and, on the other hand, the due registration of the deed of conveyance to Leonora Fonseka and subsequent deeds, the Appellants were (prior to the decree) entitled to the intestate share of Savia Umma, i.e., 1/16th part, or to the entirety of the property, free of the *fidei commissum* ;

upon this question depends the further question as to whether the damages awarded to the Appellants under the proviso to Section 9 of the Partition Ordinance, for loss sustained, are sufficient.

(3) Whether the Appellants have established a title to the property by prescription.

Section 9 of the Partition Ordinance provides as follows :—

10 “ 9. The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor of any of them truly set forth, and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty :

Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued.”

Section 3 of the Prescription Ordinance provides as follows :—

20 “ 3. Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs . . .

30 Provided that the said 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.”

5. The partition proceedings were instituted in the District Court, Colombo, by Plaint on the 15th July, 1949. The Respondents Nos. 1 p. 247. to 7 were the Plaintiffs in those proceedings and the Respondents Nos. 8 to 43 were the Defendants. The prayer was that the property in question p. 251. should be sold under the Partition Ordinance and the proceeds shared equally between thirty-seven of the parties to the proceedings, i.e., the seven Plaintiffs and all the Defendants except Defendants Nos. 4, 14, 27, 30 and 36 (i.e., Respondents Nos. 11, 21, 34, 37 and 43 in the present suit). A Statement of Claim on behalf of Defendants Nos. 15, 16, 17 p. 254. and 20 (i.e., Respondents Nos. 22, 23, 24 and 27 in the present suit) accepting the shares allotted to them in the Plaint, was filed on the 14th December, 1949 ; at the hearing those Defendants contended that there was one *fidei commissum* over the entire property, while the p. 256. Plaintiffs contended that there were eleven separate *fidei commissa*, Savia Umma having had eleven children. Evidence was given by the

pp. 255-256.  
pp. 256-258.

1st Plaintiff (Respondent No. 1 in the present suit) on the 9th March, 1950, and Judgment was pronounced by Sansoni, A.D.J., on the 29th March, 1950.

pp. 259-260.

6. Pursuant to the said Judgment dated the 29th March, 1950, it was ordered and decreed that the parties to the proceedings were entitled to the property in question in shares as set out in the decree and it was further ordered and decreed that the property should be sold and the proceeds brought into Court.

p. 260.  
pp. 263-267.

p. 267.

p. 246.

7. On the 20th May, 1950, the Appellants filed a Petition for Injunction in the said partition proceedings. They pleaded *inter alia* that they are the owners of the property in question, that they learned of the partition proceedings in the month of April, 1950, and that they had not been given notice of the said proceedings. They prayed for *inter alia* an injunction to restrain the sale of the property and that the said decree should be set aside. On the 24th May the said Petition was dismissed with costs. 10

p. 275.

p. 281.

8. On the 6th September, 1951, an appeal by Defendants Nos. 15, 16, 17 and 20 against the said Judgment dated the 29th March, 1950, was heard and dismissed by the Supreme Court (Gunasekere and Swan, JJ.). 20

p. 18.

9. On the 20th May, 1950, by Plaintiff filed in the District Court, Colombo, the Appellants instituted

#### THE PRESENT SUIT.

pp. 24-28.

By their said Plaintiff, as amended on the 31st May, 1950, the Appellants plead and allege *inter alia* the following :—

p. 24.

p. 126.

p. 128.

p. 132.

p. 136.

p. 147.

(i) The death of Lebbe Marikar, former owner of the property (on the 8th May, 1876), the will (dated 12th December, 1872), probate (admitted on the 29th May, 1876), the conveyance to Savia Umma (by Deed No. 2575 dated the 14th September, 1888), the purchase by Leonora Fonseka and the conveyance to her (by Fiscal's conveyance dated 29th March, 1916) and the sale and conveyance from Leonora Fonseka to Adamjee Lukmanjee (by Deed No. 6186 dated 16th August, 1919). 30

p. 24.

(ii) That Adamjee Lukmanjee thereafter possessed and enjoyed the property.

pp. 24-25.

(iii) That Adamjee Lukmanjee died intestate on the 20th February, 1927, and that (by reason of various acts and events all specifically pleaded) the said deceased's title to the said property had devolved upon the Appellants.

p. 25.

(iv) That the Deed of Conveyance to Leonora Fonseka and also the Deed of Conveyance from the latter to Adamjee Lukmanjee were duly registered. 40

p. 25.

(v) That the Appellants by themselves and through their predecessors in title have been in sole and undisturbed possession of the property since at least the 29th March, 1916.

(vi) That in April, 1950, the Appellants have learnt of the partition proceedings, which were instituted without notice to the Appellants, and that the date of 26th May, 1950, has been fixed for the sale of the property under the decree in the said proceedings. p. 25.

10 (vii) That the Respondents should have made the Appellants parties to the partition proceedings, that the Respondents acted fraudulently and in collusion with each other and falsely stated in the said proceedings that they and their predecessors in title had been in undisturbed and uninterrupted possession and that all improvements were in common between them and caused the Court to enter a decree for sale and falsely caused the Court to declare that the Respondents are the owners; and that the Respondents wrongfully and unlawfully and/or negligently and/or fraudulently and/or in collusion with each other neglected or omitted to make the Appellants parties to the said proceedings or to give them notice thereof. p. 26.

(viii) That there has not been a due or proper investigation into title by the court in the partition proceedings and accordingly the decree therein is null and void. p. 26.

20 (ix) That the Appellants have effected improvements worth at least Rs.30,000/- p. 26.

(x) That the property is worth at least Rs.100,000/-. p. 26.

And the Appellants prayed for relief as follows (summarised) :— p. 27.

(A) That the decree in the partition proceedings be set aside.

(B) A declaration that the said decree is null and void.

(C) In the alternative for damages in the sum of Rs.100,000/-.

(D) For an injunction to restrain any sale under the said decree or in the alternative to restrain the Respondents from applying for the withdrawal of the proceeds of any sale deposited in Court.

30 (E) For an order to stay the sale.

(F) Costs and other and further relief.

10. By Answer dated the 7th March, 1951, the Respondents Nos. 22 to 27 rely upon the will of Lebbe Marikar as creating a valid *fidei commissum* in their favour; they state that they are unaware of the conveyance to Savia Umma, the conveyance to Leonora Fonseka and the various steps pleaded in support of the alleged devolution of the title of Adamjee Lukmanjee upon the Appellants, and deny that their interests as *fidei commissary* heirs has been affected by any of these transactions; they state that after the death of Savia Umma the possession of others claiming title under the Fiscal's Conveyance became *mala fide*; that the partition proceedings were not instituted by them (the said Respondents); that they put the Appellants to strict proof of the allegation that there was no proper investigation into title by the Court in the partition proceedings; that the Appellants as *mala fide* possessors were not entitled to notice of the partition proceedings, that they are only entitled to compensation for necessary improvements and that the Respondents are entitled to set off the rents and profits received by the Appellants during their *mala fide* possession. p. 43. p. 43. pp. 43-44. p. 44. p. 44. p. 44. p. 44.

p. 45. 11. By Answer dated the 2nd May, 1951, the Respondents Nos. 8, 11, 21, 29 to 31 and 37 state that they are unaware of the conveyance to Leonora Fonseka and the various steps pleaded in support of the alleged devolution of the title of Adamjee Lukmanjee upon the Appellants; deny the allegations against the Respondents in relation to the institution and conduct of the partition proceedings (and specially the allegations of fraud and collusion) and the Appellants' claims to title; state that the partition proceedings were conducted with due publicity and the decree duly and regularly entered; and state that in law the Appellants cannot maintain the action, that there is a misjoinder of cause of action and that 10  
pp. 45-46. the plaint is bad in law. The same Respondents, by Objections dated the 2nd May, 1951, further stated that the application for injunction is misconceived and that there is no provision in law to enable the Court to stay proceedings in the partition suit.

pp. 46-47. 12. By Answer and Objections dated the 19th September, 1951, the Respondents Nos. 1 to 7, 13, 29 to 31 and 37 put forward a defence in terms exactly similar to those contained in the Answer and Objections respectively of the Respondents referred to in paragraph 11 above. And by Answer p. 48. dated the 19th September, 1951, Respondent No. 34 also put forward a defence in terms exactly similar to those contained in the Answer of the 20 Respondents referred to in paragraph 11 above.

p. 50. 13. On the 31st October, 1951, on petition of the Appellants, the p. 28. Court (Sinnethamby, A.D.J.) Ordered and directed that the sale of the property under the decree in the partition proceedings, fixed for the 20th November, 1951, should be postponed until after the trial, which the Court fixed for hearing on the 5th February, 1952.

pp. 52-54. 14. Issues were framed and the case was heard on the 5th and pp. 55-75. 6th February, 1952. The evidence disclosed little disagreement between the parties on the facts (such disagreement as there was, on the facts, sufficiently appears from the summary of findings of the learned trial 30 judge, set out below).

pp. 82-97. 15. Judgment of the District Court (L. B. de Silva, A.D.J.) was pronounced on the 4th March, 1952. The learned judge found and held as follows :—

pp. 82-85. (1) That the Appellants are not entitled to have the decree in the partition proceedings set aside or declared null and void, because—

p. 82. (i) A partition decree is conclusive against all persons ;

p. 83. (ii) A person claiming to be the owner of an undivided share of land is competent to maintain a partition action though 40 he is not in possession ;

p. 84. (iii) There was a proper investigation of title by the Court before the partition decree was entered.

pp. 85-86. (2) That in view of the last Will of Lebbe Marikar, which created a *fidei commissum* in favour of the children and grandchildren

of the children of the deceased, the conveyance to Savia Umma, and the fact (proved by the evidence of Respondent No. 8, accepted on this point by the learned judge) that Savia Umma and all her children are dead, the title of the Appellants and their predecessors as owners is at an end, it having been terminated on the death of Savia Umma. p. 86.

(3) That the Appellants have not acquired a title by prescription, because— pp. 86-89.

10 (i) As the title of the Respondents is that of *fidei commissarii* no length of prescriptive possession prior to the accrual of their rights has any effect by reason of the proviso to Section 3 of the Prescription Ordinance ; p. 86.

(ii) The burden of proof was upon the Appellants, once it was shown that the Respondents are *fidei commissarii*, to show that subsequent to the accrual of the rights of the Respondents the Appellants have had undisturbed and uninterrupted possession for 10 years ; pp. 87-88.

(iii) The Appellants have not proved when the rights of the Respondents as *fidei commissarii* accrued. pp. 88-89.

20 (4) That the probate of the last will of Lebbe Marikar and the conveyance to Savia Umma have not been duly registered but the Fiscal's Conveyance to Leonora Fonseca and subsequent deeds in favour of the Appellants and their predecessors in title have been duly registered. Therefore the Appellants are entitled, by virtue of due and prior registration, to claim the intestate rights of Savia Umma from Lebbe Marikar free from the *fidei commissum* created by the will—this title, however, is as to a 1/16th share and not (as contended by the Appellants) the entirety of the property in question. pp. 89-90. p. 90.

30 (5) That the value of improvements to the property carried out by the Appellants and their predecessors in title was Rs.25,000/-. pp. 90-91.

(6) That the value of the property in May, 1950, was Rs.100,000/- and at the date of the judgment Rs.150,000/-. p. 91.

(7) That the Appellants are entitled to compensation for improvements without any set-off for (i) rents and profits, because there would have been no such income if the improvements had not been effected, and therefore such income is an advantage derived from the improvements, or (ii) a sum of Rs.18,000/- paid by the Municipality for the acquisition of a portion of the property in 1920, as this should be the subject of a separate claim. pp. 92-93. p. 93.

40 (8) That the Respondents were in breach of duty in not making the Appellants parties to the partition proceedings and in not disclosing to the Court that the Appellants were in possession, paying taxes, collecting rents, effecting improvements and claiming to be the owners, and that the Respondents acted fraudulently and collusively. Therefore the Appellants are entitled to damages under the proviso to Section 9 of the Partition Ordinance because p. 94. p. 94.

they have been deprived of their title to 1/16th share of the property by the decree for sale in the partition proceedings. The damages were assessed as follows :—

p. 94.	(i) 1/16th of Rs.100,000/-	..	..	..	Rs.6,250.00
	(ii) 15/16th of Rs.25,000/-	..	..	..	Rs.23,437.50
					<hr/>
					Rs.29,687.50
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p. 95. (9) That the Appellants are not entitled to an injunction.

p. 96. The Respondents were ordered to pay half the costs of the action as they had partially succeeded in their defence. A decree was entered in accordance with the said judgment. 10

pp. 97-99.

These Respondents submit that the learned trial judge's said findings of fact, other than those referred to in (5), (6), (7) and (8) above, are right ; and on the facts found by the learned trial judge these Respondents submit that the said judgment is right. These Respondents further submit that the Court has no jurisdiction to set aside or declare null and void or grant an injunction or a stay in respect of, or otherwise interfere with, the said decree, being a decree of the Court in a separate proceeding.

p. 99. 16. The Appellants appealed against the said judgment. By their Petition of Appeal dated the 13th March, 1952, they stated the grounds of their said appeal as follows (summarised) :— 20

p. 103. (i) That by virtue of prior registration of their deeds the Appellants have title to the entirety of the property in question and not only 1/16th share.

(ii) That the Appellants have acquired title by prescription.

(iii) That the Appellants are the successors in title of a *bona fide* purchaser without notice of the *fidei commissum*.

(iv) That the Appellants were the legal owners and therefore entitled at least to damages in the sum of Rs.100,000/-.

(v) That there was not due and proper investigation into title in the partition proceedings and the decree therein was not entered 30 as provided for in the Ordinance.

p. 104. 17. By Petition dated the 25th March, 1952, the Appellants applied to the District Court for an injunction to restrain the sale of the property until the final determination of the action. On the 5th April, 1952, the said application was refused by L. B. de Silva, A.D.J. on the ground that the Court had no power to restrain the actions of the Court in another case.

pp. 108-110.

pp. 110-115. 18. In the Supreme Court the principal judgment was delivered by Gunasekera, J., who held as follows :—

pp. 112-113.

(1) That the learned trial judge was right in holding that the interest to which the Appellants were entitled by virtue of due and prior registration of deeds was a 1/16th share and not the entirety of the property ; 40



(2) That the learned judge was right in holding that the Appellants have failed to prove a title by prescription ; pp. 113-114.

(3) That the learned judge was right in holding that there had been a proper investigation of the title to the property in the partition proceedings ; pp. 114-115.

(4) That notwithstanding the finding of fraud and collusion the Appellants are not entitled to an order setting aside the decree in the partition proceedings ; p. 115.

10 And that the appeal should be dismissed with costs. de Silva, J., p. 115.  
concurrent. These Respondents submit that the said judgment of the p. 115.  
Supreme Court is right.

19. On the 10th March, 1954, the Appellants were granted p. 120.  
Conditional Leave to appeal to the Privy Council. Final Leave to appeal  
was granted on the 29th March, 1954. p. 124.

20. These Respondents submit that the Judgment of the Supreme Court should be upheld and this appeal dismissed with costs for the following amongst other

### REASONS

- 20 (1) BECAUSE the Judgment of the Supreme Court is right for the reasons stated in the judgment of Gunasekera, J., and for other good and sufficient reasons.
- (2) BECAUSE on the facts found by the learned trial judge the Judgment of the District Court is right for the reasons therein stated and for other good and sufficient reasons.
- (3) BECAUSE the decree in the partition proceedings is good and conclusive against all persons whomsoever and therefore against the Appellants.
- 30 (4) BECAUSE the Respondents as persons claiming ownership of undivided shares of the property in question were competent to maintain the partition proceedings.
- (5) BECAUSE there was a proper investigation of title by the Court before the decree in the partition proceedings was entered.
- (6) BECAUSE the District Court has no jurisdiction to set aside or declare null and void or grant an injunction or a stay in respect of, or otherwise interfere with, the said decree, being a decree of the Court in a separate proceeding.
- 40 (7) BECAUSE the will of Lebbe Marikar deceased created a *fidei commissum* in favour of the children and grandchildren of the children of the deceased and, the property having been conveyed under the terms of the will to Savia Umma, a child of the deceased, the title of the Appellants and their predecessors terminated on the death of Savia Umma.

- (8) BECAUSE the Respondents are the grandchildren of Savia Umma and all her children are deceased.
- (9) BECAUSE the Appellants have not proved that they have had undisturbed and uninterrupted possession of the property for 10 years subsequent to the accrual of the Respondents' title as *fidei commissarii*, and therefore have not acquired title by prescription.
- (10) BECAUSE the Appellants were not entitled by virtue of due and prior registration of their deeds to more than 1/16th share. 10
- (11) BECAUSE on the facts found and on the evidence the Appellants are not entitled to any further relief than that given to them by the said Judgment of the District Court.

RALPH MILLNER.

**In the Privy Council.**

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**ON APPEAL**  
*from the Supreme Court of Ceylon.*

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BETWEEN  
**MOHAMEDALY ADAMJEE**  
and Others . . . . . *Appellants*

AND

**HADAD SADEEN** and  
Others . . . . . *Respondents.*

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**Case for the Respondents**  
Nos. 1 to 8, 12 and 14 to 21.

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**T. L. WILSON & CO.,**  
6 Westminster Palace Gardens,  
London, S.W.1,  
*Solicitors for Respondents Nos. 1 to 8,*  
*12 and 14 to 21.*