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Re Mohammed Hassan

[HIGH COURT—Fatiaki, J.—21 June 1988]

B

Civil Jurisdiction

Fiji National Provident Fund—Member with case balance and dies testate (leaving widow, 5 children) in Australia—no nomination—Probate granted there—no reseal here—question as to whom money should be paid—wife sole beneficiary—construction of Fiji National Provident Act—order that money be distributed and paid as on intestacy.

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Shafia Nas Hassan (applicant) widow of Mohammed Hassan (deceased) sought an order for the payment out of a sum held by the Public Trustee, having been received by it from the Fiji National Provident Fund (the Fund). The Registrar has asked to whom the money should be paid, to the deceased's executor or to the widow herself.

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The deceased, formerly of Fiji but at his death on 21 July 1987 living in Brisbane, Australia, left a will in which he appointed Gordon Thomas Baily (executor) sole executor. He named the widow as sole beneficiary. He was survived by the widow and five children.

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On 14 December 1987 Probate was granted by the Supreme Court in Queensland to the executor. The deceased did not nominate any person to receive the $17,238.19 standing to his credit with the Fund as he was entitled under the Fiji National Provident Fund Act (Cap. 219) (the Act). On 20 November 1987 this sum as required by s.35(1) of the Act was paid into Court and thereafter, as was the practice paid to the Public Trustee for retention and investment.

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By s.35(3) and (5) claims to the sum in the Fund must be made within 12 months of the money being paid into Court, to the Court or the Public Trustee as appropriate: in the absence of such claim the monies are to be repaid to the Board of the Fund.

The question raised on this case as to whom should the monies be paid. S.35 and s.43 of the Act are relevant. They read—

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"35.—(1) If, at the time of the death of a member of the Fund, there is no person nominated under section 34 the Board, on being notified of the death of the member, shall pay into Court the amount standing to the credit of the member in the Fund for disposal in accordance with the law.

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(2) If, at the time of the death of a member of the Fund—

(a) a sole nominee under section 34 is dead; or
(b) a nomination under section 34 is of no effect,

the Board, on being notified of the death of the member, shall pay into Court such proportion of the amount standing to the credit of the member in the Fund as is indicated in the nomination for disposal in accordance with the law. A

(3) Where no claim is made in respect of money paid into Court in accordance with subsection (1) or (2) within one year of being so paid in to Court, the Court shall repay the money to the Board and the Board shall credit it to the general reserves of the Fund. B

(4) Where a person, other than a spouse, is—

(a) nominated under section 34; or
(b) entitled by virtue of subsection (1) or (2) to receive all or part of the amount standing to the credit of a deceased member of the Fund, C

and the person so nominated or entitled is under the age of 18 at the time of payment of the amount payable out of the Fund, the amount to be paid shall be paid by the Board or the Court, as the case may be, to the Public Trustee for the benefit of the person so nominated or entitled.

(5) Where no claim is made in respect of money paid to the Public Trustee in accordance with subsection (4) within one year of being so paid to the Public Trustee, the Public Trustee shall repay the money to the Board and the Board shall credit it to the general reserves of the Fund. D

(6) Subsections (3) and (5) do not prejudice the right of any person found to be entitled to receive any amount paid into the general reserves of the Fund in accordance with those subsections." E

"43.—(1) Notwithstanding the provisions of any other written law but subject to the provisions of subsection (2), no contribution to the Fund, nor any amount standing to the credit of a member in the Fund nor interest on any such contribution or amount, nor withdrawals made by the authority of the Board from the Fund in accordance with sections 30, 31, 32 or 35, nor the rights of any member of the Fund acquired under this Act, nor the right to receive any annuity under any order made under the provisions of paragraph *(b)* of section 64, shall be assignable or transferable or liable to be attached, sequestrated or levied upon for or in respect of any debt or claim whatsoever." F

and more particularly subsection (2) which reads: G

"(2) Notwithstanding the provisions of any other written law, all moneys paid out of the fund on the death of any member of the Fund shall be deemed to be impressed with a trust in favour of the person nominated under the provisions of section 34 by the deceased member or, if no such person has been nominated, the person or persons determined by the Court in accordance with the provisions of subsection (1) of section 35 to be entitled thereto and shall be deemed not to form part of the deceased member's estate nor to be subject to his debts." H

A The Court considered deemed should be interpreted in accordance with the first and second meaning attributed to it in *St. Aubyn v. Attorney-General* (1952) A.C. 15 at p.53 i.e. to impose an artificial construction or to put a meaning beyond doubt.

In *re Narendra Prasad* FNPF (57/1982) Kermode, J. said:

B "By virtue of that subsection on the death of a member the money is deemed to be impressed with a trust in favour of the person nominated or the person whom the Court determines is entitled to it in the absence of any nomination. The fund is deemed also not to form part of the deceased member's estate.

No problems arise where there has been a nomination but who is entitled to the fund by law if there is no nomination if the fund is deemed by law not to be part C of the deceased member's estate?

One answer to that query in interpreting the subsection might be to hold that the section is designed to protect the fund from creditors and exempts it from estate and succession duties but that it remains nevertheless in fact, and in law the property of the deceased's estate for any other purpose.

D If that is the correct legal position then the person or persons entitled to the fund might be determined by the provisions of the deceased's will or the law of intestacy."

E In *M. v. Attorney-General* (1985) Cullinan, J. referring to the words "in accordance with the law" said—

"As I see it, those words can only refer to distribution in accordance with the law applicable to testacy or intestacy as the case may be."

F and later

"Dr Singh submits that the effect of section 43(2) of (the Act) is that where any debt or claim whatsoever is concerned, the money paid into Court shall not form part of the estate. . . . I agree with that submission."

Later referring to the phrase in s. 43(1)—

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". . . . (but subject to the provisions of subsection (21). . . ."

he said that the phrase did not suggest that other provisions of the Act were also excluded.

He also said, referring to s. 43(2)—

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"Dr Singh submits that the effect of section 43(2) of the FNPF Act is that where 'any debt or claim whatsoever' is concerned, the money paid into Court shall not form part of the estate. Again I agree with that submission. It will be seen

that subsections (1) & (2) of section 43 commence with the words 'Notwithstanding the provisions of any other written law:... 'Written law' is defined in section 2 of the Interpretation Act, Cap. 7, as meaning 'all Acts ... and all subsidiary legislation'. The expression 'other written law' can then only refer to another Act altogether. That indicates that the other provisions of Cap. 219 are not excluded, such as for example the provisions of section 35(1). I observe that subsection (1) of section 43 contains the additional phrase "... (but subject to the provisions of subsection (2)..." I do not see that such phrase necessarily suggests that the other provisions of the FNPF Act are also excluded. As I see it, the phrase is additional, having been incorporated in section 43(1) when first introduced, and serves but to emphasise the inclusive effect of the particular provisions of subsection (2), namely, that while contributions, interest, or withdrawals etc. are not subject to 'any debt or claim whatsoever', they are nonetheless subject to the trust created under subsection (2).

I observe also that section 43(2) does not state that the particular monies shall not form part of the deceased member's estate; instead the subsection says that the moneys' shall be deemed not to form part of the deceased member's estate'. The phraseology used indicates, in my view, that it is only for the purposes of section 43 that the monies paid out of the Fund on the death of a member are not deemed to form part of the deceased member's estate. For any other purposes therefore, they are to be regarded as forming part of the estate, for example for the purposes of distribution under section 35."

The Court noted *Re Alexander Maull* in which there was a will, a sole beneficiary who was also the executor and the money was paid to the Solicitors for the applicant and not to the applicant herself.

In the instant case, there was the complication that the Probate was taken out in Queensland, Australia and not resealed in Fiji.

Held: To order payment of the amount in the fund to the executor in Queensland would take the amount out of the jurisdiction of the Court and out of the "protective provisions" of s. 43(1) and (2) of the Act. Thus would be a risk that the amount may not contrary to s. 43(2) be administered with a trust in favour of the person's determined by the Court to be entitled to it: and that the amount may not be protected from all debts or claims.

The Act ought be interpreted for the benefit of those for whom the Fund was created. Any nomination in the purposes of the Fund by a member should override the provisions in the member's will.

The law as expressed in the phrase "in accordance with the" is that which related to intestacy, to be found in the Succession Probate and Administration Act (Cap. 60) (Succession Act) see s.2(1) definition of "intestate"; and s.5 and s.6.

A deceased member of the Fund who leaves a will in which no specific disposition is made of the amount standing to his credit in the Fund dies "intestate" in

A respect of such amount and that amount will be distributed in accordance with the provisions of the Succession Act.

Cases referred to:

Re Narendra Prasad F.N.P.F. 57/1982

B *Re L. deceased:* F.N.P.F. 49/1985

Re Alexander Maull deceased: F.N.P.F. 108/1985

St. Aubyn v. Attorney-General (1952) A.C. 15

FATIAKI, Mr Justice

C

Decision

Mohammed Hassan (s/o Wali Mohammed) (hereafter referred to as the deceased) was a contributor and member of the Fiji National Provident Fund before he migrated to Australia. He died testate on the 21st July, 1987 leaving his widow and five children.

D By his last will and testament dated the 20th of July 1987 the deceased appointed Gordon Thomas Bailey sole executor of his will in which his wife Shafia Naz Hassan was named the sole beneficiary. Probate of the will was granted by the Supreme Court of Queensland on the 14th of December, 1987 to the above-named executor.

Unfortunately, like so many other members, the deceased did not nominate any E person to receive the sum of money standing to his credit with the Fiji National Provident Fund as he was entitled to under section 34 of the Fiji National Provident Fund Act Cap. 219 (hereinafter referred to as the Act). The amount standing to the deceased's credit at the time of his death was $17,238.19.

This sum, as required by the terms of Section 35(1) of the Act where no recipient has been nominated, was paid into court on the 20th of November 1987, and as is the F usual and convenient practice by court order dated the 11th of February, 1988 was transferred to the Public Trustee to be retained and invested pending further order of the court.

It should be noted that by subsections 3 and 5 of Section 35 a statutory time limit of 12 months is imposed within which claims must be made to the court or the Public Trustee as appropriate and in the absence of any such claim the monies shall G be repaid to the Board of the Fiji National Provident Fund.

Shafia Naz Hassan, the deceased's lawful widow, within the prescribed time limit, by her affidavit dated the 8th of April, 1988 seeks an order of the court for the payment out of the said sum held by the Public Trustee and the Registrar asks to whom is the money to be paid out, to the executor of the deceased's will or to the widow and sole beneficiary of the deceased's estate?

H To answer this question I have considered the following decisions of this court:

1. *Re Narendra Prasad (s/o Bhagwan Prasad:* F.N.P.F. 57/1982:

2. *Re L. deceased:* F.N.P.F. 49/1985: and
3. *Re Alexander Maull deceased:* F.N.P.F. 108/1985

together with the provisions of section 43 and section 35(1) of the Fiji National Provident Fund Act Cap. 219 which latter section was repealed and replaced by the F.N.P.F. (Amendment) (No. 2) Act 29 of 1986 which came into force on 1st January, 1987 (*see:* L.N. 7 of 1987).

It is immediately apparent that section 35 of the Act was repealed and replaced subsequent to the above-mentioned decisions. Nonetheless in my view the decisions remain persuasive because of the retention of section 43 unamended, and the words "... in accordance with the law" in section 35(1), which words undoubtedly originate, with an insignificant variation in my view, from the earlier equivalent expression considered in the decisions, namely, "... in accordance with the law for the time being in force."

In my view section 35 which is set out below provides part of the answer to the question. The section reads: (in its amended form subsequent to the above decisions).

"35.—(1) If, at the time of the death of a member of the Fund, there is no person nominated under section 34 the Board, on being notified of the death of the member, shall pay into Court the amount standing to the credit of the member in the Fund for disposal *in accordance with the law*. (My emphasis).

(2) If, at the time of the death of a member of the Fund—

(a) a sole nominee under section 34 is dead; or
(b) a nomination under section 34 is of no effect,

the Board, on being notified of the death of the member, shall pay into Court such proportion of the amount standing to the credit of the member in the Fund as is indicated in the nomination for disposal in accordance with the law

(3) Where no claim is made in respect of money paid into Court in accordance with subsection (1) or (2) within one year of being so paid in to Court, the Court shall repay the money to the Board and the Board shall credit it to the general reserves of the Fund.

(4) Where a person, other than a spouse, is—

(a) nominated under section 34; or
(b) entitled by virtue of subsection (1) or (2) to receive all or part of the amount standing to the credit of a deceased member of the Fund,

and the person so nominated or entitled is under the age of 18 at the time of payment of the amount payable out of the Fund, the amount to be paid shall be paid by the Board or the Court, as the case may be, to the Public Trustee for the benefit of the person so nominated or entitled.

(5) Where no claim is made in respect of money paid to the Pubic Trustee in accordance with subsection (4) within one year of being so paid to the Public Trustee, the Public Trustee shall repay the money to the Board and the Board shall credit it to the general reserves of the Fund.

(6) Subsections (3) and (5) do not prejudice the right of any person found to be entitled to receive any amount paid into the general reserves of the Fund in accordance with those subsections.

A (7) Where a person is found entitled to receive any amount which has been credited to the general reserves of the Fund pursuant to subsection (3) or (5) the Board shall, subject to subsection (8), pay interest on that amount calculated from date upon which it was credited to the general reserves of Fund until the date upon which payment is made by the Board to the person entitled thereto at the maximum rate of interest being offered by licensed banks in Fiji for savings deposits on the date of such payment by the Board.

B (8) Nothing in subsection (7) shall be construed as requiring the Board to pay interest upon interest."

I say 'part of the answer' because the legislature has provided no assistance as to the meaning to be attributed to the expression, underlined above, namely: "... in accordance with the law."

C Instead the legislature has, with respect, complicated and confused the interpretation of the phrase by enacting section 43 which reads:

"43.—(1) Notwithstanding the provisions of any other written law but subject to the provisions of subsection (2), no contribution to the Fund, nor any amount standing to the credit of a member in the Fund nor interest on any such contribution or amount, nor withdrawals made by the authority of the Board from the D Fund in accordance with sections 30, 31, 32 or 35, nor the rights of any member of the Fund acquired under this Act, nor the right to receive any annuity under any order made under the provisions of paragraph *(b)* of section 64, shall be assignable or transferable or liable to be attached, sequestrated or levied upon for or in respect of any debt or claim whatsoever."

and more particularly subsection (2) which reads:

E "(2) Notwithstanding the provisions of any other written law, all moneys paid out of the fund on the death of any member of the Fund shall be deemed to be impressed with a trust in favour of the person nominated under the provisions of section 34 by the deceased member or, if no such person has been nominated, the person or persons determined by the Court in accordance with the provisions of subsection (1) of section 35 to be entitled thereto and shall be F deemed not to form part of the deceased member's estate nor to be subject to his debts."

Kermode J. (as he then was) first posed and answered the problem created by the words underlined in section 43(2) in the following manner in his interim decision in *Re Narendra Prasad:* (1982).

"By virtue of that subsection on the death of a member the money is deemed to G be impressed with a trust in favour of the person nominated or the person whom the Court determines is entitled to it in the absence of any nomination. The fund is deemed also not to form part of the deceased member's estate.

No problems arise where there has been a nomination but who is entitled to the fund by law if there is no nomination or if the fund is deemed by law not to be part of the deceased member's estate?

H One answer to that query in interpreting the subsection might be to hold that the section is designed to protect the fund from creditors and exempts it from estate and succession duties but that it remains nevertheless in fact, and in law the property of the deceased's estate for any other purpose.

If that is the correct legal position then the person or persons entitled to the fund might be determined by the provisions of the deceased's will or the law of intestacy. A

Such an interpretation makes sense in my view but the question will have to be argued and a ruling made by the Court. Since I have heard no argument in respect of the present application I refrain from making any ruling."

I would here interpose the question what if no specific disposition is made in the deceased member's will of the fund standing to his credit in the F.N.P.F. and there are several beneficiaries under the will? B

Then in *M. v. Attorney-General* (1985), Cullinan J. took the opportunity to hear argument on the point from the applicant's solicitor and Dr A. Singh counsel for the Attorney-General. His lordship in that case ruled as follows:

"Dr Singh submits that the words in section 35(1), 'disposal in accordance with the law for the time being in force' can only mean that the money paid into Court under that section must be distributed as part of the estate. I agree with that submission. As I see it, those words can only refer to distribution in accordance with the law applicable to testacy or intestacy, as the case may be: if a deceased dies testate then the money paid into court must be distributed in accordance with the will (bearing in mind the rules of construction applicable thereto e.g.....): if the deceased dies intestate, the money must be distributed as in the case of any intestacy, that is, in accordance with the provisions of section 6 of the Succession, Probate and Administration Act Cap. 60." C D

And dealing more specifically with the interpretation of Section 43 of the Act, his lordship states:

"Dr Singh submits that the effect of section 43(2) of the FNPF Act is that where any debt or claim whatsoever' is concerned, the money paid into Court shall not form part of the estate. Again I agree with that submission. It will be seen that subsections (1) & (2) of section 43 commence with the words 'Notwithstanding the provisions of any other written law...'. 'Written law' is defined in section 2 of the Interpretation Act, Cap. 7, as meaning 'all Acts . .. and all subsidiary legislation'. The expression 'other written law' can then only refer to another Act altogether. That indicates that the other provisions of Cap. 219 are not excluded, such as for example the provisions of section 35(1). I observe that subsection (1) of section 43 contains the additional phrase" . . .(but subject to the provisions of subsection (2) . . ". I do not see that such phrase necessarily suggests that the other provisions of the FNPF Act are also excluded. As I see it, the phrase is additional, having been incorporated in section 43(1) when first introduced, and serves but to emphasise the inclusive effect of the particular provisions of subsection (2), namely, that while contributions, interest, or withdrawals, etc. are not subject to 'any debt or claim whatsoever', they are nonetheless subject to the trust created under subsection (2). E F G

I observe also that section 43(2) does not state that the particular monies shall not form part of the deceased member's estate: instead the subsection says that the moneys 'shall be deemed not to form part of the deceased member's estate'. The phraseology used indicates, in my view, that it is only for the purposes of section 43 that the monies paid out of the Fund on the death of a member are not deemed to form part of the deceased member's estate. For any other purposes therefore, they are to be regarded as forming part of the estate, for example for the purposes of distribution under section 35." H

A However both of the above cases dealt with intestacy. Nevertheless, I do not consider that that factor did or could give rise to a different interpretation of section 35(1) and section 43 of the Act as adopted by the two learned judges.

More recently, in *Re Alexander Maull* deceased (Dec. 1986), which was a case where the member died testate. Cullinan J. confirmed his interpretation of sections 35 and 43 of the Act and ordered that the money then held by the Public Trustee be B paid out direct to the Solicitors for the applicant (rather than to the applicant herself).

In this case Cullinan, J. found that there was no partial intestacy and as in the present case there was only a named sole beneficiary of the deceased member's estate. However, and it is not without significance, in my view in that case the named sole beneficiary was also the sole executrix and trustee under the deceased C member's will.

Here, as previously mentioned, the sole executor and trustee of the deceased's estate is Gordon Thomas Bailey, whereas the sole beneficiary is Shafia Naz Hassan. The matter is complicated further by the fact that the probate granted by the Supreme court of Queensland of the deceased's last will has not been resealed in this Court although application is being made. Needless to say this Court has no control D over the administration of the deceased's estate in Australia.

Suffice to say that, in my view an order by the court for payment out of the deceased's funds to the executor in this case would take the funds out of the Court's jurisdiction and control and most certainly outside the applicability of the protective provisions of sections 43(1) and (2) of the Act.

To postulate the problem in another way, where is the guarantee, once the money E is paid out to an executor, that:

(a) the deceased member's fund will be administered in accordance with the trust impressed upon it in favour of the person determined by this court to be entitled thereto: and

(b) that the protection of the fund afforded by section 43 of the Act from all debts or claims whatsoever will be adhered to or worse, not ignored?

F Furthermore does not an order paying out a deceased member's monies to the executor and trustee appointed under the will of the member have the real effect of rendering the monies part of the deceased member's estate and available (in the words of section 11(1) of the Succession Probate and Administration Act Cap. 60) "... *for the payment* of all duties and fees and of *the debts of the deceased* in the ordinary course of administration". (My emphasis).

G Section 10 of the Succession Probate and Administration Act Cap. 60 would be of only partial assistance in this case and in the light of the view I take of Sections 35(1) and 43 of the F.N.P.F. Act, would be unnecessary to be applied to any monies paid out by the F.N.P.F. on the death of a member.

In my humble opinion and with deference to the views of the two learned judges earlier set out, I do not agree entirely with their interpretation of the relevant phrase H and sections of the Act, particularly in the case of a member who dies testate.

As was stated by Lord Radcliffe in: *St. Aubyn v. Attorney-General* (1952) A.C. 15 at p.53:

> "The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word

or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description to include what is obvious, what is uncertain and what is, in the ordinary sense, impossible." A

With respect to the view expressed by Cullinan, J. as set out above, in my opinion the senses in which the word is used in the context of section 43(2) of the Act is in the first and second senses, namely, to impose an artificial construction and put beyond doubt a construction of the phrase . . . "in accordance with the law" in section 35 of the Act which would enable a deceased member who had not made a statutory nomination during his life time to make a non-specific posthumous testamentary disposition of his credit in a will. B

In my view the Act might be considered "social legislation" which ought to be interpreted for the benefit of those for whom the fund was created. C

In that regard the legislature has pointed the way by the enactment of the protective provisions of Sections 43(1) and (2), which provisions ought to be given full legal and practical effect in the interpretation of the phrase . . . "in accordance with the law." In a similar vein, the Act provides that ". . . the subsequent marriage of a nominator (i.e. member) shall render any nomination made by him null and void" and by subsection 4 of Section 35 permits payment out of a deceased member's fund to a nominated or entitled spouse albeit that he or she is a minor D

In my humble opinion the provisions of Section 34 enabling and empowering a member of the fund to appoint or nominate a recipient or beneficiary of the amount standing to the members credit is equivalent to a "testamentary disposition" of the fund in the case of a deceased member who has validly exercised his right to nominate during his lifetime. E

It follows then that any nomination under the Act overrides and supercedes the terms of any will which the deceased member may have left at the time of his death. This is implicit in the mandatory words of Section 32 read with the "deeming" provisions of Section 43(2) of the Act coupled with a realisation that its very nature a will is always revocable and despite its avowed "sanctity" can be altered by an order under Section 3 of the Inheritance (Family Provisions) Act Cap. 61. F

If the deceased member should leave a will without having nominated any person to receive the amount standing to that member's credit in the fund, then the court's determination of the person entitled". . . in accordance with the law" to the fund under Section 35(1) must be circumscribed by the statutory protections in Section 43(2) that such fund". . . shall be deemed not to form part of the deceased member's estate nor to be subject to his debts." G

In my view to determine that the fund should be disposed in accordance with the terms of the deceased member's will and therefore payable to the beneficiary (or beneficiaries) thereunder, is to elevate the terms of the deceased member's will to that of a "nomination" when in fact and in law (i.e in terms of Section 34 of the Act) there has been none. Such a disposition in my view would not be ". . . in accordance with the law." H

Needless to say the practical and legal difficulties that would face the court in a determination of who is entitled under a deceased member's will with several named beneficiaries, and by how much, where the will expressly apportions shares in the deceased member's residuary estate are onerous to say the least.

A "The law" in that event in my respectful opinion is that which relates to intestacy only and is to be found in the Succession, Pobate and Administration Act Cap. 60. In particular Sections 5 and 6 which together deal with the distribution of and succession to property of an intestate person (member).

I am fortified in this by the inclusive definition in Section 2(1) of the Succession, Probate and Administration Act of the term "intestate" which:

B "includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate."

In conformity with the view I have already expressed I would hold that a deceased member of the fund who leaves a will, in which no specific disposition is made in that will of the amount standing to his credit in the Fund, dies "intestate" in respect of such amount which then falls for distribution by this court in accordance C with the provisions of the Succession, Probate and Admininstration Act Cap. 60.

In the particular circumstances of this case and in answer to the question posed by the Registrar, I order that the monies standing to the credit of Mohammed Hassan (s/o Wali Mohammed) and presently held by the Public Trustee be distributed and paid out in accordance with the provision of Section 6 of the Succession Administration and Probate Act Cap. 60 with the shares of any children who D are minors to be retained and invested by the Public Trustee pending their attainment of the age of 21 years.

Distribution ordered.