

1939

Present : Soertsz A.C.J. and de Kretzer J.

SHERIFF *v.* PATHUMUTTU *et al.*

11—D. C. (Inty.) Colombo, 2,810

Deed—Conveyance of land to mosque—Reservation of share of usufruct to donor and his descendants—Prohibition against alienation—Effect of deed—Lease by heirs.

Where a person granted a one-fourth share of certain premises together with the buildings to the officiating priests and their successors of a mosque as a place of worship for Muhammadans subject to the following conditions :—

“I, during my lifetime, and, after my death, my descendants, during their respective lives, shall have the right (which is hereby specially reserved to me and to them) freely to enter upon the said premises and to enjoy my three-fourths of the rents and income of all the buildings now constructed and hereafter may be constructed thereon (excepting the said mosque) and three-fourths shares of the fruits and produce of the trees growing and such three-fourths of the rent, income and produce or any part thereof shall not be mortgaged or sold by my descendants or any of them nor shall the same be liable to be seized or sold in execution for any debt or debts of my descendants ; the other one-fourth share of the rent, income and produce to be taken and appropriated for the benefit and upkeep of the Mosque”.

Held, that the deed conveyed a bare dominium of the land to the trustees of the mosque with a right of usufruct to a one-fourth share.

Held, further, that as there was no grant to the children or an acceptance of the gift by them they would inherit as on an intestacy and a lease by them would be binding on their heirs.

A PPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *Peter de Silva* and *J. A. L. Cooray*), for fourteenth defendant, appellant.

E. B. Wikremanayake (with him *S. J. V. Chelvanayagam*), for sixteenth and eighteenth to twenty-fourth defendants, respondents.

M. I. M. Haniffa, for thirty-fourth defendant, respondent.

Cur. adv. vult.

May 18, 1939. DE KRETZER J.—

The decision of this case depends on the interpretation of the deed 6 D2. By that deed one Mohideen Lebbe Omeru Lebbe purported to convey an undivided one-fourth of certain premises. He says, “whereas I am desirous of granting the said one-fourth part of the premises so divided and separated as aforesaid together with the buildings thereon known as “Moheydeen Mosque” and other appurtenances thereunto belonging subject to the conditions hereinafter contained for the use of my co-religionists as a place of worship”.

This preamble is important, for it indicates the motive and the object of the conveyance.

The grantor then proceeds to convey the property to the officiating priest and his successors in office and to the trustee or trustees for the time

being upon trust "for the special use of the Muhammadans as a place of worship". Then come the conditions expressed as follows:—

"Subject to the following conditions that is to say that I during my lifetime and after my death my descendants during their respective lives shall have the right (which is hereby specially reserved to me and to them) freely to enter upon the said premises and to enjoy my three-fourths of the rents and income of all the buildings now constructed and hereafter may be constructed thereon (excepting the said mosque) and three-fourth shares of the fruits and produce of the trees growing and to be grown on the said premises and such three-fourth shares of the rents, income and produce of the said buildings and trees or any part thereof shall not be mortgaged or sold by my descendants or any of them nor the same shall be liable to be seized or sold in execution for any debt or debts of any of my descendants; the other one-fourth share of the rents, income and produce of the said buildings and trees to be taken, appropriated and used for the benefit and upkeep of the said mosque".

Omeru Lebbe died leaving seven sons and daughters, and two of the sons leased their rights to the appellants. Thereafter a portion of the land was acquired by the Crown after the two sons had died, and the question now is whether the lessees are entitled to any compensation. The learned District Judge held they were not, going on the footing that the interests of the sons were limited to their lives, and that therefore the rights of the lessees ended with the deaths of the lessors.

For the appellants it has been contended that the deed 6 D2 purported to create a trust, and that its terms offended the rule against perpetuities and were therefore void, with the result that the lessors had absolute rights and not rights limited to their lives. Section 110 of our Trusts Ordinance, No. 9 of 1917, claims to embody the rule against perpetuities, and it is this section that must apply, if at all. But before proceeding to consider this question, one must see whether it has any application, and in the first place the terms of the deed must be construed.

Now, what did Omeru Lebbe intend to do and what did he do? The deed sets out his object clearly, and that was to endow the mosque; there is no indication that he had intended by that very document to make provision for his descendants.

He created a trust with regard to the mosque. In describing the extent of his endowment he used an abundance of language where simpler and more concise language would have sufficed, and in fact it is this very abundance of language which has created the difficulty of this case.

Clearly what the mosque was to get and did get was the bare dominium of the land itself and one-fourth of the usufruct.

But the conveyancer used a cumbersome form in which to say this. He transferred the whole corpus subject to conditions and the conditions were that Omeru Lebbe and his descendants were to have the right to enter the land and to take three-fourths of the income derived from the buildings and trees.

The point I wish to emphasize is that the grant is to the mosque: there is no grant to any one else. In fact the grantor makes this clearer when

he says that he reserves a right to himself and his descendants. He almost says that he reserves the right to construct buildings and plant trees on the premises. It would not be possible to urge a further trust if the alleged prohibition against alienation had not come in,—and the words may have been not a prohibition imposed on himself and his descendants, but a promise to the mosque that he would take steps to see that none but he and his family came upon the premises. While, therefore, he expressed an intention to safeguard the interests of the mosque or prohibit alienation, there is nothing to indicate that he carried out this intention.

In this deed he refers to a transfer made by himself of the other three-fourths of the land, and he states that this also was subject to certain reservations. In that case it was a reservation. The indications are that he did exactly the same thing here. I do not think one can read a trust into these terms: something much clearer is needed.

In this view of the matter certain rights devolved at his death on his sons, the lessors, and the lease by them would ordinarily be binding on their heirs.

Mr. Wikremanayake argued that the rights reserved were personal to himself and to his descendants. Something may be said for this point of view, but there was no grant to Omeru Lebbe's children nor any acceptance of the gift by them. They therefore inherited as on an intestacy.

In the result the appellant succeeds. The case must go back for his claim to be investigated. It may be noted that Counsel for the appellant stated that he made no claim on account of repairs.

The appellant is entitled to costs in both Courts.

SOERTSZ A.C.J.—I agree.

Appeal allowed.