Present : Wood Renton C.J. and De Sampayo J. 1917.

BANDA *v.* ROSEHAUGH TEA AND RUBBER CO., LTD.

263—D. C. Kandy, 24,857.

Lease by an incumbent of a temple for thirty years—Covenant for renewal for another period of thirty years at the option of the lessee—Action to set aside lease so far as option to demand renewal was concerned—Buddhist Temporalities Ordinance, 1905, s. 38—Is trustee bound by a lease by the incumbent?

Under section 38 of the Buddhist Temporalities Ordinance of 1905 the question of the consistency of a lease of lands belonging to a temple with the interests of the temple must be looked at from the standpoint not only, or chiefly, of the past, but of the present.

"The power conferred upon the Court by section 38 must be exercised with caution, and with due regard to the position of the lessee as well as of the lessor. Each case must be disposed of on its merits. The mere fact that, at the date of the inquiry held under section 38, temple property could be dealt with on more advantageous terms would be no reason for the interference of the Court. But where, in view of the whole circumstances of the case, the Court is satisfied that the continued existence of any lease pending at the date when the Buddhist Temporalities Ordinance, 1905, came into force is flagrantly in conflict with the vital and elementary interests of the temple, it is bound to set that lease aside."

A lessee is entitled to reasonable compensation for improvements effected by him on lands when the lease is set aside under section 38.

THE facts are set out in the judgment.

Bawa, K.C., and *A. St. V. Jayewardene*, for defendants, appellants.

H. J. C. Pereira and *Chitty*, for plaintiff, respondent.

Cur. adv. vult.

October 9, 1917. WOOD RENTON C.J.—

The plaintiff is the trustee of the Aluvihare temple. The former incumbent of that temple, by deed No. 583, dated November 18, 1886, leased certain of its lands to Mr. Alexander Ross for a period of thirty years, at an annual rent of Re. 1.50 per acre for the first

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three years, and thereafter of Rs. 2 per acre for the remainder of the term. The lease contained a covenant for renewal, at the same rent and generally on the conditions contained in it, at the option of the lessee. The lands demised have now been converted into a rubber estate, and are in the possession of the defendants, the Rosehaugh Tea and Rubber Co., Ltd., on an assignment of the lease by Mr. Ross, the original lessee. The lease was due to expire on November 18, 1916, and the defendants, through their proctor, on March 17, 1916, called upon the plaintiff, who was elected trustee of the temple in October, 1915, and re-elected in 1916, to implement the covenant for renewal. The plaintiff refused to do so, and subsequently sold the lease to a third party at a higher annual rent, namely, Rs. 80 an acre. In the present action he sues, under the provisions of section 38 of the Buddhist Temporalities Ordinance, 1905,[1] to have the lease set aside in so far as the option to demand a renewal is concerned. The grounds of his claim are that an extension of the term of the lease for thirty years is inconsistent with the interests of the temple, and that its conditions generally disclose an improvident alienation and inadequate consideration within the meaning of the provisions of section 38 of the Buddhist Temporalities Ordinance, 1905.[1] The defendants deny the plaintiff's right to have the lease set aside. They further plead that, at the date of the lease the land was jungle, and that, relying on its terms, they planted the land with rubber at a considerable expense, and claim that, if the lease be set aside, they should be awarded Rs. 45,000 by way of compensation. The case went to trial on the following issues: (1) Do the averments in the plaint disclose the plaintiff's right to the relief prayed for in the plaint ? (2) Was the term of the lease, providing for an extension of the term for thirty years, inconsistent with the interests of the temple, or does it render the lease an improvident alienation or one for an inadequate consideration ? (3) If he lease is liable to be set aside, what compensation, if any, are the defendants entitled to ? (4) Is the plaintiff bound by the covenant for a further extension of the lease ? It was agreed at the trial that the issue as to compensation should be reserved for inquiry and adjudication after the Court had disposed of the other issues. Evidence was led on both sides, and the learned District Judge, although he did not answer the issues specifically, held in effect that the plaintiff was bound by the covenant for renewal, but that the lease in favour of Mr. Ross was an improvident alienation, which was inconsistent with the interests of the temple, and which must, therefore, be set aside under the provisions of section 38 of the Buddhist Temporalities Ordinance, 1905.[1] The District Judge held also that the defendants were entitled to reasonable compensation from the plaintiff for the improvements which had been effected on the lands. He made no order as to costs until the question of the

[1] *No. 8 of 1905.*

amount of that compensation had been determined. The defendants appeal against this judgment in so far as the setting aside of the lease is concerned, and the plaintiff has filed a notice of objection to that part of it which affirms the right of the defendants to compensation.

I entirely agree with the learned District Judge that the plaintiff is bound by the terms of the lease in so far as these would have been binding upon the original lessor. Section 19 of the Buddhist Temporalities Ordinance, 1905,[1] in effect enables the trustee for the time being of any temple to enforce rights of action arising out of contracts between a third party and his predecessor in office. It would be inequitable if with this right there should not be associated a correlative liability under such contracts. Moreover, section 20 of the Ordinance, under which all the immovable property of a temple vests in its trustee, expressly makes that vesting " subject to any leases and other tenancies, charges, and incumbrances affecting " the property. In English law a covenant for the renewal of a lease runs with the land, and in this Colony it may, I think, fairly be held to come within the scope of the expression " charge " or " incumbrance," as used in section 38 of the Ordinance of 1905.[1]

The next question that has to be determined is whether or not a case for the setting aside of the lease under section 38 of the Buddhist Temporalities Ordinance, 1905,[1] has been made out. In addition to the terms above mentioned, the lease provided that at the end of any period of three years the lessee should be entitled to cancel it on giving six months' notice of his intention to do so, and no remedy for non-cultivation was reserved to the lessor. The second of the issues is no doubt wide enough in its language to enable the plaintiff to contend that these circumstances, as well as the inadequate consideration and the length of the term of the renewal, made the lease an improvident one. I was in some doubt, however, during the argument as to whether either side had interpreted it in that wide sense at the trial. But I have come to the conclusion that the defendants have suffered no prejudice in this matter. Equally with the plaintiff, I think that they intended that the District Judge should consider the question of the alleged improvidence of the lease in the light, not merely of the *vivâ voce* and other documentary evidence, but of its provisions as a whole. The District Judge has, in fact, dealt with it in this way, and the petition of appeal does not contain any complaint against his judgment on that ground. The evidence shows that there was nothing unreasonable in the low rent at which the lands were originally leased, and in view of the decision of Clarence and Dias JJ. in *Girigama Dewa Nilame v. Henaya*,[2] I do not think that exception could fairly be taken to the original term of thirty years. But I agree with the

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[2] *(1891) 2 C. L. R. 42.*

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learned District Judge that the conditions entitling the lessee to determine the lease on the expiry of any period of three years on giving six months' notice to the lessor, and securing to the latter no right to damages from the former if he failed to cultivate the land, are not such as any prudent owner of property would have, or any trustee of such property ought to have, entered into. This is an observation that arises on a mere perusal of the terms of the lease. If there is anything in the nature of temple lands in general, or of the lands here in suit in particular, which is capable of throwing a different light on the position of matters, it was the duty of the defendants to have proved the fact affirmatively at the trial. This they have not done. These objections to the lease become all the more formidable when the question for decision is not whether it should originally have been granted, but whether it should be extended on the same conditions for another period of thirty years. It appears to me that, even if we take as our standpoint the state of matters at the time when the lease was granted, it was an improvident alienation, and inconsistent with the interests of the temple.

In my opinion, however, section 38 of the Buddhist Temporalities Ordinance, 1905,[1] requires us to look at the question of the consistency of a lease of lands belonging to a temple with the interest of the temple from the standpoint not only, or chiefly, of the past, but of the present. It provides that "whenever it is proved to the satisfaction of a competent Court that any property of any temple has heretofore been leased (*a*) for a longer term of years than is consistent with the interests of such temple ; or (*b*) on terms showing an improvident alienation ; or (*c*) for clearly inadequate consideration," such lease shall be set aside. The language of this enactment indicates that the intention of the Legislature was to enable the Courts to inquire into the present consistency of leases of temple lands existing at the time of the passing of the Ordinance with the interests of the temple to which such lands belong. This interpretation of the section is, I think, supported both by the fact that it goes on to secure to a lessee whose lease is set aside an advantage that he would not enjoy under the common law, namely, a right to compensation for improvements, and also by the provision in section 27 for the sanction of the District Committee, and in certain cases of the Court, being obtained as a condition precedent to the exercise by trustees of temples of their leasing powers. Section 27 appears to me to deal only with leases entered into after the commencement of the Buddhist Temporalities Ordinance, 1905.[1] It has no application to the present case. The covenant for renewal is practically an agreement for a lease entered into long before the passing of the Ordinance of 1905. The plaintiff has himself regarded it in that light. He has treated it as an existing

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lease, and has come into Court to have it set aside under the provisions of section 38. It is, of course, obvious that the power conferred upon the Court by that section must be exercised with caution, and with due regard to the position of the lessee as well as of the lessor. Each case must be disposed of on its own merits. The mere fact that, at the date of an inquiry held under section 38, temple property could be dealt with on more advantageous terms would be no reason for the interference of the Court. To apply the law in that way would be as injurious to temple property itself as to the persons who had been unfortunate enough to have anything to do with it. But where, in view of the whole circumstances of the case, the Court is satisfied that the continued existence of any lease pending at the date when the Buddhist Temporalities Ordinance, 1905,[1] came into force is flagrantly in conflict with the vital and elementary interests of the temple, it is bound to set that lease aside. It may be well to note in passing that no point arises on the provision in the original lease that the new lease shall contain the same covenant as the old one. It is well settled (see *18 Halsbury 463, s. 935*, and cases there cited) that a condition of this kind does not entitle the lessee to have a covenant for renewal perpetually renewed. But, if we are to take account of the present as well as the past in interpreting section 38 of the Ordinance, the actual rent which would be reserved in the renewed lease is wholly inadequate, and the extension of the lease, at that rent and on the terms and conditions above noted, for a further period of thirty years, is so inconsistent with the best interests of the temple as to justify the interference of the Court in compliance with the provisions of section 38 of the Ordinance.[1] It had been held by the Courts anterior to the Buddhist Temporalities legislation, *cp. Udanwita Loku Banda v. Giragama Ratemahatmaya*,[2] that the Basnayake Nilames of temples had no power to grant long leases of temple lands, and any person accepting a lease from any of these ecclesiastical officers must be presumed to have been aware of the fact that there was in law a difference between the position of his lessor and that of any ordinary private landowner. On these grounds I think that the learned District Judge has come to a right conclusion, and I would dismiss the appeal.

It is only necessary to add a word as to the plaintiff's cross notice of objection on the question of compensation. The objection is founded on the following clause in the lease: "And the said lessee for himself and his aforewritten hereby bind themselves peaceably and quietly to have, surrender, and yield up the said premises hereby demised unto the said lessor and his aforewritten at the end or other sooner determination of the term hereby granted or to be granted, together with all buildings and other erections and plantations, thereon, and it is hereby covenanted and agreed by and

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[2] *(1875) Ram. 1872–76, 185.*

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between the said lessee and the said lessor that he the said lessee and his aforewritten shall not have the right to demand of the said lessor and his aforewritten any compensation for any such building and plantations or other improvements to the said premises, and that he the said lessor or his aforewritten shall not be entitled to have or receive of or from the said lessee or his aforewritten any compensation or allowance for the non-cultivation or non-improvement of the said premises hereby demised or for any other act whatsoever on the part of the said lessee."

This clause excludes any right on the part of the original lessee or his privies in interest to claim any compensation from the lessor on the determination of the lease by effluxion of time, or, as in the case of non-payment of rent, through the action of the Court. I entirely agree, however, with the learned District Judge that it cannot in any way affect the defendants' right to compensation under section 38 of the Buddhist Temporalities Ordinance, 1905.[1] It contemplates the cessation of the lease only by one of the ordinary incidents of a tenancy. Much stronger language would be necessary to deprive the defendants of a statutory right to compensation for improvements conferred by subsequent legislation and embodied in the very section on which the plaintiff has elected to come into Court. The cross notice of objection to the judgment under appeal must be dismissed. Although the argument of the question of compensation occupied a comparatively short period of time, it is one of considerable importance, and I agree with my brother De Sampayo that the fairest order to make as to costs is that both the appeal and the cross notice of objection should be dismissed, without costs.

DE SAMPAYO J.—

By deed of lease No. 583, dated November 18, 1886, Sonuthara Nayaka Unnanse, who was the chief priest and incumbent of Aluvihare, leased a number of lands owned by the temple to Mr. Alexander Ross for a period of thirty years, with a covenant for renewal of the lease for another period of thirty years at the option of the lessee. The lease was assigned by the lessee to the defendant company. The original period of thirty years was to expire in November, 1916, and the defendant company in exercise of the option called for a renewal lease from the plaintiff, who is a trustee of the temple under the Buddhist Temporalities Ordinance, which was enacted since the date of the lease. Thereupon the plaintiff brought this action praying that the lease be set aside so far as the right to demand an extension for thirty years was concerned, on the ground that in that respect the terms of the lease were inconsistent with the interests of the temple, and showed an improvident alienation for inadequate consideration. The defendant company took

[1] *No. 8 of 1905.*

issue on these points, and in the alternative claimed Rs. 45,000 as compensation for improvements. The District Judge allowed the claim of the plaintiff, and also decided the question of compensation in favour of the defendant company, but reserved the determination of the amount, and the defendant company have appealed.

At the time of the lease the lands were jungle or chena, and have since been planted with rubber, and form part of Nikakotuwe estate belonging to the defendant company. There is no express stipulation that the lessee should plant or otherwise improve the lands, and it is argued for the plaintiff that even if it was a planting lease the incumbent of the temple had no right to grant such a long lease, and that for that reason alone the covenant for a renewal cannot be enforced. The question of long leases by such trustees as Basnayake Nilames of dewales and ecclesiastical incumbents of temples has been considered in several cases. See *Loku Banda v. Giragama* [1] and *Giragama v. Henaya.*[2] The first of these cases discloses the fact that under the Kandyan Government a lease of temple or dewale land could not be granted for more than one or two years, and a lease of some boutiques for thirty years was set aside as being for too long a period and not binding on the successor of the incumbent who had granted it. The Court did not, however, lay down a hard and fast rule as to the proper period, and added, "Every case will greatly depend on its own circumstances and the urgency of the need for a departure from ordinary usage, the guiding principle being that a Basnayake Nilame should execute his trust consistently with the interest of the dewale, as one terminating with himself, hampering his successor as little as possible." This principle was adopted in the second of the above cases, and a building lease for thirty-five years was upheld as being in the circumstances not unreasonable. In the present instance, if the lease was, as a matter of fact, a planting lease, as appears to be the case, a period of thirty years cannot be considered too long. There may, however, be a question whether an extension for another thirty years can be justified or not. There was no specific issue on that point, nor was the evidence particularly directed to it, but I think it is unnecessary to consider it further, because the whole case practically turns upon the effect of the Buddhist Temporalities Ordinance.

It may be convenient here to dispose of another objection raised on behalf of the plaintiff. The covenant in question is such that the lessee has the right to demand a renewal for thirty years, but the lessor cannot compel him to take one, and it is accordingly contended that the convenant cannot be enforced for want of mutuality. There is no doubt that want of mutuality is a good ground for refusing specific performance of a contract, but some qualification, or rather a right application of the doctrine, appears to be necessary. *Fry on Specific Performance, s. 465 (3rd ed., p. 218)*, discusses with

[1] *Ram. (1875) 185.*

[2] *2 C. L. R. 42.*

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reference to authorities the very case of a lessor covenanting to renew on the request of his lessee, and says that it is a case merely of conditional contract, and that, when the condition is fulfilled by a request to renew, the contract becomes absolute and mutual, and capable of enforcement by either party. This exactly fits the circumstances of this case, because the defendant company did, before the action, make a request to renew, and the plaintiff is, therefore, unable in this case to stand on the ground of want of mutuality alone. Nevertheless I think the nature of the covenant, and the effect of it, if no request to renew had been made, should be taken into account when the further question, whether the lease as a whole is improvident comes to be considered.

The rent stipulated in the lease is Re. 1.50 per acre per annum for the first three years, and Rs. 2 per acre per annum for the rest of the term. It is well proved on behalf of the defendant company that this was a reasonable rent to be paid for a planting lease at the time when the lease was granted, but the District Judge finds, and there is no doubt, that it is wholly inadequate at the present time, and he has accordingly held that the covenant to renew, which is sought to be enforced now, amounts to an improvident alienation. The chief question involved in this appeal is whether the District Judge's order setting aside the lease on this ground is good in law. The general rule, of course, is that the issue of fairness must be considered as at the date of the contract. But section 38 of the Buddhist Temporalities Ordinance, 1905, appears to me intended to empower the Court to revise leases which may be found at the present time to be improvident or for an inadequate consideration. Before considering that section more particularly, I should like to point out that the Ordinance contains restrictive provisions as regards the periods for which temple lands may be leased. Section 27 prohibits leases for any time exceeding fifty years, and requires the trustee, or where there is no trustee, the incumbent, to obtain the sanction of the District Court whenever he may be desirous of granting a lease for a period of more than ten years. If the present lease had been granted after the coming into operation of the Buddhist Temporalities Ordinance, the covenant for renewal would undoubtedly have been *ultra vires*, and the Court would not decree specified performance. *Bellringer v. Balgrave.*[1] The policy of the Ordinance clearly is, that the Court shall from time to time see that the leases proposed to be granted are in the interests of the temple. In pursuance of the same policy, section 38 provides that, where any property of the temple has prior to the Ordinance been leased (1) for a longer term than is consistent with the interests of such temple, or (2) on terms showing an improvident alienation, or (3) for clearly inadequate consideration, the Court shall set aside such lease. If this is so in the case of a subsisting lease, there is still greater reason

[1] *De G. & S. 63.*

for the Court refusing to recognize and enforce a covenant to renew it. Even on the assumption that it was competent for the incumbent of the temple in 1886 to enter into the covenant, it does not follow that his successor should since the enactment of the Ordinance be compelled to perform it, for the Court will not generally decree specific performance, where to do so would be to compel a person to do what he is not now lawfully competent to do, even though at the time of the contract the act might have been lawful. *The Laws of England, vol. 27, pp. 38, 39.* The District Judge, in exercising his power under section 38 of the Ordinance, was content to hold that the lease was an improvident alienation of temple property, as it was for an inadequate consideration. But there are other features in the lease which, even apart from the length of the period, appear likewise to make it improvident, such as the lessee's power to terminate the lease at any time by giving six months' notice, and his express exemption from liability for " non-cultivation or non-improvement of the said premises hereby demised, or for any other act whatsoever on the part of the said lease." In my opinion the order of the District Judge is right in respect of both law and fact.

The plaintiff has also given a cross notice of objection to the part of the order which decides the question of compensation in favour of the defendant company. The lease does, indeed, provide that there shall be no claim for compensation for improvements " at the end of or other sooner determination of the term hereby granted or to be granted," but the determination of the term by the Court setting aside the lease at the suit of the plaintiff is not a determination contemplated by the lease, and I think that the defendant company are entitled to compensation.

I would dismiss both the appeal and the cross notice, and would give no costs of appeal to either side.

Appeal dismissed.