1907.
December 16.

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

APPUHAMY *et al.* *v.* MOHAMMADO LEBBE *et al.*

D. C., Kegalla, 1,918.

Vihare, lands belonging to—Non-performance of services—Prescription—Grant of land—Reservation of right of revocation—Validity—Prescription Ordinance, No. 4 of 1870, s. 24, and Ordinance No. 22 of 1871, s. 6.

Where no services have been rendered by the Nilakarayas of a Nindagama, and no commuted dues have been paid for ten years, the right to claim services or commuted dues is lost for ever.

Quære.—Whether a clause giving the donor absolute power to revoke a gift at any time for any purpose is valid?

APPEAL by the plaintiffs from a judgment of the District Judge of Kegalla. The facts sufficiently appear in the judgment of the Chief Justice.

A. St. V. Jayewardene, for the plaintiffs, appellants.

Sampayo, K.C., for the defendants, respondents.

Cur. adv. vult.

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The first plaintiff sues as trustee, and the second sues as the incumbent of the Dippitiye Vihare, alleging that the land described in the plaint is the property of the vihare; that the defendants are tenants of the land, and have failed to offer to the vihare the customary dues; and that the terms of the tenancy render them liable, on the non-performance of the services agreed on, to yield up to the vihare the occupation of the land on payment to them of Rs. 60, and they claim a declaration that the land is the property of the vihare, and damages; and that on payment to the defendants by the plaintiffs of Rs. 60, the defendants be ordered to give up possession of the land.

The defendants denied that the land is the property of the vihare, or that they ever performed *rajakariya*, or that they are tenants of the vihare. They set up a title through Andris Naide, who, they said, was entitled to the land. They also set up title by prescription; and further said that the plaintiffs' claim to *rajakariya* is barred by section 24 of Ordinance No. 4 of 1870 and section 6 of Ordinance No. 22 of 1871, as the defendants performed no *rajakariya* for ten years and upwards. They also said that the plaintiffs cannot maintain the action because of non-compliance with the Proclamation of September 18, 1819.

Banda Lekam-mahatmaya, who was admitted by both parties to be the owner of the land, by deed of August 26, 1867, granted it to Andris Naide, to be held by him on performance of *rajakariya* services to the vihare; and it was thereby agreed (1) that Andris Naide and his heirs should possess the land, performing the service of giving yearly two pingos of pots and pans to the incumbent of the

vihare, and other usual *rajakariya* services; (2) that if A. Naide or his heirs should fail to render the services, Banda or the incumbent " shall only recover the services in due course of law from him or his heirs and this agreement shall never be cancelled or the land changed;" (3) that as Andris has spent £6 on the vihare and has improved it and has performed *rajakariya* for a long time and possessed the land without dispute, the agreement shall not be cancelled; and (4) that " if I, the said Banda Lekam-mahatmaya, or my heirs, or the incumbent of the vihare, require to cancel this agreement for the non-performance of *rajakariya* services as agreed to before by the said Andris Naide or his heirs, or for any other purposes, I, the said Banda Lekam-mahatmaya, or the incumbent, shall pay to the said Andris Naide or his heirs the £6 spent on account of the vihare and for other trouble, and thereafter this agreement can be cancelled and the land taken over, otherwise it shall not be cancelled."

Andris Naide, by deed of January 6, 1887, reciting that he is owner under the above-mentioned deed, rendering *rajakariya* services, sold and transferred the land to Sego Madar Udayar, subject to the delivery of the two pingos of pots and pans. And by subsequent deeds Sego Madar's title became vested in the defendants.

The purchaser from Andris Naide and his successors in title were all Moslems; and the defendants denied that any of them had ever rendered any services to the vihare. The District Judge found—and the correctness of the finding is not really disputed—that no services were rendered in respect of the land after the sale by Andris Naide in 1887. And he held that by section 24 of the Service Tenures Ordinance, No. 4 of 1870, the right to the services was lost for ever, because no services had been rendered for more than ten years.

The appellants contend that that ruling is wrong, because the defendants are not paraveny tenants, and therefore section 24 does not apply. They contend that under the deed of 1867 the defendants are only tenants-at-will.

The clauses which I have numbered (2) and (3) in the deed of 1867 seem to be inconsistent with clause (4), at least so far as we can judge from the translation. But, doubtless, they did not appear to the parties to the deed to be inconsistent. The District Judge, who is a Sinhalese, says: " I read the original to mean that cancellation is possible only when the recovery of the services by the course of law is impossible, " and that " so long as the tenant continues able and willing to perform services the tenancy cannot be determined, " *i.e.*, it is not a tenancy at will. Whatever may be the true explanation of clause (4), I think that clauses (1), (2), and (3) establish that the tenant was not a tenant-at-will, and that under this deed he was a paraveny tenant, holding in perpetuity, although his tenancy was possibly liable to be determined under the ambiguous provisions of clause (4). In my opinion, therefore, the right to claim the services was lost by reason of their not having been rendered for ten years.

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The appellants then contend that clause (4) gives them a right to re-take possession at any time on payment of £6. The Chief Interpreter to this Court, Mr. de Silva, has compared for me the original with the two translations filed with the record. He says that he finds the two translations to be substantially correct, and that the clauses are contradictory; that the earlier clauses say that the agreement shall not be cancelled for non-performance of the services, but clause (4) says that, if the non-performance of the services or any other cause necessitates the cancellation, it shall be effected only on payment of £6, or Rs. 60, to the grantee as compensation.

The District Judge held that the defendants had acquired a title by prescription, having been in possession of the land without performance of the services or any acknowledgment of the plaintiffs' title since 1887. He does not refer to clause (4) of the deed of 1867, although one of the issues agreed upon was—"Are the defendants liable to be ejected on payment to them of Rs. 60?"

If clause (4) was intended to give an absolute power of revocation at any time "for any purpose," the question must be answered: What is the effect of such a proviso? Can such a limitation be attached to a grant of land in perpetuity? Is there no limit to the time within which the grant can be revoked? We were not referred to any authority on this question, and I have not been able to find any directly in point. But I cannot think that it is lawful to attach such a condition to the land in perpetuity. If any effect is to be given to it, I think that time must begin to run against the grantor from the date of the grant. It is to be observed, however, that clause (4) does not expressly give a power to revoke, but only declares that if the grant is revoked, the grantor shall pay a certain sum to the grantee; whereas the earlier clauses expressly declare that it shall never be revoked. In my opinion, as the two declarations are inconsistent, and as the first is quite clear and the second is doubtful, we must give effect to the first, and hold that there is no absolute unfettered power of revocation at any time.

In my opinion, therefore, the plaintiffs' claim fails, and the appeal should be dismissed with costs.

WENDT J.—

I agree that the appeal fails. In particular I wish to say that I share the Chief Justice's doubt as to the validity of the reservation by the grantor of land of a power to revoke the grant at any time. If the reservation is valid at all, then, considering that the power might be exercised the day after the grant, limitation must be held to run from the date of the instrument, so that after ten years the grantee's title would become indefeasible.

Appeal dismissed.