

1930

Present : Dalton J. and Maartensz A.J.

SITTY NAIMA v. GANY BAWA.

83—*D. C. Kandy*, 34,500.

Fidei commissum—*Clause prohibiting lease for more than five years—No penalty—Prohibition ineffective—Rights of fideicommissary heirs.*

Where a fideicommissary gift provided that the fiduciary should not lease the property for a period exceeding five years.—

Held, that such a prohibition would be void in the absence of a penalty to take effect in the event of the prohibition being disregarded.

Where, in such a case, a lease is granted by the fiduciary, it does not postpone the right which the fideicommissary heirs have to possession immediately on the death of fiduciary.

APPEAL from a judgment of the District Judge of Kandy.

This was an action for declaration of title to a half share of certain premises which belonged to one Assena Lebbe, who gifted them by deed No. 3,943 dated December 17, 1895, to Mohideen Meera Lebbe and Hamidu Lebbe subject to a *fidei commissum*. The donees leased the premises by deed No. 9,026 dated January 9, 1920, for seven years, commencing from February 1, 1923, to the first added defendant. Hamidu Lebbe died on April 13, 1923. The plaintiffs are his minor children who are the fideicommissary heirs under the deed of gift. It was contended on behalf of the added defendant that, as the fideicommissary gift empowered the donees to lease the premises for a period not exceeding five years, he was entitled to possession. The learned District Judge rejected the contention and gave judgment for the plaintiff.

A. E. Keuneman, for first added defendant, appellant.

Weerasooria, for plaintiffs, respondent.

August 6, 1930. MAARTENSZ A.J.—

This is an action for declaration of title to a half share for premises bearing

assessment Nos. 232 and 233 situated in Colombo street, Kandy, and possession and damages. The prayer for ejectment was abandoned at the trial.

The premises admittedly belonged to one Assen Lebbe, who gifted them by deed No. 3,943 dated December 17, 1895, to Mohideen Meera Lebbe and Hamidu Lebbe, subject to, as it was admitted, a *fidei commissum*.

The donees possessed the premises by leasing them from time to time. The last demise was by deed No. 9,026 dated January 9, 1920 (D 1), for seven years commencing from February 1, 1923, to the first added defendant, who was the lessee under the previous deeds too.

Hamidu Lebbe, the second-named donee, died on April 13, 1925. His minor children are the first four plaintiffs. They are fideicommissary heirs under the deed of gift.

The first added defendant contended that he was entitled to possession in spite of the death of Hamidu Lebbe as the deed of gift empowered the fiduciary donees to lease the premises for a period not exceeding five years. The learned District Judge rejected this contention, and the first added defendant appeals from the decree against him.

The learned District Judge held that the lease was bad as it was for a period exceeding five years. He also held that the lease was effective only for two years from the day it began to run, that is to say, the term of the demise must be taken to have commenced to run from the date of the execution of the deed of lease and to be limited to five years. I am unable to follow his reasoning for either of these conclusions. No doubt the deed creating the *fidei commissum* prohibits a lease for a period of more than five years, but, in the absence of a penalty or forfeiture being imposed in the event of a lease exceeding the prescribed limit, the provision is, as Bertram C.J. observed in the case of *Saidu v. Samidu*,¹ ineffective and nothing

¹ (1922) 23 N. L. R. 506.

but a *brutum fulmen*. As regards the second point, if Hamidu had survived the lease would have been good for seven years from February 1, 1923.

The real question in the case is whether the reversionary heirs are bound by the lease because of the provision in the deed of gift that the donees "shall not lease for a period of more than five years the lands donated".

A clause of this nature to be effective must be followed by a penalty or forfeiture in the event of a lease exceeding the prescribed period. In the absence of such penalty or forfeiture the limitation is of no effect. And I do not think that the limitation can be construed into an enlargement of the rights of the fiduciary heir so as to bind the fideicommissary heirs after the death of the donee.

A similar clause where the period is limited to ten years was considered in the case of *Abeyesinghe v. Perera et al*¹. But in that case the decision turned on a clause to the effect that after the donee's death his legitimate children shall be entitled to the same and possess or dispose of the same according to their will and pleasure. I do not think, however, that the absence of such a clause in the deed of gift under consideration can affect the result, for, unless possession has been postponed by the terms of the deed or will, a fideicommissary heir succeeds to the *fiduciarius* on the latter's death. No particular words are necessary to create that result.

I am therefore of opinion that on the death of Hamidu Lebbe the first added defendant's rights under the lease ceased.

The issues were, at the date the trial took place, January 9, 1930, but for the question of costs purely academic ones, as a period of five years had already elapsed from the date the term of the lease was to run.

I dismiss the appeal with costs.

DALTON J.—I agree.

Appeal dismissed.

¹ (1915) 18 N. L. R. 222.