

1943

Present: Moseley A.C.J. and Jayetileke J.

EXECUTOR OF LAST WILL OF RAMBUKWELLA
SIDDHARTHA, Appellant, and SUMANA THERO,
Respondent.

165—D. C. Colombo 31/X.

Buddhist Temporalities Ordinance (Cap. 222), s. 23—Pudgalika property—Disposition by Will—What is meant by alienation during lifetime—Property deemed to be property of temple—Right of executor to resort to such property.

The disposition by last will of *pudgalika* property by a bhikku does not amount to an alienation during the lifetime of the deceased within the meaning of section 23 of the Buddhist Temporalities Ordinance.

The provision in the section that such property not so alienated shall be deemed to be the property of the temple excludes the right of the executor to resort to it for purposes of administration.

THE plaintiff, the trustee of the Lankatilake Vihare, sued the defendant, appellant claiming that he is entitled to the *pudgalika* property of one Rambukwella Siddhartha Thero, who died on March 11, 1941. The deceased made a last will by which he appointed the defendant, his executor, and disposed of all his *pudgalika* property. The question that arose for decision was whether or not the disposition amounted to an alienation during the lifetime of the deceased within the meaning of section 23 of the Buddhist Temporalities Ordinance.

The learned District Judge answered the question in the negative.

H. V. Perera, K.C. (with him D. W. Fernando and S. W. Jayasuria), for first defendant, appellant.—This appeal involves the interpretation of section 23 of the Buddhist Temporalities Ordinance (Cap. 222). The question is whether a disposition of the *pudgalika* property made by a Buddhist bhikku by his last will amounts to an “alienation during his lifetime” within the meaning of section 23. There are authorities to show that where a person makes a last will it is an “alienation” taking effect on his death. What the section contemplates is an act of the bhikku. That can be done only in his lifetime, though the effect of his act, as distinguished from the act itself, may take place at a later stage. See *Holmes v. Holmes*¹; *Ashburnham v. Bradshaw*². By section 23 *pudgalika* property is deemed to be temple property subject to certain exceptions. If the bhikku indicates that the property should belong to another then the presumption made by the section fails.

[JAYETILEKE J.—According to Sande: *Restraints on Alienation*, an alienation takes place when *dominium* is transferred.]

What is contemplated by section 23 is the “act” and not the “effect” of the “act”. The question is, has the title passed to a third person during the lifetime of the bhikku?

L. A. Rajapakse (with him G. P. J. Kurukulasuriya and V. F. Guneratne), for plaintiff, respondent.—If the plain meaning of section 23

¹ 1 *Russ & Milne* 660.

² 2 *Ak.* 36.

is considered the appellant's argument cannot be sustained. "Alienation" is making one's thing another man's. If the bhikku had "alienated" the property by last will could a creditor seize the property in execution? He could as he has a seizable interest. There is a distinction between a testamentary disposition—always ambulatory and revocable—and an alienation *inter vivos*. A testamentary disposition is not an alienation but only a wish or a desire as to the manner in which the property should devolve after death. Nobody acquires a right to property disposed of by last will till the death of the testator. Further, the testator being a Buddhist bhikku the property is *presumed* by the section to be temple property unless it is strictly proved that he has alienated it during his lifetime. A good test as to whether the property has been alienated is to ascertain the ability of a creditor to seize that property in execution. As regards the meaning of alienation see *Bell: South African Legal Dictionary*, p. 35; *Stroud: Legal Dictionary*, p. 65. As regards the effect of dispositions of property by last will see *Bell*, p. 592; *1 Maasdorp 114*; *Stroud*, p. 2249; *24 Halsbury (Hailsham)* p. 6; *4 Burge (1838 ed.)*, p. 442; *51 Law Times Repts.* 116. The scheme of the Ordinance is to conserve temple property for the temple and this must be considered in interpreting section 23.

On the question of possession, which is the subject of the cross-objections in the appeal, it is conceded that where a person makes a last will and there is a good disposition, the title vests on the heirs and legatees, subject to the right of the executor or administrator to follow the property for certain purposes. But in this case there is a positive enactment declaring property not alienated to belong to a temple. The property is not part of the estate which passes by will. The executor cannot ask for possession of property not forming part of the estate. That part of the decree relating to possession should therefore be deleted.

H. V. Perera, K.C., in reply.—A will is not a mere expression of a wish; it is an alienation taking effect on death. Unless there is a positive act of revocation it is an alienation—*Steyn on Wills*, p. 249; *Sande on Restraints*; 3—3—21.

On the right of the executor to have recourse to property for payment of debts, &c., see *The Public Trustee v. Karunaratne*¹.

Cur. adv. vult.

June 21, 1943. MOSELEY A.C.J.—

The plaintiff-respondent who is the trustee of the Lankatilaka Vihare sued the appellant and another, claiming that he in his capacity as trustee is entitled to the *pudgalika* property of one Rambukwella Siddhartha Thero, who died on March 11, 1941. The deceased had made a last will whereby he appointed the appellant executor thereof, and disposed of all his *pudgalika* property. The question that arose for decision was whether or not that disposition amounted to an alienation during the lifetime of the deceased within the meaning of section 23 of the Buddhist Temporalities Ordinance (Cap. 222). The learned District Judge answered that question in the negative.

¹ (1938) 40 N. L. R. 429.

The section is as follows:—

“23. All *pudgalika* property that is acquired by any individual bhikku for his exclusive personal use, shall, if not alienated by such bhikku during his lifetime, be deemed to be the property of the temple to which such bhikku belonged unless such property had been inherited by such bhikku.”

It is common ground that the property in question is *pudgalika*.

It is argued by Counsel for the appellant that what the Legislature contemplates is an act of a bhikku during his lifetime the effect of which may take place at a later date, not necessarily during that lifetime; that the testator in this case had done everything that was necessary, or of which he was capable, to pass the property; and that all that was necessary to complete the transaction was the death of the testator. There would appear however another formality with which compliance is necessary before the property passes, and that is the granting of probate which, for a variety of reasons, may be refused. Moreover, as Counsel for the respondent pointed out it was open to the testator at any time before his death to revoke the disposition. Or again, the property was available for execution in which case there might be a total failure. It could not, I think, be contended that any rights were conferred upon the devisees at the time of making the will. Counsel for the appellant cited a number of English authorities, none of which is helpful in regard to the real point in this case, that is, the meaning of the expression “alienation during lifetime”. In *Holmes v. Holmes*¹, no more was decided than that the date of a will may be considered in arriving at the intention of a testator where doubt existed, as it did in that case, as to the currency in which a legacy should be paid. Similarly in *Ashburnham v. Bradshaw*², reference to the date of a will was made in order to ascertain whether it was made before the passing of the new statute of Mortmain which would have rendered invalid a bequest had it been made subsequently to the passing of the act. From *Doe d. Stevenson v. Glover*³, however, the following observation, which hardly helps the case of the appellant, is gleaned:—“A will is ambulatory during the life of the person making it, and does not operate as a disposing or putting away of any estate, until after the death of the person making it;” None of these authorities, and this applies also to *Holmes v. Godson*⁴, is of assistance in arriving at the meaning of “alienation”. Counsel for the respondent was content to rely upon what he termed, and I think properly, the plain meaning of the word. It is defined in Stroud as “to make a thing another man’s; or to alter or put the possession of lands, or other things, from one man to another”. In my view a disposition by will for the reasons which I have already indicated does not have the effect set out in that definition. For these reasons I am of opinion that the learned District Judge arrived at the right conclusion on this point.

Arising out of the judgment, however, there is another point for determination. It was held by the Judge that the first defendant was

¹ 1 *Russ & M.* 660.

² 2 *Auk.* 36.

³ 14 (*L.J.*) (*N.S.*) *Com. Law* 169.

⁴ 8 *De G. M. & G.* 152.

entitled to follow the property into the hands of the plaintiff for the purposes of administration, and the plaintiff's right to the property is declared in the decree to be subject to the first defendant's right to have recourse to the property for the purposes of paying "the funeral expenses, the debts, the testamentary expenses and estate duty". In regard to this point cross-objections have been filed by the respondent. In this respect I think that the respondent must succeed. The expression "shall be deemed to be the property of the temple" seems to me to leave no room, on the death of a bhikku, for intrusion by his executors. Mr. Perera pointed out how such a construction would, in certain cases, operate harshly upon a bhikku's creditors. There is force in the contention, but that appears to be a matter for the consideration of the Legislature.

The appeal is dismissed with costs, subject to the deletion from the decree of that part reserving to the first defendant the right to have recourse to the said *pudgalika* property for the purposes of paying the funeral expenses, the debts, the testamentary expenses and estate duty. In regard to the estate duty, in this case the question may not arise. In any case, it is a matter which does not at the moment call for a decision by us.

JAYETILEKE J.— I agree.

Appeal dismissed.
Cross objection allowed
