1922.

Present : Bertram C.J. and Schneider J.

SAIDU *v.* SAMIDU.

401—D. C. Galle, 18,613.

Deed of donation creating a fidei commissum*—Is it valid under the Muhammadan law ?—Prohibition against lease for over two years—No penalty stated—*Brutum fulmen*—Right of lessor to sue trespasser in ejectment.*

A deed of gift created a *fidei commissum* and contained a prohibition against leasing for more than two years. There was no penalty imposed in the event of the lease exceeding the prescribed limit. M, a fiduciary, leased it for four years, commencing from 1920, to defendant, but M died in 1919. Thereafter the child of M and the widow of M leased the property for six years to the plaintiff.

Held, that the lease to defendant, which was to take effect after the death of M, was not valid, and that the lease to plaintiff was valid, though it exceeded two years.

The deed of donation was as follows :—

No. 14,060.

Know all men who are concerned by these presents :—That I, Isa Umma, wife of Cader Kuttyna Kudas Sarai Lebbe Marikkar of Galupiyadda, within the Four Gravets of Galle, do hereby declare that as I am willing to grant something out of my immovable property unto my sons Sarai Lebbe Marikkar Mahammado and Sarai Lebbe Marikar Mahammado Abdul Cader, both of Galupiyadda, who have been nourishing me with humble obedience for their future welfare, therefore I do hereby grant over as a gift the following premises held and possessed by me by right of purchase under and by virtue of a registered deed No. 2,568, attested by Porolis Charles Perera Gunatilaka, Notary, on February 14, 1887, to wit :—

. . . . . .

Therefore in future no claim, demand, or dispute shall be made or cause to be made either by me, the said donor, or by any of the heirs, executors, administrators, and assigns of my estate ; and the said two donees, Sarai Lebbe Marikkar Mahammado and Sarai Lebbe Marikkar Mahammado Abdul Cader, their heirs, executors, administrators, and assigns of their estates are hereby authorized to have and to hold from this day the said premises hereby donated to possess, commencing from July 27, 1894, the said premises shall be possessed accordingly,

but shall not sell, mortgage, or do or commit any act whatsoever whereby the same is, can, shall, or may be alienated, and that at one time they shall not be leased out for a term over two years. That should there come a time when there shall be no Sarai Lebbe Marikkar Mahammado, Sarai Lebbe Marikkar Mahammado Abdul Cader, and their children, grandchildren, or descendants, then, at such time, the said premises shall be vested in the Kottuwal Palliya *alias* Mahapalliya of our Muhammadan religion, situate at Talapitiya, to take the produce thereof.

Thus making these special orders this deed of gift was caused to be drawn, and I, the said Isa Umma, have set my hand and seal to three of the same tenor as these presents on this 1st day of October, 1893.

And I, Sarai Lebbe Marikkar Mahammado, do hereby declare that I have accepted this gift granted to me and to my brother who is under age with thanks to the donor promising to possess the same in equal shares.

In witness whereof, &c. . . . .

THE facts appear from the judgment.

Soertsz, for the appellant.

Abdul Cader, for the respondent.

March 28, 1922. BERTRAM C.J.—

This appeal relates to a document executed by one Isa Umma on October 1, 1893, and the action is concerned with the claims of rival lessees claiming under that document. There seems no question that it was the intention of the person executing that document to create a *fidei commissum*. It was contended in the Court below that as the parties to the transaction were Muhammadans, and the document in the initial part of it was in the form of a deed of gift, the matter was governed by the Muhammadan law, and that, consequently, any attempt to impose a restriction on alienation upon the donees was invalid, and that the document, therefore, must be treated simply as a deed of gift.

Mr. Abdul Cader, however, in this Court quite properly admitted that if the intention of the document was to create a *fidei commissum*, it would be governed not by Muhammadan law, but by Roman-Dutch law. No objection has been taken either in this Court or in the Court below to the effectiveness of the *fidei commissum* which the donor thus sought to create. We need not, therefore, discuss the question here, and it may be taken that the document is an effective *fidei commissum*.

Now, as I have said, both the parties claim under leases, one from Mahammado, one of the fiduciaries; the other from his child, the widow of Mahammado, joining as a party and with the sanction of the Court. As against the defendant, it is urged that the lease infringes one of the provisions of the *fidei commissum*. The *fidei commissum* contains a prohibition against leasing for more than two years. Mahammado, the fiduciary in question, purported to execute a lease for four years from March, 1920. It was, therefore, urged that the lease, which is the lease under which the defendant now

1922.

BERTRAM C.J.

Saidu v. Samidu

claims, was void. It is not necessary to consider that point, because there is another point which is wholly fatal to the person claiming under this lease, which is, that on January, 1919, Mahammado died, and as under the *fidei commissum* he had only a life interest, any lease which purported to take effect after his death obviously became invalid. It is clear, therefore, that the defendant has no title to stand upon.

The learned Judge, however, on examining the record came to the conclusion that the lease under which the plaintiff claims was equally ineffective, inasmuch as it purports to lease the share of the property dealt with for six years. To that Mr. Soertsz replies that, at any rate, his lease is good *pro tanto*. This is no doubt a sound answer. But there is a further answer. This provision in the *fidei commissum*, purporting to restrict the power of alienation on beneficiaries, seems to us to be altogether ineffective and nothing but a *brutum fulmen*. There is no penalty or forfeiture imposed in the event of a lease exceeding the prescribed limit, and it appears to us that the restraint thus sought to be imposed is not effective. In either case, therefore, whether the lease to be considered is made *pro tanto* or is good altogether, the plaintiff's title is clearly superior to that of the defendant.

Mr. Abdul Cader sought to impugn the plaintiff's position by contending that, inasmuch as he was not given vacant possession, and as the defendant has been in occupation of the property, his true remedy was an action against his lessor. He cited cases which contained dicta to the effect that, both in the case of a lease and in the case of a purchase, the lessee or the transferee was not bound to sue in ejectment, but was entitled to sue at once the person through whom he claimed. These authorities do not assist Mr. Abdul Cader. They only show that there is an alternative remedy. There is no question that a lessee can sue in a *rei vindicatio* action, and the claim in the present case seems to be perfectly good.

Mr. Abdul Cader raised another point. The lease under which the plaintiff claims was made with the sanction of the Court, and the order of the Court was to the effect that the share in question should be leased for a period of six years at the expiration of the pending lease. The pending lease referred to seems to be that under which the defendant claims. I do not think this point affects the matter. The Court made its order under the erroneous impression that there was in existence a valid pending lease, and had directed that the lease authorized should take effect on the expiration of that lease. As it now turns out that there was no such valid pending lease, the order of the Court, I think, took effect immediately.

For these reasons I would allow the appeal, with costs, here and below.

SCHNEIDER J.—I agree.

Appeal allowed.