1926.

Present: Garvin A.C.J. and Dalton J.

PIETERSZ *et al. v.* BASTIAN FERNANDO *et al.*

367—D. C. Negombo, 327.

Buddhist Temporalities Ordinance, No. 8 of 1905, ss. 27 and 42—Lease by the incumbent—Ejectment by dayakayas—Damages.

Where lessees, in occupation of a temple land on a lease executed by the incumbent, were ejected by the dayakayas and claimed damages from them,—

Held, that a lease granted by an incumbent, in the absence of a duly appointed trustee, was valid and the lessees were entitled to damages on eviction.

APPEAL from a judgment of the District Judge of Negombo. The facts appear from the judgment of Dalton J.

Zoysa, for 1st, 2nd and 3rd defendants, appellant.

D. B. Jayatilaka, for 4th defendant, respondent.

H. V. Perera, for plaintiffs, respondent.

July 9, 1926. GARVIN A.C.J.—

I agree that this appeal must be dismissed. The plaintiffs base their right to maintain this action on a lease of the premises granted to them by the incumbent of the temple to which the land is said to belong. No trustee has been appointed to the temple. In such a case the incumbent may, with the consent of the District Committee, lease the property of the temple. The defendants are trespassers, and do not pretend that they have any right of any kind to eject the plaintiff. They assert, however, that as members of the congregation they decided to take the law into their own hands as they disapproved of this priest's administration of the property of the temple. Their intentions, however praiseworthy, afford no justification, especially when an effective legal remedy is available.

It is argued in appeal that there is no evidence that the lease was approved by the District Committee, not a question on the point was put in the Court below. An objection of this kind which involves a question of fact should have been clearly formulated in the Court below. Under all the circumstances I am not disposed to entertain it in appeal, even to the extent of sending the case back for further evidence.

DALTON J.—

This is an appeal by the 1st, 2nd and 3rd defendants in the action. The plaintiffs claimed that they were lessees of the 4th defendant of sixteen acres of land called Pansalwatta, under deed P1 of June 9, 1925, for a period of three years. After they had entered into

possession of the land they say, they were forcibly ejected from the land by the first three defendants. They therefore claimed that these three defendants be ejected from the land and that they, the plaintiffs, be restored to possession; they further claimed damages from the defendants jointly and severally until they are restored to possession. In the alternative they claimed that the lease be cancelled and that the 4th defendant be ordered to refund the sum paid on the signing of the lease and a further Rs. 750 as damages. In their answer the 1st, 2nd and 3rd defendants pleaded that they were dayakayas of the Chetiyarama temple, and that the land leased was the property of the temple, and that they take the income of the land for the upkeep of the temple. The 4th defendant claimed to be incumbent of the temple by right of pupilary succession, and as such he had leased the land to the plaintiffs; that he was not responsible for any damages resulting from the acts of the 1st, 2nd and 3rd defendants; and that the plaintiffs were not entitled to any cancellation of the lease. There is an admission by him that the land is temple property.

The answer of the first three defendants is silent as to the status of the 4th defendant, but it is agreed that at the time of this action the question as to whether he was incumbent or not was the subject of a separate action. That question has since been answered in favour of the 4th defendant.

A question arose in the lower Court as to misjoinder of parties and causes of action, but Mr. de Zoysa does not press that question on appeal.

After hearing evidence the learned Judge found that the plaintiffs were put in possession of the land leased by the 4th defendant (who was himself in possession of the land either as administrator of his tutor Wimalananda or as incumbent); that he was entitled to lease the property to the plaintiffs; that the first three defendants had no legal right to the land whatsoever; and that plaintiffs were entitled to damages as against them from the date of ouster at the rate of Rs. 36 a month until restored to possession. These three defendants denied in their answer that they had ousted the plaintiffs, but there was no issue framed on that point. There is evidence, however, to support the plaintiffs' plea on this point, and in fact it was not questioned that they or their watcher had been driven away by these defendants.

In appealing from this decision it was first of all urged that, it being admitted that the land is temple property, the lease by the 4th defendant was null and void, as being an alienation within the meaning of section 42 of the Buddhist Temporalities Ordinance. That section speaks of an alienation by " sale, mortgage, gift, or otherwise." Can it be said that a lease can come within the section as being an alienation " otherwise "? But for the word " mortgage," and had the section stood alone, I should have been inclined to

1926.

Dalton J.

Pietersz v. Bastian Fernando

answer this question in the negative. But it is clear that, as the section enacts that a mortgage is an alienation, a lease for a term of years, as here, may in fact be much more of an alienation than a mortgage. One may, however, obtain assistance on this question from other sections of the Ordinance. Section 27 recognizes the right of an incumbent to grant leases without the written consent of the District Committee where there be no trustee. Apart from that, the incumbent, it is admitted, is prohibited from granting leases. Reading sections 27 and 42 together, I think it a reasonable inference that it was intended to include a lease within the term " alienation " as used in that section. But it is urged that sections 37 and 38 distinguish between property improperly alienated and leases. That is true, but section 38 itself specially provides for a lease being set aside if it be shown to be an " improvident alienation."

I have therefore come to the conclusion that a lease for a term of years does come within the term " alienation " as used in section 42 of the Ordinance.

Is this lease P1 then null and void? The incumbent has power under section 27 to grant leases, and it seems to me that where he does so, in the absence of any evidence to the contrary, one is quite entitled to assume that he has done so under the powers given him to be exercised in the circumstances set out. The three defendants in their answer deny all knowledge of the existence of the deed and merely add that the 4th defendant was not incumbent. No question was raised otherwise as to the validity of the lease. The evidence led for the defendants is silent as to the existence of a trustee, and one was not therefore surprised at the statement of Mr. Jayatilaka, in reply to a question by the Court, although of course that is not evidence, that there is in fact no trustee appointed. The incumbent clearly having the right to effect an alienation by way of lease under the provisions of section 27, having done so, in the absence of any proof that he acted in contravention of that section, this Court must presume that he acted legally. If the defendants doubted this, they had full opportunity of questioning the 4th defendant on the point when he was in the witness box. They did not do so. The fact that the lease does not actually state in express terms that he granted the lease as incumbent is immaterial here. That is admittedly the only capacity in which he could grant it. The lease is therefore in my opinion a valid lease as the plaintiffs claim.

As pointed out by the trial Judge, the only justification for their action in forcibly ejecting the plaintiffs is the reason given by the 1st defendant that the 4th defendant was squandering the income of the temple and so no longer fit to remain in possession. There is certainly some support for this in the evidence, but these defendants have their proper remedy against the 4th defendant. They are certainly not entitled to take the law into their own hands, eject the lessees, and take possession of the temple property. As the action

was constituted by the plaintiffs' on the evidence led, and on the facts found thereon, which are fully supported by the evidence, I am of opinion that the learned Judge was right in entering judgment against the first three defendants for damages as decreed and restoration of possession.

A large part of Mr. Perera's argument was based upon the assumption that the action of the plaintiffs was a possessory action and nothing else. It is true that the plaintiffs, incidentally, claimed to be restored to possession, but they went much further than that. They claim damages, and also, in the alternative, for cancellation of the lease. They based their claim upon the lease by the 4th defendant and upon the plea that he was lawfully entitled to grant the lease. That right was specifically denied by the first three defendants. If the action had been differently constituted, then I think the argument might have been to the point. As constituted, however, it seems to me that Mr. de Zoysa's answer to it was correct. It is true that so far as one can judge from the pleadings the position is not without some doubt, as they are somewhat confused and have not been very clearly drawn. But I think it was never intended that the action was to be regarded as a possessory action. This is clearly also the view taken by both sides in the Court below and by the trial Judge. After some evidence had been led there on behalf of the plaintiffs, Counsel for the 1st, 2nd and 3rd defendants actually asked if the plaintiffs wished to convert the action into a possessory action. The answer given was that he could so move if he wished. Counsel neither moved nor gave expression to any view that in fact his action as constituted was a possessory action. No useful purpose would therefore be served by expressing one's views on the interesting argument addressed to the Court on the assumption I have mentioned.

For the reasons I have given the decision of the learned Judge was correct, and this appeal should therefore be dismissed, with costs.

Appeal dismissed.