

Present : Ennis J. and De Sampayo J.

1920.

MENDIS *et al.* v. DAWOOD.

276—D. C. Colombo, 51,818.

*Agreement entered into with fiduciary owners to build on property—  
Claim for compensation against fidei commissaries—Lessees—  
Jus retentionis.*

Four persons who were entitled to a land which was burdened with a *fidei commissum* entered into an agreement with A, by which he was to construct certain buildings on the property and to render to the grantors one-third rent ; further, that if the grantors took possession of the buildings after ten years, they were to pay him half the value of the materials of the buildings as compensation.

*Held*, that the persons entitled to the property on the death of the grantors were not bound by the agreement, and that A had no right of retention as against them.

**U**NDER an agreement in writing dated July 16, 1898, four persons who were *fiduciarii* of a land in Korteboam street, Colombo, permitted the predecessor in title of the defendant to build on the said land nine boutiques and two sheds of the value of Rs. 2,500, on certain conditions, one of which material to the case is as follows :—

“ If after the expiration of ten years from the date hereof the parties of the first part (*fiduciarii*) shall require the said land for any purpose of their own, they and the parties of the second part shall appoint two competent persons, one on each side, to appraise the materials of the said nine boutiques and the two sheds, and the

1920.  
*Mendis v.*  
*Dawood*

parties of the first part shall be entitled on payment of the then appraised value of the said materials to the parties of the second part to take possession of the said buildings.”

Three of the *fiduciarii* died before action leaving one surviving, who was not a party to the action. A *fiduciarius* who was not a party to the agreement and three others claiming to be entitled to one-half of the said land and buildings as *fidei commissarii* instituted the action for a declaration of title to the said half and to the possession thereof and for damages. The defendant by his answer set up the agreement above referred to, claimed half of the appraised value of the said buildings, and to be in possession thereof till such value was paid to him. He also pleaded as a matter of law that the action could not be maintained without the surviving *fiduciary* being made a party to it.

The learned District Judge held that the surviving *fiduciary* was not a necessary party to the action, and following the case of *Soysa v. Mohideen*<sup>1</sup> entered judgment for the plaintiff and dismissed the defendant's claim in reconvention for compensation. The defendant appealed.

*A. St. V. Jayawardene* (with him *Tisseveresinghe*), for defendant, appellant.

*H. J. C. Pereira* (with him *Samarawickreme*), for plaintiffs, respondents.

February 11, 1920. ENNIS J.—

This was an action for declaration of title to a half share of certain land and for damages. The defendant claimed compensation for improvements and a right of retention until payment. It appears that the land belonged to one Maria Mirando, who died in 1822, leaving a will, which created a *fidei commissum* in favour of her children and their descendants. She had two children, Gerardus de Zoysa and Hendrick de Zoysa, who partitioned the land between them, and this case has to do merely with the portion taken by Hendrick de Zoysa. Hendrick de Zoysa had four children, three of whom died without issue, and the fourth, Henri Joseph, died in 1883, leaving six children, namely, the first plaintiff, Cecilia, Agnes, Alexandrina, Bridget, and Aloysius. Cecilia and Alexandrina are not parties to this case. Agnes died in 1906 leaving three children: the second plaintiff, who is married to the third plaintiff; the fourth plaintiff, who is married to the fifth plaintiff; and the sixth plaintiff. The seventh and eighth plaintiffs are lessees under the first to the sixth plaintiffs. Bridget and Aloysius both died without issue. On July 16, 1898, Agnes, Alexandrina, Bridget, and Aloysius

<sup>1</sup> (1914) 17 N. L. R. 279.

1920.

ENNIS J.

*Mendis v.  
Dawood*

entered into an agreement with the predecessors of the defendant by which they were to construct certain buildings on the property and to render to the grantors one-third rent. There was a condition that if the grantors required the premises before ten years elapsed, they were to pay the full value of the materials of the building as compensation, and if they required the premises after ten years had elapsed, they were to pay half the value of the materials. The defendant in pursuance of the agreement did build certain houses, which under the terms of the agreement were to be of the value of Rs. 2,500, and it appears a period of over ten years has elapsed since the date of the agreement. The position of the defendant under this agreement is difficult to understand. He cannot be regarded in any higher position than a lessee. In fact, from his answer it is clear that he makes no higher claim, as he seems to have placed the onus of paying all the taxes on the grantors of the agreement. As lessee he would not be entitled to compensation from any of the grantors beyond the period over which the grantor was at liberty to dispose the property, and as Agnes, Bridget, and Aloysius are all dead, no claim for compensation can be urged against them, and Alexandrina is not a party to the case, and the first plaintiff and the other plaintiffs are not parties to the agreement, nor successors to any of the parties to that agreement, as they derive title from the original will of Maria Mirando, and not by succession to any of the parties. The learned Judge has declared the plaintiffs entitled to a half share in the property and to possession of the half share. The appellant's position seems to be that the plaintiffs cannot take over the share to which they are entitled without paying compensation, but apparently, on the authority of the case of *Lebbe v. Christie*,<sup>1</sup> persons in the position of lessees are not entitled to claim compensation after the expiration of the right of their lessor.

I would accordingly dismiss the appeal, with costs.

DE SAMPAYO J.—I agree.

*Appeal dismissed.*

---

<sup>1</sup>(1916) 18 N. L. R. 353.