

1921.

Present : Ennis J. and Garvin A.J.

KIRIHAMY *v.* MUDIYANSE.

127—*D. C. Kegalla, 5,334.*

Lease—Is it alienation?—Partition Ordinance, 1863, s. 17.

A lease made during the pendency of a partition action is not void, as it is not an alienation within the meaning of section 17 of the Partition Ordinance.

THIS was an action brought by the plaintiff for a declaration of his right to possess a number of lands leased to him by the defendants. The defendant denied the right of the plaintiff to maintain the action, on the ground that the lease relied upon was executed during the pendency of partition proceedings.

It was admitted by the parties that the lease relied upon by the plaintiff was executed during the pendency of partition proceedings, and the parties agreed that two preliminary issues should first be decided:—

- (1) Is the lease void, as it was executed during the pendency of D. C. 3,560 ?
- (2) Is defendant estopped from repudiating his own deed ?

The learned District Judge decided the issues in defendant's favour. The plaintiff appealed.

J. S. Jayawardene, for appellant.

Keuneman, for respondent.

November 22, 1921. ENNIS J.—

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This is an action for a declaration of title to possess land in the terms of a lease. The lessee was dispossessed by his lessor after one year. The lease was for a period of eleven years. The learned Judge held on the authority of *Abeyesekera v. Silva*¹ that the lease was void, as it was made during the pendency of a partition action. The appeal is from that finding. It was contended for the appellant that a lease in Roman-Dutch law was not an alienation within the meaning of section 17 of the Partition Ordinance, No. 10 of 1863. In my opinion this contention is right. The case of *Abeyesekera v. Silva (supra)* was based on the finding of Bonser C.J., in *Goonawardena v. Rajapakse*² it was decided that a lease must be regarded as a *pro tanto* alienation for the purpose of giving the lessee the right to bring a possessory action. In the case of *Lebbe v. Christie*,³ in which most of the authorities have been dealt with, the majority of the Full Court refused to extend the exception in favour of the lessee so as to allow the lessee to claim compensation as a *bona fide* possessor. In view of this latter case, it seems to me that the case of *Abeyesekera v. Silva (supra)* requires consideration. It will be observed that sections 12 and 13 of the Partition Ordinance make specific provision for mortgages and leases, but when one looks to section 17, it will be seen that although hypothecation is prohibited after the institution of a partition action, no specific mention is made of leasing.

From a practical point of view, there are certain obvious inconveniences which would attach to a prohibition of leasing under section 17, as it might have the effect of making the property unproductive during the continuance of the partition suit. It seems clear that the Roman-Dutch law did not regard a lease as an alienation, and I can see no reason to think that the form of lease can effect the principle. *Abeyesekera v. Silva (supra)* seems to imply that a notarial lease should be prohibited, but not a verbal one.

In the circumstances, I would hold that the lease is not an alienation within the meaning of section 17 of the Partition Ordinance, and I would set aside the decree appealed from with costs, and send the case back for further proceedings on the other issues in the case.

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I agree there is authority for the proposition that where a person is prohibited from alienating property by the testator or the settler, or where such a prohibition is by law imposed on a person in a fiduciary capacity, *e.g.*, guardian, a hypothecation or lease "for a long term" of the property to which the prohibition applies should be regarded as an infringement of the prohibition. This, however,

¹ (1911) 2 *Bal. Notes* 31.

² (1895) 1 *N. L. R.* 217.

³ (1916) 18 *N. L. R.* 353.

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is not an authority for the proposition that a hypothecation or a lease must always be regarded as necessarily included in the word "alienation." Indeed, Sande asserts that under no circumstances can a lease be regarded as an alienation. Section 17 of the Partition Ordinance, in express terms, prohibits alienation and hypothecation, but makes no mention of leases. It is clear that the term "alienation" as used in this section does not include hypothecation. There is apparently no reason, therefore, for supposing that it was intended to include in the term anything which did not strictly fall within what, according to Sande, is the ordinary meaning of the word "alienation."

Set aside.

