Present: Bertram C.J. and Porter J. 1923.

KUMARASAMY KURRUKAL *v.* KARTHIGESA KURRUKAL

213—D. C. Jaffna, 15,446.

Hindu temple—Public charitable trust—Temple built with money collected from the public and contributions of the Brahmins who collected the subscription—Are subscriptions gifts to the Brahmins?—Trusts Ordinance, 1917, ss. 102 and 106—Instrument of trust.

In 1878 a Saivite reformer started a movement for building a temple on the site of an ancient temple, and after his death three members of a Brahmin family (K and his sons S and T) in 1880 collected subscriptions with the assistance of several leading Saivites and rebuilt the temple. The Brahmins also contributed largely (20 per cent.) for this purpose. In 1896 the temple was dedicated for religious worship with the usual ceremonies. In 1898 a deed of management was formally executed which provided for the management (or trusteeship) and its succession, for the appointment and succession of the officiating priests, for the control of the temple ceremonies, the custody of its treasures, and the appropriation of its public subscriptions. Under this deed the right of management was reserved to the founders S and T during their joint lives, and to the surviving founder on the death of either of them, and after them to plaintiff, eldest son of T, and so on. The right to officiate as priests was to belong to the three sons of T—plaintiff and the two defendants.

T executed in 1920 a formal transfer of his interest in all the temple property by way of donation to the plaintiff.

Plaintiff sued T for a declaration of title as owner of the temple and for ejectment. T pleaded that the temple was a public charitable trust. After the death of T, the two defendants were substituted defendants. They also prayed for a declaration that they were entitled to officiate as priests under the deed of 1898.

Held, that the temple was a public charitable trust, and that the defendants were entitled to a declaration as prayed for.

"There is certainly one formal defect in the situation. It is true that there was a formal dedication, or, as the learned Judge prefers to call it, consecration, of the temple, but no instrument of trust was executed appropriating the property for the purpose of the trust. No Court of Equity, however, would allow the great principles it administers to be defeated by a formal defect of this character, and our own Ordinance expressly provides for the point," see section 107.

"It seems to me nothing less than fantastic to argue that this temple was mainly the private property of Karthigesa and his sons unencumbered by anything in the nature of a public religious trust, and that the various subscriptions . . . . are to be

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considered as nothing more than gifts to pious Brahmins to be expended in accordance with their uncontrolled discretion."

"According to our law as declared and defined by the Trusts Ordinance, the *dominium* of the property remains vested in the legal owners, but is so vested on behalf of the beneficiaries, and the beneficiaries consist of that section of the public for whose benefit the trust was founded."

"Subject to any arrangement made by the founder, the right of the management of the foundation vests in the founder himself and his heirs, but the founder himself is entitled to make express provision for its future management . . . . No doubt such an arrangement for the management of the temple would in ordinary cases be made in an instrument declaring its devotion to religious uses, but there is obviously no reason why it should not be made in a separate instrument after the public consecration of the temple."

THE facts are set out in the judgment.

Elliot, K.C. (with him *Balasingham* and *S. Rajaratnam*), for defendants, appellants.

H. J. C. Pereira, K.C. (with him *Samarawickreme* and *H. V. Perera*), for plaintiff, respondent.

December 21, 1923. BERTRAM C.J.—

This is an action relating to the control and management of a Sivan temple at Keerimalai, two miles north-west of Kankesanturai, Jaffna. It raises very important questions connected with the title and management of Hindu temples. The issues may best be appreciated by a consideration of the history of the foundation. The temple was built upon a spot long recognized as sacred. Its site was the site of an ancient temple said to have been destroyed by the Portuguese, and there were local circumstances emphasizing its sanctity. In the year 1878, a certain Nalavar, a Saivite saint and reformer, started a crusade for the rebuilding of this ancient temple and issued an appeal to the public. In the year 1880, three persons belonging to a Brahmin family, Karthigesa and his two sons—Sabapathy and Thegaraja—took up this question and organized a public subscription. Various leading Saivites interested themselves in the matter, and transfers were procured from various people in whom the site was vested. In some cases these transfers were voluntary gifts. They were described as "charity transfers," and recited that their object was to enable the donee to build "a Sivan temple on this land and the place next to this with his own money and the money to be obtained by him from the people." An appeal for subscriptions was issued. It was in the most explicit terms an appeal on behalf of a public religious enterprise. "May you all Saivites," it declared, "subscribe to your best ability to

conduct this act of charity." The religious feelings of those who might be supposed to be in sympathy with the enterprise were appealed to in the most eloquent language. Subscriptions were collected from all parts of the Colony, and even from places beyond its borders, and lists of the subscriptions were published. The persons responsible for the issue of these appeals and the issue of these subscription lists were the three persons above mentioned, and in one of the documents issued they declared that at the request of several Saivite gentlemen " my father, my elder brother, and myself started to build the temple at the locality selected by Navalar on an auspicious day . . . and are carrying on the building work regularly."

In 1889 Karthigesa, the senior of the three founders, died. A further appeal and subscription list was thereupon issued by his two sons who gave an account of the expenditure. It appeared from this account that, among other objects, the subcriptions had been used for the purchase of those portions of the temple site which had not been voluntarily given. Some 20 per cent. of the money raised appears to have been contributed by the founders themselves. The documents issued in connection with this further appeal refer to it with equal explicitness as a public religious charity. In one of the appendices to the document there is the following appeal :—

> " Can we be careless of this good charity when the greatness of the temple, which contains the three beauties of ' Thalam,' ' Moorthy,' and ' Theertham,' is appreciated in ancient books ? Will not the number of the people who visit this ' Holy Theertham ' in a year amount to millions? If we make these millions of people worship Nagulesar and Nagulampikai after their bath in the ' Theertham,' who will be able to describe the results of it ? . . . . If a charity of this nature lies incompleted, it can only be asserted to the defect of ourselves and our ancestors. Are further assurances required for us to get this ' Thiruppani ' work completed without delay."

In 1896 the temple was finished, and formally and publicly dedicated with the traditional ceremonies. Let us pause at this point to ask what was the result of all these proceedings. Can there be the least question that the temple built as the result of these public subscriptions and donations and dedicated for religious worship was a charitable trust within the meaning of Chapter X of the Trusts Ordinance, No. 9 of 1917 ? Can it be disputed that it was a trust for the benefit of a section of the public of the category (*e*) enumerated in section 99, namely, ' for the advancement of religion or the maintenance of religious rites and practices " ? Can it be disputed that if the founders had not expended the money

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upon the temple, or had not formally dedicated it, a representative action could have been brought by persons acting on behalf of the subscribers, with a view to having the trust executed ?

There is certainly one formal defect in the situation. It is true that there was a formal dedication, or, as the learned District Judge prefers to call it, consecration, of the temple, but no instrument of trust was executed appropriating the property for the purpose of the trust. No Court of Equity, however, would allow the great principles it administers to be defeated by a formal defect of this character, and our own Ordinance expressly provides for the point. It declares by section 107 that " In dealing with any property alleged to be subject to a charitable trust, the Court should not be debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it shall be of opinion from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist."

In view of all the circumstances I have recited, it seems to me nothing less than fantastic to argue that this temple was mainly the private property of Karthigesa and his sons unencumbered by anything in the nature of a public religious trust, and that the various subscriptions contributed as the result of these glowing appeals are to be considered as nothing more than gifts to pious Brahmins to be expended in accordance with their uncontrolled discretion.

What then is the legal position up to this point ? According to Hindu religious law, the position is perfectly clear. The temple is conceived as being the property of the deity to whom it is dedicated. Or, to put it in another way, the foundation, as in Roman law, is personified, and the temple is conceived as belonging to the foundation. We are no doubt authorized in these questions to have regard to the religious law and custom of the community concerned (see Trusts Ordinance, section 106 (ii)), but I take it that in so " having regard " we cannot subordinate to any such law or custom our own express law. According to our own law as declared and defined by the Trusts Ordinance, the *dominium* of the property remains vested in the legal owners, but is so vested on behalf of the beneficiaries, and the beneficiaries consist of that section of the public for whose benefit the trust was founded. Though there is a difference in form betwen our own conception and that of the Hindu religious law, there is no difference in substance.

I am totally at a loss to understand the contention that this temple may be considered as something in the nature of what Mayne refers to as " a private chapel in a gentleman's park " (*Mayne's Hindu Law and Custom, 5th ed., 598*) to which the public have access, but which at any time may be closed at the will of the proprietor. Nor can I understand the view of the learned District

Judge that this temple is something between such a private chapel and an ordinary temple. A perusal of the documents connected with its history seems to me to disclose a public religious foundation of the most ordinary description.

Let us now resume to the history of the temple. It was completed and consecrated in 1896. The worship proceeded in due course, but no formal arrangement had been made for the future management of the temple. This question was taken in hand and consultations were held by those interested. The matter appears to have been gone into with the greatest care and intelligence, and in 1898 a deed of management was formally executed. This lengthy document provided for the management (or trusteeship) and its succession, for the appointment and succession of the officiating priests, for the control of the temple ceremonies, the custody of its treasures, and the appropriation of its public subscriptions.

What then was the legal effect of this document? Strictly speaking, it may not be "an instrument of trust" within the meaning of the definition given in section 3 of the Trusts Ordinance. It does not in form declare a trust, though it does so in substance, inasmuch as it recites the formal dedication (or consecration) of the temple to religious uses. There might be some formal difficulty, therefore, in treating it as an instrument of trust under section 106 (i). This same section, however, authorizes the Court, for purposes such as those with which this action is concerned, to have regard not only to the "instrument of trust," but also "to the religious law and custom of the community concerned."

I pause at this point to note a defect of drafting in this section. The governing words are "In settling any scheme for the management of any trust under section 102 or in determining any question relating to (*a*) The constitution or existence of any such trust . . . . the Court shall have regard . . . ." The question is, What is the meaning of "such"? I take it to mean any trust of the nature of those dealt with section 102. This would exclude Christian religious trusts under section 102 (8), and trusts regulated by the Buddhist Temporalities Ordinance under section 109. I do not think that the word "such" confines the application of the provisions of the section to trusts which are actually the subject of proceedings under section 102. If the word "such" were so interpreted, the principles of law administered by the Court would vary according as it was dealing with a case under that section and a case outside it, and this could hardly have been the intention.

What then is the religious law with regard to the management of foundations of this kind? It is perfectly clear that subject to any arrangement made by the founder, the right of the management of the foundation vests in the founder himself and his heirs, but the

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founder himself is entitled to make express provision for its future management. See *Gour's Hindu Code, section 215*:—

> "The founder is entitled to provide for the management of any endowment created by him . . . . The founder of an endowment naturally possesses the right to arrange for its management. As such it is for him to set out a scheme of management, nominate trustees, give general directions as to the mode and manner in which he wishes to serve the object of his bounty."

The cases cited are mostly in a negative form, that is to say, they assert the right of the heirs, subject to any arrangement which may have been made by the founder, but they all explicitly recite the founder's powers. For an example of such an arrangement made by the founder, see *Jadu Nath Singh v. Sita Ranji.*[1] There can be no doubt that Dr. Gour accurately states the law. No doubt such an arrangement for the management of the temple would in ordinary cases be made in an instrument declaring its devotion to religious uses, but there is obviously no reason why it should not be made in a separate instrument after the public consecration of the temple. To suggest that the right of the founder must be exercised contemporaneously with the foundation and cannot be exercised in a subsequent independent instrument would be a mere technical futility. It appears to me clear, therefore, that this deed of management, executed by the two surviving founders—Sabapathy and Thegaraja—governed the subsequent management of the religious trust. There was no necessity for any acceptance on the part of anybody else.

Under this deed the right of management was reserved to the two founders during their joint lives and to the surviving founder on the death of either of them. After the death of the founders, it was to go to Kumaraswamy, the eldest son of Thegaraja, and after his death to his eldest male descendant. Various provisions were made for the subsequent devolution of the managementship. The right to officiate as priests was provided for according to a rotation. It was to belong to the three sons of the founder. Thegaraja, namely, Kumaraswamy, the present plaintiff, and the two present defendants who were to exercise these functions for periods of ten days each at a time. For twenty-two years the management of the temple proceeded in accordance with this deed. It is recited and referred to in several subsequent documents—P 4 dated 1902 and D 9, D 10, D 11 dated respectively 1903, 1907, 1911. These all refer to supplementary dedications in connection with the temple.

What was the position of the title to the temple under this deed ? The legal ownership, as I have above explained, was in Sabapathy

[1] *(1917) I. L. R. 39 All. 553.*

and Thegaraja, the two sons of Karthigesa. By reserving to themselves the management under this deed, they, in effect, appointed themselves as trustees of the property. In Hindu religious law, the manager is the trustee. Although the property is conceived of as vested in the deity, the manager has all the powers of a proprietor subject to a trust, and according to Hindu religious law the control of the property passes with the office (see *Mayne, p. 601*). According to our own law, however, the legal ownership is actually vested in the trustee, but it does not under ordinary circumstances devolve with the office. This only takes place in certain defined cases (see section 113 of the Trusts Ordinance and in particular sub-section (2)). In cases within that section, upon the execution of a prescribed memorandum of appointment, the trust property passes from trustee to trustee without the necessity of any conveyance or vesting order. That sub-section, however, does not provide for trusteeships which under the instrument of trust devolve according to a family succession. Upon the death of a trustee holding office under such an agreement, the legal ownership does not pass to the new trustee, but in the absence of any formal instrument it would pass to the trustee's heirs, and in the absence of a transfer the only way of vesting it in a succeeding trustee is to obtain a vesting order under section 112. It will thus be seen that in a trust of this sort confusion is always likely to arise on the death of a trustee, unless he provides for the devolution of the trust property either by will or by an instrument executed during his lifetime. If he does not do so, the legal ownership passes to his heirs. The heirs, it is true, hold it subject to the trust and can be made to transfer the legal ownership to the new trustee, but it must always be very troublesome to induce them to do so.

It was, no doubt, in anticipation of such troubles as these, that in 1917, the year of his death, Sabapathy, one of the two joint founders, formally conveyed by deed of donation his interests in the temple to his brother Thegaraja. Had he not done this, his share in the legal ownership would have passed to his daughters. Fortunately he executed this deed before his death, and the legal ownership of his share accordingly passed to his brother Thegaraja. who now remained sole manager and trustee.

In 1920 Thegaraja proceeded to follow the example of his brother Sabapathy. He was advancing in years, and might, in the natural course, die at an early date. His successor in the trusteeship according to the deed of management was to be his eldest son, Kumaraswamy, the present plaintiff. Accordingly on September 9, 1920, he executed a formal transfer of his interest in all the temple property by way of donation to the plaintiff. As he explains in his evidence given in the preliminary proceedings in this case, "I executed P 1 in favour of plaintiff so as to prevent quarrels, as there would be, if the property devolved on my children."

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Neither in the deed of donation by Sabapathy to Thegaraja, nor in the similar deed by Thegaraja to his son, was any mention made of the trust, nor was any mention made of the devolution of the trusteeship. The notary pursued the simple and, in the circumstances, the efficacious course of dealing only with the legal ownership. It can easily be understood that he would prefer not to enter into the unfamiliar atmosphere of the law of trusts. It was understood between Thegaraja and his son that the former was to retain the actual management of the temple for the rest of his life. This the son himself admitted in some Police Court proceedings within a few weeks of the transfer to himself. After a very short interval, however, the plaintiff repudiated this position, and on December 16, 1920, within three months of the deed in which the legal ownership had been conveyed to him by his father, he brought an action against his father basing his case purely upon this bare legal ownership, demanding a declaration of title and the ejectment of his father from the premises. He professed to know nothing whatever of the deed of management under which the temple had been conducted for the previous twenty-two years.

The defendant Thegaraja died in the course of the action, but after he had given evidence in the proceedings for an interim injunction, and the plaintiff's two brothers, who under the deed of management discharged the duties of officiating priest in rotation jointly with the plaintiff, were substituted as defendants. The position, therefore, is that the plaintiff claims the temple as his absolute property free from any trust, to manage and dispose of in his own free discretion, and therefore demands possession of the property. The defendants claim that plaintiff holds the legal ownership subject to the trust, and that they have a right to remain upon the property as officiating priests in pursuance of the deed of management.

These are the facts, and notwithstanding the very careful judgment of the learned District Judge, I find it difficult to see how the claim of the plaintiff can receive any very serious consideration. I cannot believe for a moment that he knew nothing about the deed of management, but even if he did not he is still bound by the trust. He is a mere donee and not a purchaser for value without notice. The devolution of the trusteeship is governed by the deed of management. The capacity in which he now holds the property on the death of his father is that of trustee, and the legal ownership is vested in him subject to the trust, and under that trust, as defined by the deed of management, he is bound to allow his brothers to officiate as priests, and for that purpose to remain in the temple premises. It is urged that various dispositions of property have been made in connection with this temple which ignore the trust and treat the title as though it were one of ordinary ownership. It is also urged that many temples in the Jaffna District seem to

have been treated in documents and Fiscal's sales as though they were private property, but all this only shows that the subject of religious trusts is imperfectly understood in the notarial and legal professions.

The proceedings of the plaintiff seem to me unconscionable from start to finish. What he is entitled to is a declaration that he is owner and proprietor of the land and premises with the temple standing thereon, but subject to a religious trust under which the said temple was founded, and subject to the provisions of the deed of management executed in 1898 by two of the original founders. The defendants are entitled, on their side, to a declaration that they are entitled to officiate in the said temple in pursuance of the said deed and to enjoy the emoluments prescribed by the said deed. The appeal, in my opinion, should be allowed with costs, both in this Court and in the Court below.

PORTER J.—I agree.

Appeal allowed.