Present : Bertram C.J. and Jayewardene A.J. 1924.

KARTHIGASU AMBALAWANAR *et al. v.* SUBRAMANIAR KATHIRAVELU *et al.*

30—D. C. Jaffna, 16,481.

Hindu religious trust—Right of de facto *trustee to obtain possession of temporalities—Personality of religious foundations—Disputes between persons vested with legal title to endowments—Vesting order—Trusts Ordinance, ss. 101, 102, and 112.*

The *de facto* trustee of a Hindu temple is not entitled as such to obtan possession of its temporalities.

Our law does not recognize the personality of religious foundations.

When a person transfers property to a temple, the effect of his doing so is to constitute himself a trustee for the purpose of religious worship to be carried on at the temple. The document of dedication amounts to a declaration of trust and the *dominium* vests with the dedicator and passes on his death to his heirs subject to the trust.

The provision in section 101 of the Trusts Ordinance which reserves the right of a trustee to apply to the Court for directions regulating the administration of the trust or succession to the trusteeship applies to religious trusts as well.

Where two families descending from a common origin had a joint interest in a Hindu temple and had participated in its management for some fifty years, by reason of the fact that each had been vested with title to a share of the endowment ; and where disputes had arisen between them regarding the management of the temple and the endowments,

Held, that the appropriate remedy for the settlement of the affairs of the temple would be a vesting order under section 112 of the Trusts Ordinance, enumerating the temple properties in charge of the two groups and vesting the respective sets of property in trustees representing the respective groups.

The order should give directions regarding the devolution of trusteeship, and it should be registered in accordance with sub-section (3) of the section.

APPEAL from a judgment of the District Judge of Jaffna. The action was brought by the plaintiffs, as joint-managers and trustees of a Hindu temple, claiming a declaration of title that the twelve lands scheduled in the plaint are the property of the temple, and an order that the defendants should be ejected therefrom. It was proved that the temple had been originally built on land belonging to one Kathirnayake Mudaliyar, who left two sons, named Ulaganather and Vinayagar. The present contestants are the descendants of these two persons. The evidence further disclosed that these two lines of the descendants of Kathirnayake had for very many years

1924.

Karthigasu Ambalawanar v. Subramaniar Kathiravelu

taken an active interest in the temple and its endowments as shown by a series of deeds ; in the case of the plaintiffs from 1873 to 1901, and in the case of the defendants from 1870 to 1905. It also appeared that as a result of some friction between the two branches of the family, a trust deed had been drawn by the defendants' branch in 1905 to consolidate their position with regard to the management of the endowments. This was followed in 1916 by a similar deed of appointment and trust on the plaintiffs' line, by which the first and second plaintiffs were appointed managers and trustees of the temple.

It was also established that the properties set out in the schedule to the plaint had been in the exclusive and undisturbed possession of the defendants' branch of the family for twenty-five years ; and that out of the revenues of these lands they had contributed a share of the funds necessary for the support of the *poojahs* of the temple.

The learned District Judge having found that the first and second plaintiffs were the *de facto* managers of the temple entered a decree declaring the lands in the schedule to be the property of the temple, and directing the defendants to be ejected therefrom and the plaintiffs be put and quieted in possession.

Drieberg, K.C. (with him *Joseph*), for defendants, appellants.

Elliot, K.C. (with him *Balasingham*), for plaintiffs, respondents.

November 12, 1924. BERTRAM C.J.—

This is a case relating to a temple in the Jaffna District dedicated to the worship of a Hindu deity, Subramaniam. It raises important questions of law relating to the management of temples and the title to their endowments. The action was brought by the plaintiffs, who claim to be joint-managers and trustees of the temple. They demanded a declaration that twelve lands scheduled to the plaint were the property of the temple, and an order that the defendants should be ejected therefrom.

From the evidence given on both sides, the history of this temple and its endowments may be summarized as follows :—It is impossible to say when it was originally built, but it is referred to as being in existence as early as 1870 (see P 4). It is situated on lands registered in the *thomboo* as belonging to an ancestor of both parties who may be identified by the name of Kathirnayake Mudaliyar. Two of the sons of this original ancestor were named Ulaganather and Venayagar, respectively, and the present contestants are descendants of both these persons. It seems clear that these two lines of the descendants of Kathirnayake Mudaliyar have, for very many years past, taken an active interest in the temple and its endowments. Each side has produced a long series of deeds proving this active interest. Plaintiffs' descent from Ulaganather and the history of the connection of Ulaganather's descendants with the temple as traced by the deeds

is as follows :—At some unknown date Ulaganather, on evidence which the learned Judge accepts, is said to have converted the original mud building into a temple of stone. In 1873, by P 17 on June 27, certain lands were conveyed to the temple, Velupillai Ulaganather providing the consideration out of temple funds. In 1878 Swaminather Velupillai, a grandson of Ulaganather, under two deeds, purchased certain lands out of temple funds (see P 18 of September 2, 1878, also P 19 of December 23, 1878). A year later this same Swaminather Veluppillai advances some of the temple funds upon an otty bond (see P 16 of May 1, 1879). Swaminather Veluppillai executed a transfer in favour of the temple of the temple site (the temple itself being excepted). The price of the land so transferred was paid to Swaminather Veluppillai by his son, Veluppillai Ulaganather, and it is recited that this money was paid out of temple funds, of which we may assume that Veluppillai Ulaganather was in charge as manager or as one of the managers. On January 17, 1882, by P 23, certain other lands were sold in otty to Swaminather Veluppillai on his declaration that the purchase money was temple money. In 1891 certain other lands were sold to the temple, the purchase money being paid out of temple funds by Veluppillai Ulaganather to whom I have already referred. On July 17, 1894, by P 13, certain other lands were sold in otty to the temple, and the consideration also was furnished out of temple funds by Veluppillai Ulaganather, his son, Ulaganather Kandiah, being a witness. There is another deed of the same year (P 26) and of the same character dated July 3, 1894. In 1901 certain other lands were transferred to the temple, Ulaganather Kanthaiyar, a son of Veluppillai Ulaganather, this time providing the money, presumably as manager. There is a similar deed of the same character and of the same date with regard to certain other lands (P 15). On October 21, 1901, temple funds are again invested, the vendor in this case is Ulaganather Swaminather himself, Kanthaiyar's father. Kanthaiyar is here expressly referred to as manager, but, it may be noted, not as manager of the temple but as manager of the Hindu madame called "Ambalavana Chuppiramaniyaswamy." I pause at this point because the next deed on this side is some years later, and indicates a new phase in the story. Enough has been adduced to show that this line of the family descending through Ulaganather and Kanthaiyar had an active connection with the temple, and that its members were in charge of the temple funds for nearly a whole generation.

The story, however, of the connection with the temple of the rival line, descending from Venayagar, is equally emphatic. On June 4, 1870, by P 4, Velauther Venayagar, Venayagar's son, joins with four others, one of whom is Swaminather Veluppillai himself, in executing a deed of donation of certain lands in favour of the temple. On May 18, 1872, by P 5, this same Velayuther Venayagar conveyed

1924.

BERTRAM C.J.

Karthigasu Ambalawanar v. Subramaniar Kathiravelu

three other lands in favour of the temple for a consideration of Rs. 500, and certifies that he received this sum from his grandson, Venasithamby Kanapathipillai, who is referred to as manager of the temple. A life interest is reserved by the vendor and his daughter, and after their death, it is directed that " the said Kanapathipillai, as manager thereof, should look after, manage, and take the produce of the said properties." It may be noted that Swaminather Veluppillai, a representative of the other line of the family frequently referred to above, signs this deed as witness. On July 21, 1892, by P 6, Velayuther Venayagar transferred six other lands to the temple. The lands were accepted on behalf of the temple by Sellathamby Velasithamby (great grandson of Venayagar), who is referred to in the deed as one of the managers of the temple. Finally, on February 9, 1905, this same Sellathamby Velasithamby executed a very important deed (D 1). This is the first systematic deed of trust which appears in the story. It recites that he himself alone had managed, possessed, looked after, and conducted the twelve parcels of lands referred to in the deed, as he was directed by the late Velayuther Venayagar and his wife, Seethevy, and their son, Kanapathipillai, the trustees thereof, while they were alive. He conveys these lands to Vaitilingam Sellathurai, the fourth defendant. He further declares that " these lands have been in possession and management of the managers of the said temple, including me, and in my management and possession according to the said deeds, for more than ten years up to this date. He vests in the said Sellathurai full powers of management of these lands. He is to join with the other shareholders of the temple in respect of the said temple, and all the immovable and movable properties belonging to the said temple and not mentioned in this deed and all the affairs, and look after and manage what are necessary, and he is to look after and manage himself alone the aforesaid parcels of lands . . . . After my death the said Sellathurai, without joining any of my co-managers, is at his own will and desire, from descendants to descendants, to manage and look after the said twelve parcels of lands ; to celebrate and conduct with the income and rents thereof the affairs of the said temple, charity Inn Holy Tank. Sellathurai being a minor, his father, Venasithamby Vaitialingam, is to be associated with the grantor, Venasithamby, in the management of the property during the minority." Provision is made for failure of the descendants of Sellathurai. It is plain from the extraordinary explicitness of this elaborate deed that questions had arisen between the two branches of this family with regard to this temple and its endowments, but it nevertheless seems to me perfectly clear that this branch of the family also had been in close association with the temple, and had been actively engaged in its management. Inded, as a result of the deeds above referred to, and certain subsequent deeds, the properties set out in the schedule to the plaint

have been in the exclusive and undisturbed possession of this branch of the family for twenty-five years and upwards. See the evidence of the witness, Gnanasekera Kurukkal, a witness for the plaintiffs. Similarly, a yet more extensive number of lands has been exclusively held and possessed for the benefit of the temple by the plaintiffs' branch of the family. We have thus carried the story of the connection of these two branches in case of the plaintiffs from 1873 to 1901, and in the case of defendants from 1870 to 1905. That there was at this time some friction is, as I have said, indicated by the emphatic terms of the deed of 1905. Further evidence of that friction is to be found in a Court of Request's case of the year 1907, which owing to the want of harmony between the two branches had no definite results.

For about ten years the history of the temple was apparently uneventful. But in 1916 it entered upon a new phase. In that year, one Veluppillai Katirkesu, the brother of Veluppillai Ulaganather, previously referred to as a man of some considerable substance, conceived the idea that he had fallen under the malign influence of an evil spirit. This spirit, according to the learned Judge's account of the matter, took possession of Katirkesu's house, and offerings had to be made to the private idol in his house and in the temple to get rid of the evil spirit's influence. Out of gratitude for his deliverence Katirkesu left a large sum of money for the restoration of the temple, and the temple was accordingly restored and enlarged. In this year Ulaganather Kanthaiyar, previously referred to, executed a formal deed of appointment and trust, appointing his cousins Ambalavanar, the first plaintiff, and Muttukumaru, the second plaintiff, both sons of Katirkesu, as trustees and managers of the temple. This is the first trust deed executed in plaintiff's line and corresponding in importance to the deed of 1905 (D 1) executed on the other side. There can be no doubt that from this point plaintiff's branch of the family now assumed full control of the temple, and that the first and second plaintiffs became *de facto* managers. There are only two points in which the other branch of the family asserted itself. When it became necessary to remove the idol to another place for the purpose of improvements, the traditional ceremony for this purpose was obstructed by the fourth defendant, and it was not until some adjustment was made (of the nature of which we are ignorant) that the ceremony could proceed. Further, notwithstanding the *de facto* trusteeship of the first and second plaintiffs, the fourth defendant remained in exclusive possession of the lands scheduled to the plaint, and it is asserted by him and his witnesses and confirmed by explicit admissions on the part of the plaintiff's witness, that out of the revenues of these lands they did contribute a share of the funds necessary for the support of the *poojahs* of the temple. When the improvements were completed and the reopening ceremonies were to be carried out, printed invitations were issued in the name of

1924.

BERTRAM C.J.

Karthigasu Ambalavanar v. Subramaniar Kathiravelu

the first and second plaintiffs' as managers, and it is difficult to believe that the fourth defendant and his branch of the family were not acquainted with the terms of these invitations.

These being the facts what is the position ? The learned Judge, having found that the first and second plaintiffs were *de facto* exclusive managers of the temple, has thought himself justified in entering a decree declaring the lands in the schedule to be the property of the temple, and directing the defendants to be ejected therefrom, and the plaintiffs as *de facto* managers and trustees of the said temple to be put and quieted in possession thereof. It seems to me that it is impossible that this decree could stand. The fourth defendant and those associated with him have been in exclusive possession of these lands for at least twenty-five years. They have them in trust for the religious charity represented by the temple. The plaintiffs are mere *de facto* trustees of the temple. They have no legal right to the lands. They have not even shown a legal title to be appointed as trustees of the temple and its endowments, nor have they asked for such an appointment. It is impossible to admit the doctrine that a *de facto* trustee of the temple is as such entitled to the possession of its temporalities. He can only obtain those temporalities by becoming vested with the legal title to them. Nor is it possible by a decree of our courts to declare that lands are the property of a temple. We do not recognize the personality of religious foundations.

It is quite clear that these two families descending from a common origin have had a joint interest in the temple for some fifty years past. They have each been vested with a share of its endowments, and have from time to time participated in its management. However extensive the contributions that may have been made to the temple on the part of plaintiffs' branch of the family, the attempt to arrogate to itself its exclusive management can only be regarded as unconscientious. Similarly, on the side of defendants, the claim of the fourth defendant to be exclusive manager and proprietor of the temple is also unconscientious. It is satisfactory to know that it is recognized on both sides that this is a question for a family settlement, and that that family settlement should proceed upon a recognition of the rights of both branches to a share in the management of the temple. It has accordingly been arranged by consent that the case should go back to the learned District Judge for further inquiry and for appropriate relief.

It may be convenient to indicate what powers the learned Judge has for this purpose, and what are the matters which will require his attention. The scheme of the Trusts Ordinance is as follows :—

Section 101 deals with public charitable trusts generally. The machinery of that section is set in action either by the Attorney-General, or two persons having an interest in the trust acting by his authority. Section 102 deals with a special class of charitable

trusts, namely, those relating to places of religious worship, or religious establishments, or places of religious resort. The machinery of this section may be set in motion by any five worshippers. The section does not apply to Christian religious trusts. To prevent the section being used for purposes of faction, it is declared that a certificate of the Government Agent of the nature specified in sub-section (3) shall be necessary before such an action is instituted. But the present action is not of this character. A paragraph in section 101 expressly reserves the rights of any trustee to apply to the Court by action or otherwise under the general provisions of the Ordinance for the purpose of regulating the administration of the trust or the succession to the trusteeship. And the Court is expressly empowered on any such application to make such order as it may seem equitable. This provision applies both to section 101 and section 102, and the final sentence of section 101 must be read subject to this circumstance. It is open, therefore, to the plaintiffs in this action, as persons claiming to be trustees, to apply to the Court for such directions as the Court may deem equitable for the purpose of regulating the administration of the trust and the succession to the trusteeship. This can be done in the present case by an amendment of the plaint. In giving these directions, the Court should, in my opinion, start from the fact that the two branches of the family have been concerned in the administration of the trust, and that two groups of property have been separately controlled by these two respective branches. It will be necessary, in the first place, to ascertain and define the title to these various properties. Some of them have been simply dedicated to the deity who is worshipped in the temple. Some of them, indeed, purport to be actually transferred to the deity. But I think it must be taken as settled that we do not in our law recognize this personification of a religious foundation. See *Maraliya v. Gunasekera* [1] and *Kurukal v. Karthikesu.*[2] In my own opinion when a person, who is the owner of property, purports to transfer it to a temple, the effect of his so doing is to constitute himself a trustee for the purpose of religious worship to be carried on at the temple. The document of dedication is in fact a declaration of trust, and the *dominium* remains with the dedicator, and passes on his death to his heirs subject to the trust. It is consequently extremely difficult to know at this time in what person the *dominium* of the various properties belonging to the temple actually resides. If we could trust the recitals in the deed of 1905 by Venasithamby, the fourth defendant, the twelve lands which the defendant controlled had been in the exclusive possession of Venasithamby for over ten years ; he had acquired a prescriptive title thereto, and the full *dominium* would be vested subject to the trust in the fourth defendant. I doubt, however, whether it could

[1] *(1921) 23 N. L. R. 261.*

[2] *(1923) Times of Ceylon L. R., Vol. II., Part II., page 120.*

1924.

BERTRAM C.J.

Karthigasu Ambalawanar v. Subramaniar Kathiravelu

be said that the possession by one member of the family for the purpose of the trust of properties, the legal title to which was vested in him jointly with various unascertained members of the family, could be considered adverse possession as against these other persons legally entitled. Similar difficulties arise as to the legal title to the properties controlled by the plaintiffs' branch of the family. This confusion is an inevitable incident of hereditary religious trusts and it can only be avoided by periodical timely transfers or devises. For the purpose of the settlement of the affairs of this temple at the present moment, the appropriate remedy seems to be a vesting order under section 112. The Court should, I think, make a vesting order under that section enumerating the temple properties in charge of the two groups. The order should vest these respective sets of property in the trustee or trustees at present representing these two respective groups. And the order should be duly registered in accordance with sub-section (3). A vesting order of this nature should be asked for by a formal amendment of the plaint.

Next as to the devolution of the trust.

This religious foundation must be considered as having been founded by the two branches of the family. No scheme of management was drawn up at the time of the foundation, or within a reasonable time after it.

The religious law and the custom of the community concerned (to which we are entitled to have regard under section 106 of the Trusts Ordinance) appear to be that the right of management vests in the heirs of the founder. (See *Gour's Hindu Code, section 215 (3)*) :—

" Where the founder makes an endowment without providing for its management, the right of management vests in the founder and his heirs."

In all such foundations the custom or course of action observed in the family must be taken into account, and in this case that custom or course of action appears to have been that the lands held by the two several branches should be vested in some member of that branch as the representative of himself and the others. Dr. Gour proceeds to add :—" (4) the right of the founder to provide for the management devolves upon his heirs on his death." The meaning of this appears to be that if no deed of management is drawn up at the time of the original foundation, the heirs of the founder would be entitled at any subsequent period to draw up a deed of management for the future administration of the trust, and his deed of management might presumably contain a provision for the devolution of the trusteeship. I have consulted the authorities referred to by Dr. Gour in so far as they are accessible, and I have not been able to trace any precise authority confirming this statement. But I think that on the authority of Dr. Gour, it must be taken to be an accepted principle of Hindu customary religious law. In the absence of any selection of a special member of the

family as trustee, it would appear as if all the descendants of the founder would be joint managers and trustees discharging the functions in rotation or according to some other arrangement. See *Ramanathan Chetty v. Murugappa Chetty.*[1] But it is obviously convenient that some definite representative of the family should be recognized as trustee.

It will have been observed that deeds of the nature of deed of management have now been drawn up on both sides, that of the plaintiffs' side being P 2 of October 18, 1916, and that of the defendants' branch being D 1 of February 9, 1905. These deeds are formally executed and very fully attested, so that I think it may be taken that they represent family arrangements made by or with the consent of the members of the two respective branches. So far as these two deeds can be reconciled with each other and with the family rights of the two branches, I see no reason why they should not be accepted as deeds of management dealing with (*a*) the control of the properties vested on behalf of the trust in the particular branch ; (*b*) the devolution of the trusteeship of the temple with respect to the representatives of that branch. Both deeds provide for the trusteeship devolving from descendant to descendant, but the plaintiffs' deed makes the wise provision that the trustees with respect to that branch " should in their lifetime appoint trustee or trustees within their descendants to manage and look after the said temple and properties after their death." The same thing appears to be contemplated, though not directed in paragraph 6 of the defendants' deed.

The following observations may be made as to these respective deeds—Paragraphs 1–5 in the plaintiffs' give general directions as to what I may describe as the plaintiffs' share of the management. They relate to the management and subject to any objection by the defendants, I see no reason why they should not be accepted for the purpose of the defendants' share of the management also. There are two provisions of the defendants' deed which seem to me *ultra vires.* The first is that which directs the defendants' trustee to " join with the other shareholders of the temple in respect of the said temple, and all the immovable and movable properties belonging to the said temple and not mentioned in this deed." This should be considered as inoperative so far as it purports to deal with the properties specially vested in the plaintiffs' branch. The next provision also goes somewhat too far. It directs the defendants' trustee not only to manage and look after the twelve parcels of land specially vested in him without joining any of his co-managers, but further gives the same direction with regard to the temple itself. " To celebrate and conduct with the income and rents thereof the affairs of the said temple." This must be read as subject to the corresponding right in the other branch. Finally, in the last

[1] *(1903) 27 Mad. L. R. 192.*

1924.

BERTRAM C.J.

Karthigasu Ambalawanar v. Subramaniar Kathiravelur

paragraph of the deed, the maker attempts to provide for the case of the failure of descendants of the trustee whom he appoints, or all persons onminated by him to carry on the trust. In such an event the deed directs that the trust should be managed and looked after by the officials of the two local religious bodies. This direction could, in my opinion, have no effect, unless the other branch saw fit to concur in it. In the absence of such common arrangement, I think that on the failure of descendants of either branch the rights of that branch should pass to the surviving branch.

There is one further matter which must be provided for. At present there are two trustees, representatives of the plaintiffs' branch and only one of the defendants' branch. With regard to the present trustees, it seems to me that this *status quo* should remain, but in regard to future appointments it would seem more convenient and less likely to lead to friction if the representation of the two branches in the trusteeship was equal. If the learned Judge thought it more convenient, an additional trustee might be appointed on the defendants' side at once. Whether the trustees should exercise their functions in co-operation or in rotation, as for example, during annual or monthly periods, this is a matter on which the learned Judge, if he saw fit, might give directions after ascertaining the view of the parties.

It appears to me, therefore, that the learned Judge, on the matter coming before him again, should give directions with regard to the devolution of the trusteeship. These directions might suitably be that the trusteeship should devolve from time to time upon such descendants of the present holders of the office, in each branch of the family, as may be nominated and appointed by the holder of the office for the time being before his death, or, in the absence of any such appointment, upon such of the heirs of the original founder in that branch as may be selected by the heirs of that branch, and in the absence of any special selection, upon the eldest male descendant of the last deceased trustee. It appears to be in accordance with the family custom that a trustee nominating a descendant to succeed him should associate this descendant with himself as trustee during the continuance of his own life, and the learned Judge might bear this in mind and give any directions on the subject he thinks suitable.

The directions, therefore, to be given by the learned District Judge, as to the administration of the trust and the succession to the trusteeship, should be on the lines above suggested, subject to any particular modification which he may think fit to make by the agreement of the parties, or, in his own discretion, after ascertaining the local and family circumstances.

I would, therefore, remit the case to the learned District Judge for the purpose of an amendment in the plaint asking for directions under section 101 of the Trust Ordinance for regulating the administration of the trust and the succession to the trusteeship, for a

vesting order under section 112, and for such further and other relief as to the Court may seem fit, and for the purpose of subsequent action by the learned District Judge on the lines I have indicated.

It was agreed by the parties that no question should be raised as to the accountability of the defendants or any of them in respect of the revenues of the lands controlled by their branch of the family up to this action, these revenues being taken to be expended on behalf of the trust, and further that there should be no order as to costs either in this Court or in the Court below or in any subsequent proceedings for giving effect to this judgment in the Court below, except so far as contentions might arise in those subsequent proceedings—in which case the costs of the contention should be in the discretion of the learned District Judge.

JAYEWARDENE J.—I agree.

Set aside ; case remitted.