

Present : Hutchinson C.J. and Wood Renton J.

Oct. 19, 1910

MUTTIAHPILLAI v. SANMUGAM CHETTY *et al.*

180, D. C., Jaffna, 6,619.

“*Madam*” — Action by trustee under section 247 claiming lands belonging to “*madam*” — Sanction of Attorney-General not necessary — Ordinance No. 7 of 1871 applies to public trusts as well — Civil Procedure Code, s. 639.

Action can be taken under section 639 of the Civil Procedure Code only when a trustee has committed a breach of trust, or when the direction of the Court is deemed necessary for the administration of the trust.

Ordinance No. 7 of 1871 does not apply to private trusts only, but to public trusts as well.

A person appointed by Court, under section 4 of Ordinance No. 7 of 1871, trustee of a “*madam*” may bring an action under section 247, Civil Procedure Code, with respect to a property which he claims as belonging to the “*madam*,” without the sanction of the Attorney-General.

THE facts are fully set out in the judgments.

Walter Pereira, K.C., Acting Attorney-General (with him *Balasingham*), for the plaintiff, appellant.

H. A. Jayewardene (with him *Wadsworth*), for the defendants, respondents.

Cur. adv. vult.

October 19, 1910. HUTCHINSON C.J.—

This is an action under section 247 of the Civil Procedure Code. The plaintiff sues as trustee and manager of a “*madam*” at Karativu, and claims that certain land, which was seized by the first defendant under a writ of execution against the second defendant, be decreed to be the property of the “*madam*”, and not liable to be seized and sold for the debt of the second defendant.

It was admitted that the plaintiff is trustee of lots 6, 8, 11, 12, and 13 shown on the plan filed in the case, and that he was so appointed by a decree of the Supreme Court. The land now in question is lot 7. The following preliminary issues were settled and tried first :—

Was the plaintiff appointed trustee only of lots 6, 8, 11, 12, and 13, or of the “*madam*” and all its properties ?

Can the plaintiff as trustee of the “*madam*” bring an action for declaration of title of the “*madam*” property ?

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The District Judge dismissed the action, holding that the plaintiff is not trustee of any property except lots 6, 8, 11, 12, and 13, and that he cannot sue for land which is not included in the trust property, and that the action should have been taken according to the procedure laid down in section 639 of the Code ; for he said, "in effect the plaintiff, claiming lot 7 as trust property complains that the second defendant has committed a breach of the trust created over this land". The plaintiff appeals.

I cannot assent to the reason given by the learned Judge. Action can only be taken under section 639 when a breach of trust is alleged, or when the direction of the Court is deemed necessary for the administration of the trust. But a breach of trust can only be committed by a trustee ; and the defendants are not trustees (at least the plaintiff does not allege it, and the defendants deny it) ; nor is it alleged that the direction of the Court is necessary for the administration of the trust. That was doubtless the reason why the Attorney-General, on application being made to him for his consent under section 639 to enable this action to be brought, refused it, saying that the action was not one for the institution of which he could properly grant sanction under section 639 (p. 3). If the plaintiff is the trustee of the "madam" property, and if this land is part of the "madam" property, he can maintain this action. But the learned Judge held that the only property which is vested in the trustee is lots 6, 8, 11, 12, and 13, and if that is so, the result will be that, if lot 7 is proved to be part of the "madam" property (that is, subject to the trust), there is no person who can claim it on behalf of the trust from a person who is wrongfully in possession of it.

In 1905 an action was brought under section 639, with the sanction of the Attorney-General, by persons who claim to be interested in this trust, against four persons (one of whom was the present second defendant), who were alleged to be in charge of the trust property, and to have committed breaches of trust with regard to it. The defendants there alleged that three of them were descendants of the founder of the trust and as such were managers of the "madam", but that some of the lands mentioned by the plaintiffs as part of the trust property were not so, but were their private property, and amongst the lands which they so claimed was that which is the subject of the present action. The District Court made a decree, which on appeal was set aside, and this Court ordered that the District Judge should place the "madam" and lots 6, 8, 11, 12, and 13 under the management of the Government Agent or such other officer or person as might be willing and, in the opinion of the Judge, fit to undertake the trust, with power to apply the income of the lands as thereby directed. The defendants had admitted that lots 6, 8, 11, 12 and 13 were the subject of a public charity, but this Court in the course of its judgment said that the evidence was

insufficient to justify an order with regard to the rest of the land, and that no adjudication need be made as to the ownership of the rest of the land.

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The order of this Court was dated July 11, 1905. And on May 28, 1906, the District Court made its decree purporting to be "in terms of the decree of the Supreme Court dated July 11, 1905," declaring that lots 6, 8, 11, 12, and 13, with the "madam" on lot 6, were the property of the public for public charitable purposes, and that the present plaintiff be "appointed trustee and manager, to have sole control of the said 'madam' and all its property, movable and immovable, in terms of section 4 of Ordinance No. 7 of 1871, with power to apply the income," &c. The respondents contend that this last decree, so far as it appoints the plaintiff trustee of all the "madam" property, goes beyond that which the Supreme Court had directed. But it purported to be made in terms of the Supreme Court decree; it was made in the presence of the second defendant, who was a party to that action; and there was no appeal against it. The present defendants are therefore bound by it, even if it was wrong. But I am not at all sure that it would not have been upheld on appeal, notwithstanding the opinion expressed by Wendt J., in *Ahaimado v. Lebbe Maricar*,¹ that Ordinance No. 7 of 1871 applies only to private trusts, an opinion in which as at present advised, I should not concur.

The question remains whether the property claimed in this action is the property of the "madam". The decree dismissing the action should be set aside and the case go back for trial of the issues (1), (2), (3), (4), and (6), which were proposed in the District Court, or any other issues which that Court may think it right to try. The costs of this appeal should be costs in the cause.

WOOD RENTON J.—

This is an action, under section 247 of the Civil Procedure Code in which the plaintiff-appellant, as manager and trustee of Kanakasapathipillai Madam, situated at Karativu, in the District of Jaffna, claims that a certain land described in the plaint should be declared the property of the "madam" and released from seizure at the instance of the first defendant-respondent in execution of a debt due to him by the second, and that the first defendant-respondent should be decreed to pay Rs. 50 damages in respect of the seizure. The plaintiff-appellant had claimed this land in the execution proceedings. His claim was dismissed, and accordingly he brought this action under section 247 of the Code of Civil Procedure, with the objects already stated. The defendants-respondents in their answers have denied the appellant's *locus standi* under the following circumstances. In case 3,686 of the District Court of

¹ (1909) 12 N. L. R. 123.

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Jaffna certain persons, alleging themselves to be interested in the property of the Kanakasapathipillai Madam, instituted an action, with the sanction of the Attorney-General, under section 639 of the Code of Civil Procedure, for a declaration that the lands described in the plaint were trust property, for the ejection of the occupants of those lands, and for the appointment of new trustees. The land here in suit was one of the lands claimed in that action, and was there described as lot 7. The plaintiff obtained judgment in the District Court, but in appeal the decree of the District Court was set aside, and the District Judge was ordered by the decree of the Supreme Court to place certain specified lots under the management of the Government Agent of the Province, or such other public officer or other person as might be willing or, in the opinion of the Judge, fit to undertake the trust. "No adjudication," said the Supreme Court, "need be made as to the ownership of the rest of the land." Lot No. 7 was not among the lots which were directed by the judgment and by the decree of the Supreme Court to be dealt with in the manner that I have just described. The District Judge, in pursuance of the judgment of the Supreme Court, appointed the present appellant trustee and manager, to have the sole control of the "madam" and all its property, both movable and immovable, in terms of section 4 of Ordinance No. 7 of 1871. In making this order the District Judge went further than he was empowered to do by the terms of the decree of the Supreme Court, and the contention of the defendants-respondents in the present case is that the decree of the District Court did not vest lot No. 7 in the "madam," or in the appellant as its trustee and manager, and that consequently he is not entitled to bring any action in respect of that lot. The learned District Judge has given effect to this contention. He holds further that section 4 of Ordinance No. 7 of 1871 cannot apply, inasmuch as lot 7 was not subject to any trust within the meaning of that section, and he has accordingly dismissed the plaintiff's action, holding that if any proceedings are to be taken with respect to the lot in question, they must be brought in conformity with the provisions of section 639 of the Civil Procedure Code.

I am unable to agree with the decision of the learned District Judge on this point. Section 639 of the Civil Procedure Code has no application, except to actions for alleged breaches of express or constructive trusts created for charitable purposes, or when the direction of the Court is deemed necessary for the administration of any such trust. This is an action under section 247. The appellant does not allege that there has been any breach of trust on the part of the respondents. His contention is that the property which has been seized by the first defendant-respondent as execution-creditor belongs to the "madam," and is therefore not liable to be sold under the writ against the second defendant-respondent. No

breach of trust is alleged against any of the defendant's respondents, nor is any question as to the administration of the trust involved in the action. The simple question at issue is whether certain property is liable to be sold in satisfaction of a judgment debt. Under these circumstances section 639 of the Civil Procedure Code can have no application. (See *Othaman Hadjar v. Madar Lebbe*,¹ and *Kunaratnam v. Sinnachchy*²). We have therefore, to consider the position of the appellants under Ordinance No. 7 of 1871. By the judgment of the Supreme Court in D. C., Jaffna, 3,686, the defendants-respondents in that action were removed from the management of the "madam" and its property. The decree of the Supreme Court is, in fact, a direction to the District Court to appoint a trustee of the "madam" itself, and to place certain specified lots, which had been proved in that action to be subject to the trust, under his control and management. By virtue of section 5 of Ordinance No. 7 of 1871 the appointment of the appellants as trustee of the "madam" vested in him all the property movable and immovable, which might belong to the "madam." I do not think that the Supreme Court should be held to have intended to decide that the "madam" had no other property besides the specified lots. The Supreme Court expressly abstained from giving any adjudication on that point, and although the District Judge, who appointed the appellants trustee in conformity with the decision of the Supreme Court, has gone a little beyond the terms of the judgment and the decree on appeal, I do not think that he has really contradicted their spirit and intention. I would hold that, by virtue of the provisions of section 5 of Ordinance No. 7 of 1871, the appointment, which was undoubtedly authorized by the Supreme Court, of a trustee of a "madam" itself carried with it the right to vindicate all the property of the "madam," whether it had been specified in the decree of the Supreme Court or not. I am unable to agree with the *dictum* of Wendt J. in the case of *Ahamadu v. Lebbe Marikar*,³ that Ordinance No. 7 of 1871 was intended to deal with private and not with public trusts.

I would set aside the judgment of the District Court and send the case back for the trial of all the issues other than that of the status of the plaintiff-appellant. The costs of this appeal and all other costs, I think, should be in the discretion of the learned District Judge.

Case sent back.

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¹ (1908) 8 A. C. R. 133.

² (1906) 5 Tam. 113.

³ (1909) 12 N. L. R. 126.