

1950

Present : Jayetilleke C.J. and Dias S.P.J.

HUNTER (Government Agent, W.P.), Appellant, and
SRI CHANDRASEKERA, Respondent

S. C. 36—D. C. (Inty.) Colombo, 66/Trust

*Trust—Vesting order—Correct procedure to be followed in making application—
Civil Procedure Code (Cap. 86), s. 595—Trusts Ordinance (Cap. 72), s. 112 (1).*

Where a person asks for a vesting order under section 112 of the Trusts Ordinance, without asking for any further remedy on a cause of action, the procedure must be by way of summary procedure and not by way of regular action.

Muttukumar v. Vailhy (1937) 18 C. L. Rec. dissented from. Tambiah v. Kasi-pillai (1941) 42 N.L.R. 558 and Ambalavanar v. Somasundera Kurukkal (1946) 48 N. L. R. 61 distinguished.

APPPEAL from a judgment of the District Court, Colombo.

One M. James Fernando Sri Chandrasekera, by his will dated 1909, created a trust known as "The Sri Chandrasekera Fund". He appointed "The Government Agent, Western Province" and "The Colonial Secretary" to be the trustees of the fund and provided that in the event of these two officers or either of them declining or being in any wise unwilling or unable to act as trustees, it was to be lawful for his widow and two others named in the will to appoint in writing "a member of the Executive Council" of Ceylon, or, failing them, "any other fit and proper

person". The Government Agent, Western Province, and the Colonial Secretary were the trustees of the fund. Owing to the changes in the Constitution the office of Colonial Secretary was abolished. The widow, thereafter, acting under the power of appointment, purported to appoint a trustee in place of the Colonial Secretary. The Government Agent, Western Province (the other trustee), thereupon, moved under section 112 of the Trusts Ordinance for a vesting order in favour of the Permanent Secretary to the Minister of Home Affairs and Rural Development, alleging that this officer was the proper successor to the Colonial Secretary and that there was an uncertainty as to the person in whom the title of the said trust vested. On a preliminary objection taken by the widow the District Judge dismissed the application of the Government Agent, holding that the application should have been by regular action and not by way of summary procedure.

H. V. Perera, K.C., with *E. B. Wikramanayake, K.C.*, and *L.G. Weeramantry*, for the petitioner-appellant.

No appearance for respondent.

Cur. adv. vult.

August 31, 1950. DIAS S.P.J.—

In his will of 1909 one M. James Fernando Sri Chandrasekera created a trust known as "The Sri Chandrasekera Fund". He appointed The Government Agent, Western Province, and The Colonial Secretary to be the trustees of the fund, and provided that in the event of these two officials or either of them declining, or being in any wise unwilling or unable to act as trustees, it was to be lawful for his widow and two others named in the will to appoint in writing "a member of the Executive Council" of Ceylon, or failing them "any other fit and proper person".

It is obvious, having regard to the date of the will, that the creator of the trust wanted his trustees to be high officers of the Colonial Government of that time. If those two officials or either of them could not act, their place was to be taken by a member of the Executive Council—an august body consisting mainly of officials. It was only if such an appointment could not be made that an ordinary mortal was to be appointed.

The petitioner-appellant is the Government Agent, Western Province, one of the trustees. He moved the District Court of Colombo *in summary procedure* under s. 112 of the Trusts Ordinance, which reads:

"S.112 (1). In any of the following cases, namely—

(i) where it is uncertain in whom the title to any trust property is vested,

(ii) (irrelevant)
the Court may make an order (in this Ordinance called "a vesting order") vesting the property in any such person in any such manner or to any such extent as the Court may direct."

The appellant says that owing to changes in the constitution of Ceylon the office of Colonial Secretary was abolished and replaced by that of Chief Secretary, and that this latter office has also been abolished, and some of the functions of the Chief Secretary have now devolved on the Permanent Secretary to the Ministry of Home Affairs and Rural Development. The appellant says that this Permanent Secretary is the proper successor to the Chief Secretary as Trustee of the said Fund. The widow of the creator of the Trust (the respondent), however, has purported to appoint a trustee as successor to the Chief Secretary in pursuance of an alleged power of appointment given to her by the last will. The appellant says that in the circumstances he has been advised that the widow is not entitled to appoint a successor to the Chief Secretary. He submits that, therefore, it being uncertain in whom the title to the said trust is vested, it has become necessary to apply under s. 112 of the Trusts Ordinance for a vesting order.

The respondent appeared and objected. The District Judge dealt with a preliminary matter and dismissed the appellant's application on the ground that he should have filed a regular action, and that having moved in summary procedure his application failed.

At the hearing of this appeal, the respondent did not enter an appearance.

In my opinion the finding of the learned District Judge is wrong and cannot be supported.

S. 112 does not indicate what procedure should be followed when making an application under that section. In *Muttucumaru v. Vaithy*¹ Moseley J. said: "It is, however, contended that if he is not entitled to an order under s. 102 (of the Trusts Ordinance), he may apply to the Court for a vesting order under s. 112 (1) (i). Such an order may be made when it is uncertain in whom the title to any trust property is vested. The plaintiff has not alleged any such uncertainty, nor has it been shown that any exists. His claim in this respect must, therefore, fail. *Nor is it clear that the Court, except in a proceeding under s. 101 or s. 102 can make a vesting order under s. 112 itself.* If it is the intention of the Ordinance to confer such a power upon the Court, *it is strange that it does not indicate the procedure to be adopted for the purpose*". With the greatest respect, I am unable to agree with the dictum that a Court cannot make a vesting order under s. 112 except in a proceeding under ss. 101 or 102.

In *Tambiah v. Kasipillai*² the plaintiff claiming that he was the lawful hereditary trustee of a Hindu temple brought an action in regular procedure (a) for a declaration that he was the lawful trustee and manager for the protection of the temple and its temporalities; for an accounting and for the ejectment of the defendant; and for damages. (b) As ancillary relief he prayed for a vesting order under s. 112 in regard to the temple and its temporalities on the ground that it was not possible to ascertain the successors in title of the various properties which constituted the temporalities of the trust; and it was uncertain in whom

¹ (1937) 18 C.L. Rec. 5; 12 C.L.W. 9.

² (1941) 42 N. L. R. 558.

the legal title thereto was vested. (c) He also prayed for an injunction. It appeared that in an earlier proceeding the plaintiff had proceeded by way of summary procedure and his application was dismissed. The plaintiff appealed against that order in 40 N.L.R. 298 but his appeal failed on a preliminary point, and the point of law which now arises could not, therefore, be argued. In 42 N.L.R. 558 this Court held that the plaintiff could sue *rei vindicatio* for the trust property without having recourse to s. 102 of the Trusts Ordinance. It was further laid down that a claim to a vesting order under s. 112 may be asserted in connection with the *rei vindicatio* action. Keuneman J. said: "S. 112 applies to all cases of trusts and not only to religious trusts I have not been able to find, nor has counsel been able to show me, any section which lays down a procedure relating to a vesting order in connection with the ordinary trust as distinct from a religious trust. I do not think, where a power has been expressly given in the Ordinance, we can deny to the parties requiring the exercise of that power some appropriate procedure. In this case in earlier proceedings, it was held that a mere application to Court was not the proper procedure, but that a regular action was needed. As there was no appeal from that order, for the purposes of this case, that particular point may be regarded as settled. I hold that the claim to a vesting order may be asserted in an action, and that the present action is in order so far as it relates to the claim for a vesting order." There are certain points which strike the eye in regard to this case. In the first place, Keuneman J. did not express agreement with the finding by the District Judge in the earlier proceeding that an application for vesting order should be made by regular action. All he says is that there having been no appeal taken against that order, he is content "for the purposes of the case" he was dealing with to assume that point to be settled. In the second place, this case is an authority for the proposition that where a person having a cause of action files an action in regular procedure, it is open to him to tack on to that action an application for relief under s. 112 of the Trusts Ordinance. This case is therefore not an authority for the proposition that when a person seeks relief under s. 112 for one of the two reasons specified in that section, without asking for any other relief, he must do so in a regular action.

Finally we have *Amblavanar v. Somasundera Kurakkal*¹. Plaintiff as the hereditary trustee of a *madam* filed a regular action against the defendants for ejection and damages. He also added a prayer for a vesting order under s. 112. Canekeratne J. said: "No special procedure has been prescribed for obtaining a vesting order; but s. 116 (1) makes the enactments and rules relating to civil procedure for the time being applicable to all actions and other proceedings under the Trusts Ordinance. The District Court (Supreme Court?) can also direct the procedure to be followed in certain cases (sub-section 2). Application for obtaining relief may be made, according to the Civil Procedure Code, in one of two ways—either by regular procedure or by summary procedure. The former is the normal mode the latter is the exceptional mode. No complaint can be made against the constitution of this action if the appropriate procedure was to file a regular action; if the correct

¹ (1946) 48 N. L. R. 61.

mode of proceeding was by petition the fact that the plaintiff has made his application in the form of a suit may be regarded as a merely formal defect which has done nobody any harm, as the Court had jurisdiction to give relief. The decision in *Tambiah v. Kasipillai*¹ shows that the claim to a vesting order can be asserted by action”.

*Amblavanar v. Somasundera Kurukkal*² does not decide the point which now arises. In both the earlier cases, the plaintiff had filed an action in regular procedure on a cause of action against a defendant, and he was permitted in both cases to tack on an application for a vesting order to the other relief he claimed. In the present case the Government Agent is not suing the respondent on a cause of action. All he has sought to do is to draw the attention of the proper Court to a certain state of facts, and has invited that Court to make a proper order. In these proceedings no contest has arisen between rival claimants to the trusteeship.

I would refer to the provisions of s. 595 of the Civil Procedure Code which, although it does not affect the present case, is interesting as it deals with an analogous matter. S. 595 provides that “Applications to the District Court for the exercise of its jurisdiction for the appointment or removal of a trustee, and not asking any further remedy or relief, may be made by petition in the way of summary procedure hereinbefore prescribed.”

In my opinion, where a person asks for a vesting order under s. 112 of the Trusts Ordinance, without asking for any further remedy, the procedure must be by way of summary procedure and not by way of regular action. By proceeding by way of regular action the petitioner for a vesting order under s. 112 would lose the vital and fundamental benefits of s. 112 (2). The class of cases for which s. 112 was designed are those in which the Court should act summarily and speedily, and not by means of a protracted regular action. S. 595 gives an indication of what the proper procedure in a case like this should be. If in regard to the appointment and removal of a trustee summary procedure is necessary, it would appear to be equally necessary when it becomes the duty of the Court to vest a person with the status of trustee. The relief indicated in s. 112 (5) appears to be more appropriate to summary procedure than to regular procedure. Proceedings under s. 112 approach closely to the procedure under the Entail and Settlement Ordinance (Chap. 54).

The resultant position which emerges from these considerations is that where a person, without making any other claim against a person on a cause of action, merely asks for one of the two kinds of relief mentioned in s. 112, he should apply by way of *summary procedure*.

I, therefore set aside the order appealed against, and direct that the District Judge should proceed with the inquiry. As the respondent did not appear at the hearing there will be no costs of appeal, but the respondent must pay to the petitioner the costs of the proceedings in the District Court.

JAYETILEKE C. J.—I agree.

Order set aside.

¹ (1941) 42 N. L. R. 558.

² (1946) 48 N. L. R. 61.