SHANMUGALINGAM & ANOTHER

v.

VAITHESWARA KURUKKAL AND OTHERS

COURT OF APPEAL.
G. P. S. DE SILVA, J. (President, C/A) AND DHEERARATNE, J.
C.A. 622/76(F).
D.C. JAFFNA T.R. 106.
SEPTEMBER 10, 11 AND 12, 1986.

Hindu Religious Trust–Trustees and hereditary priest–Appointment by deed as trustee by hereditary priest and nomination of person by same deed for appointing trustees–Revocation and renunciation by deed–Duty of judge to examine case–Section 48 of Courts Ordinance No. 9 of 1917–Law before Trusts Ordinance came into operation

Before the Trusts Ordinance of 1917 came into operation in the absence of an instrument regulating the devolution of trusteeship or any special customary rule, the trusteeship devolved on the heirs of the founder of the trust. Subject to any arrangement made by the founder, the right of management of the foundation vests in the founder himself and his heirs, but the founder himself is entitled to make express provisions for future management.

Hindu temples in Ceylon are under the control and management of persons in whom the fabric is vested:

(1) by right of private ownership,

(2) by grant or assignment by the owner of the land on which the temple is built,

(3) by appointment by the congregation, and

(4) by deed of trust.

But these means by which managers or trustees are appointed are not exhaustive.

By the law then in existence the trustee is not precluded from renouncing his rights of trusteeship, agreeing to appoint another person as a trustee and relegating himself to the position of a priest reserving the right of performing poojahs subject to the authority and powers of the new trustee. After such renunciation he has no authority to appoint trustees.

After the Trusts Ordinance No. 9 of 1917 came into operation the trustee cannot renounce his trusteeship in view of s. 48 of that Ordinance. In terms of s. 72 of the Ordinance the office of a trustee is vacated by his death or his discharge from office.

Cases referred to:

(1) *Thambakar v. Govindran 1887 – N.L.R. Bombay XII, page 247.*

(2) *Supramaniam et al v. Elampa Kurukkal et al – (1922) 23 NLR 417, 424.*

(3) *Narayanan Chetty v. James Finlay and Co. – (1927) 29 NLR 65, 70.*

(4) *Ramanathan v. Kurukkal – (1911) 15 NLR 216.*

(5) *Kumaraswamy Kurukkal v. Karthigesa Kurukkal – (1923) 26 NLR 33, 37, 38.*

APPEAL from judgment of the District Court of Jaffna.

H. L. De Silva, P.C. with *K. Kanag Isvaran* for defendant-appellants.

Dr. H. W. Jayewardene, Q.C. with *S. Mahenthiran* and *Miss T. Keenawinna* for plaintiff-respondent.

Cur. adv. vult

November 14, 1986.

DHEERARATNE, J.

Plaintiffs filed this action on 03.05.1970 seeking that they be declared lawful trustees and hereditary priests of the temple called Sri Sithivinayagar Kovil and its temporalities, that they be quieted in possession as such, and for ejectment of the defendants. The plaintiffs claimed that this temple was founded by Narayanapillai Arumugam and that Kumaraswamy Kurukkal was its hereditary priest; that Narayanapillai Arumugam officiated a trustee of the temple until by deed No. 1388 of 20.09.1914 (P2), he appointed Kumaraswamy Kurukkal as trustee who officiated as such; that by P2 Narayanapillai Arumugam, nominated Kumaraswamy Kurukkal for the purpose of appointing trustees in the event of a vacancy occurring; that by deed No. 2287 of 07. 05. 1916 (P1) Kumaraswamy Kurukkal along with Narayanapillai Arumugam appointed Arumugam Sarawanamuttu to succeed Kumaraswamy Kurukkal as trustee and also provided that on

the death of Arumugam Saravanamuttu the trusteeship should devolve on the male descendants of Saravanamuttu and on the failure of such male descendants the trusteeship should devolve on Saravanamuttu's female descendants; that Arumugam Saravanamuttu and his descendants who officiated as trustees died without leaving any descendants and therefore in accordance with the terms of deed P2, by deed No. 23850 of 12.12.1969 (P3), Kumaraswamy Kurukkal appointed the plaintiffs as trustees, who by virtue of section 77 of the Trusts Ordinance No. 9 of 1917 (Chap. 87) are entitled to the said temple and to its temporalities.

On 12.10.1970, the defendants filed answer averring among other matters, that P2 of 1914 was executed by Narayanapillai Arumugam at a time when he was old and infirm and that he had been deceived by Kumaraswamy Kurukkal who was functioning as a priest to signing that deed; that when the execution of the deed P2 became known to the descendants of the founder of the temple namely Siththamparam Ramar, Kumaraswamy Kurukkal was made to join in the execution of P1 of 1916, whereby P2 was revoked and Narayanapillai Arumugam's son Arumugam Saravanamuttu was appointed the sole trustee; and that Kumaraswamy Kurukkal was permitted to officiate as the priest of the temple during his life time under the supervision of Arumugam Saravanamuttu. The defendants denied that Kumaraswamy Kurukka. had any hereditary right as a priest or any status as a trustee and P3 conveyed any rights to the plaintiffs. The defendants further averred that the temple was built by Siththamparam Ramar in the year 1775 and its trusteeship devolved on his descendants Raman Sarawani, thereafter to Sarawani Narayanapillai and then to Narayanapillai Arumugam. The defendants also averred that after Narayanapillai Arumugam, his son Arumugam Sarawanamuttu succeeded to the trusteeship and, after his death, his son Vinayagampillai succeeded as trustee, who later died unmarried and issueless in the year 1961, whereupon his cousin (son of Arumugam Saravanamuttu's sister Sittangam) Kanapathipillai Sinniah became the sole hereditary trustee; that he by deed No. 6160 of 01.09.1969 (D17) appointed his son the 1st defendant as the sole trustee of the temple; and that the 2nd defendant is assisting the 1st defendant to perform the duties of a trustee. The defendants by this answer only asked for a dismissal of the plaintiffs' action.

On 12.03.1971, the plaintiffs filed an amended plaint. In this amended plaint they took somewhat a different position and averred that P1 of 1916 was invalid in law because it is contrary to the terms of deed P2, contrary to the provisions of the Trusts Ordinance relating to the appointment of trustees, and also because Narayanapillai Arumugam had already ceased to be a trustee at the time of its execution. Further, the plaintiffs averred that P1 of 1916 was not acted upon; that the P2 of 1914 could not have been revoked; that Kumaraswamy Kurukkal appointed Arumugam Saravanamuttu to assist him in the management of the temple; that on the death of Saravanamuttu, Kurukkal appointed one Ramupillai Rasa to assist him and on Rasa's death he appointed one Ramupillai Kumaravelu to assist him; and that on Kumaravelu's death, Kurukkal appointed the plaintiffs as trustees by P3 of 1969.

On 13.06.1971, the defendants filed amended answer specifically denying that there was a failure of the descendants of Arumugam Sarvanamuttu to succeed as trustees and on the devolution set out in the amended answer, they prayed that the 1st defendant be declared entitled to as hereditary trustee.

The learned District Judge gave judgment for the plaintiffs and the main contention of the defendant-appellants at the hearing of this appeal is that there has been no proper examination of the case of the plaintiffs. The main reason which impelled the learned District Judge to hold with the plaintiffs, appears to be the view he took that by P1 of 1916, Kumaraswamy Kurukkal could not have lawfully renounced his rights as a trustee in violation of section 48 of the Trusts Ordinance No. 9 of 1917, and as P1 is of no force or avail in law, in terms of P2 of 1914 Kumaraswamy Kurukkal had the power to appoint the plaintiffs as trustees by P3 of 1968. The reasoning appears to us to be fallacious, for, as the learned trial judge reasoned out, if P1 is invalid because it is contrary to the provisions of the Trusts Ordinance No. 9 of 1917, by the same process of reasoning, P2 too should be invalid, because Narayanapillai Arumugam could not have renounced his trusteeship either. Furthermore, the learned District Judge has overlooked the fact that both P2 of 1914 and P1 of 1916 had been executed prior to the Trusts Ordinance No. 9 of 1917 came into operation, the date of its operation being 16.04.1918.

In P2, Narayanapillai Arumugam recites title to the tempie on the basis that it was in his undisturbed possession for over 50 years and by virtue of decree entered in the district court of Jaffna (P8/ D3 of 1912), Narayanapillai Arumugam further states in P2, that since he is unable to manage and administer the temple because he is old and infirm, he is appointing Kumaraswamy Kurukkal as trustee or administrator. In P2, Naryanapillai Arumugam further stated:

"I do hereby declare that the said Kumaraswamy Kurukkal shall and will have power during his life time to appoint at his discretion one other trustee or administrator to function severally or jointly with him on all matters aforesaid.

In the event of the said Kumaraswamy Kurukkal not having appointed during his life time a person to be the trustee or administrator after him, the right of being a trustee or administrator shall and would be vested in the male descendants of the said Kumaraswamy Kurukkal and their male descendants and to their male heirs. In the event of the said Kumaraswamy Kurukkal not having any male descendants or of not having appointed a trustee or administrator by writing, the aforesaid right would belong to my male descendants and after me, and to their male heirs.....

I further do hereby declare that in the event of the moveable or immoveable properties of said temple being encumbered or alienated, I, and after me my son Arumugam Saravanamuttu will defend and warrant title thereto."

By P1 of 1916, which like P2 purports to be a deed of appointment of a trustee, Kumaraswamy Kurukkal and Naryanapillai Arumugam appointed Arumugam Saravanamuttu as a trustee. The material portions of P1 read:

"And whereas under the said urumai, I (Narayanapillai Arumugam) was unable to maintain and manage the moveable and immoveable properties and had appointed...Kumaraswamy Kurukkal...as trustee of the said temple under and by virtue of deed 1388 dated 20th September 1914 (P2): And whereas I have certain claims and interests in the said temple according to the said deed. And whereas both of us, jointly or severally are unable to maintain administer and manage the moveable and immoveable properties of the said temple and also to conduct the said affairs of the said temple;

And whereas it has become necessary to nominate and appoint another trustee to conduct, maintain, administer and manage all the affairs of the said temple only reserving the right of the poojahs to the first named of us (Kurukkal)...we do hereby nominate and appoint Arumugam Saravanamuttu, son of Narayanapillai Arumugam the 2nd named of us the trustee of the said temple....

We do hereby declare the said Arumugam Saravanamuttu will and shall have full right and title during his lifetime, to appoint another trustee if so required to function jointly with him or severally....

I first named of us, the said....Kumaraswamy Kurukkal do hereby declare that I have the right of poojahs subject to the authority and powers of Arumugam Saravanamuttu."

I would pause at this stage to consider the law of trusts applicable in this country before the Trusts Ordinance No. 9 of 1917 came into operation. In our view the validity of P2 and P1 could be tested only in the light of such law. There was certainly no law before Ordinance No. 9 of 1917 incorporating the substantive law of trusts of England as a part of our law, although some legislative provisions did exist covering certain procedural matters relating to the law of trusts.

Then Attorney-General, Sir Anton Bertram (later Chief Justice) moving the second reading of the Trusts Ordinance of 1917 in the Legislative Council on 15.11.1916 stated:

"In the legal history of this colony one of its most interesting chapters has been the gradual introduction of the English Law of Trusts into the Roman-Dutch Law of the Colony, which is its common law. That process has been gradual and partial, and it is not very clear to what extent it has gone. It would not be easy to define the law of Trusts in this Colony, because the number of decisions relating to it is extremely few. All we can say is that, speaking generally, we have adopted the principles of the English law. But, in order to put the law now on a proper footing, what is proposed is this, that we should take this opportunity of taking a step, which in my own view, is the natural and proper step in all developments of this kind, and that is to introduce a codification of the general law." (*Hansard* of 15.11.1916, Columns 247-248).

Again, the state of the law at that time is reflected in the "statement of objects and reasons as appended to the bill", relevant portions of which are cited below:

"The originating cause of this Ordinance is the unsatisfactory condition of the law relating to religious trusts, more particularly as far as it concerns the Hindu religious trusts. The defects in this department of the law which principally occasion inconvenience are:

(*a*) the informal nature of the constitution of many of these trusts;

(*b*) the uncertainty of the law as to the recognition in our courts of the customary religious law of the community concerned; (see *Sivapragasam v. Swaminatha Ayar, 1905 2 Bal 49,* and subsequent cases)

(*c*) the uncertainty as to the person in whom the title to the temple or other religious foundation in question is vested;

(*d*) the absence of any proper control over trustees and their accounts;

4. When however, the general law of the colony for this purpose is considered, it appears that there is no law, either common or statutory, which is adequate for the purpose. The Roman-Dutch law, the common law of the colony, does not recognise the English principle of the trust, though the expression "fidecommissum" would seem to suggest that it does. Trusts are a special invention of the English law, and were originally based upon the dual system of law and equity. In a trust the legal title is in one person and the beneficial interest in another. But the English law has insisted on the legal owner administering the property in accordance with the beneficial interest.

5. This department of English law has never been formally applied to Ceylon. There are several enactments on the statute book in which it is assumed, as for example 'The Property and Trustees Ordinance No. 7 of 1871'. There are other references to trusts both in the Civil Procedure Code and in the Penal Code. In these enactments (some of which are taken from India, where special legislation is in force) the existence of the English system is

assumed; for example, the fundamental principles of English law of trusts that the title to the trust property does not pass from trustee to trustee without a special conveyance or vesting order is assumed in the Ordinance of 1871 above referred to, and phrases which belong to the English law of trusts, such as cestui que trust, are used in other Ordinances mentioned. On the other hand, in our Ordinance No. 7 of 1840, which is based upon the English Statute of Frauds, the English section requiring declaration of trust to be in writing was deliberately omitted. The number of cases decided on the general law of trusts, reported in our local reports, is extremely small.

6. It is clear, therefore, that before any legislation dealing with religious trusts can be passed, the general law of trusts must be put upon a definite basis. India already possesses an admirable Code of the Law of Trusts, and this should clearly be adopted as our model. As every statute must necessarily repose upon a general basis of unwritten law, provision must at the same time be made as to the principles to be applied in cases where the Code is silent.

11. The application of the customary religious law of the community is provided for by section 106. So far as Hindu Trusts are concerned, that section will bring into force the principles laid down in *Thambakar v. Govindran* (1). These principles will also have a salutory application for the purpose of Muhammadan religious trusts.

12. The difficulties arising from the informal constitution of many of the religious trusts of the Colony, both Hindu and Muhammadan, are dealt with by section 107, which provides in the widest possible terms for recogn tion of de facto trusts.

There is no doubt that certain English principles of the law of trusts were judicially received in this country before the Trusts Ordinance No. 9 of 1917 came into operation, but the extent of such reception appears to us to be a matter of conjecture. Divergent views have been expressed as to whether the entire English law of trusts had been received in this country prior to the enactment of the Ordinance of 1917. In the case of *Supramaniam et al v. Elampa Kurukkal et al* (2) Bertram, C.J. observed:

"The English Law of Trusts was long ago received into the law of this country",

while Garvin, J. in *Narayanan Chetti v. James Finlay and Co.* (3) commented:

"The whole subject of trusts as known to the English law is foreign to our Common Law and the Ordinance No. 9 of 1917 may be said to have first introduced the law of trusts into our legal system. It would perhaps be correct to say that the extent of judicial reception of the English Law of Trusts before the Ordinance No. 9 of 1917 is uncertain and not very clear to what extent it has gone."

In this state of uncertainty of the pre 1917 law, we may not be justified in considering in terms of general principles of the English Law of Trusts, as to whether Narayanapillai Arumugam could have lawfully renounced his trusteeship by executing P2 of 1914, or whether Kumaraswamy Kurukkal could have lawfully renounced his trusteeship by executing P1 of 1916. It would then be prudent in our view to interpret those two documents giving expression to the intentions of parties as far as they accord with the customary rights governing Hindu temporalities at that time.

It would appear that before the Trusts Ordinance of 1917 came into operation, in the absence of an instrument regulating the devolution of trusteeship or any special customary rule, the trusteeship devolved on the heirs of the founder of the trusts. In *Ramanathan v. Kurukkal* (4), Grenier, J. remarked:

"It is a well known fact that Hindu temples in Ceylon are under the control and management of persons in whom the fabric is vested:

(1) by right of private ownership;

(2) by grant or assignment by the owners of the land on which the temple is built;

(3) by appointment by the congregation;

(4) by deed of trust, a term well understood among Hindus.

I have not exhausted all the means by which managers or trustees are appointed, but I think there can be no doubt that the plaintiff was the trustee of the temple in question, and had the right to appoint Kurukkals or priests without consulting the congregation".

Again in *Kumaraswamy Kurukkal v. Karthigesa Kurukkal* (5) Bertram, C.J. observed:

> "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 management of the foundation vests in the founder himself and his heirs, but the founder himself is entitled to make express provisions for his future management."

It would be appropriate at this stage to consider how Narayanapillai Arumugam became a trustee of the temple. The evidence led in this case does not lend support to the position of the plaintiffs that Narayanapillai Arumugam was the founder of the trust. According to D14, a certified copy of the temple register prepared on 15.10.1883, the temple was built by "Sedhampani Ramar Naranai Gromogam" in the year 1775. This is obviously a reference to Siththampani Ramar through whom the 1st defendant claims title to the temple. Another document which is not without significance, is a certified copy of the record in case No. 8402 of the District Court of Jaffna (P8/D3). On 22.1.1912 Narayanapillai Arumugam (signatory to P2 and P1) filed action as trustee and manager of the temple against three persons regarding a parcel of land which was alleged to be a part of the temporalities of the temple. In para 3 of that plaint Narayanapillai Arumugam claimed that his ancestors who were the owners of the portion of the land in dispute "verbally donated the land to the temple 75 years ago". By decree entered in that case Narayanapillai Arumugam was declared trustee and manager and was quieted in possession of the portion of land in dispute. These two documents, coupled with the evidence given on behalf of the defendants at the trial, lead us to the conclusion that Narayanapillai Arumugam became a trustee of the temple on hereditary rights, although deeds P2 and P1 are silent on this matter.

It cannot be said that Narayanapillai Arumugam was inhabited by the law at that time from appointing Kumaraswamy Kurukkal as a trustee by P2 of 1914 and it would appear that the legal title of the temple remained with Narayanapillai Arumugam despite the fact that Kumaraswamy Kurukkal was appointed trustee. I find nothing in the

language of P2 to suggest that Narayanapillai Arumugam parted with his title to the temple. This view is further supported by the conduct of Narayanapillai Arumugam and Kumaraswamy Kurukkal in jointly executing P1 of 1916. I am of the view that the law then in existence did not preclude Kumaraswamy Kurukkal from renouncing his rights of trusteeship, agreeing to appoint Narayanapillai's son Arumugam Saravanamuttu as a trustee, and relegating himself to the position of a priest "reserving the right of (performing) poojahs subject to the authority and powers of Arumugam Saravanamuttu".

What was the conduct of Kumaraswamy Kurukkal after the execution of P1 of 1916? On 29.01.1918, two persons filed action against Arumugam Saravanamuttu and Kumaraswamy Kurukkal, by case No. 12582 of the District Court of Jaffna, claiming possession of the temporalities of the temple, the plaint of which case was produced marked D4A. Kumaraswamy Kurukkal did not file answer, while Arumugam Saravanamuttu did, in which answer he claimed the trusteeship of the temple on a hereditary basis, tracing his title from the founder Siththamparam Ramar. Decree was entered of consent in that case, Arumugam Saravanamuttu being declared the manager of the temple. (D5 and D6).

The present dispute between the parties arose in connection with some disagreement on the question of certain socially disableo persons seeking entry to the temple premises as worshippers. One R. Kumaravelu, apparently a de facto trustee of the temple, was prosecuted in case No. 1905 of the Magistrate's Court of Mallakam under the Prevention of Social Disabilities Act No. 21 of 1957. In the year 1968, Kumaraswamy Kurukkal giving evidence in that case (P4), claimed to be no more than the high priest of the temple.

According to the view I have taken, that Kumaraswamy Kurukkal renounced his trusteeship by P1, which he lawfully might have done, he had no authority to execute P3 of 1969. The question whether P3 conforms to the provisions of the Trusts Ordinance No. 9 of 1917, therefore, does not arise for our consideration.

However, the plaintiffs have a second string to their bow, for, they contend that if P1 is valid, in terms of that deed, the d ·olution of trusteeship has failed and Kumaraswamy Kurukkal had authority to appoint trustees in such an eventuality. It was common ground during

the course of the arguments before us, that the translation of P1 appearing at page 293 of the brief, is correct. According to P1, Kumaraswamy Kurukkal and Arumugam Kumaraswamy expressed:

"We do hereby declare that the said Arumugam Saravanamuttu will and shall have full right and title during his life time to appoint another trustee, if so required to function jointly with him or severally. In the event of the said Saravanamuttu not having appointed a trustee during his lifetime, such right of being a trustee would be vested on his male descendants and their heirs. In the event of the said Saravanamuttu not having male descendants, such right of being a trustee shall be vested on his female heirs."

It is in evidence that Saravanamuttu died leaving as his heir, his son Vinayagampillai, who died unmarried and issueless. The first defendant's father Kanapathipillai Sinniah, being a son of Sinnathamgam the sister of Vinayagampillai and therefore being an heir of the descendant of Arumugam Saravanamuttu, was a person who was entitled to succeed as trustee in terms of P1. Therefore, it would appear that the succession in terms of P1 had not failed and the plaintiffs' case cannot succeed even on this alternative basis.

The plaintiffs also sought a declaration that they be declared hereditary priests of the temple, but I find no cogent evidence led at the trial to support such a claim.

The next question to be decided is the validity of the claim of the 1st defendant that he is entitled to succeed to the trusteeship by virtue of deed No. 6106 of 1.9.1969 (D17) executed by his father Sinniah Kanapathipillai, who was alive at the trial, but was not called to give evidence. This was the only basis on which the 1st defendant claimed the trusteeship at the trial, for he could not have claimed the trusteeship on a hereditary basis as his father was alive. The validity of D17 should be tested in terms of Trusts Ordinance No. 9 of 1917. If Kanapathipillai Sinniah was the lawful trustee of the temple, he could not have renounced his trusteeship in terms of section 48 of the Trusts Ordinance.

Section 48 of the Trusts Ordinance reads:

"A trustee who has accepted the trust cannot afterwards renounce it—except—

(*a*) with the permission of court; or

(*b*) if the beneficiary is competent to contract, with his consent; or

(*c*) by virtue of a special power in the instrument of trust."

In terms of section 72, the office of a trustee is vacated by his death, or by his discharge from office. According to section 73, among other modes of obtaining a discharge, a trustee may be discharged by appointment under the Ordinance of a new trustee in his place. It is contended therefore that Kanapathipillai could, by executing D17, achieve this object, having recourse to section 75(1). If I may condense section 75(1) as far as it applies to the facts, it would read:

> "Whenever any person appointed a trustee . . . . . desires to be discharged from the trust ..... a new trustee may be appointed in his place by ..... the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee ....".

I do not think the language of this section enables Kanapathipillai to play the dual roles of the trustee desiring to be discharged and the person making the new appointment. I am of the view that Kanapathipillai could have got himself discharged by getting a new trustee appointed in his place, only through the intervention of court, by making an appropriate application within the scheme of the Trusts Ordinance. In the result, I fail to see how the case of the first defendant too could succeed.

For the above reasons I would allow the appeal, set aside the judgment of the learned District Judge and dismiss the plaintiffs' action. The defendant-appellants will be entitled to costs below, and costs of this appeal fixed at Rs. 525.

Before parting with this judgment, while thanking learned counsel for the appellants and respondents for their invaluable assistance rendered to court, I think, I shall be remiss in my duty, if I fail to place on record, our indebtedness to Mr. G. P. S. H. de Silva, Director of National Archives, not only for forwarding us a photo copy of the Hansard of 15.11.1916 at my request, but also for the alacrity with which it was done.

G. P. S. DE SILVA, J. – I agree.

Appeal allowed.