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Present: Fisher C.J. and Drieberg J.MARKANDAN *v.* AIYAR.

447—D. C. Jaffna, 22,114.

Hindu temple—Appointment of manager—Power to delegate office—Trusts Ordinance, 1917, s. 49.

Where a person is appointed manager of a Hindu temple by a writing "with power to appoint, if necessary, one or more persons under him as manager," and where it is provided, that "on his failure to manage the temple or in case he withdraws himself from the management," the right to appoint a new trustee is expressly reserved.

Held, that the manager was not entitled to delegate all his powers both discretionary and ministerial to another.

THIS was an action brought by one Markandan by his attorney Sangarapillai Kanapathimuttu against the first defendant, who is the priest of a Sivan temple at Changani in Jaffna, and the second defendant, who assisted the first defendant in the performance of his duties. The plaintiff asked for the removal of the first defendant from the office of priest and the ejection of the second defendant.

It was contended by the defence that the action was not maintainable as Markandan in purporting to exercise the power conferred by the deed under which he himself was appointed had gone far beyond the authority vested in him under the document; that the document was not one under which he could delegate his office within the meaning of section 49 of the Trusts Ordinance of 1917.

The learned District Judge gave judgment for the plaintiff.

H. V. Perera (with *Rajakarier*), for defendants, appellant.—This is a purely ecclesiastical matter. The Court has no jurisdiction. The plaintiff does not say that he has dismissed the defendants. But he asks the Court to dismiss the defendants. The Court has no power to do this. The plaintiff could have dismissed the defendants and asked the Court's assistance to eject them. He has not done that.

The caption of the plaint shows that Markandan is residing within the jurisdiction of the District Court of Jaffna. Therefore he cannot appear by an attorney (section 25 (b) Civil Procedure Code).

The instrument P1, by which Markandan appointed his attorney, shows that he has withdrawn himself from the trusteeship and appointed his attorney Kanapathimuttu *instead* of him. This he cannot do. A trustee cannot delegate all his powers. Delegation is only allowed within well recognized limits.

N. E. Weerasooria (with *Subramaniam*), for plaintiff, respondent.—
The caption is a mistake. There is definite evidence in the case that Markandan was away from Jaffna.

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Markandan has not withdrawn himself from the trusteeship. He has only appointed an attorney to look after the temple. The real plaintiff is Markandan. The attorney is under his control. There is evidence to that effect in the case. There is evidence that the action was instituted at the instance of Markandan. The instrument of trust appointing Markandan gives him the power to appoint somebody to look after the temple under his control.

It is not necessary to apply English law principles if there is some customary law of the Hindus of Jaffna which is applicable. The ultimate authority rests with the congregation. In the instrument of trust appointing Markandan the trustee, they have definitely reserved to themselves the power to appoint another trustee in case they are dissatisfied with his management or when Markandan withdraws himself from the trusteeship. The congregation has not disapproved of the conduct of Markandan in appointing an attorney. They have not thought that Markandan has withdrawn himself from the trusteeship. If they thought so, they would have appointed another trustee. Section 49 of Ordinance No. 9 of 1917 empowers a trustee to delegate if the instrument so provides.

August 1, 1929. FISHER C.J.—

This action was brought by K. V. Markandan of Changuvely by his attorney Sangarapillai Kanapathimuttu of Vaddukoddai, as plaintiff, against the first defendant, who is the priest of the Sivan temple, situated in the land called Thanuvodai at Changani in Jaffna, and the second defendant, also a priest, who assists the first defendant in the performance of his duties. Paragraph 3 of the plaint refers to a decree in a case No. 12,525 and purports to set out the effect thereof. Paragraph 4 states: "That the plaintiff being very busy on account of his own business outside Jaffna appointed Sangarapillai Kanapathimuttu of Vaddukoddai East as his attorney to manage the affairs of the said temple as per power of attorney dated June 21, 1926" Paragraph 5 of the plaint sets out specific acts of the first defendant which the plaintiff alleges "are derogatory to the authority of the plaintiff as manager and which are detrimental to the interests of the said temple." Paragraphs 6 and 7 are as follows:—

6. The second defendant who was not appointed as an officiating priest in the temple commits trespass by entering the said temple and performs the *poojas* in spite of the manager's protest and thereby the manager is entitled to get an order of Court to eject the second defendant from the said temple.

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7. The first defendant is constantly acting in disobedience of the authority and control of the plaintiff as lawful manager and he has by his studied acts in violation of the plaintiff's rights as manager and of his duties as priest and by arrogating to himself the rights as manager rendered it impossible for the plaintiff to retain the services of the first defendant as a priest, even although the plaintiff is willing to act towards the first defendant in spirit of compromise and it has therefore become necessary to seek the intervention of this Court to remove the first defendant from the office of priest in order that the affairs of the temple may be properly carried out.

The jurisdiction of the Court is invoked on the basis of the decree mentioned in the 3rd paragraph of the plaint which was a consent decree dated February 27, 1919, in an action in which the then manager of the temple, Ramalingam Regunather, was the plaintiff and the first defendant to the present action was the second defendant in that action. This decree ordered *inter alia* that the then second defendant "be not dismissed without the intervention of a Court of law." The first defendant is the only party to the present action who was also a party to that action, in which a former manager of the temple was the plaintiff.

The plaintiff in this case has not purported to dismiss the first defendant from his office, though what he alleges against him would presumably from his point of view have entitled him to do so, but he sues apparently on the footing that under the decree of February 27, 1919, he is entitled to call upon the Civil Court to dismiss the first defendant. I do not think that view is correct. In my opinion that decree cannot in any way affect the questions at issue between the parties in the case we are now considering. I think that where an ecclesiastical authority has purported to exercise powers as such and comes to a Civil Court to give effect to the legal position resulting from such exercise the questions whether the powers exist and whether they have been duly exercised would be considered by the Court. This seems to me to be the effect of the opinions expressed in *Pitcha Tamby v. Cassim*.¹ But that is not the position in this case. In this case the attitude adopted by the plaintiff is this, that he has proved a state of things which justifies his coming to Court to ask for the dismissal of the first defendant. This Court therefore is asked to dismiss an officiating priest from office and, in my opinion, it has no jurisdiction to do so, and I think that on that ground the action is not maintainable and should have been dismissed.

But there was a further question which was argued before us going to the root of the matter. It was urged that the action cannot be maintained by K. V. Markandan by his attorney Sangarapillai Kanapathimuttu inasmuch as in purporting to exercise the power

¹ 18 N. L. R. 111.

conferred upon him by the deed under which he himself was appointed, K. V. Markandan has gone far beyond the power and authority vested in him by that document. In the course of the argument section 25 of the Civil Procedure Code was referred to. That section enacts that "The recognized agents of parties by whom such appearances and application may be made or acts may be done are—

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- (b) Persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance or application is made or act done, authorizing them to make such appearances and application, and do such acts on behalf of such parties

According to the caption, K. V. Markandan is resident within the local limits of the Court and it does not appear therefore that that section is applicable. The real state of things appears to be that the action was brought entirely independently of that provision and was brought on the footing that Kanapathimuttu under the instrument appointing him had full power to act as if he were a substitute in the fullest sense for Markandan. In order to deal with this question it is necessary in the first place to consider the extent of the powers conferred upon Markandan by the instrument which appointed him manager of the temple. That document (P7) is dated March 3, 1921. It purports to be an appointment made by a large number of people, of whom Ramalingam Regunather is one, of K. V. Markandan as manager, called trustee, of the said temple. The operative part of this document is as follows:—

" We do hereby appoint the said Kasinather Vaitilingam Markandan as the manager, called ' trustee,' of the said temple and authorize him to manage the said temple and all its immovable and movable properties, to defray the necessary expenses for the said temple, to collect the income, to cause or cause to be done all the affairs of the said temple, to cause to be done all festivals and *poojah* ceremonies that should be done in the temple according to the Hindu rites and ceremonies, to appoint Poojakar (officiating priests), servants, &c., or to discontinue them, to reappoint others, to take charge of all the movable and immovable properties and things belonging to the temple at present, and to keep in his charge and custody, to accept the jewels, money, and other movable things that may be given to the said temple as donation, to change the said things and get other necessary things, to collect money for the daily and special *poojahs* and festivals to the said temple, to recover the money due to the said temple, to cause buildings to be made to the said temple, to let and lease out the properties, to appoint if necessary one or more persons under him as managers and again to discontinue them, to commence and carry on any

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actions as plaintiff, defendant, and intervenient, to lay claim to the said temple and its properties and things, to institute cases and to retain necessary Proctor or Proctors and Advocates for the said purposes and to do or cause to be done all things necessary for that purpose, and to keep accounts of income and expenditure of the said temple.

Wherefore the said Kasinather Vaitilingam Markandan shall or cause to be done the aforesaid things and affairs and conduct himself regularly as manager of the said temple.

Further, we declare by these presents that we or majority of us shall appoint another as manager in place of the said Kasinather Vaitilingam Markandan, in the event of his failure to manage and conduct the said temple regularly or in case he withdraws himself from the management of the the said temple or in the event of his death.

I, the said Kasinather Vaitilingam Markandan, do hereby undertake the management of the said temple as manager."

It is clear from this document that Markandan was to be the actual and active manager of the property and that he was the sole person authorized and entitled to act as such. The power to appoint anyone to act on his behalf is confined to the words " to appoint, if necessary, one or more persons under him as managers and again to discontinue them " and it is provided that on his " failure to manage the temple or in case he withdraws himself from the management of the said temple " the right to appoint a new trustee is expressly reserved. The document is clearly therefore not one under which he can " delegate his office " within the meaning of section 49 of the Trusts Ordinance, 1917. The fact that the power to appoint a new trustee has not been exercised cannot have any bearing on the question of the extent of his powers to appoint a manager. That being so the question of the validity of the document (P1) by which Markandan purported to exercise his power of appointment under the trust deed arises. The intention of that document was clearly shown by the second recital, which is as follows:—

And whereas it is happened to me to leave this place to some other places; and whereas it is necessary that I should appoint instead of me an attorney to manage and look after the affairs of the said temple; and whereas I have power and authority under and by virtue of the said deed to appoint another person as my attorney; and whereas certain Sangarapillai Kanapathimuttu of Vaddukoddai East, who is a fit and proper person and honest and trustworthy, has consented to be appointed as such attorney to look after and manage the affairs of the said temple

The words " instead of me " clearly indicate that the appointment was in fact intended to be in effect a substitution of Kanapathimuttu for K. V. Markandan as trustee and manager of the temple, and the

powers set up in the operative part of the document clearly emphasize that view. The operative part runs as follows:—

The said Sangarapillai Kanapathimuttu is to look after the said temple and manage the said and all the immovable and movable properties belonging thereto, to spend all the necessary expenses for the said temple, to take all the produce and income, to conduct or cause to be conducted all the affairs and business to be done in the said temple, to perform all the *poojah* and festival ceremonies to be celebrated in the said temple, to appoint officiating priests and other workmen, or to dispense with them who are to be appointed so, or to reappoint them, to take in his charge all the immovable and movable properties and furniture belonging to the said temple at present and keep them in his charge, to accept and take charge all the jewels, moneys, and other movable properties to be donated to the said temple, to exchange the said goods and to purchase other necessary goods, to collect moneys and goods for the daily and special *poojahs*, ceremonies, festivals, and buildings of the said temple, to recover and receive the said moneys due to the said temple, to build the building of the said temple, to lease out the properties, to appoint one or many as trustees under him and again to dispense with them, to appear as plaintiff, defendant, or intervenient if there be any cases in respect of the said temple and its properties and to conduct such cases, to claim on behalf of the said temple and its properties, to conduct cases, to appoint the necessary Proctors or Advocates for the same. Further, to do all necessary things for the same, and to keep an account of the income and expenditure of the said temple.

I do hereby agree that the said Kanapathimuttu is to look after and manage the said temple and its affairs as I could do in my proper person as I be personally present and that he should set my signature for all the documents and proxies to be signed by me, and execute and grant unto him this deed of power of attorney.

I, the said Sangarapillai Kanapathimuttu, also do hereby accept this deed of power of attorney and set my signature thereto.

This is clearly not the appointment of a manager "under him." It is a delegation of the office and is not such an appointment as Markandan was authorized and empowered to make by the instrument of trust. The point is involved in the fourth issue, which is as follows:—

4. Has the plaintiff any right to delegate his power of manager-ship to an attorney?

It is unnecessary to consider the extent and scope of the power conferred by P7 to appoint "one or more persons under him as managers." But it is quite clear that it does not extend to the exercise of the powers which Markandan purported to exercise, and

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the fourth issue should have been answered in the negative. The position taken up by Kanapathimuttu was that which is indicated in the 6th paragraph of the plaint. The attitude of the first defendant throughout appears to have been that Kanapathimuttu being in effect a usurper he declined to recognize his authority.

In my opinion, the action, being an action by Kanapathimuttu as a person to whom Markandan had attempted to delegate his office, should have been dismissed as against both defendants. The appeal therefore is allowed and judgment will be entered dismissing the action with costs in this Court and in the Court below to be paid by Kanapathimuttu.

DRIEBERG J.—

I agree with the judgment of my Lord the Chief Justice.

It is clear that the document P1, though described as a power of attorney, is not one. The respondent does not authorize Kanapathimuttu to act for and on his behalf but instead of him. It is a complete and full surrender of all powers, both discretionary and ministerial, to Kanapathimuttu. It is sufficient to point to the authority given to him to exercise what is perhaps the greatest power of a manager, one calling for the highest degree of discretion and involving the greatest responsibility, that of appointing and dismissing the officiating priest. This the respondent could not delegate unless specially authorized by his appointment.

A trustee cannot delegate his powers except within certain well recognized limits. In *Speight v. Gaunt*¹ Lord Fitzgerald said, "I accept it then as settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust avail himself of the agency of third parties, such as bankers, brokers, and others." Any delegation except within these limits and except in cases of necessity, such as absence in another country, is absolutely void.

In this action Kanapathimuttu seeks to procure the dismissal of the priest for denying his claim to have control over the temple. The cause of action is plainly stated in his evidence to be the denial by the first appellant of his authority. He claims to manage the temple by, as it were, a title independent of the previous management, for he disclaims any responsibility or liability to the appellants for transactions during the time the respondent was manager, and this he could not do if he was acting for and on behalf of the respondent. The trial Judge rightly summarizes Kanapathimuttu's claim in these words: "The attorney was trying to make his position as manager a reality and gain real control in the affairs of the temple, as he a right to do."

¹ (1883) 9 Appeal Cases 1, at p. 29.

But he had no right to exercise the powers of management in the way claimed by him.

The respondent was by P7 authorized to appoint one or more persons under him as manager; it is clear that this only enabled him to secure the assistance of a person who would work under him in his name and under his personal directions, for P7 provides that if the respondent withdrew from the management the grantors of it should appoint another manager in place of him. This provision did nothing more than allow the respondent to associate with himself in the management, but subordinate to him, some other person. This is a power which a trustee does not ordinarily have, for the settlor of a trust places his confidence, in the trustee himself and not in another person, and by allowing the latter to have the joint control of the property the trustee puts it out of his own power to deal with it promptly and effectually in case of necessity, *Salway v. Salway*.¹

By P1 the respondent in effect declared his inability to manage the affairs of the temple as he had done until then and he appointed Kanapathimuttu to do so "instead of him," the fact that he described him as his attorney does not alter the real character of the transaction, which is a complete delegation of the trusts. The respondent has in fact exercised a power which under the deed P7 only its grantors had, namely, that of appointing a manager in his place if he "failed to manage and conduct the temple regularly or if he withdrew himself from the management of the temple."

Viewing this action, therefore, as what it in reality is—namely, one by Kanapathimuttu to enforce his power of dismissal of the priest, based on a cause of action which is the denial of his authority to control and manage the temple—it must fail. Can the action, then, succeed as one brought, as it is in form, by the respondent, K. V. Markandan?

The proxy in favour of the Proctor for the respondent is signed by Kanapathimuttu as the attorney of K. V. Markandan; now this appointment, and with it the plaint and all subsequent proceedings, are bad for the reason that the power of attorney—and it is sought to use the document P1 for this purpose, for there is no other—is by a person residing within the local limits of the jurisdiction of the District Court of Jaffna; Markandan's residence is so stated in the plaint and in P1.

Another reason is that this document P1 does not authorize Kanapathimuttu to appear and act on behalf of the respondent, but on the contrary authorizes Kanapathimuttu to himself appear as plaintiff, defendant, or intervenient, and to conduct cases in respect of the temple and its properties. It follows, therefore, that Kanapathimuttu is not a recognized agent of K. V. Markandan as described in section 25 (b) of the Civil Procedure Code.

¹ (1831) 2 *Russ and Myl*. 215.

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Our attention was drawn to these words of the penultimate clause of P1: " I do hereby agree that the said Kanapathimuttu is to look after and manage the said temple and its affairs as I could do in my proper person as I be personally present and that he should set my signature for all the documents and proxies to be signed by me, and execute and grant unto him this deed of power of attorney."

In this clause; as in the rest of the deed, the words " for and on my behalf and in my name " are noticeably absent, and the reference to the signing of the documents and proxies does not necessarily refer to such actions as this. The temple owns land and there is money lent out in mortgage bonds; a lease—and Kanapathimuttu is empowered to lease—or the release of a mortgage bond, or an action brought on one, where the title of the land to be leased is in Markandan or the bond is in his name, would have to be in the name of Markandan, unless the lands were by deed vested in Kanapathimuttu or the bonds assigned to him by deed. This authority to sign documents and proxies in Markandan's name was necessary so far as the immovable property vested in Markandan was concerned even though Kanapathimuttu was appointed to manage the trust himself and not on behalf of Markandan, and it does not make P1 a general power of attorney.

Nor is it possible to recognize this action as one by Markandan by permitting him to ratify the action of Kanapathimuttu by now granting a proper power of attorney in favour of Kanapathimuttu. Even if this be done the action cannot succeed. As I have pointed out, the action of Kanapathimuttu in issuing the orders and directions to the priest, disobedience to which is the cause of action, was not professedly or in fact done by him as Markandan's agent, and ratification of such action by Markandan is not possible. Ratification is possible only in the case of acts done by one who assumes to act as agent, but acts without authority or in excess of his authority.

Appeal allowed.

