CANAGARATNAM AND OTHERS
v
KARTHIKEYA KURUKKAL AND ANOTHER

SUPREME COURT.
JAYASINGHE, J.
DISSANAYAKE, J. AND
RAJA FERNANDO, J.
S.C. APPEAL NO. 32/2003
S.C. SPECIAL L.A. No. 260/2001
C.A. NO. 947/97
D.C. CHILAW 135/TRUST
DECEMBER 3RD, 2004
MARCH 18th, 2005
JULY 26TH, 2006
JULY 27th, 2006 AND
SEPTEMBER 13TH, 2006

Trust Ordinance – Section 42(2) – Intervention in the proceedings after the sale of the property – the position of intervenient respondents.

The 2nd petitioner acting as Attorney for the 1st petitioner applied to the District Court in terms of Section 42(2) of the Trust ordinance seeking Court permission to sell the land described in the petition. The learned District Judge allowed the application. Subsequently, in terms of the order the property was sold and the proceeds were utilized/invested for the benefit of the temple.

The intervenient-respondents sought to intervene in the proceedings where the District Judge had already made order for the sale of the property in terms of Section 42(2) of the Trust Ordinance and all transfer deeds were duly executed. The District Judge dismissed the application of the intervenient-respondents on the ground that the Court is *functus* after its order dated 20.11.1996, allowing the petitioner's application under Section 42(2) of the Trust Ordinance. The intervenient-respondents then sought to revise the order of the District Judge in the Court of Appeal. The Court of Appeal on 12.11.2001 set aside the order of the District Judge and directed the District Judge to hold a full inquiry into the objections of the added intervenient-respondent-respondents. Against this order the appellants appealed to the Supreme Court.

Held:

(1) The application made by the intervenient-petitioners to add them as parties is misconceived in law, for the reason that section 42(2) has not envisaged citing of parties as respondents and secondly, in any event when the order for sale was made the proceedings are at an end and the District Judge is *functus.*

(2) An application for a declaration that deeds executed in 1940, deeds executed in 1967, and the deed executed in 1977 be declared invalid cannot be considered in an application for intervention.

(3) The intervenient had no sustainable right to claim trusteeship even in a properly constituted vindicatory action."

Per Nihal Jayasinghe, J.–

"An application under Section 42(2) of the Trust Ordinance ought not to be confused with the representative action in terms of Section 16 or Section 18 of the Civil Procedure Code."

(1) Karthigesu Ambalavanar v Subramaniam - 27 NLR 16.

(2) *Kalimuttu et al* v *Muttusamy* 27 NLR 193

APPEAL from the judgment of the Court of Appeal.

K. Kanag-Iswaran, P.C. with *R. Balasubramaniam* and *Nigel Bartholameusz* for appellants.

Ms. U.H.K. Amunugama for respondents.

Cur.adv.vult.

May 11, 2007

NIHAL JAYASINGHE, J.

The 2nd petitioner acting as attorney for the 1st petitioner applied to the District Court of Chilaw in terms of Section 42(2) of the Trust Ordinance in Case No. D.C. Chilaw 135/Trust seeking permission of Court to sell the land set out in the schedule to the petition in allotments or as an entire unit and the learned District Judge allowed the application by order dated 20.11.1996. Subsequently, in terms of the order of the learned District Judge the property was sold and transferred and the proceeds thereof utilized/invested for the benefit of the temple. However, the 1st to 6th intervenient respondent-petitioners-respondents (hereinafter referred to as intervenient respondents) by petition dated 20.02.1997 sought to intervene in the proceedings where the District Judge of Chilaw has already made order for the sale of the property in terms of Section 42(2) and all transfer deeds duly executed. The intervenient respondent sought *inter alia.*

a) to be added as parties in the proceedings Court has already made order,

b) a declaration that the intervenient respondents are trustees,

c) to set aside the vesting order made in case No.9/Trust of 20.06.1958,

d) a declaration that the deeds Nos. 1289 and 1295 executed in 1940, No. 4158 executed in 1967 and No. 4699 executed in 1970 as invalid,

e) and an interim injunction restraining the petitioners from functioning as trustees selling or leasing lands including the lands set out in the schedule to the original petition and interfering with the intervenients from functioning as trustees.

The appellants contend that the reliefs claimed by the intervenient respondents could only be sought in a separate properly constituted action and not in the D.C. Chilaw No. 135/Trust. The appellants also contend that the learned District Judge fell into error when he entertained the application of the intervenient respondents and issuing and enjoining order *ex-parte* restraining the petitioners from

> "*selling, leasing, mortgaging or in any other way alienating or encumbering the lands of the temple trust including the land described in the schedule to the petition of the petitioner" and also issuing notice of interim injunction.*

when the learned District Judge by his order dated 20.11.1996 had already allowed the application to sell the land. Consequent to the said order the transfer deeds in respect of the property been executed and title passed. The appellants questioned the validity of the order made by the District Judge on the basis that such order was wholly untenable in law in that the application of the appellants under Section 42(2) of the Trust Ordinance stood concluded and also for the reason that the intervenient respondents have not been added as parties and were merely seeking to be added. The appellants also contend that the application before the District Court was an application under Section 42(2) of the Trust Ordinance and that it was not an action between contesting parties which inquired adjudication on competing claims. However, when the matter came up before the District Court of Chilaw again on 18.03.1997 the learned District Judge refused the extension of the enjoining order and also refused the application to add the

intervenient respondents as parties. No appeal was preferred against this order. However, the appellants complain that the District Judge having refused the extension of the enjoining order and also having refused the application of the intervenient respondents to be added as parties and instead of dismissing the application of the intervenients ordered parties to file written submissions. On 07.05.1997 the intervenient respondents renewed the application to be added as parties without disclosing to Court the fact that their application to be added as parties have been refused on 18.03.1997, the Court also made order restraining the 1st petitioner from disposing the land in question. On 24.09.1997 a further petition was presented by the intervenient respondents to set aside the deeds of transfer already executed. Transferees however were not made parties to the application. On 22.10.1997 the learned District Judge dismissed both applications of the intervenient respondents dated 27.02.1997 and 22.02.1997 on the basis that the Court is without jurisdiction after its order of 20.11.1996 allowing the petitioner's application under 42(2) of the Trust Ordinance. The intervenient respondents then sought to revise the order of the District Judge in the Court of Appeal. The Court of Appeal on 12.11.2001 set aside the order of the learned District Judge and directed that the District Judge hold a full inquiry into the objections of the added intervenient respondent-respondents. The petitioners (appellants) contend that the application in D.C. Chilaw 135/Trust was in terms of Section 42(2) of the Trust Ordinance for the sale of trust property and that those proceedings were concluded and transfer deeds executed. That purported petitions of the intervenient respondents were misconceived from the inception.

The respondents submit that an application dated 27.02.1997 was filed in the District Court of Chilaw for the purpose of having the order made under Section 42(2) to sell the trust property dated 20.11.1996 set aside. Subsequently, a further petition dated 24.09.1997 was also filed to set aside the deeds transfer. The learned District Judge allowed the application of the intervenient respondents and added them in terms of Section 18 of the Civil Procedure Code. The learned District Judge however by his order dated 22.10.1997 dismissed the application of the petitioner on the ground that it was not made in accordance with the provisions of Section 102(3) of the Trust Ordinance. The intervenient respondents sought to attack the sale of the land on the basis that there were no respondents to the said application for the sale of the land. That

the appellants failed to make any of the beneficiaries parties to the application. That the appellant could have made an application under Section 18 of the Civil Procedure Code and added certain number of devotees and or worshippers as respondents to this application. Such an exercise would have yielded the opportunity to ascertain whether the purported sale is in the best interest in the temple. That no evidence was led to establish the suitability of the purported sale. Application for sale was made by the holder of the power of attorney and not by the trustees. That there was in short collusion in the sale of property. That it was in these circumstances that the respondents made an application on 05.03.1997 to intervene in the proceedings.

Mr. Seneviratne, President's Counsel submitted that the intervention by the intervenients were inspired by their need to protest the trust property of the temple and no other consideration. I have not the slightest doubt that their intentions were honourable. Mr. Kanag-Iswaran, President's Counsel in the course of his submissions did not seek to assail the integrity of the intervenients. But urged that the intervenients ought to comply with the procedure set out in the Trust Ordinance. Petitioners came to the District Court of Chilaw for an order under Section 42(2) of the Trust Ordinance for the sale of property set out in the schedule to the petition in case No. D.C. Chilaw 135/Trust. He submitted that an application under Section 42(2) of the Trust Ordinance is one that was made for the sale of trust property and the Court having considered the propriety of the application would make an appropriate order. The application under Section 42(2) ought not to be confused with the representative action in terms of Section 16 or Section 18 of the Civil Procedure Code. He submitted that an action which concerns breach of a Hindu Charitable Trust must be by way of a regular action in terms of Section 102 of the Trust Ordinance by five persons interested in the trust and after having first presented the petition to the Government Agent of the administrative district and obtained a certificate that inquiry has been held. He submitted that any misfeasance or breach of trust not governed by Section 102 of the Trust Ordinance, the proper procedure is which is laid down in Section 101 of the Trust Ordinance is by way of a regular action after not less than two persons having an interest in the trust and having obtained the written consent of the Attorney-General. The learned President's Counsel referred Court to the **Laws and Customs of Tamils of Jaffna** by H.W. Thambiah page, 14 and 15. Thus:

"The scope of Section 101 of the Trust Ordinance is explained by Bertram C.J. in *Karthigesu Ambalavanar* v *Subramaniam.*(1)" He says "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 place of religious worship or religious establishments or places of religious resorts. The machinery of this section may be set in motion by any five worshippers ..... To prevent the section being used for the 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 action is instituted."

I cannot but accept this submission of the appellant that the application of the intervenient respondents is clearly out side the realm of the Trust Ordinance and misconceived in law. The intervenient petitioners in their applications to Court sought number of reliefs. As regards the application to be added as parties such application is misconceived in law, firstly for the reason that Section 42(2) has not envisaged citing of parties as respondents and secondly in any event when the order for sale was made the proceedings are at an end and the District Judge *functus*.

The intervenient petitioners also sought a declaration that they be declared trustees and also to set aside the vesting order made in case No. 9/Trust on 20.06.1988. The position of the intervenient respondents that the intervenient respondents' ancestors were trustees and as such they be declared lawful hereditary trustees of the temple, is misconceived and that the claim to trusteeship of the ancestors of the intervenient respondents have been rejected in the case of *Kalimuttu et al* v *Muttusamy*(2) However the petitioners rights have been clearly set out in documents P3 and P3A; the intervenient respondents in this instance had no sustainable right to claim trusteeship to the temple, even in a properly constituted vindicatory action. As stated by H.W. Thambiah in 'The Laws and Customs of the Tamils of Jaffna' page 13.

"When a person claims to be a trustee against another, the proper action to establish his right is an ordinary action for a declaration that he is a trustee. He cannot in such a case bring an action under

Section 101 and 102 of the Trust Ordinance, because the object of these sections is not to determine the conflicting rights of private individuals but to devise the method for fully carrying out the purpose of the trust".

As regards the application for a declaration that the Deeds Nos. 1289 and 1295 executed in 1940 and Deeds Nos. 4158 executed in 1967 and 4699 of 1977 declared invalid, cannot be considered in an application for intervention. I have considered the submissions of Counsel carefully. I am of the view that the Court of Appeal was in error when it sought to direct the District Court to hold a full inquiry into the objections of the intervenient-respondents-petitioners.

The judgment of the Court of Appeal is set aside and the appeal is accordingly allowed. I make no order for costs.

DISSANAYAKE, J. - I agree.

RAJA FERNANDO, J. - I agree

Appeal allowed.
Judgment of the Court of Appeal set aside.