

1946

Present : Wijeyewardene and Canekeratne JJ.

AMBALAVANAR, Appellant, and SOMASUNDERA KURUKKAL,  
Respondent.

7—D. C. Jaffna, 984.

*Trust—Religious trust—Suit by trustee to be placed in possession of certain lands belonging to the trust—Vesting order—Modes of appointment of a new trustee—Trusts Ordinance (Cap. 72), ss. 101, 102, 112.*

Where the plaintiff who was the hereditary trustee of a *madam* brought action in respect of two lands belonging to the *madam*, and the trial Judge ordered (a) the plaintiff to be placed in possession of the lands, defendants to be ejected therefrom and to pay damages; (b) a vesting order to be made—

*Held*, that the plaintiff was not precluded by sections 101 and 102 of the Trusts Ordinance from maintaining the action.

*Held, further*, that a trustee of a religious trust is as much entitled as any other person to avail himself of the provisions of section 112 of the Trusts Ordinance for obtaining a vesting order.

**A**PPPEAL from a judgment of the District Judge of Jaffna.

S. J. V. *Chelvanayagam* (with him V. K. *Kandaswamy* and J. N. *David*),  
for the 1st defendant, appellant.

N. *Kumarasingham*, for the plaintiff, respondent.

*Cur. adv. vult.*

December 18, 1946. CANEKERATNE J.—

This is an appeal by the first defendant from a judgment in favour of the plaintiff who sued as trustee of the *Karthigai Nadchathira Madalayam* (or *madam*) of *Vetharaniam* in South India for possession of two lands situated at *Sanguvely* in the parish of *Udivil*, *Jaffna District*, and forming part of the property belonging to the *madam*. Certain material facts are not in dispute, namely, the existence of this *madam* and

the utilisation of the income of these lands for performing poojahs at the *madam* for a long period. On other points the views given expression to by the plaintiff and the appellant diverge considerably.

One Namasivayam Kurukkal, the great-grandfather of the plaintiff, founded, according to the latter, about 200 years ago the *madam*, created trusts in relation thereto and settled funds for the purpose of the trusts; the objects of the trust were the performance of poojahs called Maheswaram poojahs on the Karthigai Nadchathiran day of each and every month, the feeding of the Kurukkals who gathered at the *madam* for the celebration of the poojah and the celebration of a special poojah in the night before the shrine of Subramaniaswamy in the Sivan temple about 200 yards away from the *madam*; the trustees were to be the eldest living male descendants of the founder. The lands in dispute were acquired by Vaithianathan, a son of Namasivayam, as trustee and held as part of the trust property. On the other hand one Veerasesgaram Mudaliyar, an ancestor of the appellant, was, according to him, the owner of these lands; he donated them "for the charitable object of performing poojahs at " this *madam* monthly on a particular day (the same day as mentioned above). The appellant avers that the lineal descendants of Veerasesgaram were the trustees and that these descendants carried out the trust till about 25 years ago when the *madam* was abandoned and since that time he has devoted the income for "acknowledged charitable objects".

The plaintiff was not able to produce any deed relating to these lands in favour of Vaithinathan, nor did the appellant produce any deed in favour of Veerasesgaram or the deed of donation. The plaintiff produced documents relating to these lands, i.e., indentures of lease P6 (of March 1896) P1 (of October 1909), P7 (of October 1938) affecting land No. 1; P2 (of October 1909) and P5 (of October 1938) affecting land No. 2; P4 (of September 1920) affecting both lands and a report (numbered P3 of June 1909) by four arbitrators (one of whom was the 1st defendant, then village headman) for damage caused to land No. 1.

The trial Judge held that the plaintiff was the hereditary trustee of the *madam* in question and that the lands belonged to the ancestors of the plaintiff; the evidence amply justifies his findings. He ordered (a) the plaintiff to be placed in possession of the lands, defendants to be ejected therefrom and to pay a sum of Rs. 500 as damages; (b) a vesting order to be made.

Among the contentions advanced by Counsel for the appellant, one was that an action by the plaintiff could not be maintained in respect of these lands as he was not the trustee *de jure*, and the decision in the case of *Karthigasu Ambalawanar et al. v. Subramaniam Karthiravelu et al.*<sup>1</sup> was referred to in this connection. This case was one where persons who were *de facto* trustees of a temple tried unsuccessfully to obtain possession of a land to which they had no legal right from the defendants who had held the lands in trust for the religious charities represented by the temple and had been in possession of them for at least twenty-five years. That decision does not help the appellant. Another was that the plaintiff was precluded by sections 101 and 102 of the Trusts Ordinance of 1917

<sup>1</sup> (1938) 12 C. L. W. at p. 11.

(Ch. 72 of the Ceylon Legislative Enactments) from obtaining relief. An action against a trespasser for recovery of possession of trust property and damages consequent on the trespass is not an action within section 101 of the Ordinance. This is not a case where there is a breach alleged of an express or constructive charitable trust or a direction of the Court, for the administration of such a trust was deemed necessary; nor is the relief claimed in the plaint one or other of those mentioned in the section. The plaintiff being the trustee of the *madam* is clearly entitled to bring this action against the defendants.

In the case of certain religious trusts an action charging the trustee, manager, superintendent, or member of a committee with misfeasance, breach of trust or neglect of duty, or for the removal of any such person, or for getting some act performed by any such person may be brought under the provisions of section 102, sub-section 1, provided the conditions of sub-section 3 have been complied with (e.g., with the leave of the Government Agent, &c). Certain other actions, one being for vesting any property in the trustees, can also be brought with similar leave. As the joining of all the persons interested in the trust was inconvenient or impracticable, it was considered desirable that some of them (e.g., five or more) might sue without bringing the others provided they obtained the consent of the official mentioned in the section<sup>1</sup>. The plaintiff's action, so far as the order for restoration of possession and consequential relief is concerned, is not barred by the provisions of section 102.

It was further contended by Counsel that one who desires to obtain a vesting order must make an application under section 101 or section 102 of the Trusts Ordinance, and he referred to the dictum appearing in the course of the judgment in *Muthu Kumaru v. Vaithy*<sup>2</sup>; but as pointed out by Keuneman J. in *Tambyah v. Kasipillai*<sup>3</sup> "Moseley J. in the above case referred to the point but refrained from discussing it". This point was discussed by Keuneman J. in the course of the judgment in *Tambyah v. Kasipillai* (to which Moseley J. was himself a party) and he arrived at a conclusion adverse to that urged by counsel for the appellants, but the latter argued that the remarks on this point were not necessary for the decision of that case.

The legal estate can only be transferred by the persons in whom it was legally vested or by a vesting order of the Court. It might happen that a trustee may leave the country permanently or become a lunatic or being a sole trustee die intestate and without any heir. The legal estate, being vested in him, could only be got out of him by a duly executed conveyance or assignment or by an order of Court; and as the former could not be obtained the latter became a matter of necessity. At a time when the Trustee Act of 1850 was in force in England, Ordinance 7 of 1871 was passed; jurisdiction was conferred by this Ordinance on the District Court to nominate trustees in certain cases and to make orders vesting trust property in the new trustee (sections 4 and 5). An applicant for relief followed the mode prescribed by the Code of Civil Procedure after the coming into operation of the Code; generally application was made by petition and affidavit. This Ordinance was repealed by the

<sup>1</sup> *Cf. R. Chowdhuri v. M. Das Baishnav*, I. L. R. (1897) 24 Cal. at p. 425.

<sup>2</sup> (1938) 12 C. L. W. 10.

<sup>3</sup> (1941) 42 N. L. R. at 561.

Trusts Ordinance of 1917; provisions relating to the appointment of new trustee are to be found in section 75 (appointment out of Court), section 76, section 101 sub-section 1 (a), and section 102 sub-section 1 (h). Section 77 (1) provides that on the appointment of a new trustee the trust property shall become vested in him if there is no other trustee, or in him and the surviving or continuing trustees or trustee if there are other trustees, &c. The Court is also given power to make orders vesting trust property by sections 102 sub-section 1 (b) and 112 sub-section 1. In the former case it can make a decree vesting any property in the trustees—in the latter case an order vesting the property in such person as the Court may direct (a vesting order). The former section is of limited application; the action in which this relief is sought must be one instituted by five or more persons who are interested in a religious trust and have complied with the conditions of sub-section 3. Section 112 is a part of the chapter headed "Miscellaneous": It is a general section and its application is not confined to any particular classes of persons. The section makes provisions for two cases: any person who can prove the essentials required by part 1 or part 2 is entitled to come to a District Court and request the Court to make a vesting order. A trustee of a religious trust would be as much entitled to make use of the salutary provisions of this section as any other person. That the Legislature did not intend to prevent such a trustee from resorting to the general provisions of the Trust Ordinance is made clear by section 101—"Nothing contained in this or the next succeeding section shall be deemed to preclude the trustee . . . for such . . . relief as he may be entitled to obtain under the general provisions of this Ordinance".

No special procedure has been prescribed for obtaining a vesting order; but section 116 sub-section 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 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 applicant files a plaint and the adverse party is formally called upon to state his answer to the case of the plaintiff: the latter is the exceptional mode, the applicant files a petition often with an affidavit. No complaint can be made against the constitution of this action if the appropriate procedure was to file a regular action, but if the correct 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<sup>1</sup>. The decision in *Tambyah v. Kasipillai* (*supra*) shows that the claim to a vesting order can be asserted by action.

The order vesting these lands in the plaintiff as trustee of the Karthigai Nadchathira *Madalayam* has been correctly made. The formal order, called vesting order, drawn up by the Proctor for the plaintiff and signed

<sup>1</sup> *Ismail v. Ismail* (1920) 22 N. L. R. 190.

by the Judge can hardly be justified : it should be recast and the Judge should take steps to see that the order is correctly drawn up before it is signed. Subject to this modification the appeal is dismissed but the respondent is not entitled to the costs of appeal.

WLJEYWARDENE J.—I agree.

*Appeal dismissed.*

