

1916.

*Present: Shaw J. and De Sampayo J.*FERNANDO *et al.* v. FERNANDO *et al.*

113—D. C. Kalutara, 6,141.

Buddhist Temporalities Ordinance, s. 17—Action by trustee before giving security as trustee—Non-joinder of all trustees.

Plaintiffs, who were two out of three trustees of a temple, sued the defendants for damages, for wrongfully drawing toddy from trees belonging to the temple. At the date of the institution of the action plaintiffs had not given security as trustees.

Held, that they had status to bring the action.

It is not conditional to the appointment of a trustee that he should give security although, probably, a trustee who fails to give security, when such has been determined on by the Committee, may be removed from office under the provisions of the Ordinance.

THE facts are set out in the judgment of Shaw J.

M. W. H. de Silva, for plaintiffs, appellants.—The plaintiffs were duly appointed trustees at the time they brought the action. Security is in the discretion of the District Committee, and not necessary for the validity of the appointment. If we were to read section 17 in the sense of security being imperative, we shall have to go the length of holding that a duly appointed person does not become a trustee if he refuses remuneration.

*Fernando v. Fernando*¹ was decided on other grounds, and security was referred to incidentally as showing that there had been no valid appointment. Even if it be held that security is imperative, it is merely a defect in status, and has been cured before date of trial (*Silva v. Weerasuriya*²). With regard to the non-joinder of third trustee, section 2 is conclusive.

Gūnatillake, for respondents.—*Fernando v. Fernando*¹ decided with reference to the present plaintiffs themselves that security was

¹ C. W. R. 209.

² (1906) 10 N. L. R. 73.

imperative. The President's evidence shows that security was asked for and not given. It is essential that security should be given for the protection of temple property.

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Cur. adv. vult.

April 11, 1916. SHAW J.—

The plaintiffs-appellants, as trustees of the Buddhist temple at Magalkanda, sued the defendants for Rs. 469.90 damages, for wrongfully drawing toddy from sixty-seven trees alleged to be the property of the temple.

The District Judge has dismissed the action, without going into the merits, on the ground that on the date when the action was instituted the plaintiffs had not given security as trustees, and had therefore no status to bring the action. He appears also to have thought that the non-joinder of the third trustee as party to the action was a fatal defect.

I think the Judge is wrong upon both points.

The plaintiffs produced and put in evidence certificates, dated November 15, 1914, signed by the President and two members of the District Committee, certifying their appointment as trustees. It was, however, admitted that at the date of the institution of the action they had not given security as trustees. The President himself gave evidence showing that the plaintiffs were duly elected trustees. In cross-examination he stated: " Trustees are bound to give security. Until they have given security their appointment is not valid. " This I take to be an expression of the President's view of the law. It was suggested in the course of the hearing of the appeal that the President may have meant that, in respect of this particular temple, there was a condition to the appointment becoming operative that security must be given. I do not think the evidence can bear such a construction, and there is no evidence that any security was determined on by the Committee, or that the plaintiffs were ever asked or refused to provide it; the certificates of appointment, moreover, make no mention of any such condition. Subsequent to the institution of the action, and prior to the day of trial, security was given, but how it came to be given, and how the amount was arrived at, the evidence does not disclose, and it was probably given voluntarily by the plaintiffs to meet any possible objection that might be taken of it not having been given.

Section 17 of the Buddhist Temporalities Ordinance, 1905, after providing for the election of the trustees, provides as follows:—
" Every such trustee shall give such security, and shall receive remuneration as may be determined by the District Committee. " I cannot read this as making it conditional to the appointment of a trustee either that he should give security or receive remuneration, nor, indeed, does it seem to me to make it obligatory on the Committee either to require security or to give remuneration, although probably, a trustee who fails to give security, when such has been

1916. determined on by the Committee, may be removed from office under the provisions of the Ordinance. A "trustee" under the definition in section 2 includes a person "elected in terms of section 17," and the very paragraph relied on by the defendants speaks of the person who may be called upon to give security as a "trustee," in contradistinction to a "person" referred to in the succeeding paragraph who is incompetent to be elected or to serve as trustee.

SHAW J.

Fernando v. Fernando

In my opinion the plaintiffs were "trustees" within the meaning of the Ordinance at the time of the institution of the action. I think the District Judge was mistaken as to the effect of the decision in *Fernando v. Fernando*.¹ In that case there was no satisfactory evidence of election and appointment, and I understand my brother De Sampayo to refer to the absence of security as tending to show that no valid appointment had in fact been made.

With regard to the second and minor point, the Ordinance by section 2 provides that the majority of the trustees may have and exercise all or any of the powers, and may perform all or any of the duties, vested in a trustee under the Ordinance. One of the powers given by section 19 is to enforce rights of action on behalf of the temple. It is unnecessary, therefore, to join the third trustee. Even had this been otherwise, in view of the provisions of sections 17 and 18 of the Civil Procedure Code, the action should not have been dismissed for non-joinder.

I would allow the appeal with costs, and remit the case to the District Court for trial on the merits.

DE SAMPAYO J.—

I am of the same opinion. My brother Shaw has correctly stated the effect of my judgment in *Fernando v. Fernando*.¹ Perhaps I used too strong a word when I said that under section 17 of the Buddhist Temporalities Ordinance the giving of security by a trustee on his election was imperative. There security had in fact been required by the District Committee, and I thought that under the circumstances non-compliance with that requisite was a further reason for saying that the appointment of the trustee in that case was not complete.

Appeal allowed.

¹ C. W. R. 209.