

1949

*Present: Basnayake J. and Gratiaen J.*

ANTHONY GASPAR *et al.*, Appellants, and THE BISHOP  
OF JAFFNA, Respondent

*S. C. 90—D. C. Jaffna, 3,312*

*Trust—Right of a community of persons to be beneficiaries.*

Just as a community of persons can hold property or acquire rights in property, so also a community of persons can be beneficiaries under a trust deed.

**A**PPEAL from a judgment of the District Court, Jaffna.

*C. Thiagalingam*, with *V. Arulambalam*, for the defendant appellant.

*H. W. Tambiah*, with *D. Vivekanandan*, for the plaintiff respondent.

*Cur. adv. vult.*

October 7, 1949. BASNAYAKE J.—

The plaintiff, the Bishop of Jaffna, is an incorporated person by virtue of section 2 of the Roman Catholic Archbishop and Bishops of Ceylon Incorporation Ordinance. His case is that two persons by name Simeon Raphael and Anthony Gaspar, the first defendant to this action, who were the owners of a land called Thookumarakadu (hereinafter referred to as the land) by virtue of deed No. 6804 of February 8, 1912 (hereinafter referred to as D1) transferred the land to him by deed No. 6138 of May 16, 1918 (hereinafter referred to as P1) with absolute power to do what he liked with it. He alleges that the defendants have unlawfully and wrongfully erected a shed thereon and are claiming to be entitled to be in possession of it.

<sup>1</sup> (1925) *A. I. R. Privy Council*, 130.

<sup>2</sup> *C.C.A. Minutes of September 13, 1949.*

In this action he seeks to have the fifteen persons whom he has named as defendants ejected therefrom and to recover damages in a sum of Rs. 300 with continuing damages at Rs. 300 per mensem until he is restored to possession.

The case for the fourteen defendants who filed answer is that the land was purchased by the fishermen of Anaicottai and Kokuvil West who were also members of the congregation of the Church of the Lady of Refuge situated at Anaicottai with their own money and that by D1 it was transferred in trust to the first defendant and one Simeon Raphael, who by P1 transferred it subject to the same trust to the plaintiff who holds the land in trust for the defendants and other fishermen of Anaicottai and Kokuvil West. The defendants claim that they and other fishermen of the above-mentioned villages who also form the congregation of the church at Anaicottai are the beneficial owners of the land and ask for a declaration that the plaintiff holds the land and its appurtenances in trust for them and the other fishermen of those two villages.

According to Anthony Gaspar, one of the transferors on P1 and the only witness who can claim to know personally the history of the transactions relating to the land, about 35 elders of the community of fishermen at Anaicottai and Kokuvil West contributed towards the purchase of the land which is 5 lachams in extent. It was acquired for the beaching of boats and the storing of fishing tackle, which up to that time used to be done at a place called Navanturai. A shed was erected thereon by the fishermen for housing their fishing tackle and as a place of rest and protection from the weather. It was later enlarged by the parish priest, one Rev. Father Iyan, with funds provided by the fishing community, and a watcher appointed. He was paid in kind. The catch of each fisherman was also sold on that land and a tithe paid to the church through its collector. About the year 1946 the driver of the present parish priest, Rev. Father Tarcisius, contracted a marriage in the village of Anaicottai. He invited one and all. As the union was disapproved by the entire fishing community of the village, the wedding was boycotted by the villagers. Of the villagers the collector of tithes alone attended it. In consequence the defendants marked their disapproval of his conduct by refusing to pay the tithes to him. They tendered the tithes to the Bishop of Jaffna, who referred them to the parish priest. They then tendered the tithes to the parish priest, who insisted on their payment through the collector. Then they asked that another collector be appointed. This request was refused. They then paid the tithes into a special account opened by them at the Bank of Ceylon. The parish priest retaliated by excluding from the shed on the land those who did not pay the tithes to the collector. Thereupon the defendants constructed another shed for their fishing tackle on the same land. These actions resulted in both the parish priest and the defendants seeking the aid of the Police, who refused to take action on the ground that the dispute was of a civil nature. This action was thereupon commenced.

The following issues were determined at the trial:—

- (1) Are the defendants entitled to be in possession of the land referred to in the plaint?
- (2) If not, is the plaintiff entitled to eject the defendants from the said land?

(3) Damages.

(4) Is the plaintiff the absolute owner and proprietor of the land described in the schedule to the plaint?

(5) If not, is the plaintiff's action maintainable?

(6) Is plaintiff holding the land in question subject to an express trust in favour of the defendants and other fishermen of Anaicottai and Kokuvil West and their descendants?

(7) If so, is the plaintiff's action maintainable?

(8) Are the defendants and other fishermen of the villages of Anaicottai and Kokuvil West entitled to the beneficial interest in the land in question?

(9) If so, is plaintiff's action maintainable? "

The learned District Judge has held that—

(a) the defendants are not entitled to be in possession of the land,

(b) the plaintiff is entitled to eject the defendants therefrom,

(c) the plaintiff is the absolute owner proprietor thereof,

(d) the plaintiff does not hold it subject to an express trust in favour of the defendants and other fishermen of Anaicottai and Kokuvil West and their descendants, and

(e) that the defendants and other fishermen of the villages of Anaicottai and Kokuvil West are not entitled to the beneficial interest therein.

The defendants dissatisfied with the decision of the learned District Judge have appealed to this Court.

The questions arising for decision on this appeal have in my opinion to be resolved by an examination of the documents D1 and P1. The plaintiff has also produced marked P4 a translation of D1. The differences in the two translations are not material. The relevant portions of D1 read—

" Know all men by these presents that I Murugesar Ponnampalam of Vannarponnai West Jaffna do hereby execute deed of transfer in favour of Simon Raphiel and Anthony Kaspar of Kokuvil West, to wit—

Land situated at Anaicottai in the parish of Manipay Valikamam West Division of the Jaffna District, Northern Province called " Thookkumarakadu " in extent 2 acres and 28 perches of this on the south western side the extent of 5 lms p/c is bounded on the east and north by the remaining portion of this land belonging to me, west by lane intended for leading cattle, and south by road; the whole within these boundaries is hereby sold and transferred to the said persons at the price of the said sum of rupees forty two and cents fifty (Rs. 42/50). I have received this sum of rupees forty two and cents fifty from the said transferees in full who declared that the said amount has been entrusted to them by that section of the catholics of those catholics belonging to the Church of Lady of Refuge Anaicottai who form the Catholic Karava Community of Kokuvil West. This sum of money they stated was collected among the said section of the catholics for the purpose of purchasing a land to be used by the said section of the catholics and their descendants as a place for keeping implements and selling fish. I having received the said amount do hereby sell and transfer the said land to the said section of the Catholic Karava Community for the aforesaid purpose."

It is clear from the passage italicized that the first defendant and Simon Raphiel held the land on that deed as trustees for the group of persons whom they represented, viz., "that section of the catholics of those catholics belonging to the Church of Lady of Refuge Anaicottai who form the Catholic Karava Community of Kokuvil West."

The declaration of the first defendant and Simeon Raphiel in deed P1 is as follows:—

"We Simeon Raphiel and Anthony Kaspar both of Kokuvil West in Jaffna do hereby declare.

Whereas the Catholic people belonging to the Church of Lady of Refuge at Anaicottai and the Karava Catholic people of Kokuvil West belonging to the said church have collected money and given us to go in for a piece of land for use by them and their descendants as a Port and for selling fish and whereas we having out of the said money purchased a piece of land described below and whereas it is not proper for us to retain the land in our names bought out of public funds and as it is but just and reasonable to surrender all properties common to the Catholic cause to the Catholic Mission.

Now know all men by these presents that we Simeon Raphiel and Anthony Kaspar both of Kokuvil West do hereby convey transfer and set over and assign to Dr. Henri Julain, O. M. I. Bishop at Jaffna of the Catholic Mission the following property.

Land belonging to us by right of purchase and possession of the said Karava people as per transfer deed dated the 8th day of February 1912 and attested by S. Sivaprakasapillai Notary under No. 6804.

For reasons above described we do hereby transfer unto the said Rt. Rev. Dr. Henri Julain and his successors in office and his and their assigns the said property with its appurtenances.

Therefore that the said Rt. Rev. Dr. Henri Julain Bishop and his successors his or their assigns may for ever have the absolute right and power and title to sell, mortgage, to exchange for another the whole or any portion of the said land and that he or they have the right to deal with this property in any way they like and utilise the proceeds or the land exchanged for whatever purposes he or they desire."

P1 indicates in no uncertain terms that the transferors were trustees for the community of persons described therein. Although the transferors give the transferee absolute right and power to sell the land and to deal with the property in any way he likes that power cannot be exercised in derogation of the trust created by the instrument under which the transferors derive their title. As trustees they had no power to alter the terms on which they held the property. Even the plaintiff has up to the date of the dispute which gave rise to this action acted on the footing that he is the trustee for the community of persons indicated by P1 and D1. There is no provision of the Trust Ordinance which invalidate the trust created by D1 and there is no reason why it should not prevail. A community of persons can hold property or acquire rights in property. In the same way a community of persons can be beneficiaries under a trust deed. It is not disputed that the defendants belong to the class of persons for whose benefit the land has been provided. But it is claimed

that they have forfeited their right to its enjoyment by non-payment of tithes. Although Rev. Father Tarcisius says: "The shed in question is used only by those fishermen who pay tithes. The fishermen who refuse to pay tithes are not entitled to use it.", there is nothing in the instruments from which they derive their rights which makes the right to use the land dependent on payment of tithes. Nor is there any precise evidence to show that a fisherman who does not pay tithes ceases to be a Roman Catholic. Father Tarcisius says: "It is the practice of the Catholic fishing community to pay 1/10 of their catch to the church. If they do not pay they are not entitled to their rights." The witness does not explain what he means by "their rights". In the absence of a clear definition of those words I am not prepared to read them as including a forfeiture of such rights as they are entitled to under the instruments in question.

It is unnecessary for the purposes of this appeal to discuss the questions of law relating to charitable trusts which learned counsel for the respondent raised.

The appeal of the defendants is allowed and the plaintiff's action is dismissed with costs.

GRATIAEN J.—I agree.

*Application allowed.*

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