[IN THE COURT OF APPEAL OF SRI LANKA]

1973 *Present :* **Sirimane, J., Samerawickrame, J., and Siva Supramaniam, J.**

L. R. BALASUNDARAM and 5 others, Appellants, *and* K. L. RAMAN and 2 others, Respondents

COURT OF APPEAL, No. 23 OF 1972

S. C. 359 (Inty.)—D. C. Chilaw, 10/Tr.

Trusts Ordinance—Sections 112, 116 (1)—Hindu temple—Uncertainty in whom the title to the temple and its temporalities is vested—Claim for vesting order—Procedure that should be followed—Whether there should be a regular action or whether relief can be claimed by summary procedure—Civil Procedure Code, s. 5.

The petitioner, claiming to be the sole hereditary trustee, kapurala or manager of a Hindu temple in Chilaw, filed a petition and affidavit in the District Court praying for a vesting order under section 112 of the Trusts Ordinance. He stated that there was uncertainty as to the person in whom the title to the temple and its temporalities vested. He averred *inter alia* that in the year 1830 his ancestor, one N, functioned as trustee, kapurala or manager of the temple, but did not say that title was in N. Nor did he ask for ejectment of the alleged trespassers. On the affidavits filed in the District Court by the petitioner and the respondents there was little doubt that there was uncertainty as to the title of the trust property.

Held, that the petitioner was prima facie entitled to initiate proceedings for a vesting order under Section 112 of the Trusts Ordinance. When a vesting order is prayed for, summary proceedings are more appropriate, for such proceedings end in an *order* and not in a *decree* as in a regular action. An application under Section 112 is not an *action* under section 5 of the Civil Procedure Code.

APPEAL from a judgment of the Supreme Court reported in (*1972*) *76 N. L. R. 259.*

C. Thiagalingam, with *K. Kanag-Iswaran,* for the appellants.

H. W. Jayewardene, with *Miss I. Marasinghe* and *J. C. Ratwatte,* for the respondents.

Cur. adv. vult.

June 11, 1973. SIRIMANE, J.—

One Kalimuthu Letchi Raman (whom I shall refer to as the "petitioner") claiming to be the sole hereditary trustee, kapurala or manager of the Hindu temple called Badrakali Kovil filed a petition and affidavit in the District Court of Chilaw praying for

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a vesting order under section 112 of the Trusts Ordinance Chapter 87. He named as respondents eight persons six of whom are the appellants in this appeal, and to whom I shall refer as the "respondents". He stated that there was uncertainty in whom the title to the aforesaid temple and its temporalities vested. The relevant part of Section 112 reads as follows:

"In any of the following cases, namely:

(1) Where it is uncertain in whom the title to any trust property is vested: the Court may make an order (in this Ordinance called a "vesting order") vesting the property in any such person in any such manner or to any such extent as the court may direct."

The petitioner averred in his petition *inter alia* that since 1830 one Narayanan functioned as trustee, kapurala or manager of the temple, and that according to custom and usage from time immemorial appertaining to this temple the respective eldest sons functioned as trustee or kapurala or manager of the temple and its temporalities. He did not say that title was in Narayanan.

In view of certain submissions made at the argument regarding devolution of trusteeship to Hindu Temples in the Jaffna District, it is useful, as Counsel for the petitioner pointed out, to remember that this temple is situated in Chilaw, and the trustees referred to even by the respondents by the term "kapurala" as well. However, it was conceded that trusteeship to Hindu temples in any part of Ceylon was not governed by any hard and fast rule, and depended on custom and usage appertaining to *each* particular temple.

Now, according to the petitioner from about the year 1830 one Narayanan functioned as trustee, kapurala or manager of the temple and its temporalities, and following the law of primogeniture as averred by him, at one stage his grandfather Letchi Raman functioned in this office. But as this man was old and sickly, his eldest son Kalimuthu performed the duties of trustee or kapurala. Letchi Raman had nine children in all, the eldest Kalimuttu being the petitioner's father. The other eight are the respondents to his petition. Kalimuthu pre-deceased his father. He died in 1958 and Letchi Raman in 1962. "……ever since the death of the said Letchi Raman"—avers the petitioner, the respondents have "falsely, wrongfully and unlawfully asserted that they are entitled to be trustees, kapuralas or managers of the temple and temporalities belonging thereto." The petitioner was a minor at the time of Letchi Raman's death and became a major in 1969 in which year he filed this petition and affidavit in the District Court of Chilaw.

The respondents take the pedigree a step beyond Narayanan and state that one Ratnasinghe Giri Ayer and his adopted son Narayanan were the trustees or kapuralas of the temple. Put shortly, in their affidavit filed in the District Court of Chilaw they deny that the eldest male child functioned as trustee or kapurala, and that the male issue as and when born became joint trustees and kapuralas. The pedigree sets out the devolution of trusteeship, but not the devolution of title to the property comprising the trust. They further stated that according to customs and usages relating to Hindu temples in Ceylon if such customs are applicable to this shrine a 1/7th share devolved on Kalimuthu's male descendants and 1/7 each on the 1st, 3rd, 4th, 5th, 6th and 7th respondents; the other two respondents to the original petition being females. Thereafter they referred to some settlement that was arrived at which the petitioner has failed to honour.

In our opinion on the affidavits filed in the District Court by the petitioner and the respondents there can be little doubt that there is uncertainty as to the title to the trust property, and the petitioner was prima facie entitled to initiate proceedings for an order under Section 112 of the Trusts Ordinance referred to above.

Section 112 however is silent in regard to the procedure that should be followed—whether there should be a regular action or whether relief can be claimed summarily.

The preliminary objection that on the facts alleged and set out by the petitioner, Section 112 did not apply, was rejected by the Supreme Court. It appears to us that it was right in doing so.

There is no definite decision on this point in the authorities cited and Judges have expressed different views. For example in *Muthukumaru v. Vaithy*[1] (12 C.L.W. 9) Moseley J. said that it is not clear, that except in proceedings under Sections 101 and 102 of the Trusts Ordinance (which deal with *actions* for carrying into effect trusts for public charity, and *suits* by persons interested in religious trusts) that a Court could grant a vesting order. The respondents also relied on the case of *Thambiah v. Kasipillai*[2] 42 N.L.R. 558 (1941) where Keuneman J. said with reference to a similar objection to summary procedure "the short answer is that a person who can establish the fact that he is the trustee can sue for the recovery of trust property from a trespasser and it is not a necessary requisite that he should have clothed himself with a vesting order before action was brought. Further a person who brings an action to obtain a vesting order, obviously cannot already have obtained that order before the

[1] *(1937) 12 C.L.W. 9.* [2] *(1941) 42 N.L.R. 558.*

action." But earlier in 1932 in *Thamotherampillai v. Ramalingam,*[1] 34 N.L.R. 359 the plaintiff as joint manager of a Hindu temple asked for a declaration that the first defendant was not entitled to a right of way over the Courtyard of the temple. The defendant pleaded that the plaintiff was not entitled to maintain the action without first obtaining a vesting order under section 112 of the Trusts Ordinance. The District Judge gave the plaintiff an opportunity to obtain such an order before continuing with the action. Garvin J. held that the plaintiff was not entitled to cure the defect of his title by obtaining a vesting order after the institution of the action. Said he, "With the learned District Judge's conclusion that the action was not maintainable by the plaintiff I entirely agree, but I cannot, however, agree that the effect of obtaining after trial a vesting order would be to entitle the plaintiff to the relief he claimed, provided, of course, that in other respects he showed his right to such relief. It is a well established principle of law that the rights of parties must be determined as at the date of action. Clearly, at the date of this action the plaintiff had no right to maintain it." Keuneman J. did not refer to this case in his judgment in the 42 N.L.R. case. In *Hunter v. Sri Chandrasekera*[2] 52 N.L.R. 54 (1950) Dias S.P.J. took the view that where a person asks for a vesting order under section 112 of the Trusts Ordinance without asking for any further remedy on a cause of action the procedure must be by way of summary procedure and not by way of regular action. The instant case is very similar, for no ejectment of the alleged trespassers is prayed for. In *Kandappa Chettiar v. Janaki Ammah*[3] 62 N.L.R. 447 (1960) Sansoni J. disagreed with Keuneman J. and pointed out that he had not dealt with the legal principle to which Garvin J. referred, and did not give any reasons for the conclusion he reached in that case. Sansoni J. with whom Sinnetamby J. agreed said at page 450 "In my view it would be unsatisfactory to leave the matter in that situation and I would hold that where a plaintiff claims to be entitled as trustee to a land and seeks to eject a trespasser, he will not be entitled to rely on a vesting order unless he has obtained such vesting order prior to the filing of the action. If the legal estate was not in him at the commencement of the action, no vesting order obtained subsequently will cure the initial want of title." We are in respectful agreement with the views expressed by Garvin J. and Sansoni J. We also agree with the submissions of the Counsel for the petitioner that where a vesting order is prayed for, summary proceedings are more appropriate, for such proceedings end in an *order* and not in a *decree* as in a regular action. Counsel for the respondents pointed out that he would be at a disadvantage if summary procedure

[1] *(1932) 34 N.L.R. 359.* [2] *(1950) 52 N.L.R. 54.* [3] *(1960) 62 N.L.R. 447.*

is adopted for example he would lose his right to obtain information by interrogatories and the burden of proof would be different when procedure is summary. But surely no Court will lightly grant a vesting order except after a full inquiry at which the petitioner proves that he is entitled to one as claimed in his petition.

Counsel for the appellants drew our attention to Section 116 (1) of the Trusts Ordinance and submitted that Section 5 of the Civil Procedure Code would be applicable to determine the procedure to be adopted in applications under Section 112. We have considered this argument but are of the view that an application under Section 112 is not an *action* under Section 5 of the Civil Procedure Code.

We notice that an objection had been taken to reading in evidence an affidavit dated 25.7.1969 filed by the 5th and 6th respondents, and that objection upheld by the learned District Judge. In order that there may be a full and complete inquiry in this matter, we would give a direction to the learned District Judge to permit the declarations in that affidavit relating to the devolution of title or trusteeship to be led in evidence.

We would affirm the judgment of the Supreme Court and also agree with its observation that summary procedure is intended to bring quick relief in matters of this nature and that the District Judge should give priority to the hearing of the case. Subject to the direction in regard to the admissibility of the affidavit referred to above, we would dismiss this appeal with costs.

Appeal dismissed.