1949 *Present :* **Dias J. and Windham J.**

DORAISWAMI KURUKKAL, Appellant, *and* THAMBIPILLAI *et al.*, Respondents

S. C. 28 Inty. and 139—D. C. Jaffna, 16,608 M.

Hindu temple—Charitable trust—No deed creating the trust—Founder and heirs unknown—Appointment of trustee in such circumstances—Trusts Ordinance (Cap. 72), ss. 99 (c), 107.

The 1st substituted defendant and his ancestors for nearly one hundred years were officiating as the *de facto* managers and trustees of a Hindu temple which was proved to be a charitable trust within the meaning of section 99 (*c*) of the Trusts Ordinance. There was, however, no deed creating this charitable trust and the founder and his heirs were unknown and could not be traced.

Held, that, in the circumstances, section 107 of the Trusts Ordinance was applicable and the 1st substituted defendant should be held and declared to be the *de jure* trustee of the temple.

APPEAL from a judgment of the District Court, Jaffna.

S. J. V. Chelvanayakam, K.C., with *A. Vythialingam*, for the 1st substituted defendant appellant.

H. W. Tambiah, with *S. R. Canaganayagam* and *C. Shanmuganayagam*, for the plaintiffs respondents.

N. Kumarasingham, with *C. Vanniasingham* and *S. Sharvananda*, for the 2nd substituted defendant respondent.

S. Thangarajah, for the 3rd defendant respondent.

A. C. Nadarajah, for the 10th respondent.

Cur. adv. vult.

November 8, 1949. DIAS J.—

This is a dispute regarding the ownership and management of a Hindu temple known as the Naviddapuram Kandaswamy Temple in Tellipallai, Jaffna.

The deceased 1st defendant who is now represented by his son the 1st substituted defendant claimed the temple and its appurtenances as their absolute private property. This is denied by the plaintiffs who are some of the worshippers at this temple. They assert that the temple is a " charitable trust " within the meaning of s. 99 (*c*) of the Trusts Ordinance (Chapter 72). They have filed this action under s. 102 of the Trusts Ordinance alleging mismanagement and misappropriation of temple property. They prayed that the 1st defendant should be removed from office as manager, and asked the Court to formulate a scheme for the better control and management of the trust.

The 1st defendant having died during the pendency of the action, his two sons the 1st and 2nd substituted defendants were added in his place. The 2nd substituted defendant disclaimed all interest in the temple. The plaintiffs did not amend their plaint asking for any relief against the 1st substituted defendant. In fact, no charges have been made against him personally, except that he is the son of his father. The 3rd and 4th defendants and the 10th respondent (who is the nephew of the deceased 1st defendant) claim to be officiating priests in this temple. They merely ask that in any order which the Court may make in this case, their status and rights should be preserved. The main contest, therefore, is between the plaintiffs and the 1st substituted defendant who is now in control of and managing this temple.

The learned District Judge has considered the various questions raised. His findings may thus be summarised: (1) The temple is a public charitable trust. The District Judge holds that the evidence on the point is overwhelming and to a great extent admitted. He holds that the 1st substituted defendant is, and his ancestors were, hereditary trustees and managers of the temple, but not its proprietors. (2) The 1st defendant and after him his son the 1st substituted defendant cannot be regarded as being the proprietors of the temple and its temporalities. He holds that in the face of the various donations made by the faithful to the deity, they cannot claim to be proprietors of the endowments of the temple, and nowhere has any distinction been made between the *kovilkadavi* itself and the endowments to the temple. They were all treated alike. (3) Various acts of mismanagement have been alleged against the 1st defendant. As he is now dead and has in a sense been removed from office by divine intervention, the District Judge did not feel called upon to adjudicate on the charges made against a dead person. (4) With regard to the 1st substituted defendant the Judge finds that as no specific charges have been made in the pleadings against him, it is not relevant in this proceeding to go into the question as to whether he has been performing his duties satisfactorily. The Judge holds that if any charges are to be made against him, these should form the subject of a separate action—particularly as the 1st substituted defendant is now before the Court only in a representative character. (5) With regard to the accounting, the District Judge holds that this would now be useless because three years have already elapsed since the death of the 1st defendant. It was argued in appeal that under s. 105 of the Trusts Ordinance the Court may order the present trustees to file accounts for a period not exceeding three years *from the date of the order*. I think the Court was right in refusing to order the 1st substituted defendant to render an account, because no such relief had been claimed against him in the plaint, and also because that was not the case he had to meet. (6) The District Judge formulated a scheme of management.

Having carefully considered all the arguments addressed to us, I am of the view that the judgment of the District Judge is right, and must not be disturbed.

As found by the learned District Judge, the evidence proving that this temple is a public charitable trust is overwhelming. It is stated (see for example P 10 and P 28) that in the 9th century an Indian princess

of the *Chola* Dynasty came to Ceylon seeking a cure for the loss of her beauty. She bathed in a sacred stream when " her equine face " was restored to human form. Although she was then abducted by a king of Lanka, she made a thank offering for her cure by building a temple at Maviddapuram, and imported Brahmin priests from India to perform the ceremonials therein about the year 800 A.D. The 1st substituted defendant claims that he and his ancestors are descendants of those priests. In the 17th century the Portuguese destroyed this temple. In the early 19th century, however, some *unknown* persons built the present temple. It was not asserted until 1875, nor is there any proof beyond that belated assertion, that it was an ancestor of the 1st substituted defendant who rebuilt or founded the present temple.

Turning from legend to fact, there cannot be any doubt that the ancestors of the 1st substituted defendant officiated *as managers* of this temple. The first document in the chain of proof is the letter of appointment 1D1 of 1825. This is not a deed of transfer or conveyance. It merely states that Sabapathi Aiyar No. 1 and his wife Parupathiamma appointed Sokanadar to be the manager of this temple. Sokanadar by deed D11 of 1847 delegated his powers of management under 1D1 to his son Sabapathi Aiyer No. 2, who was also constituted the attorney of Sokanadar for the management of the affairs of the temple. D11 is not a deed of conveyance, nor did Sokanadar execute it as owner. By 1D12 of 1859 Swaminathar the brother of Sabapathi Ayer No. 2 renounced whatever rights he had in this temple in favour of his brother. Thereafter on November 7, 1875, Sabapathi Aiyer No. 2 took part in the execution of the deed P2, which is an important document in this case. No less than thirty-four members of the public, including Sabapathi Aiyar No. 2, declared that, in view of the fact that Sabapathi Aiyer No. 2 who was at that time managing and looking after the Kandaswamy Temple was in bad health, they the " selected representatives " of the residents of the village had assembled, and unanimously agreed " to nominate and appoint, during the minority of the grandson of Sabapathi Aiyer No. 2, the son-in-law of Sabapathi Aiyer No. 2 and the father of the minor, to be the manager of the temple subject to the supervision of the executants of the deed. This manager was to carry out the priestly office and the *poojas*, and he was to be subject to the executants of the deed ". Now, that was a clear admission by Sabapathi Aiyer No. 2, that he was not the owner or proprietor of this temple, but only the manager thereof. If he considered the temple and its appurtenances were his private property; he would not have allowed members of the public to intervene in its management. The deed P2 was notarially attested, and there is nothing to show that at the time of its execution Sabapathi Aiyer was labouring under any other infirmity except that he was sickly. The deceased 1st defendant and his son the 1st substituted defendant both derive their rights through Sabapathi Aiyer No. 2. In fact, the deceased 1st defendant was the minor referred to in P2. The language used in P2, when read with the earlier documents 1D1, 1D11, and 1D12, lends strong support to the view that 1st defendant and the 1st substituted defendants are nothing more than hereditary managers of this temple.

After executing P2, however, it is obvious that Sabapathi Aiyer No. 2 began to repent that he had executed that deed. It is clear that he made up his mind secretly to repudiate P2 and claim title to this temple as owner. Within twenty days of the execution of P2, namely, on November 27, 1875, Sabapathi Aiyer No. 2, without going to a notary, went before the Commissioner of Requests and executed the deed 1D14 under the provisions of Ordinance No. 17 of 1852 (Chapter 58). There was no need for him to have gone before a Judge, probably in chambers, to execute 1D14 unless he was actuated by the desire to keep this transaction secret. It is also noteworthy that he gave no notice of what he intended doing to the thirty-four other executants of deed P2. In fact, 1D14 possesses all the badges of fraud. In 1D14 Sabapathi Aiyer No. 2 asserts that he executed P2 under " misapprehensions and misrepresentations ", and while " he was not in a fit state to comprehend and understand the true meaning and purport of the deed, and that he had been persuaded to sign it ". He then proceeded to revoke P2 and declare that the temple was his " free and absolute property as heretofore, to wit, before the 7th day of November ". It is a question whether a bilateral deed like P2 could be lawfully revoked by the unilateral act of one of the parties—*see Jayawardene v. Jayawardene* [1]. Having got P2 out of the way, Sabapathi Aiyer No. 2 on December 27, 1875, executed the deed 1D8 which he described as " the deed of transfer of my temple proprietorship ". This deed contains several misstatements. He says that his ancestor Sabapathi Aiyer and his wife Paruwathiamma had during the Dutch times founded, established, and made popular (*pita-padip-padithi* = made public) the Kandaswamy Temple, and possessed the same as their own absolute property. There is not a *scintilla* of evidence to support that latter assertion. 1D8 further estates that in their old age they by deed 1D1 did assign and convey the temple to Sokanathar who possessed it as his absolute property. This is another misstatement because there is no evidence to support it. The deed 1D1 is not a deed of conveyance at all. Sabapathi Aiyer No. 2, then, says that about 1850 the temple devolved on him and that he had possessed the same " in the same manner as his ancestors " for twenty-five years. He then proceeded to assign, convey and deliver the temple and its appurtenances to his daughter (mother of the deceased 1st defendant) providing that his son-in-law was to manage the temple until his grandson (the 1st defendant) attained majority. This was an ingenious deed, because it did not alter the arrangements made by deed P2. I am clearly of the view that 1D8 conveyed no legal title to the 1st defendant. It is to be observed that no title by prescription can be claimed in this case. This is conceded by both sides.

The statement in 1D8 that this temple had been made " popular " is significant. We have been told by learned counsel that the word does not mean " advertised " but " made public ". This is in accordance with the evidence which shows that, for a great many years, this temple had become renowned as a place of public worship, and for the maintenance of which the faithful made munificent donations in land and money —see P9, P10, P11. If the contention of the 1st substituted defendant

[1] *40 N. L. R. at p. 473.*

is right, all these gifts are his private property to use as he pleases. In my opinion, the District Judge came to a perfectly correct conclusion. The claim of the deceased 1st defendant and 1st substituted defendant to be declared the absolute owner of this temple is fantastic—although it may have been made in good faith.

All the evidence proves clearly that this temple is a " charitable trust " within the meaning of s. 99 (*c*) of the Trusts Ordinance. The plaintiffs who are persons who for a period of not less than twelve months had been in the habit of worshipping in this temple (see s. 102 (2)) have the right as persons " interested in this temple " to institute this action under s. 102 (1)—see *Sathasivam v. Tythianathan Chettiar* [1], *Kalimuttu v. Muttusamy* [2], *Abdul Cader v. Ahamadu Lebbe Marikar* [3].

I agree with the District Judge that the 1st defendant being dead there was no necessity to investigate the charges made against a dead man. Had the plaintiffs desired to make charges against the 1st substituted defendant, they should have amended their pleadings, and given the 1st substituted defendant an opportunity of meeting such charges. For the same reasons, in the absence of a specific prayer that the 1st substituted defendant should be called upon to account for his stewardship, the District Judge was under no obligation to consider the matter.

I am not impressed by the argument that the 1st substituted defendant should be removed from his managership. So far as I can see there is nothing against him.

I am inclined to agree with counsel for the plaintiffs and the 2nd substituted defendant that, although this temple is a charitable trust, in strict law the 1st substituted defendant and his ancestors are not *de jure* trustees, but only *de facto* managers and trustees. The case law shows that where the owner of property executes a deed in favour of a Hindu temple, but does not appoint a trustee, the *dominium* of the property remains vested in the legal owners, but is so vested as trustees on behalf of the beneficiaries who are that section of the public for whose benefit the trust was founded—*Kumarasamy Kurukkal v. Kathigesu Kurukkal* [4]. In the same way if the legal owner of land builds or founds a Hindu temple for public worship on his land, then, unless the founder makes arrangements for the appointment of trustees, the right of management of the foundation vested in the founder himself and his heirs (*ibidem*). In such a case he must be considered the trustee. In this case, however, there is no deed creating this charitable trust. After the Portuguese destroyed the original temple, somebody built the new temple, but nobody can say who the founder was. In strict law it is that founder and his heirs who would be the trustees of the temple. Those persons are unknown and cannot be traced. There is no evidence, as I have already pointed out, to establish that it was an ancestor of the 1st substituted defendant who founded the new temple. All the facts and circumstances negative such a view. But as was pointed out by Bertram C.J. in *Kumarasamy Kurukkal v. Karthigesu Kurukkal* [4] " No Court of equity would allow the great principles it administers to be defeated by a formal defect of this character, and our own Ordinance

[1] *(1923) 25 N. L. R. at p. 94.*
[2] *(1925) 27 N. L. R. at p. 193.*
[3] *(1935) 37 N. L. R. at p. 262.*
[4] *(1923) 26 N. L. R. at p. 36.*

expressly porvided for the point. It declares by s. 107 that ' In dealing with any property alleged to be subject to a charitable trust, the Court should not be debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it shall be of opinion from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist ' ''. In my opinion s. 107 of the Trusts Ordinance applies to the facts of this case. I am satisfied that a charitable trust exists. Owing to a formal defect, there is an absence of evidence as to the formal constitution of the trust, because there is no known trustee. It is unnecessary to consider the long arguments which were addressed to us as to whether or not a trust can exist without a trustee. The 1st substituted defendant and his ancestors for nearly one hundred years have been officiating as the *de facto* managers and trustees of this temple. In such circumstances any Court of equity would hold that, in the interests of the temple and all concerned, the 1st substituted defendant should be held and declared to be the *de jure* trustee of this temple, and I so declare him to be.

The 2nd defendant (now represented by the 10th respondent), the 3rd and 4th defendants are the hereditary priests of this temple with the right to perform *poojas* and to receive the customary perquisites of that office. Their rights are not in dispute in this case.

I would therefore affirm the decree and the vesting order entered by the learned District Judge, with the following variations:—

(*a*) The 1st substituted defendant is declared the hereditary trustee and the high priest of this temple, and in any scheme of management which may be formulated his rights and status must be made clear.

(*b*) The 2nd defendant (now represented by the 10th respondent), the 3rd and 4th defendants are declared to be the hereditary priests of this temple with the right to perform *poojas* and to receive the customary perquisites of that office, and in any scheme of management which may be formulated the rights of these priests must be made clear.

In accordance with the learned District Judge's directions it will now be the duty of the Court to approve of the scheme for the future management of this temple and its temporalities. It is very desirable that such a scheme should not be too elaborate but should be as simple as possible.

The 1st substituted defendant has failed to establish his claim that this temple is his private property. The plaintiffs and the 2nd substituted defendant have failed in their contention that the 1st substituted defendant should be removed from office. With regard to costs, the fairest order, therefore, is to direct that each and every party must bear their own costs of this appeal. The order for costs made in the lower Court must stand affirmed.

WINDHAM J.—I agree.

Decree varied.