

1960

Present : Sansoni, J., and Sinnetamby, J.V. C. KANDAPPA CHETTIAR *et al.*, Appellants, and N. JANAKIAMMAH *et al.*, Respondents*S. C. 109—D. C. Jaffna TR 8**Charitable trust—Property dedicated for its use—Vesting of title to the property—Trusts Ordinance, ss. 75, 76, 77, 112, 113.*

The owner of certain immovable property created a charitable trust (a *madam*) and dedicated that property for the purpose of the trust. She nominated as trustees to manage the trust property herself and, after her lifetime, one P who was the trustee of a Hindu temple (and after his lifetime his successors in office as trustees of the temple).

Held, that in the absence of a notarial transfer in favour of P, the legal title to the immovable property remained in the author of the trust, and on her death passed to her heirs, subject to the obligations of the trust, the heirs then becoming constructive trustees.

Held further, 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 made in terms of section 112 of the Trusts Ordinance 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.

APPPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *V. Arulambalam*, for Plaintiffs-Appellants.

C. Ranganathan, with *V. K. Palasuntheram* and *K. Devarajan*, for Defendants-Respondents.

Cur. adv. vult.

April 4, 1960. SANSONI, J.—

The plaintiffs have sued the defendants claiming that they should be ejected from a certain land in Vannarponnai, and asking to be quieted in possession themselves.

It is common ground that one Ponnukannu was the former owner of that land, and that she executed the deed P1 in 1905 whereby she founded a *madam* named the Sri Math Sunderamoorthy Nayanar Guru Pooja Madam and dedicated the land in dispute for the purpose. She nominated as trustees and managers herself, the child or children to be born to her, and her mother; and after their lifetime three persons named Ponnusamy Chettiar, one of the trustees of the Vaitheesparan Temple at Vannarponnai (and after his lifetime his successors in office as trustees and managers for his share of the Vaitheesparan Temple), Thambu Kailasapillai, the trustee of the Saivapirakasa Vidiyasalai (and after his lifetime his successors in office as managers of the said Vidiyasalai), and M. L. R.M. Kalaiyappapillai (and after his lifetime his successors as

administrators and managers of his boutique). She further provided in the deed that she and her children and her mother should reside in a building on the land; also that the trustees should conduct and carry on the Guru Pooja of Sunderamoorthy Nayanar annually, and after the death of herself and her children and her mother a Maheswara Pooja to each of them annually.

By a subsequent deed P2 of 1931, Ponnukannu reciting that M. L. R.M. Kalaiyappapillai had died and the boutique of M. L. R.M. Kalaiyappapillai had been closed, and that Thambu Kailasapillai had become old and was not willing to carry on the charity, appointed herself, and after her death her mother, and after her mother's death Ponnusamy Chettiar (and after his lifetime his successors in office as trustees of the Vaitheeparan Temple), as the trustees to manage the trust properties and to conduct the Poojas.

The plaintiffs came into Court claiming to be the successors in office as trustees of the Vaitheeparan Temple of Ponnusamy Chettiar, and complaining that the defendants were in unlawful occupation of the land in dispute since 1953. In their answer, the defendants pleaded that the deed P1 did not create a valid charitable trust, and that no rights vested in Ponnusamy Chettiar. They also pleaded that the plaintiffs had no right to the land in dispute, and could not maintain this action in the absence of a vesting order vesting the land in them. In an amended plaint the plaintiffs pleaded that the legal title to the land in dispute became vested in Vythilingam Chettiar their father, and that they, as his children and devisees under his last will, were the lawful trustees of the land in dispute. They claimed a declaration that they were the lawful trustees and asked for a vesting order in terms of section 112 of the Trusts Ordinance vesting the land in them, and that the defendants be ejected. By their amended answer the defendants pleaded that the plaintiffs were not vested with the title to the land in dispute; they also pleaded that the amended plaint should be rejected as it altered the character of the action.

When the case came to trial, the defendants' counsel among other issues, suggested :

- (14) Are the 1st to 3rd plaintiffs entitled to the said land and to possession thereof as trustees ?
- (15) If not, is this action maintainable ?
- (16) Can the plaintiffs maintain this action in any event in the absence of a vesting order ?

The learned District Judge held that if P1 created a valid charitable trust, the plaintiffs have succeeded to the trusteeship, but he held that no valid charitable trust was created. He accordingly dismissed the plaintiffs' action. The plaintiffs have appealed and before us it was argued that P1 created a valid charitable trust. Counsel for the defendants-respondents contested this submission, but in the view I take of the rights of the plaintiffs I do not find it necessary to decide this issue. Let

it be assumed, for the purpose of argument, that there was a valid charitable trust created by the deed P1 and that Ponnukannu became a trustee for the purpose of the trust. The first matter that falls to be decided is whether the trust property is vested in the plaintiffs who claim that they have a right to bring this action as trustees, and ask for a declaration that they are the lawful trustees of this trust. Now the title to the land remained in Ponnukannu subject to the trust, but it is quite clear that Ponnusamy Chettiar did not become a trustee with ownership of the land either under P1 or P2, because the land was not transferred by deed to him. There are several judgments of Bertram, C.J., which have set out the legal position under similar circumstances. As he pointed out, it is often supposed that by a mere dedication and by the appointment of a trustee by the author of the trust in terms similar to deed P1, title not only passes to the trustee but would also devolve from time to time on the various trustees successively appointed. The truth is that in this case, in the absence of a notarial transfer to Ponnusamy Chettiar, the trustee appointed by the author of the trust, the legal title remained in Ponnukannu the owner of the land, and on her death passed to her heirs, subject to the obligations of the trust, the heirs then becoming constructive trustees.

It is thus clear that there is a fatal defect at the root of the plaintiffs' title, for if Ponnusamy Chettiar never became vested with the title to the property there was no title which could devolve on those who claim to be his successors as trustees. It was argued for the appellants at one stage that section 113 of the Trusts Ordinance would apply to this case. Let it be conceded that the trustees of the Vaitheesparan Temple are persons who hold an office in an institution or body, and that the title to the trust property will devolve from time to time upon the persons holding such office without any conveyance or vesting order. How does this help the appellants if they have failed to establish that the title to the trust property in dispute at any time devolved on Ponnusamy Chettiar? In the absence of such proof, nothing devolved on his successors. As I have tried to show, the title which was in Ponnukannu never passed to Ponnusamy Chettiar, for no deed of transfer was executed in his favour by her. Sections 75, 76 and 77 of the Ordinance also do not apply to this case, because it is not even suggested that the plaintiffs or their predecessors were appointed trustees under either section 75 or under section 76. The appellants' counsel went so far as to argue that the mere nomination of Ponnusamy Chettiar as trustee by deeds P1 and P2 vested him with the legal title to the land, and that no notarial transfer in his favour was necessary. It is impossible to accept this submission which runs counter to all the accepted principles of the law relating to the vesting of trust property.

He then fell back on the claim in the amended plaint to a vesting order in terms of section 112 of the Ordinance. I do not see how this will help him either, because the plaintiffs will in that event be relying on a title acquired subsequent to the institution of the action. It is a

principle of law requiring no citation of authority that a plaintiff cannot rely on a title which he did not have at the commencement of the action. Garvin, J. applied this principle in *Thamotherampillai v. Ramalingam*¹, a case which is indistinguishable on this point from the present case. He said there: "There is nothing in the Trusts Ordinance, or in any other provision of any law that I am aware of, which states that a person may bring such an action in respect of temple property and at some subsequent date clothe himself with title to the property by obtaining a vesting order, and notwithstanding defects of title at the time of the institution of the action is entitled to escape from the consequences of bringing an action at a time when he had not the right to do so." Unfortunately this judgment was not referred to in the later case of *Tambiah v. Kasipillai*², where a similar objection was raised to the maintainability of the action by a plaintiff who claimed to be the lawful hereditary trustee and manager of a temple. In that case a vesting order was claimed in the original plaint in respect of certain temporalities on the ground that there was a doubt as to the person in whom the legal title to them was vested. Keuneman, J. with reference to a similar objection said: "The short answer is that a person who can establish the fact that he is 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 action." The learned Judge has not dealt with the legal principle to which Garvin, J. referred nor does he give any reason for his conclusion. The very matter which is in dispute in this case and was in dispute before Garvin, J. was whether a person claiming to be a trustee can sue in respect of trust property before he has obtained a vesting order in his favour. With great respect, I disagree with the opinion of Keuneman, J. on this point and I prefer to follow the reasoning of Garvin, J. We were also referred to the judgment of Canekeratne, J. in *Ambalavanar v. Somasundera Kurukkal*³, where the learned Judge appears to have taken a view similar to that of Keuneman, J. He has not considered the legal objection that a person who has no title at the commencement of the action cannot rely on a title acquired subsequently. The judgment is therefore of no assistance. The matter has also been considered recently by H. N. G. Fernando, J. in *Rajammal v. Balasubramaniam Kurukal*⁴, and the learned Judge has expressed the opinion that the judgment of Garvin, J. should be followed although he thought that the two later judgments were distinguishable. 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.

¹ (1932) 34 N. L. R. 359.

² (1941) 42 N. L. R. 558.

³ (1946) 48 N. L. R. 61.

⁴ (1957) 61 N. L. R. 343.

In this case, therefore, the claim to a vesting order, which the plaintiff made in the amended plaint, should have been disallowed and in any event the Court should under such circumstances refuse to make an order vesting the property in the plaintiffs since it would serve no purpose in the action. In the result, issues 14, 15 and 16 should have been answered against the plaintiffs and their action should have been dismissed on this ground. I would dismiss the appeal with costs.

SUNNETAMBY, J.—I agree.

Appeal dismissed.
