

1954 Present: Gunasekara, J., and H. N. G. Fernando, A.J.

S. MURUGESOE *et al.*, Appellants, and V. CHELLIAH
et al., Respondents

S. C. 534—D. C. Point Pedro, 3,035

*Charitable trust—Construction of deed—Purchase of property for a Hindu temple—
Legal position of the purchaser—Co-trustees—Survival of trust on death of a
co-trustee—Trusts Ordinance (Cap. 72), ss. 5, 6, 7S, 8I, 107.*

Where a transfer of immovable property contained a recital that the consideration was paid by the transferee "for" a specified Hindu temple—

Held, that the transferee must be taken to have purchased the property with funds provided by, or held by him for, the religious charity represented by the temple. The transferee, therefore, held the property as trustee, and, on his death, the land devolved on his heirs subject to the same trust.

Held further, that section 78 of the Trusts Ordinance is applicable to charitable trusts. On the death, therefore, of a co-trustee, the trust property passes to the other co-trustees and not to the heirs of the deceased trustee.

FERNANDO, A. J.—The words "for the Temple" were not merely precatory but were sufficient to create a trust.

APPEAL from a judgment of the District Court, Point Pedro.

H. V. Perera, Q.C., with *H. Wanigatunga*, for the 1st defendant appellant.

H. W. Tambiah, with *H. L. de Silva*, for the 2nd defendant appellant.

N. E. Weerasooria, Q.C., with *E. R. S. R. Coomaraswamy*, for the plaintiffs-respondent.

Cur. adv. vult.

September 14, 1954. GUNASEKARA, J.—

This is an appeal by the 1st and 2nd defendants in an action before the District Court of Point Pedro from a decree declaring the two plaintiffs entitled to a 1/16th share each of a piece of land, 3 roods 14.5 perches in extent, which had been conveyed by the Crown to one Vyramuttu Kandavanam on the 8th October, 1910. The question that arises on the appeal is whether Kandavanam purchased it for himself, as alleged by the plaintiffs, or in trust for a religious charity, as alleged by the defendants.

Kandavanam died in 1914. The district judge holds that thereupon a $\frac{1}{2}$ share of this property devolved on Kandavanam's widow and the other half on his two brothers (the 3rd defendant and one Velupillai) and two sisters. Velupillai died in 1920, and the learned judge holds that the $\frac{1}{2}$ th share which Velupillai had inherited devolved on his sons, the two plaintiffs. (An issue as to their legitimacy was decided in their favour and this finding was not canvassed in appeal.) The case for the 1st and

2nd defendants is that upon Kandavanam's death the property passed to his brothers subject to the trust alleged by these defendants, and upon Velupillai's death the 3rd defendant became the sole trustee and by two deeds executed on the 26th August, 1940, conveyed a portion of the property to the 1st defendant and the rest to the 2nd defendant subject to the same trust.

The crown grant of 1910 recites that the consideration for the grant is a sum of Rs. 27 "paid by Vyramuttu Kandavanam of Polikandy for Polikandy Kandasamy Temple", and the appellants rely on this recital to show that Kandavanam bought the property in trust for the temple. The learned district judge takes the view that it is insufficient to indicate either the beneficiaries or the purpose of the trust.

The learned judge points out that "it is not possible to declare lands are the property of the temple as we do not recognise the personality of religious foundations". But the personification of the temple in the statement that the price paid for the land was paid on behalf of the temple does not purport to treat it as a juristic person: the figure of speech is employed merely as a means of indicating the religious charity represented by the temple. As Mr. Perera pointed out in the course of his argument, it is one that the legislature itself has found it convenient to use for a similar purpose: see the Buddhist Temporalities Ordinance (Cap. 222) which speaks, for instance, of property belonging to a temple (sections 4, 26, 28, 29, 30, 32), tenants of a temple (section 14), property appropriated to the use of a temple (section 20), offerings made for the use of a temple (*ibid.*), contracts made "in favour of any temple or of any person on its behalf" (section 22), "persons who owe any money to any temple or to any person on its behalf" (*ibid.*), moneys received by a trustee "for or on behalf of a temple" (section 25). In each of these expressions the temple is personified without the attribution to it of a juristic personality, but with the implication of the existence of a trust for the benefit of those persons for whose benefit the place of worship has been established. When the property in question was conveyed to Kandavanam for a consideration that he purported to pay on behalf of the Polikandy Kandasamy Temple, he must be taken to have purchased it with funds provided by, or held by him for, the religious charity represented by the temple. Therefore the beneficiaries of the trust attaching to the ownership of the property are the persons for whose benefit the temple was founded and the purpose is that for which it was founded.

It was contended by Mr. Weerasooria that there is no evidence that the Polikandy Kandasamy Temple is a charitable trust. Learned counsel for the appellants drew our attention to some evidence, to the effect that the temple had a manager and that "high festivals" were celebrated there, as evidence which showed that the temple was (or represented) a charitable trust. This evidence may well have been regarded as being too slender for the purpose if the parties had been at issue on the point. But the proceedings at the trial appear to indicate that it was assumed that the Polikandy Kandasamy Temple (which was apparently a well-known institution) represented a charitable trust. The answers of the 1st and 2nd defendants averred that they held the land in question "for and on

behalf of the Polikandy Kandasamy Temple, which is a charitable trust"; but, while issues were framed as to whether it was "the absolute property of Vyramuttu Kandavanam or the property of the Polikandy Kandasamy Temple", and as to whether the plaintiffs could maintain the action if it was held that the land "belongs to the Kandasamy temple", there was no issue as to whether the temple represented a charitable trust. It appears also to have been assumed in the argument of counsel for the plaintiffs at the trial that the temple represents a charitable trust. I do not think that the question whether it does can be canvassed at this stage.

The land in question, having been held by Kandavanam subject to a trust, devolved on his heirs subject to the same trust. It is immaterial whether his heirs were his two brothers only or his brothers and sisters, for, in any event, by reason of the provisions of section 78 of the Trusts Ordinance (Cap. 72), upon the death of Velupillai the trust property passed to his co-trustee or co-trustees and not to the plaintiffs. There appears to be no substance in a contention that was advanced on behalf of the plaintiffs at the trial that section 78 does not apply to charitable trusts.

I agree with my brother, whose judgment I have had the advantage of reading, as to the order that should be made.

H. N. G. FERNANDO, A.J.—

The two plaintiffs in this case, who claim to be the sons of one Vyramuttu Velupillai, sought a declaration of title to a half-share of a certain land situated at Polikandy, basing their action upon the following averments:—

- (a) the land in question was conveyed by a Crown Grant (P1 of 1910) to one Vyramuttu Kandavanam;
- (b) Kandavanam died intestate in 1914, leaving a widow, but no children, so that upon his death a half-share of the land became her property, and the remaining half-share devolved on Kandavanam's two brothers, namely the plaintiff's father Velupillai and the 3rd defendant Kathiritamby;
- (c) the latter half-share was included in the inventory filed for the purposes of the administration of Kandavanam's estate and was subsequently conveyed (P3 of 1915) by the Administrator (3rd defendant) jointly to himself and Velupillai;
- (d) on Velupillai's death intestate his share devolved on his two sons (the plaintiffs), to the exclusion of his daughters who had been separately dowered. (It will be seen that even on this footing the two plaintiffs are jointly entitled only to a $\frac{1}{4}$ share which was all that devolved on their father Velupillai).

The learned District Judge has found the plaintiffs to be entitled each to a $\frac{1}{16}$ th share, presumably upon the basis that they have not established their claim to exclude the right of their sisters to shares in Velupillai's property.

The only question which has been raised at the argument in appeal is one of law, namely whether the land conveyed to Kandavanam by P1 was held by him subject to a trust. This contention was put forward on behalf of the 1st and 2nd defendants, but was rejected by the learned Judge.

The consideration for the Crown Grant P1 (as stated therein) was twenty-seven rupees "paid by Vyramuttu Kandavanam of Polikandy for Polikandy Kandasamy Temple", but, apart from this recital, there was no evidence of the constitution of a trust or of the terms or conditions of the alleged trust. The only other relevant evidence as to Kandavanam's intention was that of one Chelliahpillai (now deceased) who had given evidence in earlier proceedings in this action which were subsequently set aside on appeal to this Court. He had been the Manager of the Polikandy Kandasamy Temple and stated that Kandavanam had purchased the land "to develop it so as to make use of the income for defraying the expenses for reading of *puranas* at the Temple". This object was apparently not carried out during Kandavanam's lifetime and for a considerable period thereafter for the reason that the land was not planted and produced no income until quite recently.

It is relevant at this stage to refer to the title which the 1st and 2nd defendants have claimed. Their case is that the transfer P3 of 1915 by Kathiritamby to himself and Velupillai of a half-share of the land was invalid in so far as it purported to convey the share free of the trust, and that, upon Kandavanam's death in 1914 the land vested in his heirs, i.e., his four brothers and sisters, subject to the trust upon which it had been previously held by Kandavanam, and that in 1940, Kathiritamby was the sole surviving trustee. In that year, Kathiritamby executed transfers of the land (in divided portions) to the 1st and 2nd defendants respectively, stating that he was unable to develop the land and render it productive and expressing his confidence that it would be developed by the transferees. The latter have both given evidence to the effect that they are possessing the land, not on their own account, but on behalf of the Temple, and the learned Judge has accepted their evidence that the coconut plantations now on the land were made by them. The 3rd defendant filed one answer fully acknowledging the existence of the trust, but subsequently filed answer admitting the plaintiff's averments while yet asking for a dismissal of their action; he took no further part in the case.

The question whether a trust was created by P1 has to be determined by reference to S. 5 & 6 of the Trusts Ordinance read together with S. 107. The document in this case being a Crown Grant in favour of Kandavanam and not an instrument executed by Kandavanam does not strictly fulfil the requirements of S. 5, but this defect can be remedied under the provisions of S. 107 which render evidence of the formal constitution of the trust unnecessary in a case where property is alleged to be the subject of a charitable trust. The recital in P1 that consideration was paid "for the Polikandy Kandasamy Temple" was obviously one inserted into the Crown Grant at the direction or request of Kandavanam himself, and if their inclusion can be held to constitute a declaration of a charitable trust there would be every reason to have recourse to the provisions of S. 107.

S. 6 of the Trusts Ordinance is no more than a statutory reproduction of the principles of English Law as to the requisites necessary for the creation of a trust: indeed the language is much the same as that employed in the English text books, (*Underhill, Law of Trusts and Trustees, 9th Edition, p. 17*).

Postponing for the present a consideration of the question whether PI indicates with reasonable certainty an intention on Kandavanam's part to create a trust, but assuming that there was such an intention, the other requirements of S. 6 are undoubtedly satisfied. If the intention was to create a trust in favour of the Temple, there has been a sufficient indication of the purpose, i.e., that the property was to be applied for the benefit of the Temple. *Underhill* (at pp. 22 & 23) refers to numerous English cases where it has been held that directions to a legatee to apply the property for "religious purposes", "charitable purposes", or "religious and charitable purposes" constitute a sufficient indication of the purpose of the trust. The fact that no particular ceremonies, festivals or heads of expenditure are indicated in PI is not material and the purpose must be construed to cover all purposes properly connected with the Temple.

There is also a sufficient indication of the beneficiaries, since it is clear that any trust for the benefit of a temple is in reality for the benefit of the worshippers in that temple who will, if necessary, be entitled to avail themselves of the remedies provided for beneficiaries in Chapter 10 of the Trusts Ordinance. As for the last requirement in S. 6, it is unnecessary to cite authority for the proposition that the person in whose name property is bought may himself be trustee.

There remains then the question of Kandavanam's intention to create the trust. It is necessary first to distinguish an intention to create a trust from mere expressions of desire or hope and precatory words. The more modern view upon language of the latter description is stated by *Underhill* (p. 27) as follows:—"If a gift in terms absolute is accompanied by a desire, wish, recommendation, hope, or expression of confidence that the donee will use it in a certain way, no trust to that effect will attach to it, unless, on the will as a whole, the court comes to the conclusion that a trust was intended". For instance where a gift of property contained the words "and it is my desire that she allows to A. G. an annuity of £25 during her life", it was held that the property was not subject to a trust, *Re Diggels*¹; and again where a testatrix gave legacies to two nieces adding "I wish them to bequeath the same equally between the families of O and P", it was held that there was no trust in favour of the families. *Re Hamilton*². In the case of *Arumugam Pillai v. Velupillai Periyatamby*³ the deed in question transferred a land "by way of donation" and on account of "natural affection" for the donee, who was entitled by its terms to "take the rents and profits of the land". There was a condition also that the donee should perform a certain "poojah" as also a certain festival in the Temple standing on the land, but Wijeyewardene J. was unable to find any evidence as to whether or not the performance of the stated ceremonies would involve expenditure, nor was the donee enjoined to utilise any part of the income for the purpose of those ceremonies.

¹ (1838) 39 Ch. Div. 253.

² (1895) 2 Ch. Div. 370.

³ (1945) 46 N. L. R. 241.

He held that the conditions were insufficient to create a trust, being presumably more in the nature of a pious desire on the part of the donors, than an expression of an intention to impose an obligation annexed to ownership.

Upon a consideration of the full implication of the recital in P1, it cannot I think be said that the language constitutes a mere expression of desire. The words such as "for the Polikandy Kandasamy Temple" would rarely if ever be inserted in a Crown Grant except with some specific object, and they are in my opinion capable only of one of two constructions, either that the money was money actually belonging to the Temple in the sense that it formed part of the Temple funds, or that it was money that Kandavanam decided to gift to the Temple. Accordingly the money at the moment of its delivery to the Government as consideration for the grant was actually Temple money or money held in trust by Kandavanam for the benefit of the Temple. In the one case then, the transfer by a Crown Grant to Kandavanam was for a consideration paid or provided on behalf of the Temple, and Kandavanam would in terms of S. 84 of the Trusts Ordinance have held the property for the benefit of the Temple; in the latter case Kandavanam's declaration that he was paying his money "for the Temple" is a sufficient indication of his intention to create a trust over the money in his hands and over the property into which the money was converted. It has to be borne in mind in construing P1 that "a much greater latitude of expression is allowed in gifts to charity than in gifts to individuals, and that a gift to charity will never fail for uncertainty" (*Levin on Trusts, 15th Edition p. 425*).

The learned District Judge appears to have experienced some difficulty in the face of decisions of this Court to the effect that a Temple is not a juristic person and is therefore incapable of holding property. But any difficulty arising thereby is completely resolved by the Law of Trusts. In the case of *Karthigasu Ambalavaner v. Subramaniam Kathiravelu*¹, Bertram C.J. said "When a person who is the owner of property purports to transfer it to a Temple, the effect of his so doing is to constitute himself a trustee of the Temple. The document of dedication is in fact a declaration of trust and the *dominium* remains with the dedicator and passes on his death to his heirs subject to the trust". For the reasons stated above, I am of opinion that Kandavanam held the land purchased on P1 subject to a trust for the benefit of the worshippers at the Polikandy Kandasamy Temple. Since no provision was made either by P1 or by any subsequent instrument, executed by Kandavanam for the devolution of the trusteeship, the property would devolve on Kandavanam's heirs who would continue to hold it subject to the same trust. On the evidence in this case, these heirs were either Kandavanam's two brothers (Velupillai and Kathiritamby), or those brothers together with their two sisters. But in any event, by 1940 Kathiritamby was by virtue of S. 78 of the Trusts Ordinance the sole surviving trustee. In the absence of express provision in that behalf, Velupillai's heirs had no right to the property, whether as trustees or otherwise, and accordingly the plaintiffs had therefore no right now to maintain this action.

¹ (1921) 27 N. L. R. 15 at p. 21.

In this connection Mr. Weerasooria argued that S. 78 has no application in the case of a charitable trust, because matters relating to charitable trusts fall, he said, to be decided solely by the provisions of Chapter 10 of the Trusts Ordinance, and cannot be determined by reference to those provisions of the Ordinance applicable to trusts *simpliciter*. I see no substance in this argument. Its consequence if upheld would be that all matters relating to powers, duties and disabilities of trustees, successions to trusteeships, extinction of trusts, rights of beneficiaries, etc., which are in cases of ordinary trusts dealt with by sections 11-98 of the Ordinance, can in the case of charitable trusts be determined only by means of special recourse to a District Court. The correct view, I think, is that all the provisions of the Ordinance other than Chapter 10, apply generally in relation to all trusts, and that Chapter 10 merely contains special additional provisions applicable to charitable trusts only.

Mr. Weerasooria also contended that the provisions of S. 107 are not available in this case on the ground that in the absence of evidence that the Temple in question was open to worship by the public, a trust in its favour is not a *charitable trust* within the meaning of S. 99 of the Ordinance. The only evidence on record is that "the high festival is celebrated in May or June", and "the 'Kanthasiddy festival' in November", and in addition there is an office of Manager of this Temple. These two items of evidence permit of the inference that the Temple is open for worship, at least by a section of the Hindu public in that area. Moreover, there was no evidence to the effect that the Temple is situated on land which belonged to Kandavanam or his heirs, and Counsel for the respondents at the trial made no suggestion that the Temple was not one open to public worship. I think therefore that the allegation by the defendants that the trust in question was a charitable trust is sound, and that accordingly resort may properly be had to the provisions of S. 107 to hold that a trust exists despite the absence of evidence of its formal constitution.

The appeal must be allowed and the plaintiff's action dismissed. The plaintiffs must pay the costs in the original Court to the three defendants, and the costs of appeal to the 1st and 2nd defendants.

Appeal allowed.
