

1941

*Present : Moseley S.P.J. and Keuneman J.*TAMBIAH *v.* KASIPILLAI.

26—D. C. Jaffna, 13,897.

Hindu temple—Declaration of title as trustee and manager of temporalities—Right to bring action and ask for vesting order—Prescription—Trusts Ordinance (Cap. 72), ss. 102 and 112 and 111 (1) (c).

Where the plaintiff claiming to be the lawful hereditary trustee and manager of a Hindu temple and its temporalities asked for a declaration that he is the lawful trustee and manager thereof and also for a vesting order under section 112 of the Trusts Ordinance on the ground that it was uncertain in whom the legal title to the various properties comprising the temporalities vested,—

Held, that the plaintiff was entitled to bring an action *rei vindicatio* in respect of the trust property without having resort to section 102 of the Trusts Ordinance.

Held, further, that plaintiff's claim fell within section 111 (1) (c) of the Trusts Ordinance and that it could not be barred by any provisions of the Prescription Ordinance.

Held, also, that a claim to a vesting order under section 112 of the Trusts Ordinance may be asserted in connection with the present action and that no question of prescription could arise in connection with such an order.

A PPEAL from a judgment of the District Judge of Jaffna.

H. V. Perera, K.C. (with him N. Nadarajah and C. J. Ranatunge), for plaintiff, appellant.

N. E. Weerasooria, K.C. (with him H. W. Thambiah and S. Kandesamy), for defendant, respondent.

Cur. adv. vult.

October 2, 1941. KEUNEMAN J.—

This action was in respect of the temple known as Santhirasekera Vairavanathar Sivan Kovil. The plaintiff alleged that the original founder was Poolagasingha Mudaliyar, who in the year 1830 erected further buildings and enlarged the temple fabric. The plaintiff further set out a pedigree, whereby he claimed that he was an heir of the said founder, and stated that he was the lawful hereditary trustee and manager of the temple and its temporalities. He stated that a cause of action had arisen for a declaration that he was the lawful trustee and manager, for protection of the temple and its temporalities, for an accounting from the defendant for the ejection of the defendant, and for damages. As ancillary relief, the plaintiff claimed for himself a vesting order in regard to the temple and its temporalities, on the ground that it was not possible to ascertain the successors in title of the various properties which constituted the temporalities of the trust, and it was uncertain in whom the legal title thereto was vested. The plaintiff also claimed an injunction. The prayer of the plaint contained claims to relief in respect of the various matters I have mentioned.

At the trial certain preliminary issues were framed. The most important of which are as follows :—

- (1) Is the cause of action prescribed ?
- (2) Is an action available to plaintiff except under the provisions of section 102 of the Trusts Ordinance ?
- (3) Can the plaintiff maintain this action without obtaining a vesting order ?

I do not mention the other issues, which principally related to pleas of *res judicata* and estoppel. These have been correctly answered by the learned District Judge, and no comment is necessary.

As regards issue (1) the District Judge held that the plaintiff's action was in substance a claim to an office or a status, and that the further reliefs claimed were subservient to the claim for declaration of trusteeship, and that the fact that these reliefs were claimed did not convert the action to one to be quieted in possession of immovable property. The period of prescription was three years, and as plaintiff's title to the office had been disputed for more than three years, the District Judge held that the claim was prescribed. He further held that section 111 of the Trusts Ordinance had no application to the present case.

In support of this contention, Counsel for the respondent argued that in the present case, the defendant himself acknowledged the existence of the religious trust, and merely disputed the claim of the plaintiff to be declared trustee, setting up his own claim to the trusteeship as against this. I do not think that this fact alters the nature of the action, which is in substance a claim by a person alleging that he holds the legal title to property, as against one, who it is alleged, has neither a legal nor equitable title to the same. I do not think that the fact that the plaintiff claims a declaration that he is the trustee, converts this action into one for an office or status. It is common in a *rei vindicatio* action for the plaintiff to add a prayer that he be declared the owner, but in substance the claim is in vindication of the property.

On a careful examination of the plaint, I agree with the contention of the appellant's Counsel, that two distinct elements are revealed. One relates to the temple and the temple premises, the other relates to the temporalities. As regards the temple and the temple premises, the plaintiff alleged that the title to these, resided in the original founder, who by his dedication of these to the temple, became a trustee. The plaintiff alleged that the legal title descended to him. The burden of proof rested on the plaintiff to establish these facts, but if he did establish them, I do not think that any plea of prescription could avail against him.

I think the language of the Trusts Ordinance is clear. Section 111 (1) (c) says that "in the case of any claim in the interests of any charitable trust, for the recovery of any property comprised in the trust, or for the assertion of title to such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance".

There can be no question that the present action is "in the interests of a charitable trust", and it must certainly be regarded as one for "the recovery of property comprised in the trust" or "for the assertion of title to such property", or as containing both these elements.

I hold in this connection that the plea of prescription is not available to the defendant in respect of any property the legal title of which is proved to have resided in the alleged original founder, and to have subsequently descended to the plaintiff.

As regards the temporalities, the plaintiff has claimed a vesting order, on the ground that there is a doubt as to the person in whom the legal title is vested. This will apply to all those temporalities, for which the original founder had no legal title. I do not think this claim can be based on any declaration that the plaintiff is a trustee of those temporalities. In fact the very claim for a vesting order negatives this. The matter will have to be decided upon evidence placed before the Court, and I think the Court will have a discretion either to grant or to refuse a vesting order. At the same time, if the plaintiff succeeds in proving that he is the trustee of the temple and the temple premises that will be one element which the District Judge may take into account.

Can a claim to a vesting order be prescribed? It should be borne in mind that such a claim is not based on the assertion that the claimant is a trustee in that respect. Under section 112 (2) of the Trusts Ordinance a vesting order will have the same effect "as if the trustee or other person in whom the trust property was vested had executed a transfer to the effect intended by the order". The claim for a vesting order is not then a claim to an office or status. The order only has the effect of transferring the legal title from any one in whom it may reside, to the person named in the order. I do not think that any question of prescription or limitation arises in connection with the claim to a vesting order, but delay may be an element to be considered, in connection with the granting of the vesting order.

As regards issue 2, it was argued for the respondent that section 112 of the Trusts Ordinance, while it gives the Court the power to make a vesting order, does not provide any procedure for the purpose. It was further contended that, as section 102 provides a procedure for obtaining a vesting order in connection with a religious trust (*vide* section 102(1) (b)), it was necessary that the procedure there laid down should be followed. Now it is true that section 102 gives the right to any five persons interested in the religious trust, provided the conditions of sub-section (3) have been complied with, to institute an action to obtain a decree "vesting any property in the trustees". But this appears to presume that the trustees have already been ascertained, and I think it does not apply to the case "where it is uncertain in whom the title to any trust property is vested" (section 112 (1) (a)). Further, section 112 applies to all classes of trusts, and not only to religious trusts. It is contained in a Chapter headed, "Miscellaneous". I have not been able to find, nor has Counsel been able to show me, any section, which lays down a procedure relating to vesting orders in connection with the ordinary trust as distinct from a religious trust. I do not think, where a power has been expressly given in the Ordinance, we can deny to the parties requiring the exercise of that power some appropriate procedure. In this case, in earlier proceedings, it was held that a mere application to Court was not the proper procedure, but that a regular action was needed. As there was no appeal from that order, for the purposes of this case, that particular point may

be regarded as settled. I hold that the claim to a vesting order may be asserted by an action, and that the present action is in order, so far as it relates to the claim for a vesting order.

This touches mainly the temporalities. The claim to the temple and the temple premises is based on the allegation that the plaintiff is the trustee, and the defendant a trespasser. I think it is clear that a person who is able to prove that he is the trustee, is entitled to bring an action *rei vindicatio* or for declaration of title in respect of the trust property against a trespasser. He is not required to resort to section 102, and in fact that section has no application to an action of that nature.

Counsel for the respondent referred us to the case of *Sangto v. Paras Ram*¹. But that case has no application to the facts of the present case. In *Muthu Kumaru v. Vaithy*², Moseley J. refers to the point I have discussed but refrains from deciding it.

As regards issue 5, 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.

For the reasons I have given, I am of opinion that issues (1), (2) and (5) must be decided in favour of the plaintiff. The appeal is allowed and the order dismissing the plaintiff's action is set aside, and the case is remitted to the District Court for due proceedings on such further issues as the District Judge may frame. The appellant is entitled to the costs of the appeal, and of the trial dates, on which the present proceedings were taken. All other costs are in the discretion of the District Judge.

MOSELEY S.P.J.—I agree.

Appeal allowed.

