

1945

Present: Soertsz A.C.J. and Rose J.

THAMBIPILLAI *et al.* v. KUMARASWAMY  
KURUKKAL *et al.*

80—D. C. (Inty.) Jaffna, 16,608.

*Trusts—Suit by persons interested in religious trust—Petition by 79 persons for Government Agent's certificate—Not necessary for all of them to join as plaintiffs after obtaining certificate—Strangers to petition cannot join as plaintiffs—Trusts Ordinance (Cap. 72), s. 102.*

Where seventy-nine persons presented a petition to the Government Agent of a Province, in compliance with the requirements of section 102 of the Trusts Ordinance, praying for the appointment of a Commissioner or Commissioners to inquire into the subject matter of their plaint and for a certificate from the Government Agent in terms of paragraphs (a) and (b) of section 102 (3)—

*Held*, that, having obtained the Government Agent's certificate, it was not necessary for all the seventy-nine petitioners to join as plaintiffs; any five or more of them could institute action.

*Held*, further, that, where eight of the seventy-nine petitioners and four strangers to the petition instituted action, the Court could permit the four strangers to withdraw from the action and the action to proceed thereafter.

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

N. Nadarajah, K.C. (with him N. Kumarasingham), for the plaintiffs, appellants.

H. V. Perera, K.C. (with him S. J. V. Chelvanayagam), for the substituted defendants, respondents.

S. Mahadevan, for the second defendant, respondent.

*Cur. adv. vult.*

December 18, 1945. SOERTSZ A.C.J.—

Seventy-nine persons, claiming to be interested in the matters set forth in the plaint filed in this action, presented a petition to the Government Agent of the Northern Province, in compliance with the requirements of section 102 of the Trusts Ordinance (Cap. 72), praying for the appointment of a Commissioner or Commissioners to inquire into the subject matter of their plaint and for a certificate from the Government Agent in terms of paragraphs (a) and (b) of sub-section (3) of section 102. Having obtained this certificate, eight of the seventy-nine petitioners and four strangers to the petition instituted this action.

On the trial date, 47 issues were framed and adopted, but by agreement of Counsel appearing for the various parties, issues 33 and 34 were submitted for determination as preliminary issues. Those issues are:—

(33) Did the plaintiffs submit a petition to the Government Agent as required by Section 102 (3) of the Trusts Ordinance before filing this action?

(34) If not, can the plaintiffs maintain this action?

In the course of the argument Counsel appearing for the plaintiffs declared that he was not making an application to strike out the names of any of the plaintiffs. The learned trial Judge thereupon dismissed the plaintiffs' action with costs to the second, third, fourth defendants and first substituted defendant. The appeal is from that order.

I am clearly of the view that the trial Judge had no alternative but to make the order he did make in view of the stupidly petulant attitude on the part of the plaintiffs when they refused to ask that the names of the non-petitioner-plaintiffs be struck out.

Counsel appearing for the plaintiffs on the appeal, however, declared that he could not support the contention of his clients in the Court below, and he asked that in view of the substantial interests involved in the litigation, the case be sent back for an application to be made to the Court for the non-petitioner-plaintiffs to be permitted to withdraw from the action. But Counsel appearing for the respondents contended strongly that the contemplated withdrawal would not be of any avail because, he maintained, there would still be nothing to show that the eight remaining plaintiffs were those found by the Government Agent to be interested within the meaning of section 102 (2) of the Ordinance in the matters for consideration and adjudication by the Court. His argument was that inasmuch as, for the purpose of appointing Commissioners, and, thereafter, on their report, granting or refusing the requisite certificate, the Government Agent was not required to go beyond satisfying himself that any five of the petitioners were interested, it would be reasonable to suppose that he would not address himself to the question whether all seventy-nine were interested and that, in that view of the matter, it would be impossible to say that the eight remaining petitioner-plaintiffs in this case, or five of them are the persons on whose interestness the Government Agent based himself in appointing Commissioners and granting the certificate.

Mr H. V. Perera carried his argument to the point of maintaining that all the seventy-nine petitioners should have joined as plaintiffs and that an action by any fewer must fail. The fallacy of this argument, I think lies in the assumption that the question of interestedness is once for all considered and determined by the Government Agent or the Assistant Government Agent in the course of discharging the duty imposed on him by sub-section 4. There, certainly, are no words in the section that provide that his finding in that respect is final, and it would hardly be reasonable to read that section as implying such finality. The inquiry held by the Government Agent or Assistant Government Agent is primarily, for the purpose of satisfying himself that there is a substantial matter for investigation by a Court, and that *prima facie*, five persons at least are interested in it. The inquiry is held *ex parte* and it would cause great hardship if persons who had not an opportunity of being heard in regard to the question of interestedness were held to be bound by the Government Agent's or Assistant Government Agent's view of the matter. In my opinion, it would be open to a Court to consider the question of interestedness independently should it arise before it. Mr. Perera's argument, by its implication, conceded that the case would be properly brought if all seventy-nine petitioners joined as plaintiffs but that contention ignores the possibility or, according to his submission, the probability that among the seventy-nine there would be many whose interestedness had not been considered at all, and in respect of them, there would, ordinarily be misjoinder in that persons found to be interested in the litigation had joined with others not found to be so interested. To surmount that difficulty, Mr. Perera resorted to what may be described as the "Group theory". He said, if I understood him aright, that in a case in which seventy-nine persons had petitioned under section 102 (2) and the Government Agent, satisfied that five of them were interested, granted his certificate, the ascertained interestedness of those five attracted the other seventy-four as co-plaintiffs by force of their having joined in the petition. This is very ingenious, but hardly satisfactory. The words in section 102 seem to me to repudiate the argument for it lays down that "any five persons interested in . . . may without joining as plaintiff any of the other persons interested institute an action . . .". These words seem to me to say very clearly that if, for instance, in this case, assuming that the Government Agent's finding of interestedness disposes of the question of interestedness finally, the Government Agent was called as a witness and he deposed to the fact that he examined the interestedness of all seventy-nine and found thirty of those were interested, five of those thirty could bring the action without joining the other twenty-five or any other interested parties outside the seventy-nine petitioners. Forty-nine having no interest would taint the action with misjoinder if they came in. The more the section is examined the clearer it appears to be that this question of interestedness is one of the matters for the consideration of the Court quite independently of the inquiry by the Government Agent, that is, of course, if the question is raised before the Court. After all, adjudication is made between parties, according to their rights and obligations as at the date of action, and a Court must be satisfied that at the date

the case comes up for trial there are at least five interested parties who had petitioned the Government Agent or Assistant Government Agent, before the Court.

As I have already observed the trial Judge had no alternative but to make the order he made. It was not for him, even if he had the power, to strike out those who had not been petitioners. I should have, therefore, dismissed this appeal but that the questions involved are of semi-public interest and for that reason I would accede to the application of appellants' Counsel and make order that the case be remitted to enable the parties to apply to the Court for such of them as had not joined in the petition to withdraw from the action and, for the action to proceed thereafter. The *locus standi* of the eight others was not questioned.

Then, there is the question of costs and I would direct that as a condition for proceeding with the action, the plaintiffs must prepay the costs of the inquiry and of this appeal. If this is not done within three months of the case being received in the Court below, the order of the trial Judge will stand.

ROSE J.—I agree.

Case sent back.

