1946 *Present :* **Keuneman S.P.J. and Jayetileke J.**

PIYARATANA NAYAKA THERO, Appellant, *and* DHAMMANANDA NAYAKA THERO, Respondent.

215—D. C. Colombo, 2,882.

Trust—Trustee holding office in public institution—Devolution of trust property on him without any conveyance or vesting order—Trusts Ordinance (Cap. 72), ss. 113 (1) (2) (3).

Thirteen persons formed themselves into a Sabha the object of which was to establish a Pirivena. It was agreed among them that the right of appointment of the Principal and Teachers of the said Pirivena should be with the Sabha.

One of the members of the Sabha, who was the owner of the premises on which the Pirivena was built, in furtherance of the common object granted the premises by deed of gift to the Principal and to his successors in the office of Principal. In an action brought by a successor in office to the original grantee praying *inter alia* for a declaration that he held the premises in trust for and as trustee of the 2nd to the 14th defendants as members of the Sabha, and that the 1st defendant who was in wrongful occupation of a portion of the premises be ejected—

Held, that sub-section 1, and not sub-sections 2 and 3, of section 113 of the Trusts Ordinance was applicable and that the plaintiff was entitled to maintain the action without the need of any conveyance, vesting order or other assurance.

APPEAL from a judgment of the District Court of Colombo. The material facts appear from the head note.

R. L. Pereira, K.C. (with him *L. A. Rajapakse, K.C., G. T. Samarawickrame* and *Dharmakirti Peiris*), for the plaintiff, appellant.—The question that arose for consideration on the preliminary issues of law that were tried was whether the plaintiff was duly appointed trustee according to the requirements of the Trust Ordinance. By the original deed creating the trust (P2A) the premises in question were given " to the Ven. Sumangala Nayaka Thero, Principal of the Vidyodaya Pirivena, and on his demise to the Principals appointed to the Pirivena by the parties of the second part . . . . ". The plaintiff is the Principal of the Vidyodaya Pirivena and in terms of section 113 (1) Trusts Ordinance the title to the trust property devolved on him without any conveyance. The learned Judge has held that the operation of section 113 (1) is limited to cases where the creator of the trust or the beneficiaries have nothing to do with the appointment to the office concerned. This limitation finds no support in the Ordinance or elsewhere and is arbitrary and unwarranted. The learned Judge further held that section 113 (2) applied and that a memorandum in writing notarially executed as contemplated by sub-section (3) was necessary to vest the property. It is submitted that sub-section (1) deals with the appointment of trustees by reference to office and sub-section (2) of trustees *qua* trustees. Sub-section (1) and not (2) would therefore apply to the present case. The principle underlying them is an extension of that underlying the Ordinance for the Prevention of Frauds. It is necessary that there should be no doubt as to the identity of a trustee to prevent impostors from claiming. Where the appointment is made by reference to office it is clear enough but where the appointment is of trustees *qua* trustees there is room for raising disputes. Hence the requirement of a notarially executed memorandum of appointment. In any event the learned Judge has misdirected himself in not going on to consider whether sub-section (1) also did not apply once he had decided that sub-section (2) applied. It is to be noted that sub-section (1) was enacted by Ordinance 9 of 1915 as an amendment to the Trusts Ordinance 1871 and at that time there was no provision corresponding to sub-section (2). In the case of *Muttiahpillai v. Sanmugam Chetty* [1] it was held that the Trusts Ordinance applied to private trusts as well as to public trusts. As regards the land described in schedule B plaintiff's position was that it formed part of the Pirivena premises after its purchase by Rev. Mabatouwana and that the Trust has prescribed to it. Reference may also be made to the case of *Masson v. Mathes* [2] where it was held that in the case of religious trusts of this nature even a *de facto* trustee may sue.

N. Nadarajah, K.C. (with him *H. W. Jayewardene*), for the 1st defendant, respondent.—Whatever may be the nature of the trusts disclosed by the deeds P 1 and P 2A the plaintiff claims to hold the lands in trust for the 2nd to 14th defendants who are members of the Vidyadara Sabha. This is clearly a trust for a private association and falls within sub-section (2). A memorandum of appointment notarially executed was necessary for vesting the trust property. It is admitted that such a memorandum does not exist.

[1] *(1910) 14 N. L. R. 15.* [2] *(1938) 40 N. L. R. 562.*

The provision now found in section 113 (1) was first enacted by Ordinance 9 of 1915 in consequence of the decision in *Van Reeth v. de Silva* [1]. It was re-enacted along with sub-section (2) in the present Trusts Ordinance. The Objects and Reasons are to be found in the *Government Gazette* of August 25, 1916, and are instructive. It is stated, " The first part of section 113 re-enacts Ordinance 9 of 1915 which was recently passed as a special enactment. The second part of this section should prove of some use to religious societies which have property vested in trustees. Such societies seldom take the trouble to see to the execution of the necessary conveyance on a change of trustees ". Clearly therefore sub-section (2) was enacted to catch up cases like the present. *Muttiapillai v. Sanmugam Chetty* (*supra*) was decided before the Trusts Ordinance was amended by Ordinance No. 9 of 1915 and is not an authority applicable to the provision under discussion. Section 113 (1) will apply in cases where a person like the Archbishop of Colombo who is appointed from Rome and with whose appointment the parties to a trust have no concern is declared trustee. In this case the deed of trust itself contemplates the appointment of the principal by the Vidyadara Sabha who are the beneficiaries. Indeed inasmuch as they contributed part of the consideration for the transfer they are also authors of the trust. Since the deed provides for a principal appointed by the Sabha being trustee there is a method for the appointment of a trustee prescribed as contemplated by section 113 (2). Alternatively the method followed in practice should be regarded as the customary method. The deed really and in fact makes provision for the appointment of a trustee by the Sabha and the fact that the word "Principal" is used cannot affect the matter. Further, even if this case is thought *prima facie* to fall within section 113 (1), sub-section (1) is a general provision and sub-section (2) is an exception to it which is specially applicable to the facts of this case and should therefore be followed.

E. B. Wikramanayake, for the other defendants-respondents except the sixth.

R. L. Pereira, K.C., in reply.—Sub-section (1) deals with the appointment of trustees by reference to office ; sub-section (2) with the appointment of trustees *qua* trustees. It cannot be said that one is general and the other special.

Cur. adv. vult.

October 25, 1946. KEUNEMAN S.P.J.—

In this case a large number of issues were framed but, at the suggestion of counsel for the 1st defendant, issues 19, 20 and 21 were tried as preliminary matters.

The issues in question are as follows :—

19. Was the plaintiff appointed lawful trustee according to the requirements of the Trust Ordinance of 1918 ?
20. Is the plaintiff vested with the properties in Schedules A and B ?
21. If issues 19 and 20 or either of them are answered against the plaintiff, can plaintiff maintain this action ?

[1] *(1903) 8 N. L. R. 97.*

It was agreed that these three issues should be tried " on the assumption but without conceding the truth of the allegations in the plaint ".

The District Judge decided these issues against the plaintiff and dismissed his action with costs payable to the 1st defendant.

In his plaint the plaintiff alleged that thirteen persons on or about December 6, 1873, formed themselves into an association called *Vidyadhara Sabha*. The chief object of the Sabha was to obtain a portion of land in Colombo and to establish a Pirivena thereon for the purpose of teaching Buddhism. Certain agreements by the said persons were then set out, including the agreement that the right of appointment of the Principal and teachers of the said Pirivena should be with the Sabha. The mode of appointment of future members was to be prescribed by the Sabha, the membership being restricted to thirteen persons. Provision was also made for the filling of vacancies among the thirteen persons by reason of their death. I may add that the agreement in question was embodied in document P 1—No. 925 of December 6, 1873.

The Sabha collected money and constructed a building for the Pirivena, and established the Vidyodaya Pirivena, and about 1873 appointed the Venerable Hikkaduwe Sri Sumangala Nayaka Thero as the Principal. By deed No. 1,259 dated March 9, 1876 (P 2A) one of the thirteen persons, who was the owner of the premises on which the Pirivena was built, in furtherance of the common object transferred the premises in Schedule A of the plaint to the Venerable Hikkaduwe Sri Sumangala Nayaka Thero and to his successors in the office of Principal.

The actual deed took the form of a gift and assignment to the priest I have mentioned and " on his demise to the Principals appointed to the Pirivena " by the thirteen persons, " and on their death by the gentlemen" who joined the Sabha. The gift was " by way of a dedication absolute and irrevocable and as Sanghika property ".

The plaint further alleged that the Sabha made arrangements to acquire the adjoining premises—described in Schedule B of the plaint—for the Vidyodaya Pirivena, and that these premises were transferred by deed No. 2,134 dated April 4, 1884 (P 3). This deed took the form of a plain transfer to the Rev. Mabotuvana Siddharta Thero, but the plaint alleged that he held the legal title in trust for the members of the Sabha.

It was further alleged that certain buildings had been erected on these premises. It was also stated that on the death of each Principal his successor was appointed by the Sabha, the last Principal appointed being the plaintiff.

The plaint finally alleged that the 1st defendant about December, 1941, wrongfully and unlawfully entered into occupation of a portion of the premises.

The plaintiff prayed *inter alia* for a declaration that he held the premises in question in trust for and as trustee of the 2nd to the 14th defendants as members of the Sabha, and for ejectment of the 1st defendant from the premises.

The argument addressed to the District Judge and in appeal by the 1st defendant was that the plaintiff had not been duly appointed trustee

within the terms of section 113 of the Trusts Ordinance (Cap. 72). It was contended that the case did not fall within section 113 (1), which runs as follows :—

> "Where, whether before or after the commencement of this Ordinance, it is declared or intended in any instrument of trust that the trustee shall be the person for the time being . . . . holding or acting in any office or discharging any duty in any public or private institution . . . . the title to the trust property shall devolve from time to time upon the person for the time being holding or acting in any such office, or discharging such duty, without any conveyance, vesting order, or other assurance otherwise necessary for vesting the property in such person."

It seems clear that the language used is wide enough to cover the present case, at any rate as far as the premises in Schedule A are concerned. The deed P 2A grants the legal estate to the Venerable Sumangala Nayake Thero, Principal of the said Pirivena, and on his demise to the Principals appointed by the Sabha. On the plain terms of the sub-section the legal title should devolve upon " the person for the time being holding . . . . that office " without the need of any conveyance, vesting order or other assurance.

It has been argued before us that this sub-section does not apply where the appointment to the office is made by the author of the trust or, as in this case, by the persons who are alleged in the plaint to be the beneficiaries. No authority has been cited in support of this contention, and we are unable to import such a meaning into the sub-section. In our opinion section 113 (1) applies to the present case, so far as the deed P 2A is concerned.

The deed P 3 does not raise the present point. The plaintiff no doubt will have to establish his contention with regard to the land in Schedule B. But that is a matter of evidence, and the preliminary objection raised does not apply to these premises.

The 1st defendant further argues that section 113 (2) and (3) apply to the present case, and contends that these sub-sections, if applicable, exclude the operation of section 113 (1). I have doubts whether the last part of the argument is good, but I do not think it is necessary to decide the point and shall merely determine the question whether sub-sections (2) and (3) are applicable to this case.

The relevant portions of the sub-sections are as follows :—

> 113 (2)—" Where, whether before or after the commencement of this Ordinance, in the case of any charitable trust, or in the case of any trust for the purpose of any public or private association (not being an association for the purpose of gain) a method for the appointment of new trustees is prescribed in the instrument of trust . . . . or by any rule in force, or in the absence of any such prescribed method is established by custom, then upon any new trustee being appointed in accordance with such prescribed or customary method, and upon the execution of a memorandum referred to in the next succeeding sub-section, the trust property shall become vested without any conveyance, vesting order, or other assurance in such new trustee . . "

113 (3)—" Every appointment under the last preceding sub-section shall be made to appear by a memorandum under the hand of the person presiding at the meeting or other proceeding at which the appointment was made, and attested by two other persons present at the said meeting or proceeding. Every such memorandum shall be notarially executed."

It was argued in this case that a method for the appointment of new trustees was prescribed in the instrument of trust, or in the alternative was established by custom in this case. I do not agree with this contention which is based upon a misconception. Nowhere in the document P 2A is there any mention of the appointment of trustees. On the contrary the trustees are declared to be the Principals appointed by the Sabha. There is no doubt reference to the method of appointment of the Principals. But that is an entirely different matter. The considerations which may influence the Sabha to appoint a Principal are not necessarily the same as they would take into account in appointing a trustee. Further, the reference to the method of appointment of the Principals are at the most words of description put in in order to give greater clarity to the term " Principal ". The method of appointment of the Principal is laid down in document P 1, and has only been referred to in document P 2A to indicate the kind of " Principal " that is meant. I do not think the sub-sections (2) and (3) apply to the present case. I may add that the document P 3 is not affected by the argument of the 1st defendant, for reasons already mentioned.

Counsel for the 1st defendant further argued that the prayer of the plaint was incorrect, inasmuch as the members of the Sabha are not the beneficiaries, and that the trust is in reality a charitable trust. This may be a matter for investigation in the District Court and may affect the decree which the plaintiff may obtain, but it has no bearing on the present argument.

In the circumstances I hold that as regards the matters raised under issues 19, 20 and 21 there is no bar to the maintenance of the present action. I set aside the judgment of the District Judge and send the case back for the determination of the other issues in the case. The plaintiff will have the costs of appeal and of the inquiry in the District Court.

JAYETILEKE J.—I agree.

Appeal allowed.