

THIYAGARAJAH AND OTHERS
v
GOPALAKRISHNANATH AND OTHERS

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 21/2005
DC KAYTS 7/2004/T
MARCH 8, 16, 2006

Trust Ordinance Sections 99,102 and 102(3) – Declaration that, the plaintiffs are lawfully elected trustees of Temple – Civil Procedure Code – Section 671 – Removal of trustees at the Annual General Meeting – Scheme of Management – Procedure to be followed in the removal of trustees? – Opportunity to defend to be given? – Certificate of the Government Agent – Is it necessary?

The plaintiff-respondent filed action for a declaration confirming that the plaintiffs were lawfully elected trustee of the Sri Amman Temple at the Annual General Meeting (AGM) and also a declaration confirming that the defendants-petitioners were removed from all posts they held in the Board of Trustees. The plaintiff further sought an order to appoint a receiver to administer the temple and its temporalities.

The defendants-petitioners raised a preliminary objection that the District Court has no jurisdiction to have and maintain the action in view of Section 102 (3) of the Trust Ordinance, and sought the dismissal of the action.

The plaintiff-respondent contended that in view of the scheme of management that was settled in an earlier case, the provisions of Section 102 have no relevance and that the appointment and removal of trustees have to be conducted in the manner set out in the scheme of management that was settled in Court in the earlier case. The District Court held with the plaintiff-respondent.

Held:

- (1) The temple is managed and administered and all activities such as appointing and removal of trustees have to be conducted in terms of the articles in the scheme of management.

- (2) In terms of Article 10(1) a of the Scheme of Management a special general meeting of the congregation will have to be convened, if all or any of the Trustees are to be removed. The congregation shall then proceed to refer the removal to a panel of independent arbitrators to conduct an inquiry into the charges leveled at them.

Per Wimalachandra, J.

The plaint does not disclose that the plaintiff convened a special general meeting and the trustees concerned were given an opportunity to defend themselves. Moreover there was no appointment of independent arbitrators to conduct the inquiry.

- (3) The mere passing of a resolution at the AGM to remove a trustee alone is not sufficient to remove them from the Board of Trustees. The removal of the defendants from the posts of Trustees at the AGM is illegal and contrary to the articles of the scheme of management.

Held further:

- (4) If the plaintiffs have any complaint against the defendants as trustees with regard to any matter such as mismanagement, negligence, breach of trust or removal of trustees, the proper remedy is to seek the jurisdiction of the District Court in terms of Section 102 of the Trust Ordinance, and further a certificate of the Government Agent is imperative under and in terms of Section 102(3).

APPLICATION for leave to appeal from an order of the District Court of Kayts.

Cases referred to:

1. *Kanagasabai v Sivasambu* CA 161/81 CAM 6.7.1981 at 8.
2. *Nadarajah Arunasalam and two others v Rasanayagam and others* CA 479/84 DC Jaffna TR/44.
3. *Sivaguru v Alagaratnam* 48 NLR 369.
4. *Sitaravelu v Ramalingam* 61 CLW 31.
5. *Arumathura v Arudeseivanayagam* 65 CLW III and 67 NLR 522.
6. *Velauthan v Velauthan* 61 NLR 230.
7. *Ramesh and another v Chettiar* (2004) 1 Sri LR 355.

S. Sivarasa, PC with *N.R. Sivendran* and *K. Prabakaran* for defendant-petitioner.

K. Kanag-Iswaran PC with *M.A. Sumanthiran* for plaintiff-respondent.

Cur. adv. vult.

June 19, 2007

WIMALACHANDRA, J.

This is an application filed by the defendant-petitioners for leave to appeal from the order of the District Judge of Kayts dated 12.1.2005. Briefly, the facts relevant to this application are as follows:

The plaintiff-respondents (plaintiffs) filed this action in the District Court of Kayts *inter alia* for a declaration confirming that the plaintiffs were lawfully elected as Trustees at the Annual General Meeting held on 30.5.2004 and also a declaration confirming that the defendants, under rule 24(iv) of the scheme of management, were removed from all the posts they held in the Board of Trustees and also from the post of Trustees at the Annual General Meeting held on 30.5.2004. The plaintiffs also sought an order from the Court that the defendants should hand over the keys of the temple, money, movable properties and all the documents and records to the plaintiffs and also an order to appoint a receiver under Section 671 of the Civil Procedure Code to administer the temple and its temporalities. On 9.6.2004 the plaintiffs supported the petition for the appointment of a receiver and the Court issued notice on the defendants. After hearing the parties the learned Judge made an interim order appointing the Chief Executive Officer and the Accountant to manage the temple until an order was made appointing a receiver. When the case was called on 21.7.2004 the defendants raised a preliminary objection that the District Court has no jurisdiction to have and maintain the action in view of Section 102(3) of the Trusts Ordinance. It was the defendants' position that the reliefs prayed for in the plaint fell under Section 102 of the Trusts Ordinance and as the plaintiffs had failed to comply with Section 102(3) of the Trusts Ordinance the plaintiffs could not have and maintain the present action as presently constituted. On this ground the defendants sought a dismissal of the plaintiffs' action. The learned District Judge delivered the order on 12.1.2005 overruling the preliminary objection. It is against this order the plaintiffs have filed this application.

It is common ground that the subject matter of this action, the Hindu temple called and known as "Nainathivu Sri

Nagapooshani Amman Temple* is a religious trust within the meaning of Section 99 of the Trusts Ordinance. It is admitted that a Scheme of Management dated 25.11.1985 had been recorded and decreed in case No. 10/Trust in the District Court of Kayts and declared to be the Scheme of Management under which the said Sri Nagapooshani Amman Temple at Nainathivu would be managed and its temporalities would be administered. It is admitted that the defendants were holding posts as trustees of the aforesaid temple "Sri Nagapooshani Amman Kovil" at the time the Annual General Meeting was held on 30.5.2004. Thus the temple and its funds had been under the custody and care of the defendants.

It is the plaintiffs' position that on 30.5.2004, at the Annual General Meeting, the congregation decided under the Scheme of Management to remove all the trustees including the hereditary trustees as there were irregularities and mismanagement. Accordingly, they were removed and a new Board of Trustees was elected. The plaintiffs also state that the defendants failed to handover the books, keys of stores ("Kalanchiyam") and all the other documents and records which had been in the custody of the defendants. The plaintiffs filed this action for an order to remove the defendants who were in control and were in-charge of the administration of the temple and its temporalities (see-paragraph 15 of the plaint). It appears that the plaintiffs have instituted this action seeking the appointment of a receiver and a declaration that the plaintiffs were duly elected as trustees of the temple.

It seems to me that the main purpose of instituting this action by the plaintiffs is to get the Court sanction for the removal of the defendants from the posts of trustees, and for a declaration from Court that the plaintiffs are the trustees of the temple and also to have the properties of the temple vested with the plaintiffs.

The Counsel for the plaintiffs in his written submissions, submitted that in view of the Scheme of Management that was settled in Court in D.C. Kayts case No.10/T on 25.11.1985, the provisions of Section 102 have no relevance to the action filed by the plaintiffs. The Scheme of Management was entered in the

aforesaid case with regard to the management and administration of the Temple. The learned Counsel contended further that the appointment and removal of trustees have to be conducted in the manner set out in the Scheme of Management.

According to the plaint, at the Annual General Meeting of the Congregation, new trustees were appointed in place of the trustees (defendants) removed from office by the members of the Congregation. It is to be noted that the three main reliefs prayed for by the plaintiffs are as follows:

- (i) a declaration that the defendants were removed from all the posts held by them in the Board of Trustees and also from the posts of Trustees, under rule 24(iv) of the Scheme of Management.
- (ii) a declaration that the defendants were suspended with immediate effect from all the posts held by them in the Board of Trustees and also from the posts of Trustees under rule 8(4) of the Scheme of Management.
- (iii) to make necessary orders under the powers granted in terms of section 101(2) of the Trusts Ordinance.

It is common ground that the temple is managed and administered and all activities such as appointing and removing trustees in respect of the temple have to be conducted in terms of the Articles in the aforesaid Scheme of Management. For the removal of the trustees (defendants) and the appointment of new trustees at the Annual General Meeting, the audit report should disclose that there had been serious irregularities due to negligence, inefficiency, dishonesty or other cause on the part of any or all Trustees, and if all the members of the Board of Trustees were involved in the irregularities the congregation may resolve for the removal of all the Trustees including the hereditary Trustees as provided for in Article 8(4) in case where they are elected to any office, from such office and shall proceed to elect a new Board of Trustees. The congregation may also direct the new Board of Trustees to institute separate legal proceedings to recover damages or other appropriate remedy from all or any of the Trustees. Provided however the provisions of Article 10 are complied with in the event of a

resolution to remove any or all of the Trustees, (emphasis added).

Therefore, if all or any Trustee is to be removed, Article 10 of the Scheme of Management has to be complied with.

In terms of Article 10(1)(a) of the Scheme of Management a Special General Meeting of the Congregation shall have to be convened. At such Special General Meeting every Trustee concerned shall be given an opportunity to defend himself. Thereafter a resolution could be passed to remove the Trustees. The Congregation shall then proceed to refer the removal to a panel of independent arbitrators to conduct an inquiry into the charges leveled at them.

In the instant case the plaint does not disclose that the plaintiffs convened a special General Meeting and the Trustees concerned were given an opportunity to defend themselves. Moreover, there was no appointment of independent arbitrators to conduct an inquiry.

In terms of Article 10(2) when the special General Meeting resolves -

- (a) to remove from office any or all the members of the Board of Trustees and
- (b) to take necessary legal action -

the proviso to Article 10 of the Scheme of Management has to be followed. It states thus:

When a resolution is passed to remove a Trustee from Trusteeship the congregation shall proceed to refer it to a Panel of Independent Arbitrators to conduct an impartial inquiry into the charges and if at the conclusion of such inquiry the Trustee is found guilty, his removal from office shall stand confirmed and shall take effect immediately, if he is an elect Trustee. In the case of a Hereditary Trustee being found guilty as aforesaid he shall be reported to the Appropriate Court of Law by the Board of Trustees for appropriate action by the Court.

The Panel referred to above shall consist of -

- I. The Head of the Department of Hindu Civilization of the Jaffna University for the time being;
- II. The Head Incumbent of the Nallai Adheenam for the time being and
- III. Any Retired Judge or retired Magistrate who is a Hindu nominated by the Congregation. Temple funds shall be utilized for the expenses incurred in implementing the provisions of this Article."

In this case there was no such appointment of independent arbitrators and as such no finding by an independent arbitrator.

Thus it will be seen that the mere passing of a resolution at the Annual General Meeting to remove a trustee or trustees alone is not sufficient to remove them from the Board of Trustees. In the circumstances the removal of the defendants from the posts of Trustees at the Annual General Meeting held on 30.5.2004 is illegal and contrary to the Articles of the said Scheme of Management.

I am inclined to agree with the submissions made by the learned Counsel for the defendants that the passing of a resolution alone at an Annual General Meeting will not be sufficient to remove any Trustee who is holding office, without complying with the Articles of the said Schemes of Management. Therefore the plaintiffs cannot claim that they were the newly elected Trustees of the said temple. Accordingly, the plaintiffs cannot be considered as duly elected Trustees at the Annual General Meeting held on 30.5.2004.

It is to be observed that the reliefs sought by the plaintiffs in paragraphs (b), (c), and (d) of the prayer to the plaint are governed by Section 102 of the Trusts Ordinance and consequently a certificate of the Government Agent is imperative under and in terms of Section 102 of the Trusts Ordinance. Therefore, if the plaintiffs have any complaint against the defendants as Trustees of the said temple with regard to any matter such as mismanagement, negligence, breach of trust or removal of the trustees, the proper remedy is to seek the jurisdiction of the District Court in terms of Section 102 of the Trusts Ordinance.

The main submissions of the defendants centered around Section 102 of the Trusts Ordinance. It is the contention of the defendants that the plaintiffs have failed to comply with Section 102 of the Trusts Ordinance. Section 102(1) states as follows:

"Subject to the conditions of sub-section(3) hereof, any five persons interested in any place of worship, or in any religious establishment or place of religious resort, or in the performance of the worship or of the service thereof, or in the trusts, express or constructive, relating thereto, may, without joining as plaintiff any of the other persons interested, institute an action in the court within the local limits of whose civil jurisdiction any such place of establishment is situate, or if such place is situate outside Ceylon, and the action is instituted with respect to immovable property situate within Ceylon, in the court having local jurisdiction, to obtain a decree –

- (a) settling a scheme for the management of the trusts thereof;*
- (b) vesting any property in the trustees;*
- (c) enumerating the properties comprised in the trust, or declaring that any property is trust property comprised in the trust;*
- (d) directing accounts and inquiries;*
- (e) declaring what proportion of the trust property or of any interest therein shall be allocated to any particular object of the trust;*
- (f) declaring any trustee, manager, or superintendent of such place or establishment, or member of any committee of management, guilty of any misfeasance, breach of trust, or neglect of duty;*
- (g) awarding damages and costs against any such trustee, manager, superintendent or member of a committee in respect of any such misfeasance, breach of trust, or neglect of duty;*
- (h) directing the removal of any trustee, manager, superintendent, or member of committee, and, if*

necessary, directing the appointment of any new trustee, manager, superintendent, or member of a committee;

- (i) directing the specific performance of any act by any trustee, manager, superintendent or member of a committee;
- (j) granting such further or other relief as the nature of the case may require.

According to section 102(1) of the Trusts Ordinance before filing an action the plaintiffs are required to comply with the provisions of Section 102(3). It reads as follows:

"No action shall be entertained under this section unless the plaintiffs shall have previously presented a petition to the Government Agent of the Administrative District in which such place or establishment is situate praying for the appointment of a commissioner or commissioners to inquire into the subject-matter of the plaint, and unless the Government Agent shall have certified that an inquiry has been held in pursuance of the said petition, and that the commissioner or commissioners (or a majority of them) has reported –

- (a) that the subject-matter of the plaint is one that calls for the consideration of the court; and*
- (b) either that it has not proved possible to bring about an amicable settlement of the questions involved, or that the assistance of the court is required for the purpose of giving effect to any amicable settlement that has been arrived at.*

The plaint filed by the plaintiffs does not disclose that the plaintiffs have complied with the provisions of Section 102(3).

In an unreported judgment delivered in the case of *Kanagasabai v Sivasambu*⁽¹⁾ at 8 Justice Abdul Cader said:

"A certificate under Section 102(3) is preceded by several steps that the law requires. A suitor should

present a petition to the Government Agent accompanied by the proposed plaint. The Government Agent is required to appoint a Commissioner to inquire into the subject of the plaint. The Commissioner should hold an inquiry and report to the Government Agent and thereafter the Government Agent should issue a certificate to the suitor. All these steps involve a good deal of publicity by and any parties who are interested in the dispute relating to a public trust like a Hindu temple would have had an opportunity of placing their respective points of view before the Commissioner and if necessary even to move to participate in the District Court proceedings.

I have come to the conclusion that the failure to file a certificate under Section 102 resulted in a patent lack of jurisdiction, which would disentitle the plaintiff to continue with that action.*

In the case of *Nadaraja Arunasalam and two others v Rasanayagam and another*⁽²⁾ (Unreported) Justice Anandacoomaraswamy, J. said:

"The last relief sought was a settlement of a Scheme of Management and this is governed by Section 102 of the Trust Ordinance and therefore a certificate of the Government Agent is imperative. (Vide *Sivaguru v V. Alagaratnam*⁽³⁾, *Sitaravelu v Ramalingam*⁽⁴⁾, *Arumathura v Arudeselvanayagam*⁽⁵⁾, and *Velauthan v Velauthen*⁽⁶⁾.)"

In a recent judgment of the Court of Appeal reported in *Ramesh and another v Chettiar*⁽⁷⁾, it was held that a plaintiff who has filed action for a declaration that the defendant is not the lawful trustee of a kovil and for the removal of the defendant from the office of the trustee has no legal right or status to institute the action as he had failed to comply with the provisions of Section 102(3) of the Trusts Ordinance. It is a condition precedent to obtain the approval of the Government Agent concerned to file action in terms of Section 102(3) of the Trust Ordinance.

Now I shall proceed to consider the applicability of Section 102(1) of the Trusts Ordinance. The plaintiffs pleaded *inter alia* in paragraph 15 of the plaint that they seek an order from Court to remove the defendants and their agents from the control and administration of the said temple. This is a relief that relates directly to Section 102(1)(h). Furthermore the reliefs prayed for in paragraphs (b) and (c) of the prayer to the plaint relate to Section 102(1)(h) as well. The prayer (d) relates to Section 102(1)(j).

In the circumstances, the plaintiffs have not complied with the provisions of Section 102(3) of the Trusts Ordinance, in that they have failed to file a certificate from the Government Agent, and it follows from this that the action could not have been entertained by the learned District Judge.

For these reasons leave to appeal is granted and the order of the learned District Judge dated 12.1.2005 is set aside. Accordingly, the appeal is allowed and the plaintiffs' action is dismissed with costs.

Appeal allowed.

Plaintiff's action dismissed.