[FULL BENCH.]

1917.

*Present :* Wood Renton C.J. and Shaw and De Sampayo JJ.

## NANNITAMBY *v.* VAYTILINGAM *et al.*

*34—D. C. Jaffna, 19,750.*

*Amendment of decree after twenty-five years—Application by heirs of original party—Civil Procedure Code, ss. 5, 189, and 408—Judgment—Compromise.*

N sued V and A for a declaration of title to the office of manager of a Hindu temple, basing his claim on hereditary succession. The defendants (V and A) demurred to the plaintiff's libel, on the ground that the right to the managership was not heritable, and could not be transmitted in succession; and they further alleged that they had a right, both by inheritance and by prescription, first defendant to the incumbency and second defendant to the managership. On March 19, 1891, the action was settled by a consent decree, on the basis of a memorandum submitted by both sides. This memorandum affirmed the right of the plaintiff and his heirs and the second defendant and his heirs to the joint managership, and of the first defendant and his heirs to be officiating priests.

It contained also clauses dealing with the position of the parties in regard to a ceremony connected with the flagstaff festival, and also with the custody and possession of the temple property. The District Judge pointed out that he could not incorporate the latter portions of the memorandum into the decree, as the matters to which they related did not arise upon the pleadings. He then proceeded as follows: "The Court is ready to enter a decree adjudging the plaintiff and second defendant to be joint managers of the temple, and first defendant to be officiating priest thereof. Counsel state that they are quite satisfied with this; they only ask that the memorandum be filed. Let a decree be entered in terms of the memorandum, omitting the portions I have marked A and B." The passages marked A and B are those dealing with the flagstaff festival and the question of the custody of the temple. The decree entered up did not refer to the heirs of the parties. In November, 1916, after all the original parties were dead, the first and second respondents (sons of the first defendant) presented a petition to the Court for the amendment of the consent decree of 1891 by insertion of the word "heirs," and noticed the appellants (sons of second defendant) and the third respondent (son of the plaintiff).

The District Judge amended the decree as prayed for.

*Held* (*per* Wood Renton C.J. and De Sampayo J., *dissentiente* Shaw J.)—

(*a*) That the omission of the words "and his heirs" was due to an error, and that the Court had power to alter the decree.

1917.

*Nannitamby v. Vaytilingam*

(*b*) The record by the District Judge of what took place before him in 1891 was a judgment, and the decree might be amended under section 189 of the Civil Procedure Code.

(*c*) The office of a priest may be heritable, and in such a case any question as to who are or are not the heirs of a particular priest should be determined by Hindu law and custom.

THE facts are set out in the head note. This case was referred to a Bench of three Judges, by Wood Renton C.J. and Shaw J.

*Bawa, K.C.* (with him *Balasingham* and *S. R. Rajaratnam*), for appellants.

*Hayley*, for respondents.

*Cur. adv. vult.*

June 14, 1917. WOOD RENTON C.J.—

In 1889 Murugar Nannitamby sued Valayuthar Vaytilingam and Vayramuttu Arumugam, in the District Court of Jaffna, for a declaration of his title to the office of manager of a Hindu temple at Sulipuram. He based his claim to the managership on hereditary succession from the founder of the temple, Ramoo Sathukavaler. The defendants demurred to the plaintiff's libel, on the ground that the right to the managership was not heritable, and could not be transmitted in succession; and they further alleged that they had a right, both by inheritance and by prescription, the first defendant to the incumbency, and the second defendant to the managership, of the temple in question. As the point was the subject of some discussion at the argument before us, it may be desirable to observe that paragraph 10 of the defendants' answer makes it quite clear that the first defendant, as well as the second, relied on hereditary title. It is sufficient in this connection to quote the following passage from that paragraph: "The first defendant says that he, and before him his said father, having officiated as priest of the said temple and enjoyed the perquisites thereof uninterruptedly and without any disturbance by a title adverse to and independent of that of the plaintiff, and all others whomsoever, for ten years and upwards previous to this action, he has acquired a prescriptive right to the said office."

On March 19, 1891, the action was settled by a consent decree entered up by the then District Judge of Jaffna, on the basis of a memorandum submitted to him by both sides. This memorandum affirmed the right of the plaintiff and his heirs and the second defendant and his heirs to the joint managership, and of the first defendant and his heirs to be officiating priests, of the temple. It contained also clauses dealing with the position of the parties in regard to a ceremony connected with the flagstaff festival, and also

with the custody and possession of the temple property. The learned District Judge pointed out that he could not incorporate the latter portions of the memorandum into the decree, as the matters to which they related did not arise upon the pleadings. He then proceeded as follows: " The Court is ready to enter a decree adjudging the plaintiff and second defendant to be joint members of the temple, and first defendant to be officiating priest thereof. Counsel state that they are quite satisfied with this; they only ask that the memorandum be filed. Let a decree be entered in terms of the memorandum, omitting the portions I have marked A and B. As agreed on, each party will pay their own costs." The passages marked A and B are those dealing with the flagstaff festival and the question of the custody of the property of the temple. The reference in the memorandum to the heirs of the parties are not included in the excepted passages. The appellants are the sons of the second defendant. The first and second respondents are sons of the first defendant. The third respondent is a son of the plaintiff in the action. The original parties to the proceedings are all dead. In November, 1916, the first and second respondents presented a petition to the District Court, Jaffna, for the amendment of the consent decree of 1891 by the insertion of the word " heirs " in those clauses of the memorandum of consent which deal with the devolution of the managership and the incumbency of the temple. The appellants opposed this application. The learned District Judge, after hearing both sides, has allowed it. Hence this appeal.

The appellants' counsel contended that it was clear from the record of the proceedings in 1891 that the District Judge had deliberately omitted from the decree the reference to " heirs " in the memorandum of consent ; that, even if he had not done so, section 408 of the Civil Procedure Code precluded the present District Judge from inserting that word now, inasmuch as no question of hereditary succession was really involved in the action ; that the application could not be brought under section 189, inasmuch as no " judgment " had been pronounced in the case; that the appellants, who had in 1909 obtained from the second defendant a deed appointing them to the managership of the temple, were in the position of third parties whose rights should not be prejudiced; that a devolution of an incumbency by inheritance might involve the absurdity of a woman officiating as a Hindu priest; and, in the last place, that no amendment of the decree could in any event be made until there was affirmative evidence that reasonable notice of the application had been given to all the heirs of the original parties.

I do not think that any of these contentions is entitled to prevail. It appears to me that the record shows that it was the intention of the District Judge that every part of the memorandum of consent,

1917.

WOOD RENTON C.J.

*Nannitamby v. Vaytilingam*

except the passages A and B, should be incorporated into the decree of the Court. The omission of any reference to "heirs" in his running narrative of the proceedings before him, which constitutes the real "judgment" in the case, must be considered in the light of the context, and the retention of the word "priests" in the consent decree itself certainly does not indicate any intention on the part of the Court to depart from the provisions of the memorandum as to the devolution of the incumbency. The summary that I have given above of the pleadings shows that the first defendant as well as the second relied upon hereditary title. Moreover, I think that it would be very undesirable to construe the language of section 408 of the Civil Procedure Code in a sense that would preclude the parties to litigations of this character from settling by consent, not merely the immediate issues in the case, but matters germane to those issues and directly involved in the pleadings. The record by the District Judge of what took place before him in 1891 is, in my opinion, a "judgment" within the meaning of section 5 of the Civil Procedure Code. It states the grounds both of the exclusion of the passages A and B from the consent decree, and, by necessary implication, of the readiness of the Court to allow the decree, *quoad ultra*, to be drawn up in terms of the memorandum of consent. The appellants are not really in the position of third parties, in spite of the deed from the second defendant on which they rely. They come into the case as heirs of that defendant. There can be no doubt that it was the original intention of all the parties to the action that the incumbency should be hereditary. I do not think that they would have come to an arrangement of this kind if they had thought that it would involve grotesque results. The case of *Supramani Ayer v. Changarapillai* [1] shows that, under the Hindu ecclesiastical law, a priesthood may be heritable, and it may well have been within the contemplation of all the parties to the memorandum of consent that any question as to who were or were not the heirs of a particular priest should be determined by Hindu law or custom. It was held by Sir John Bonser C.J. and Withers J., in *Gooneratne v. Perera*,[2] that the words "pending the action," as used in section 404 of the Civil Procedure Code, mean "before final decree," and that there could be no substitution under that section after final decree had been entered up. It would no doubt be possible for this Court, under section 4 of the Code of Civil Procedure, to make a special order so as to secure the presence of all the necessary parties before the Court, prior to an amendment of a decree under section 189. But I do not think that any such order is required, or could be justified, in the present case. The learned District Judge considered, and the allegations of the respondents in the affidavit in support of their petition warranted him in so doing, that the parties affected

[1] *(1896) 2 N. L. R. 30.* [2] *1896) 2 N. L. R. 185.*

by the proposed amendment of the decree were sufficiently before him. The point that I am now considering was not one of the grounds of objection to the amendment of the decree in the lower Court, nor was it urged upon us at the first argument of this appeal.

I would dismiss the appeal, with costs.

SHAW J.—

This is an appeal from an order of the Judge of the District Court of Jaffna amending a decree of that Court entered up on March 19, 1891.

The action was brought by one Murugar Nannitamby against two defendants, Valayuther Vaytilingam and Vayramuttu Arumugam, claiming a declaration that he was entitled to hold the office of manager of a certain Hindu temple, for an injunction restraining the defendants from preventing him from exercising the functions of manager, and for damages.

The defendants filed answer alleging, *inter alia*, that the managership of the temple was not heritable, and could not be transmitted in succession. The answer went on to allege that the temple had been built by an ancestor of the second defendant, and that he had been succeeded by his descendants, as set out in the answer, until the managership came to the second defendant, who claimed to be entitled to the managership by prescription. The answer further alleged that the first defendant's father had been officiating priest for forty years, and that he had been succeeded by the first defendant, who had officiated as priest for seventeen years, and claimed that the first defendant was entitled by prescription to the office of priest.

After some further pleadings, under the practice in force at the time, which add little to the respective claims of the parties, the case came on for trial on March 19, 1891. On that day the parties came to an agreement for settlement, which was put into writing and signed by them.

The agreement provided that the plaintiff and his heirs, and the second defendant and his heirs, should be declared joint managers of the temple. That a ceremony known as a flagstaff ceremony should be conducted in a certain manner. That the first defendant and his heirs should be declared to be officiating priests of the temple and should have certain rights and should perform certain duties, and it further provided that the parties should bear their own costs.

The following journal entry was made by the Judge on March 19, 1891: "And parties present with their advocates. A memorandum of terms of settlement duly signed by parties filed (marked X). Counsel for parties ask that the Court enter a decree in terms of this agreement. The Court intimates that it cannot well incorporate in the decree that portion referring to a particular ceremony connected with the flagstaff festival. Nor can it declare the first

1917.

SHAW J.

*Nannitamby v. Vaytilingam*

defendant to be entitled to the custody and possession of all the temple property, movable and immovable, and decreeing that he must furnish accounts. These points do not arise for adjudication in the pleadings. The Court is ready to enter a decree adjudging the plaintiff and the second defendant to be joint managers of the temple, and the first defendant to be officiating priest thereof. Counsel state that they are quite satisfied with this; they only ask that the memorandum be filed. Let a decree be entered in terms of the memorandum, omitting the portions marked A and B as agreed on. Each party will pay their own costs."

On the same day the decree was drawn up and signed by the Judge. It omitted the paragraphs A and B of the memorandum relating to the flagstaff ceremony and the rights and duties of the priest, and it also omitted the words " and his heirs " in the declaration that the plaintiff and the second defendant should be declared managers, and in the declaration that the first defendant should be declared officiating priest.

No objection was taken by the parties to the terms of the decree as drawn up, which remained unchallenged for twenty-five years.

On November 7, 1916, all the parties to the action being then dead, the respondents, who claim to be the sons of the first defendant, and to be entitled to officiate as priests of the temple, petitioned the District Judge to amend the decree of March 19, 1891, by adding the words " and his heirs " in the various places where they had been omitted in the decree, on the ground that the words had been omitted in the decree by a clerical error. They made the son of the plaintiff and the two sons of the second defendant respondents to the petition.

The District Judge has amended the decree in accordance with the prayer of the petition, and from his order the present appeal is brought.

I am of opinion that the order is wrong, and that the appeal should be allowed.

The amendment purports to be made under section 189 of the Civil Procedure Code. That section provides as follows: " If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion, or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment, or to correct such error. Provided that reasonable notice has been given to the parties or their proctors of the proposed amendment."

That this is not a " clerical error " in the decree appears to be quite obvious. The words " and his heirs " have been omitted in no less than three places after the names of the various parties. Moreover, the words " he is " instead of " they are " have been inserted in the declaration of the second defendant's right to be officiating priest. It seems to me to be impossible to imagine that

so many variances with the terms of the memorandum, all of them making sense and consistent with one another, could have occurred through clerical errors, and I feel driven to the irresistible conclusion that the alterations from the terms of the memorandum were made by design. Neither does it appear to me that the decree is " at variance with the judgment, " which is the other ground for the amendment of a decree under section 189.

In the first place, there does not appear to me to have been any " judgment " at all in the case. " Judgment " is defined by section 5 of the Code to mean " the statement given by the Judge of the grounds of his decree or order. " The only grounds given by the Judge are that the parties have settled the case, and that he cannot incorporate in the decree anything about the flagstaff festival or the rights of the priest.

What took place on March 19, 1891, appears to me to have been not a judgment of the Court under section 189, which seems to refer to a judgment after hearing under the preceding sections 184 to 188, but an assent of the Court to a compromise under section 408. Nor does there seem to me to be any mistake whatsoever in the decree as drawn up, or any variance with what the Judge expressed his willingness to decree. He expressly told the parties that he was willing to adjudge the plaintiff and second defendant joint managers and the first defendant to be officiating priest, and said nothing whatever about " heirs, " and he declined to put anything in the decree about certain other matters that did not arise in the pleadings. When he finally directed decree to be entered in terms of the memorandum, omitting the portions marked A and B, I consider he meant in so far as it was consistent with what he had already said that he would consent to.

The addition of the words relating to the heirs of the parties would have been open to the same objection as the clauses relating to the flagstaff ceremony and the rights and duties of the priest, for neither the first nor second defendants suggested in the pleadings that either the management or the priesthood were hereditary, but both claimed by prescription, and in fact denied in the answer that the management was heritable, and any declaration that their heirs were entitled to the offices would have been going beyond the power to enter a consent decree, " so far as it relates to the action, " conferred by section 408 of the Code.

The Judge also probably saw that it was not within his power to make a decree declaring the rights of persons not in existence or before the Court, and also that it would be going beyond the scope of his jurisdiction to declare that the " heirs " of some person should be entitled to officiate as priests of a temple. In a decree the word " heirs " would have to be construed in its legal sense, and it would amount to a declaration that persons who might perhaps be the widow and daughters of the priest were entitled to officiate.

1917.

SHAW J.

*Nannitamby v. Vaytilingam*

I feel no doubt that the words were never intended by the Judge to be inserted in the decree, and their omission was in accordance with his expressed intention, and was no mistake or clerical error.

There are two other objections to the order of the Judge, on both of which the appeal is, in my opinion, entitled to succeed, namely, that the persons who moved to amend the decree are not " parties " to the action, and that notice has not been given to the " parties " of the proposed amendment (see *Peris v. Mudalihamy* [1]). As I am of opinion that the appeal should succeed on the merits, I do not think it necessary to deal with these objections at length.

DE SAMPAYO J.—

In this action, which was instituted in June, 1888, the plaintiff claimed to be the manager of the Hindu temple called " Esura Venayager Koil, " at Sulipuram, and traced his title to such office by descent from the alleged original founder of the temple, and stated that the office of manager was so transmitted from one to the other of the persons mentioned in the plaint, including the plaintiff, in conformity with local usage. As such manager he claimed to be entitled to have charge of the property of the temple, movable and immovable, to superintend the due observance of its religious rites, and specially to have the sole conduct of the chief festival of the temple on the first day thereof. He complained that the two defendants had hindered him in the exercise of his rights as manager, and had interfered with his custody of the property of the temple; and he prayed for a declaration that he was entitled to hold the office of manager and to exercise the rights claimed, and for an injunction and damages. The defendants denied the plaintiff's claim, and pleaded that " the right to the management of the temple is not heritable, and cannot be transmitted in succession, " though they themselves proceeded to state that the temple was founded by the second defendant's ancestor, that the managership was held by the descendants and relatives of that founder, and that the second defendant, on the death of his father in 1886, succeeded to the management of the temple. The first defendant was a priest, and the defendants stated as regards him that his late father was officiating priest of this temple for forty years, and on his death, about seventeen years before the action, he was succeeded by his son, the first defendant, who further claimed to be entitled to the office of officiating priest by prescription. The plaintiff filed a replication, in which, while admitting that the first defendant occasionally performed ceremonies under the plaintiff's authority, the plaintiff denied that the first defendant ever was officiating priest. On these pleadings the case ultimately came on for trial on March 19, 1891, when the parties stated to the Court they had settled the case, and submitted a written

[1] *(1916) 2 C. L. R. 71.*

memorandum of the terms of settlement, and asked the Court to enter a decree in those terms. The terms in substance were that the plaintiff and his heirs, and the second defendant and his heirs, should be declared to be the joint managers of the temple, and that the first defendant and his heirs should be declared to be the officiating priests of the temple. There were two other terms relating to what was called the flagstaff festival, and giving the custody of the property to the first defendant with the obligation of rendering accounts. But the District Judge considered he could not embody these latter terms in the decree, as those points did not arise for adjudication in the action, and he made order for entering a decree in terms of the memorandum, omitting the portions marked A and B, which contained the terms to be excluded. A decree was accordingly entered, but the expression " and his heirs, " which in the memorandum follows after the designation of each of the parties, does not appear in the decree as entered. The plaintiff and the defendants have since died, and the parties to this appeal are respectively the sons of the plaintiff and the defendants. The first two respondents, who are the sons of the first defendant and are *de facto* officiating priests of the temple, applied that the decree be amended by inserting the words " and his heirs " in the relevant places, on the ground that the same were omitted in the decree by an error; and this appeal is taken by two of the respondents to the application, who are the sons of the original second defendant, from an order of the District Judge allowing the amendment.

The first question arising for decision is whether the omission was intentional or due to inadvertence. The appellants place great reliance on a passage in the District Judge's order, where, after stating that the two terms above referred to could not be embodied in the decree, he said: " The Court is ready to enter a decree adjudging the plaintiff and the second defendant to be joint managers of the temple, and the first defendant the officiating priest thereof, " and it is contended that the District Judge did not intend to include the heirs of the parties in the declaration. To my mind it is clear from the context that this passage merely emphasizes and distinguishes the terms to be excluded, and is not intended to limit the agreement of the parties still further by omitting their heirs, and when the District Judge concluded his order thus: " Let a decree be entered in terms of the memorandum, omitting the portions there marked A and B, " there is hardly room for any doubt as to the intention of the District Judge to embody in the decree all the terms agreed upon, save the terms marked A and B. Consequently, I think the omission of the words " and his heirs " was due to an error on the part of the draftsman of the decree, and was unnoticed by the District Judge when he signed the decree. Nor do I think, as was argued before us, that the District Judge must be taken to have intended to omit the words, because the

1917

DE SAMPAYO J.

*Nannitamby v. Vaytilingam*

case concerned the immediate parties, and no declaration was asked for, and could be made in favour of their successors. I have above reproduced the substance of the pleadings, in order to show that the rival claims of the plaintiff and the second defendant to be managers of the temple were based on descent from a remote ancestor, and that the claim of the first defendant to be officiating priest was practically similar. It seems to me that the agreement was intended once for all to settle the nature of the tenure of those offices, and to have it recorded that it was regulated, not by such modes as appointment or selection, but by descent. I do not find any insuperable difficulty in the use of the word " heirs " to express this idea. The usual meaning of the term no doubt is " heirs *ab intestato*, " but I believe the Tamil equivalent of the term is much wider, and includes relationship by blood, and sometimes even by marriage. The word may in a sense be indefinite, but the parties must be taken to have understood whom they meant by " heirs, " and to have referred to the local usage mentioned in the plaint for determining them. Hereditary title to both lay and priestly incumbencies of temples is well known in Jaffna. Questions may hereafter arise between individual claimants who seek to come in as heirs of the parties to the action, but such possible questions should not, I think, be in the way of giving effect to the actual agreement of the parties.

Another point taken in connection with the same objection is that the succession to these offices was not involved in the action, and as under section 408 of the Civil Procedure Code the Court can pass a decree in accordance with an agreement only " so far as it relates to the action, " the District Judge must be taken to have refused to include " heirs " in the declaration. As I have endeavoured to show, the question of the hereditary right by which the parties claimed to be entitled to these offices was involved in the action, and I think that any agreement on that point, which must necessarily have regard also to the tenure of the offices when one or more of the parties shall have died, relates to the subject-matter of the action. A compromise to be recorded and embodied in a decree need not necessarily be confined to the relief originally prayed for. Section 375 of the old Indian Code and Order 23, rule 3, of the present Code correspond to section 408 of our Code, and it has been held in India that the language of the section is wide and general, and does not preclude parties from settling their disputes on such lawful terms as they might agree to, without being restricted to such relief as one only of the parties had chosen to claim in the plaint; and so where the plaintiff sued on certain bonds and prayed for a money decree, and where by compromise he was given judgment for a specified sum payable in instalments, and a charge was created on certain immovable property of the defendants, the High Court of Madras held that the agreement as regards the

charge was not only lawful, but " related to the suit, " so as to be embodied in the decree (*Joti Kuruvetappa v. Izari Sirusappa*[1]). The learned authors of " Civil Procedure in British India, " in their commentary on Order 23, rule 3, say generally: " The decree passed on a compromise cannot be regarded as *ultra vires*, simply because it goes beyond the subject matter of the suit and contains other conditions. " The subject-matter of the present action is the lay and ecclesiastical incumbency of the temple, and the compromise settling the rule of succession appears to me to " relate to the action." I think, therefore, that the argument on this point is untenable.

The next point to be considered is as to the power of the Court to make the amendment. Section 189 provides for the amendment of a decree which is " at variance with the judgment, " or contains " any clerical or arithmetical error. " It was said that there was in this case no " judgment " with which the decree was to be brought into conformity. In my opinion the order of the District Judge, in which he discusses the terms of settlement submitted to him, and gives his reasons for excluding some and adopting others, is for this purpose a judgment. Apart from that, I think the omission in the decree is a " clerical error, " which may be corrected under the above section, even if there be no " judgment. " Some difficulty, however, arises from the fact that the original parties are now dead. Section 189 provides for notice of the proposed amendment being given to the parties or their proctors. But it is not disputed that if the parties in any case are dead, the application for an amendment may be made by, and notice thereof given to, their legal representatives, and, in a proper case, by or to all their heirs. The applicants in their affidavit, with which the District Judge was satisfied, sufficiently stated the representative character of themselves and of the respondents to their application, and no question on that point was raised in the Court below, and in these circumstances I am not disposed to interfere on a technical objection of this kind. As *Hatton v. Harris*,[2] cited by Mr. Hayley, shows, the lapse of time since the entry of the decree is not of itself an objection to its amendment now.

In my opinion the appeal fails and should be dismissed, with costs.

*Appeal dismissed.*

[1] *(1907) I. L. R. 30 Mad. 478.*

[2] *(1892) A. C. 547.*