

KURUKKAL

v.

KURUKKAL

SUPREME COURT

SAMARAKOON, C.J., WANASUNDERA, J., AND SOZA, J.

S.C.74/81; C.A. (LA) 16/81; C.A. (APPEAL No. 23/78). D.C. MALLAKAM

No. 3968.

JULY 8, 1982.

Trust - Scheme of Management of Kovil - Regulation by Court - Sections 101 and 102 of Trusts Ordinance - Sections 217, 334 of Civil Procedure Code.

Action No. 3968 D.C. Jaffna was instituted for settling disputes between two parties for the management rights of Kolankalady Veerakathy Pillayar Kovil at Maviddapuram. On 10.3.55 the District Judge approved a scheme of management which was filed by the partner. But this order was not a formal decree.

Somewhere in 1977 disputes regarding management arose again and the appellant filed two petitions in the District Court. The District Judge dismissed the first application on the ground that a separate action should have been filed for the reliefs claimed there but allowed the second on the grounds that it only sought to enforce rights under a scheme of management as these could be effected under Section 344 of Civil Procedure Code.

On Appeal to the Court of Appeal the appeal was allowed dismissing the application. The Court of Appeal granted leave to appeal to the Supreme Court. The ground was whether the second application of 25.2.78 could be maintained under Section 101(2) or Section 102 of the Trusts Ordinance or whether a fresh action should have been instituted.

Held -

- (1) Under Section 101(2) of Trusts Ordinance a trustee was entitled to sue either by regular action or by way of summary procedure or petition and affidavit or by petition only or by affidavit only.
- (2) The Court had power under Section 101 to make any order that it may deem equitable for the regulation of the succession of trustees by changing the mode of succession.
- (3) That even though there was no formal decree in Case No. 3968 D.C. Jaffna, what was passed was an order in terms of Section 217 of the Civil Procedure Code and for the execution of such order any of the provisions of Chapter XXII was available.

Case referred to:

- (1) *Karthigesu Ambalavanar v. Subramaniam Kathiravelu* (1924) 27 NLR 15, 21.

APPEAL from judgment of the Court of Appeal

K. Thevarajah with *S. Navaratnam* for respondent-appellant.
V. Arulambalam with *S.A. Parathalingam* for appellant-respondent.

July 26, 1982.

SAMARAKOON, C.J.

This dispute relates to the management of Kollankaladdy Veerakathy Pillayar Kovil at Maviddapuram which is a charitable Trust. The history of this matter is briefly as follows: On the 30th October, 1947, one Ambalavanar Thesigar Ponniah Thesigar instituted action No. 3968 in the District Court of Jaffna for a declaration that he is the hereditary manager, Trustee and Chief Priest of the Temple, and that he is entitled to the offerings made during the High Festivals.

He prayed that he be "placed in possession of the income and office" of the Temple. The 1st to 6th defendants (the 1st defendant being the respondent-appellant in this appeal hereinafter referred to as the appellant) filed answer stating that their father Vaithilingam, who was a brother of the plaintiff, owned a 1/2 share of the pooja rights. They therefore claimed these 1/2 shares and damages for being kept out of the benefit of the offerings. After trial the District Judge held that the plaintiff was entitled to a 1/2 share of the management rights and to a half share of the pooja rights and the defendants were entitled to the other half share of the management and pooja rights that Vythilingam would have been entitled to. He also awarded damages to the defendants. In answer to issue 9, raised at the trial, he stated that a scheme of management was necessary for the temple. He added "as regards the scheme of management let this case be called in Court as early as possible, but after the appealable period is over, and if, there is no appeal, let the parties move Court to have a proper scheme of management regarding the temple drawn up and approved by Court to be adhered to by the parties". No formal decree has been entered of record. The plaintiff filed an appeal which was dismissed by the Supreme Court. A scheme of management was thereafter filed and it was approved by Court on 10th March, 1955. The plaintiff died in 1959 leaving a son Ambalavanar Thesiger and 2 daughters. Ambalavanar Thesiger died on 2.12.1976 leaving no issue. Until his death the scheme of management appears to have been followed without dispute. But for his death he would have entered into the management of the temple commencing 14.4.1977. Shortly after his death disputes seem to have arisen regarding rights of management. On 2.8.1977 the appellant-respondent (hereinafter referred to as respondent) obtained an injunction from the High Court valid for a period of 6 months to enable him to vindicate his rights in an action. The appellant moved the Supreme Court in revision but when the application came up for hearing on 2.2.78 no order was made as the period of 6 months had elapsed.

Thereafter the appellant has filed two petitions in the same case. The first petition was filed on 17.2.78 together with an affidavit. The caption stated that it was an application under the provisions of section 101(2) of the Trust Ordinance (Cap.87). In it he claimed to be the sole Trustee and Manager of the temple after the death of Ambalavanar Thesiger. Accordingly he prayed for an amendment of the scheme of management, for an injunction, and for damages. The respondent filed objections to this application on 10.4.78. The second

petition was filed together with an affidavit on 2.5.78 claiming that he was entitled to the pooja rights from 14.4.78 in terms of clauses 5 and 6 of the scheme of management. Objections were filed by the respondent on 25.5.78. Both applications were taken up for hearing together by the District Judge of Mallakam. He dismissed the first application as he was of the view that a separate action should have been filed for the reliefs claimed therein. He allowed the second application on the ground that it only sought to enforce the rights ensured by the scheme of management which could be effected in terms of the provisions of section 344 of the Civil Procedure Code. Accordingly he ordered that the appellant be placed in possession of the temple so that he may enjoy the rights of management and pooja for 1 year from the date of his order. He also restrained the respondent from disturbing these rights. The respondent appealed to the Court of Appeal, and the Court of Appeal allowed the appeal and dismissed the appellant's application.

The Court of Appeal has granted leave to appeal on the following questions of law:

- “1. Whether upon the facts set out in the judgment of this court dated 6.3.1981 the decree entered in case No.3968 of the District Court of Mallakam can be construed to embody the scheme of management approved by the District Court on 19.3.1955.
2. Whether the 2nd application dated 2.5.1978 made by the respondent (Vaithilingam Kumarasamy Kurukkal) in the District Court Case can in law be maintained under Sec. 101(2) or Sec.102 of the Trusts Ordinance Chapter 87, Vol.III, L.E.C.) or whether the respondent should have instituted a fresh action for a proper adjudication of the matters involved in that application.”

The first point of law refers to a decree entered in the case. There is no such decree in the record. The provisions of Sec. 344 of the Civil Procedure Code do not therefore apply. Counsel for the appellant stated that he is not making any submissions on this point of law and therefore this Court is not required to answer the question.

The second question raises the query as to whether the second application of 2.5.78 can “in law be maintained under Sec. 101(2) or Sec. 102 of the Trust Ordinance Chapter 87”, or whether a fresh action should have been instituted. The Court of Appeal was of opinion that this action No. 3968 was not one filed under Sec. 102

of the Trust Ordinance. The Court of Appeal was right in its conclusion. It is neither one under Sec. 102 nor one under Sec. 101(1) of the Trust Ordinance. It is a regular action filed in terms of the Civil Procedure Code to obtain a declaration of status as Trustee and for consequential remedies. But in that same action a scheme of management has been approved and imposed upon this temple. That was in pursuance of an answer to issue 9 which has been affirmed by the Supreme Court. That scheme was followed until these disputes started. We do not need to, and indeed we cannot, now question the propriety of that scheme or even research into its legal validity. I might however state that if I was disposed to delve into it I would most probably come to the conclusion that it was legally and validly imposed for reasons that will presently manifest themselves. I however do not need to decide this question and I proceed on the basis that the scheme of management exists in law and its legal validity cannot now be questioned for the purpose of this decision.

This application purports to be one made under the provisions of Sec. 101(2) of the Trust Ordinance which reads as follows:

"101(2) Nothing contained in this or the next succeeding section shall be deemed to preclude the trustee or author of any charitable trust from applying to the court by action or otherwise for such direction or relief as he may be entitled to obtain under the general provisions of this Ordinance, or for the purpose of invoking the assistance of the court for the better securing of the objects of the trust, or for regulating its administration or the succession to the trusteeship, and upon any such application the court may make such order as it may deem equitable."

The ingredients of this subsection are as follows:

- 1 The application may be made by the Trustee or Author of the Trust.
- 2 The application may be by means of action or *otherwise* (the emphasis is mine).
- 3 The object of such application is –
 - (a) to obtain such direction or relief as he may be entitled to obtain under the general provisions of this Ordinance, or
 - (b) for the purpose of invoking the assistance of the Court for better securing the object of the Trust, or

- (c) for regulating its administration or the succession to the Trusteeship.
4. Upon any such application the Court is empowered to make such *Order as it may deem equitable* (the emphasis is mine).

Sec. 101(1) deals with all kinds of charitable trusts and empowers persons having an interest in the Trust to institute an action in Court with the prior permission of the Attorney-General. Section 102 deals with religious Trusts and empowers two persons interested in the Trust to institute an action in Court provided they first obtain the necessary certificate from the Government Agent in terms of Sec. 102(3). But for these provisions the two categories of persons mentioned in these sections would not have the legal status and right to institute such actions. Furthermore they have no right or power to institute actions as and when they please. They must first obtain the approval of the Government Officers mentioned. The action referred to in Sec. 101(2) has no such fetters because the Trustee has a legal right and status to bring an action. Fetters that are binding under Sec. 101(1) and Sec. 102 do not bind a Trustee for the simple reason that his is a legal right arising from his status as Trustee of a Charitable Trust. His legal personality is recognised in law. This is an action available "to any Trustee", per Bertram, C.J. *Karthigasu Ambalavanar vs. Subramaniam Kathiravelu* (1).

The next matter to be considered is the form of the action. This action was originated by petition and affidavit. The section permits a Trustee to apply to a Court "by action or otherwise". There are therefore many options open to a Trustee. He can bring an "action". Thus he can institute an action adopting either "regular" procedure or "summary" procedure. (Sec. 7 Civil Procedure Code). If he adopts the former he must file plaint and conform to the provisions of Chapters III to VII of the Civil Procedure Code and summons will issue under Chapter VIII. If he adopts the latter course, he must file a petition and affidavit and conform to the same provisions, but the order that would be made would be either an order nisi in terms of Sec. 377(a) Civil Procedure Code or an interlocutory order in terms of Sec. 377(b) Civil Procedure Code. These are procedures available to an ordinary litigant. But the Trustee referred to in Sec. 101(2) is in a more advantageous position. He has the liberty of adopting other modes known to the law. He can thus institute proceedings by petition or by affidavit alone or by petition and affidavit without resorting to summary procedure or by mere application. These would

all be covered by the word "otherwise" in the subsection and still be an action within the meaning of Sec. of the Civil Procedure Code. The Appellant has resorted to a petition and affidavit and has not asked for any order in terms of Sec.377 Civil Procedure Code in the first instance. The Court has issued notice and the Respondent has filed objections. In view of the special privilege granted to Trustees by this section I hold that the action has been properly constituted and heard to a conclusion by the District Judge.

The last matter to be considered is whether the dispute is one that is contemplated by the provisions of this section. I have mentioned earlier that one of the ingredients of this section is the right to ask for "such direction or relief for the purpose of regulating.....the succession to the Trusteeship". The District Judge was called on in this action to decide a dispute between two claimants to a Trusteeship where one of them asked *inter alia* for an order altering the succession set out in the scheme of management. The Court was thereby asked to regulate the succession by changing the mode of succession. This the Court could do under subsection 101(2).

In the course of the argument Counsel for the Respondent contended that the Appellant should have instituted a separate action for the reliefs claimed and that he had no right to intervene in this action (No.3968) as this was not a Trust Action. In the alternative he stated, that if the Appellant had the right to intervene in this action he should first have substituted parties for the deceased parties. As I have already stated this action which commenced as a private dispute ended as a Trust Case with the Court entering of record a scheme of management, and if any alteration or change is to be made to such scheme, it must be in the case in which that scheme was made and exists. As for substituting parties I need only say that this scheme of management was for the temple and its management and not for particular parties. It endures until the temple exists, if not revoked earlier. Trustees who take office in the future do so in terms of such scheme and therefore they have every right to ask for further orders in the same case in respect of the same scheme. It is not correct to look at this case in the light of a dispute between private parties. It concerns a temple and its temporalities which is a Charitable Trust. The District Court is the guardian of and in control of all Charitable Trusts and for exercising its functions, the section gives the Court the power to make any order it deems equitable. It can make any order that is fair and just in the circumstances. The power is set out in the widest possible manner.

The object of this section is to ensure speedy action and thereby to ensure the proper administration of a Charitable Trust. It was also contended that no decree capable of execution can be entered in such a case. It is correct that a formal decree known to the Civil Procedure Code is not entered of record but this is an "order" within the meaning of Sec.217 of the Civil Procedure Code and such of the provisions of Chapter XII of that Code as are applicable to such orders can be utilised. For the above reasons I would set aside the order of the Court of Appeal. There is however another matter to be considered. The Appellant has been kept out of his rights these many years and an equitable order is required in recompense. The District Judge is therefore directed to cause the Appellant to be placed in possession of the temple and the pooja rights. The Appellant will then be entitled to continue as such Managing Trustee for a period of 3 years from the date he is so placed in possession. The period of 1 year granted to Trustees in rotation under the scheme of management will commence after the expiration of the said period of 3 years.

The Appellant will be entitled to costs of appeal in this Court and the Court of Appeal and also to the costs of proceedings in the District Court.

WANASUNDERA, J. - I agree.

SOZA, J. - I agree.

Appeal allowed.