Present : Schneider and Dalton JJ.

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KALIMUTTU *et al.* *v.* MUTTUSAMY.

402—D. C. Chilaw, 7,306.

Trusts Ordinance—Powers of Court to vary or modify trusts—Failure to prove a breach of trust—Public purposes—Ordinance No. 9 of 1917, s. 100.

The powers vested in the Court under section 100 of the Trusts Ordinance to modify or vary charitable trusts can only be exercised in order to carry into effect the intentions of the founders of such trusts so far as such intentions are not inconsistent with any existing law.

It is not the duty of a Court to direct charitable property to be employed in such manner as it thinks will be most beneficial for public purposes.

The principle laid down in *Attorney-General v. Boucherett*[1] followed.

THIS was an action brought by eight persons as plaintiffs against the defendant who is the incumbent of the Munnesaram temple. They purported to bring the action under the provisions of section 102 of the Trusts Ordinance 1917, and prayed amongst other things for an order directing defendant to account for all moneys received from 1912 to the date of the action, and for the settlement of a scheme for the management of the temporalities of the temple, alleging that defendant was as a trustee accountable to the congregation and that he had failed to carry out the trust.

The defendant took up the position in the lower Court that he was the incumbent, and that he was not answerable to any earthly authority.

The learned Judge after hearing the evidence came to the conclusion that the temporalities of the temple constituted a charitable trust, and made an order adverse to the defendant in terms of the prayer of the plaintiffs.

The defendant appealed.

Hayley (with *Tissaverasinghe* and *S. Rajaratnam*), for defendant, appellant.

The plaintiffs purport to bring the present action under section 102 of Ordinance No. 9 of 1917. That section requires that five persons " interested " should make the application to Court. The evidence in the case does not disclose that even five out of the

[1] *25 Beaven 116.*

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eight persons are persons "interested" within the meaning of the section. The best that the evidence discloses is that four of the plaintiffs are interested, and hence the action must fail.

Furthermore, the procedure laid down by the Ordinance has not been followed. Sub-section (3) of section 102 requires that before institution of action there should be an inquiry by the Assistant Government Agent. No such inquiry has been held, nor has a plaint been submitted as required by the Ordinance, but only a petition.

With regard to the merits of the case the whole course of dealings on the part of the defendant and his predecessors show that they have interested themselves in this temple, and brought it to its present state. It must, however, be conceded that the defendant is a trustee. Before the plaintiffs can get the relief they pray for they must prove that there has been a breach of trust on the part of the trustee. No proof of any breach of trust has been forthcoming; on the contrary it is abundantly clear that much of the moneys has been spent on the temple itself. The mere fact that leases contrary to the deed have been granted do not constitute such a breach as entitles the appointment of a new trustee, as it has not been shown that it resulted in any loss to the trust.

Defendant has met debts incurred by his predecessors for renovation of the building.

None of the charges made against the defendant has been substantiated, and the defendant is entitled to have the action against him dismissed.

Balasingham (with *Arulanandan* and *Weerasinghe*), for the respondents.

As regards the interest of the plaintiffs, it can be satisfactorily established. The mere fact that the temple is a Hindu temple does not take those of the plaintiffs who are Buddhists out of the category of persons interested. [Schneider J.—We do not wish to hear you on that question as we are satisfied that the action can be maintained as at present constituted.]

The defendant, although he took up the position that he was accountable to none but to God, would now seem to try to make out that he is in the position of an English trustee. That is not so. His true position is that of the head of a "Mutt," and as such is accountable to the congregation.

The position is well explained in *27 Madras 435* at *pp. 439* and *442*.

It is true the specific charges made against the defendant have not been substantiated, yet a sufficient case has been made out of his mismanagement. Hence the order made by the District Judge with regard to a new scheme ought to stand.

Counsel also cited *Ramanathan v. Kurukal*.[1]

[1] *15 N. L. R. 216.*

September 22, 1925. DALTON J.— 1925.

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This is an action by eight persons as plaintiffs, under the provisions of section 102 of the Trusts Ordinance, 1917, asking for an order of the Court—

(1) Directing the defendant to account for all properties belonging to the Munnessaram temple since 1912 to the date of the action, and to bring into Court all moneys unaccounted for and remaining in his hands ;

(2) Restraining the defendant by injunction from receiving and appropriating the " undial " offerings during the annual perahera festival, and any income derived from the temporalities ;

(3) Appointing a person to act as receiver *pendente lite ;*

(4) Directing the appointment of a board of trustees ; and

(5) Settling a scheme for the management of the temporalities of the said temple and trust.

The defendant, it is sufficient to say at present, is the incumbent of the temple. As will appear later he claims to be more than that. The plaintiffs claim to be persons " interested " within the meaning of section 102 (2) of the Ordinance, in the temple, and also to be " hereditary trustees of the temporalities, income, and offerings belonging to the said temple," and charge the defendant with neglect and waste of the temporalities, pawning the jewellery and precious stones belonging to the temple and substituting tinsel and paste, leading an immoral life in Colombo and neglecting his duties as priest whereby the temple is brought into disrepute, and its services are neglected.

Evidence was led at length and the learned trial judge made an order dated October 3, 1924, on the claim, the following of which are the material parts :—

(1) The Hindu temple of Siva at Munnessaram and the lands, income, " undial " and other offerings and temporalities thereof are a charitable trust within the meaning of the Trusts Ordinance 1917.

(2) A scheme to be settled and a board of trustees to be appointed for the management of the trust, the scheme to be submitted by plaintiffs and defendant for the final approval of the Court.

(3) The defendant is ordered to submit to the Court—

(*a*) A detailed account of all the income, " undial," and other offerings, and all emoluments received by him during the last three years out of the said temple ;

(*b*) A statement of all the leases of temple properties given by him, and an account of the various sums of money received by him upon the said leases ; and

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(c) A full true and sufficient statement and inventory of all the property, movable and immovable, belonging to the temple.

(4) Until the final scheme is settled the defendant is restrained from incurring any expenditure of an extraordinary nature on behalf of the temple, and from leasing any of the properties belonging to the temple.

From this order defendant has appealed on the following grounds :—

(1) The plaintiffs have failed to comply with the provisions of section 102 (3) of the Ordinance in as much as it does not appear that the petition addressed by them to the Government Agent in 1920 upon which the latter issued his certificate was in respect of the subject matter of the plaint in this action ;

(2) The temple and its property does not constitute a charitable trust within the meaning of section 102 ;

(3) It has not been proved that any five of the plaintiffs are " interested " parties within the provisions of section 102 (2) ;

(4) The plaintiffs are not trustees, hereditary or otherwise, as claimed ;

(5) The temple in question is a *Paravtham* temple ;

(6) Even if it be held that the temple constitutes a " charitable trust " within the meaning of the Ordinance, and that the defendant is a trustee thereof, the evidence does not establish and the Court does not find any breach of trust or misconduct on his part beyond the fact that defendant has granted a few imprudent leases.

The facts which are not in dispute show that the temple, held in veneration by Buddhists as well as Hindus, is one of considerable antiquity. The first authentic record appears to be a Royal grant of lands to the temple in the year 1448 by means of a *sannas* inscribed on its walls. This inscription appears to have been removed from an older building, and built into the present one. In 1596 the temple is said to have been sacked and destroyed by the Portuguese, and after being rebuilt in the interval, to have been destroyed a second time about the year 1600. Thereafter there is a record in the Government Archives of a further Royal grant of lands on a copper plate in the year 1675. The temple, however, appears in course of time to have fallen into disrepair, until it is stated that in 1804 Brahmin priests ceased to officiate there. Evidence is produced of official correspondence in that year dealing with the area of the land given to the temple, and the amount of paddy to which the priests of the temple were entitled. Between 1804 and 1873 the affairs of the temple seem to have suffered still greater

neglect, during which the buildings naturally suffered. In the latter year, however, an action was commenced in the District Court of Chilaw by eleven persons who claimed to be " trustees of the said temple " at Munnessaram to vindicate title to certain lands occupied by the defendants in that action.

The defendants, who included the Police Headman and Vel-Vidane, claimed title by prescription to the lands in dispute. By his judgment dated May 13, 1875, the District Judge decreed as follows :—

> " It is decreed that the plaintiffs be and they are hereby declared proprietors, *qua* trustees of the Munnessaram temple, of the portions of land marked B, C, D, and E in the survey plan filed in this case, that they be quieted in the possession thereof, and that the defendants do pay all costs of this suit."

It was in the course of that case that Kumaraswamy Kurukal, an important person in this case, first appeared on the scene. Up to that time he had no connection with the temple, but was called by the plaintiffs to give expert evidence about the *sannas*. One Sinnetamby Kapurala is said to have been incumbent at the time, but it is admitted that the temple was in ruins and overgrown with jungle. Kumaraswamy Kurukal appears to have interested himself in it and became chief priest of it " by virtue of a reply of His Excellency the Governor of this Island bearing No. 1,299 dated July 8, 1875," as set out in a power of attorney granted by him in 1878 (Exhibit D 3). What the Government had to do with the temple, or what was the nature of the application to the Governor do not appear. The plaintiffs' case is, however, that Kumaraswamy was chosen by the twelve persons mentioned in the case No. 20,181, Chilaw, who claimed to be trustees, to be incumbent in place of Sinnetamby Kapurala who was old, sickly, and incompetent. However that may be, it is admitted that he got the villagers together broke down the ruins, and rebuilt and restored the temple, spending a considerable sum of money on it, officiating himself at the temple, or arranging for its services to be carried on.

As Kumaraswamy Kurukal lived in Colombo, in 1878 he appointed one Muttu Aiyar who, in the words of the power of attorney—

> " Has been hitherto appointed by me as such without a legal writing or authority to manage the affairs of the said temple to be my true and lawful attorney for me and in my name as chief priest as aforesaid and to continue as officiating chief priest aforesaid, and to defend all suits in respect of the said temple and premises, and to ask, demand, sue for, recover, and receive of and from all persons whomsoever liable . . . . all sum or sums

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of money, debts, dues, rents, profits, and produce due and payable hereafter to me as chief priest . . . . to build, construct, repair, and improve the said temple and premises, and to let lease and demise any lands belonging thereto upon such terms as he shall think proper," &c.

Kumaraswamy died in 1909, and so far as he is concerned it is clear from the documentary evidence in respect of his actions, between 1878 and 1909, he considered himself to be a trustee of the temple, in whom the temple and its appurtenances were vested. No question arose during those years of the plaintiffs or any of the villagers being trustees. In 1885 he raised money on mortgage (D1) mortgaging the income of the temple. In 1886 Muttu Aiyar, his attorney, took action in the District Court of Chilaw against the Attorney-General of the Colony to stay the sale of land alleged to belong to the temple. In that action (D2) plaintiff described himself as trustee of the temple and of the lands, property, and temporalities belonging and appertaining thereto. It is admitted by the plaintiffs that he also brought another action to vindicate title to temple lands. It is in fact also admitted that during Kumaraswamy's lifetime no question arose between him and any other person contesting his position, and the rights he claimed in respect of the temple and its lands. Some trouble arose in 1900 between Kumaraswamy and Muttu Aiyar, who was dismissed but he was taken back in 1902 and 1903. Muttu Aiyar eventually died in 1912.

Meanwhile, in 1902 Kumaraswamy had executed an important document. The defendant, Somaskanda Kurukal, is his grandson, and by deed D7 in that year Kumaraswamy appointed him to act jointly with him, and under his directions during his lifetime, and after his death to act as sole trustee and Manager of the temple and its properties. The deed recites that for twenty-five years Kumaraswamy had been trustee, manager, and director of the temple, and that as he was getting old and infirm, and unable to attend to the temple and its temporal affairs personally, he was " desirous of vesting the said temple and the properties belonging thereto in a trustee." The appointment of the defendant is then made, and the property vested " for ever in trust for and to the following use and purposes and subject to the following conditions," fully set out in the deed.

In considering the plaintiffs' claim it is most material to consider the position and attitude taken up by Kumaraswamy, for they admit that they had no complaint against him of any kind. He undoubtedly acted over a long period as sole trustee of the temple and its properties, without interference or question and no claim of any other person other than Kumaraswamy, Muttu Aiyar, and the present defendant to be a trustee, has ever been put forward between 1878 and the commencement of the present action.

This action, commenced in August, 1923, is brought by the plaintiffs in two capacities, first, as hereditary trustees of the temple and its temporalities, and secondly, under the provisions of section 102 of the Trusts Ordinance 1917, as persons interested in this temple as a religious trust.

They set up that the temporalities of the temple and the "undial" offerings have been from time immemorial "under the management, control, and supervision of eleven trustees by right of hereditary succession and election by the surviving trustees as the occasion arose," that they are the next of kin of the "previous trustees," and have acted as such since the death of their "predecessors in title." The "previous trustees" referred to would appear to be the plaintiffs in the action D. C., Chilaw, No. 20,181 of 1873, already mentioned. It is true that those plaintiffs were found to be "proprietors *qua* trustees of the Munnesaram temple," but the only evidence available in that case is that of the 1st plaintiff who says he was "Kapural and trustee," being chosen as such by twelve other persons whom he also calls trustees. From his evidence they might be nothing but a board of electors, as he alone seems to have had full control and management of the temple property. I do not think further that much can be inferred from the use of the word "trustee" in the action of 1873. The question in issue was whether the lands claimed by the plaintiffs were temple lands or had been acquired by the defendants by prescription. The term "trustees" may have been loosely applied to persons interested as worshippers, or villagers, in the temple and its properties. Whatever these twelve people were, however, I am quite satisfied that the plaintiffs have failed to prove that they are their next of kin. James Perera, the 2nd plaintiff, merely says he is a son of Don David Perera, Vel-Vidane Aratchy, who died in 1901. A person of that name appears as the 3rd plaintiff in the 1873 suit. If he was the father of James Perera he sat by from 1873 to 1901, allowing Kumaraswamy and Muttu Aiyar to raise money on mortgage, bring actions in respect of the temple property, and act generally as if Kumaraswamy was sole trustee, without objection. Not one of the witnesses can produce documentary evidence of any kind that either Kumaraswamy Kurukal, Muttu Aiyar or defendant recognized them as trustees or co-trustees after 1875; there is evidence to show that they were worshippers at the temple and so interested in it, but nothing more.

The 3rd plaintiff says he is a son of Ranhamy Gabode Lekama, and brother of Nalliah Gabode Lekama. Ranhamy Gabode Lekama appears to be the name of the 10th plaintiff in the 1873 suit. This 3rd plaintiff however says he did not become a trustee until July, 1912, when ten other trustees elected him. His evidence is vague and indefinite. He knew nothing about the moneys with

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which the temple had been rebuilt, did not know of the appointment of defendant by Kumaraswamy as his successor, and yet admits that he had signed documents (P14 and P15) respecting meetings at the temple and the hoisting of the flag by order of the defendant. His real claim I think may be summed up in words he used " the Devala belongs to us the villagers."

The 7th plaintiff claims to have succeeded his uncle fifteen years ago. He admits, however, that his father signed the bond D1 in 1885 as a witness only. The evidence of the 8th plaintiff is no more definite as regards his claim to be a trustee. The 1st plaintiff states he is the son of Sinnetamby Kapurala, already mentioned, but his cross-examination makes it clear that he was no trustee, but merely a worshipper at the temple, as he is described by the 3rd plaintiff. This description the 3rd plaintiff also applies to the 5th and 7th plaintiffs and I have no doubt it adequately describes the amount of their interest in the temple and its property. The remaining plaintiffs have failed to substantiate their claim to be trustees or the next of kin to alleged previous existing trustees. I am therefore unable to agree that the learned trial judge is correct, when he says there is no reason to disbelieve the plaintiffs when they say that they succeeded their ancestors as trustees of the temple. The evidence is, in my opinion, most vague, indefinite, and unsatisfactory on a matter which the plaintiffs had properly to establish before they could maintain their claim as " hereditary trustees."

Where however they claim as parties interested in a religious trust, it is a different matter. Mr. Hayley, I understood, admitted he could not contest the finding of the trial judge, that the temple and its property and appurtenances did constitute a charitable trust within the meaning of the Trusts Ordinance. It seems to me that the evidence, documentary and otherwise, led for the defence is conclusive on that point, although the defendant himself at one time maintained a different attitude. The interest of at least five of the plaintiffs within the meaning of section 102 (2) of the Trusts Ordinance, to enable them to maintain this action, is also I think satisfactorily established. An objection was taken that no plaint had been submitted to the commissioners appointed under section 102 (3) to hold the statutory inquiry which must precede the action, but it seems to me that the real subject matter of the action was before the commissioners, and in view of the powers of amendment given by section 102 (7) this objection was not pressed.

The result then to this point is that the plaintiffs have established their right to maintain this action, in respect of a religious trust of which defendant is sole trustee and of which they are some of the beneficiaries. In their claim they allege he is guilty of breach of trust, neglecting the temple, committing waste, pawning the jewellery and precious stones of the temple, leading an immoral life, neglecting his duties as priest and bringing the temple into disrepute.

On these charges the learned trial judge comes to no conclusion. He says " I do not think it is necessary for me to examine these charges in detail. If I think it will be in the interest of the temple to appoint trustees, instead of leaving it in the sole charge of the defendant it is my duty to do so." I regret I am unable to agree with him, for I think these charges were of the essence of plaintiffs' case, and it is extremely unfortunate that the trial judge did not deal with them. As we were informed he is no longer in the Chilaw District, it is impossible now to send the case back for a finding to be arrived at. The plaintiffs and the defendant were entitled to have a definite finding on these serious charges. If the plaintiffs established them, they would have been entitled to an order of the Court settling the future management of the trust ; if they failed I do not think this Court should interfere with the trust as it now exists. The cases in which the Court interferes to alter or modify trusts under the powers given in section 100 of the Ordinance are fairly well defined. In *Attorney-General v. Boucherett* (*supra*) cited in course of the argument the Master of the Rolls, dealing with the powers of the Court in respect of charitable trusts says : " It is not its duty to direct charity property to be employed in such manner as it thinks will be the most beneficial for public purposes, but to carry into effect the intentions expressed by the founders, so far as those intentions are not inconsistent with any existing law. The authorities show this very distinctly, that the Court cannot vary or modify existing charity trusts, so as to meet its own views with regard to what it may think most beneficial and for the general advantage of the public ; nothing but an act of Parliament can do that."

If the charges framed by the plaintiffs had been sustained in whole or in part it could undoubtedly have been said that the intentions with which this trust was founded were not being carried into effect, and the Court would have been justified in exercising its powers of varying the trust. It is true that the defendant has granted leases of temple property for a period longer than is allowed by his deed of appointment, but the evidence of the witness Corea, which was not questioned in cross-examination, shows the rents paid were fair and reasonable, and the lands were being cultivated in the same way as other village lands. There is no evidence that defendant has committed waste in respect of the immovable property. It was urged, however, that he has pawned or disposed of temple jewellery. That is one of the matters which the learned trial judge does not deal with. A perusal of the evidence, having regard also to the unsatisfactory nature of the evidence of some of the plaintiffs to which I have already referred, does not satisfy me that this one of the charges has been established beyond a reasonable doubt. It is unfortunate that they have not been dealt with in the Court below, and a definite finding in respect of them come to by the

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learned judge. Mr. Balasingham for the plaintiffs (respondents) has however taken the judgment as it stands, and does not ask this Court to come to any finding on the charges. Had he done so I should have been compelled to say the plaintiffs had failed to substantiate them in any material respect. The granting of the leases, although contrary to the deed, has not been shown to have resulted in any loss to the trust or to have caused any failure in the intention for which the trust was founded. There is evidence to show that jewellery of the temple was pawned in 1912, but it does not appear what was done with the proceeds. It is clear, however, on the other hand that the temple from early in Kumaraswamy's days was in debt, sometimes in a large sum, on account of the building and other expenses incurred, which debts defendant had to meet. In 1913 it is true that when asking (see P 23) for police protection for the temple during the annual festival, defendant said the temple jewellery was worth Rs. 8,000, whereas now he says in his evidence it is worth only about Rs. 1,000. The terms of his petition in 1913 appear to me to be somewhat exaggerated, and no doubt defendant stated his case as strongly as possible to obtain what he was seeking. It is this matter of the jewellery which raises any question in my mind as to whether or not the Court would be justified in granting any part of the claim of the plaintiffs. On the whole I am of opinion, as I have stated, that sufficient ground has not been shown for doing so. Books seem to have been properly kept (D 18) which the plaintiffs, or some of them, admit they never asked for nor cared to examine. Lists of temple property, movable and immovable, were produced by the defendant from his books. The offerings, whether daily offerings or undial offerings, appear, from the evidence of the witness Sunderam Kurukal called by the plaintiffs, to have been properly dealt with at the time of which he speaks.

There is only one further matter that remains to be mentioned. During the trial the defendant certainly took up the position that he was answerable to no one, no earthly authority, if I may put it so. He said " I am only answerable to God in case I mismanage." In arguing the appeal for the defendant, Mr. Hayley has been unable to justify or support that attitude. I have therefore thought it unnecessary, for the purposes of this case as it has gone, to deal with the arguments arising out of the claim that the temple is the *Pavartham* temple (although it might have been necessary to do so, had ground be shown for varying the trust), and that the position of the defendant was that of the head of a " Mutt " as found in South India. Mr. Balasingham cited authority for the proposition that the head of a " Mutt " is not a mere trustee but a corporation sole (*Tirtha Swami v. Tirtha Swami.*[1]) Defendant now admits he is a trustee within the meaning of the Trusts Ordinance, and I have

[1] *27 Madras L. R. 435.*

to deal with him on that basis. The plaintiffs have not succeeded in their contention that he has been guilty of any breach of trust whether he occupy the position of the head of a " Mutt " or not, such as would justify the Court in making or require the Court to make a decree under any of the provisions of section 102 of the Trusts Ordinance.

The action of the plaintiffs should, therefore, in my opinion, have been dismissed, but in view of the fact that defendant denied the existence of a trust, without costs. I would, therefore, allow this appeal with costs.

SCHNEIDER J.—I agree.

Appeal allowed.