

1972 Present: Wimalaratne, J., and Rajaratnam, J.

L. R. BALASUNDARAM and 7 others, Appellants, and
K. L. RAMAN, Respondent

S. C. 359/69 (Inty.)—D. C. Chilaw, 10/Trust

Charitable trust—Two rival claimants to trusteeship thereof—Allegation by one of them that it is uncertain in whom the title to the trust property is vested—Institution of proceedings by him by way of summary procedure praying for a Vesting Order—Validity—Trusts Ordinance (Cap. 87), ss. 35, 76, 101, 102, 112, 116—Civil Procedure Code, ss. 217, 387.

It is open to a person who claims to be the trustee of a charitable trust, and where it is uncertain in whom the title to the trust property is vested, to obtain a vesting order under Section 112 of the Trusts Ordinance prior to the institution of a regular action for a declaration that he is sole trustee as against a rival claimant. Such a vesting order may be obtained by instituting proceedings by way of summary procedure under Chapter XXIV of the Civil Procedure Code.

APPEAL from an order of the District Court, Chilaw.

C. Thiagalingam, with C. Ranganathan and K. Kanag-Isvaran, for the 1st, 2nd and 4th to 7th respondents-appellants.

No appearance for the 3rd and 8th respondents-appellants.

H. W. Jayewardene, with N. Nadarajasunderam, L. C. Seneviratne and Miss Ivy Marasinghe, for the petitioner-respondent.

Cur. adv. vult.

June 28, 1972. WIMALARATNE, J.—

The Petitioner claiming to be the sole trustee of the Badrakali Kovil in Munnessaram, instituted these proceedings by way of summary procedure in the District Court of Chilaw, praying for a Vesting Order under Section 112 of the Trusts Ordinance (Chap. 87) on the ground that it was uncertain in whom the title to the trust property was vested. He complained that since August 1962 the eight respondents were wrongfully asserting that they were entitled to officiate as trustees.

The respondents denied the petitioner's claim to the trusteeship. They also denied that the present application was one under Section 112, and challenged the right of the petitioner to have and maintain these proceedings by way of summary procedure.

Two preliminary questions arose for determination by the learned District Judge—namely, whether the application was in fact one under Section 112, and if so whether the procedure was correct. He answered both questions in favour of the petitioner and the respondents have appealed.

Learned Counsel for the respondents-appellants have analysed the several averments in the petition in order to demonstrate that it is not in fact an application under Section 112. Paragraph 4 avers that from about 1830 one Narayanan possessed the temple and functioned as trustee or kapurala and manager. Paragraphs 5 to 16 trace the devolution of trusteeship from Narayanan, and paragraph 17 asserts the petitioner's right as the eldest male descendant of Narayanan to be sole hereditary trustee according to long established custom and usage. Paragraphs 18 and 19 deal with the wrongful acts of the respondents. Uncertainty of title to the trust property is pleaded in paragraph 20 in the following words:—“that thus it has become uncertain in whom the title to the temple and temporalities belonging thereto is vested.” The complaint of the appellants is that the petition does not say how this so called uncertainty of title has arisen. The reply of learned Counsel for the petitioner is that one must read the petition in its entirety to ascertain what it means. Uncertainty of title can be gathered, he contends, not only from the various averments in the petition, but also from the fact that Narayanan has left several heirs, whose names have transpired in the pleadings.

The use of the word “thus” in paragraph 20 is unfortunate. It has the effect of conveying the meaning that by reason of the previous averments in the petition title was uncertain. A reading of the entire petition however leaves no room for doubt that there was uncertainty as to the persons in whom title to the trust property was vested, and Section 112 applied.

Was the petitioner entitled to institute these proceedings by way of summary procedure? Section 112 of the Trusts Ordinance reads thus:—

“ 112 (1). In any of the following cases namely:—

- (i) where it is uncertain in whom the title to any trust property is vested; or
- (ii) irrelevant,
the Court may make an order (in this Ordinance called a “Vesting Order”) vesting the property in any such person in any such manner or to any such extent as the Court may direct.”

In the absence of rules regulating procedure made under Section 116 (2), “all actions and other proceedings under this Ordinance” are governed by the Civil Procedure Code—Section 116(1). Certain provisions of the Ordinance, such as Sections 101, 102 provide for the “institution of an action”, meaning thereby a regular action. Certain other provisions such as Sections 35, 76 provide for proceedings “by way of petition, without instituting a suit”. But Section 112 is silent regarding procedure. The absence of an indication regarding the procedure to be adopted led Moseley, J. to take the view, in *Muthucumaru v. Vaithy*¹ (1937) 12 C.L.W. 9, that the Court cannot, except in proceedings under Section 101 or 102, make a vesting order under Section 112. But in *Hunter v. Sri Chandrasekera*² (1950) 52 N.L.R. 54, Dias, J. took the view that where a person asks for a vesting order under Section 112 without asking for any further remedy, the procedure must be by way of summary procedure and not by way of regular action.

Two other cases relied upon by the appellants may be referred to. In *Thambiah v. Kasipillai*³ (1941) 42 N.L.R. 558, the action was in substance a claim by a person alleging that he held the legal title to the property, as against one who, he alleged, had neither a legal nor an equitable title to the same. In the same action he asked for a vesting order under Section 112 on the ground that it was uncertain in whom the title to the various properties comprising the temporalities was vested. It was held that he could, in a regular action, also ask for relief under Section 112. This case is, however, not an authority for the proposition that when a person seeks relief under Section 112 for one of the two reasons specified in that Section without asking for any other relief, he must do so in a regular action. Similarly in *Ambalavanar v. Somasundera Kurukkal*⁴ (1946) 48 N.L.R. 61,

¹ (1937) 12 C. L. W. 9.

² (1950) 52 N. L. R. 54.

³ (1941) 42 N. L. R. 558.

⁴ (1946) 48 N. L. R. 61.

what was decided was that in a regular action by the hereditary trustee against a trespasser for recovery of possession of the trust property and damages consequent on the trespass, he could also avail himself of the provisions of Section 112 and obtain a vesting order.

A vesting order is one that could more appropriately be incorporated in a final order made at the conclusion of summary proceedings, under Section 387 of the Civil Procedure Code, which reads thus:— “The Court, after the evidence has been duly taken, and the petitioner and the respondent have been heard shall pronounce its final order in the matter of the petition” A regular action, on the other hand, ends always in a decree. A decree may command the person against whom it operates to do certain acts or it may enjoin that person to abstain from specific conduct or it may declare a right or status—Section 217. It is difficult to see how a vesting order could be incorporated in a decree entered at the end of a regular action. I am therefore of the view that when a person asks for a vesting order under Section 112, without asking for any further relief, the appropriate procedure is by way of summary procedure under Chap. XXIV of the Civil Procedure Code.

It has been argued by the appellants that the petitioner's remedy is a regular action for a declaration that he is the sole trustee. The opinion of Keuneman, J in 42 N.L.R. at p. 561 is relied upon for the proposition that “a person who can establish the fact that he is a trustee, can sue for the recovery of trust property from a trespasser, and it is not a necessary requisite that he should have clothed himself with a vesting order before action was brought.” In the earlier case of *Thamotherampillai v. Ramalingam*¹ (1932) 34 N.L.R. 359, Garvin, J. had taken the view that a person claiming to be a trustee could not sue in respect of trust property before obtaining a vesting order, on the principle that a plaintiff cannot rely on a title which he did not have at the commencement of the action. Sansoni, J. took the same view in *Kandappa Chettiar v. Janakiammah*² 62 N.L.R. 447. In that case the plaintiffs claiming to be the successors in office to one P.C. instituted a regular action to be declared the trustees of a Hindu temple. P.C. became trustee by virtue of a trust deed P1 of 1905 executed by one Ponnukannu, the owner of the land. The defendants pleaded that P1 did not create a valid charitable trust, that plaintiffs had no right to the land in dispute and therefore could not maintain the action in the absence of a vesting order vesting the land in them. It was held that title to the land was in the heirs of Ponnukannu, subject to the

¹ (1932) 34 N.L.R. 359.

² (1960) 62 N.L.R. 447.

obligations of the trust ; that P.C. had never become vested with the title to the land and that plaintiffs as successors in office of P.C. had no title. It was also held that as the legal title was not in the plaintiffs at the commencement of the action, no vesting order obtained subsequently, as a result of an amendment to the plaint, cured the initial want of title. Sansoni, J. disagreed with the opinion of Keuneman, J. as he had not given any reason for his conclusions, and as he had not dealt with the principle applied by Garvin, J. I am in respectful agreement with this view of Sansoni, J. I therefore take the view that it is open to a person who claims to be the trustee of a Charitable trust, and where it is uncertain in whom the title to the trust property is vested, to obtain a vesting order under Section 112 of the Trusts Ordinance prior to the institution of a regular action for a declaration that he is sole trustee as against a rival claimant. Such a vesting order may be obtained by instituting proceedings by way of summary procedure under Chap. XXIV of the Civil Procedure Code.

I dismiss the respondents' appeal with costs. Summary procedure is intended to bring quick relief, if the petitioner is entitled to the same. But in this case, as a result of the interlocutory appeal, nearly three years have elapsed after the learned District Judge made his order in favour of the petitioner. The District Judge should therefore give priority to this case and fix it for early hearing.

RAJARATNAM, J.—I agree.

Appeal dismissed.
