

1957 Present: H. N. G. Fernando, J., and T. S. Fernando, J.

RAJAMMAL *et al.*, Appellants, and S. BALASUBRAMANIYAM  
KURUKAL, Respondent

*S. C. (Inty.) 142—D. C. Chilaw, 13579*

*Religious trust—Actio rei vindicatio instituted by trustee—Vesting order—Right of plaintiff to claim it by amending plaint—Right to claim vesting order in respect of part only of the trust property—Trusts Ordinance, ss. 102, 112 (1).*

Where a plaintiff claiming to be the trustee and manager of a Hindu temple and its temporalities institutes an action for declaration of title to certain property on the basis that it belongs to the temple, he cannot, in anticipation of his failure to establish his title to the temple and its temporalities, seek by an amendment of the plaint a vesting order under section 112 (1) (i) of the Trusts Ordinance so as to cure the defects in his action as instituted.

Where it is uncertain in whom the title to the property alleged to be subject to a trust is vested, a vesting order under section 112 of the Trusts Ordinance will not ordinarily be made in respect of only a part or portion of such property.

Plaintiff instituted action for declaration of title to a house and for the ejectment of the defendants therefrom. He alleged in the plaint that the house was the property of a temple and that he was the trustee and manager of the temple and its temporalities. Subsequently he sought to amend the plaint alleging that the temple and its temporalities constituted a charitable trust and that there was uncertainty as to the person in whom the trust property was vested, and claiming, in addition to the original relief, a vesting order under section 112 of the Trusts Ordinance vesting the house in dispute in him.

*Held*, that the plaintiff was not entitled to amend his plaint claiming a vesting order in terms of section 112 of the Trusts Ordinance.

**A**PPEAL from an order of the District Court, Chilaw.

*H. V. Perera, Q.C.* with *C. Ranganathan*, for the defendants-appellants.

*S. J. V. Chelvanayakam, Q.C.*, with *C. Chellappah*, for the plaintiff-respondent.

*Our. adv. vult.*

January 22, 1957. H. N. G. FERNANDO, J.—

The plaintiff, who is the respondent to this appeal, filed an action in May 1951 for a declaration that a house alleged to be occupied by the appellants is the property of the Munnasaram Temple and for the ejectment of the appellants from the house. The plaintiff based his right to institute the action upon his allegations in the plaint that he was the Trustee and Manager of the Temple and its Temporalities, that he had permitted the defendants in or about August 1946 to reside in the house, and that such permission had been revoked by notice in September 1950. After an amendment of the plaint which is not material for present purposes, the defendants filed answer in which they denied the first two of these allegations and thus also denied the right of the plaintiff to maintain the action; they did not however deny that the house in question was the property of the Temple, but claimed a right to reside there upon grounds which again are not at this stage material. Issues were framed in April 1954, the more important of which are those designed to test the plaintiff's claim that he is the lawful Manager and Trustee of the Temple and its Temporalities. Two dates of trial were thereafter fixed, but no trial was held on those issues.

In October 1954, another application was made to amend the plaint, by the incorporation of provisions *inter alia* alleging that the Temple and its Temporalities constitute a charitable trust and that there is uncertainty as to the person in whom the trust property is vested, and claiming, in addition to the original relief, a vesting order vesting the house in dispute in the plaintiff. The present appeal is against the order of the District Judge allowing that amendment.

It is clear that the plaintiff seeks by his amendment to invoke the jurisdiction conferred on the Court by section 112 of the Trusts Ordinance :—

“ 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) where a trustee or any other person in whom the title to trust property is vested has been required in writing to transfer the property by or on behalf of a person entitled to require such transfer, and has wilfully refused or neglected to transfer the property for twenty eight days after the date of requirement, 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.

(2) A vesting order under any provision of this Ordinance shall have the same effect as if the trustee or other person in whom the trust property was vested had executed a transfer to the effect intended by the order.”

The principal objections which have been urged before us against the correctness of the order appealed against are :—

- (1) that the plaintiff cannot through an amendment of his plaint seek a vesting order in order to establish his right to eject the defendants, and may only establish that right by proving the title as Trustee which he had originally claimed ;
- (2) that section 112 is not available, particularly when invoked by way of an amendment, in order to secure a vesting order in respect of a part or portion only of the trust property, if there is in fact uncertainty as to the person in whom the whole of the trust property, i.e. the Temple and its Temporalities, is vested.

In the case of *Tnamotherampillai v. Ramalingam*<sup>1</sup>, the manager of a Hindu temple had instituted an action for a declaration that the 1st defendant was not entitled to a right of way over the courtyard of the temple. The defendant pleaded as a matter of law that the plaintiff could not maintain his action as the temple and its properties were not vested in him. One of the issues raised was whether the plaintiff could maintain the action without obtaining a vesting order under section 112 of the Trusts Ordinance. After trial the District Judge made order upholding the contention that the action was not maintainable, presumably on the basis that the plaintiff had not proved his title to the trust property ; the Judge decided, however, to give the plaintiff an opportunity to obtain a vesting order under the Trusts Ordinance and allowed the plaintiff time until a specified date to take steps under section 112. In an appeal against this latter order of the Judge, this

<sup>1</sup> (1932) 34 N. L. R. 359.

Court held that the order was bad and dismissed the action. The following observations of Garvin, J. are pertinent to the question we now have to decide. "It is a well established principle of law that the rights of parties must be determined as at the date of the action. Clearly, at the date of this action the plaintiff had no right to maintain it. There is nothing in the Trusts Ordinance or in any other provision of any law that I am aware of which states that a person may bring such an action in respect of temple property and at some subsequent date clothe himself with title to the property by obtaining a vesting order and notwithstanding defects of title at the time of the institution of the action is entitled to escape from the consequences of bringing an action at a time when he had not the right to do so." In effect that case decided that where a plaintiff had instituted an action in reliance on his title as trustee to temple property, it would not be open to him in that action to claim his title as trustee upon the strength of a vesting order obtained in other proceedings, but subsequently to the time of his institution of the action. The only difference in the present case is that the plaintiff seeks to obtain a vesting order, not in other proceedings, but in the action already instituted by him. Having regard to the terms of Garvin, J.'s judgment, he would not, I think, have regarded the distinction as a substantial one.

In the subsequent case *Tambiah v. Kasipillai*<sup>1</sup> the plaintiff claimed in his plaint that he was the lawful hereditary trustee and manager of a temple and its temporalities and he sued for a declaration as such and for the ejectment of the defendant. In addition (as stated in the judgment of Keuneman, J.) "As ancillary relief, the plaintiff claimed for himself a vesting order in regard to the temple and its temporalities, on the ground that it was not possible to ascertain the successors in title of the various properties which constituted the temporalities of the trust, and it was uncertain in whom the legal title thereto was vested." For present purposes, only one of the preliminary issues raised in that case is of relevance, namely, "(3) can the plaintiff maintain this action without obtaining a vesting order?". On examination of the plaint, Keuneman, J. decided that two distinct elements were revealed, one relating to the temple and temple premises, the other relating to the temporalities. As regards the temple and the temple premises, the plaintiff had alleged that the title, as trustee, of the original founder had descended to him. It would seem therefore that the claim for a vesting order, although made in respect both of the temple and of the temporalities, was made principally in order that the plaintiff may clothe himself with a right which he could in law assert in respect of the temporalities. On the facts, then, the position was that this Court ultimately held that a person who could establish his title to temple property could in the same action obtain a vesting order in respect both of the property and of the temporalities, as well as an order for the ejectment of the defendant. The decision in the subsequent case of *Ambalavanar v. Somasundera Kurukkal*<sup>2</sup> was not substantially different. It was there held that a person who could prove that he was the hereditary trustee of a *madam*

<sup>1</sup> (1941) 42 N. L. R. 558.

<sup>2</sup> (1946) 48 N. L. R. 61.

could in one action obtain a declaration of title as such, together with a vesting order in respect both of the *madam* and the other lands which were temporalities of the *madam*, as well as an order for ejection.

In the two cases to which I have just referred no reference was made in the judgments to the earlier decision of Garvin, J. But in any event it seems to us that the earlier decision can be clearly distinguished from the subsequent ones. Garvin, J. was not concerned with a case where the plaintiff could establish his title to temple property and sought to rely on that title as part of the evidence upon which to base a claim for a vesting order in respect of the temporalities. He was concerned rather with the case where a plaintiff having first averred a claim of title to a temple as trustee, was to be allowed to rely for the success of his action upon a vesting order subsequently obtained. The facts of the present case are even further removed from those reported in the forty second and forty eighth volumes of the New Law Reports; here the plaintiff seeks, in anticipation of his failure to establish a title both to the temple and to the temporalities, to claim by an amendment a vesting order which might cure the defects in his action as instituted.

Counsel for the respondent has argued upon the authority of *Tambiah v. Kasipillai* and *Ambalavanar v. Somasundera Kurukkal* that if it was proper for the plaintiff in those cases to combine his claim of title with the claim for a vesting order, then the present plaintiff should be entitled to place himself in the same position by means of the present amendment to his plaint. One reason why this argument has to be rejected is that even if the original plaint in the present action had combined the claim for declaration of title with the claim for a vesting order, the plaint would still have lacked an important characteristic of the plaints filed in the cases on which counsel relies, namely, the characteristic that in the later mentioned plaints the plaintiffs averred and expected to be able to establish legal title to the temple premises, and claimed that having done so they were entitled in the same action to obtain a vesting order in respect of the temporalities on the ground of uncertainty referred to in section 112. The other ground upon which I think the argument must be rejected will appear in my discussion of the second objection to the order now appealed from.

In the plaint now under consideration, even if amended in the manner specified in the amendment, the plaintiff's claim is only for a declaration that the *house in dispute* is the property of the temple and for a vesting order in respect of that house. There is no claim that the plaintiff is the trustee of the temple itself or for a vesting order in *respect of the temple and all its temporalities*. I do not think that section 112 of the Trusts Ordinance is applicable to a case where a plaintiff seeks a vesting order in respect only of some isolated property which is alleged to be subject to a trust without at the same time seeking to secure a vesting of all the trust property the title to which is uncertain. It is at least undesirable that a general power such as that conferred by section 112 should be invoked by a person who does not take upon himself the burden of establishing his right to be vested with title as trustee to all the property in respect of which the alleged uncertainty exists.

Section 102 of the Ordinance provides a salutary procedure whereby persons interested in a religious trust can after fulfilling certain conditions designed to give notice of their application, seek from the Court orders vesting trust property in trustees, and other orders for the regulation of the trust. While therefore section 112 has been held to be applicable in the cases referred to in 42 and 48 N.L.R., I do not think the facts of the present case would justify the exercise of the discretion which the Court has under section 112 to make a vesting order. If it were open to a plaintiff in litigation against an individual over some minor matter to obtain a vesting order in respect of a part or portion of property alleged to be subject to a religious trust, there would be a real possibility that different properties subject to the same trust would become vested in different persons—an absurdity which would not arise in cases similar to the two upon which the respondent relies because there a *vesting order was claimed for all the trust properties*. For these reasons the appellant's second objection must also succeed.

We would therefore set aside the order of 25th May 1955 by which the District Judge accepted the proposed amendment of the plaint, and remit the case to the District Court for trial on the former pleadings and on the issues arising thereon. The plaintiff will pay to the defendants the costs of this appeal and of the proceedings consequent upon the application for amendment.

T. S. FERNANDO, J.—I agree.

*Order set aside.*

