

1932

Present : Garvin and Dalton JJ.

THAMOTHERAMPILLAI v. RAMALINGAM *et al.*

274—D. C. Jaffna, 21,021.

Trusts Ordinance—Action by manager of a Hindu temple—Failure to obtain a vesting order before action—Relief given by Court to obtain such an order—Plaintiff's defect of title not cured—Defendant's acquiescence in order—Right of appeal—Ordinance No. 9 of 1917, s. 112.

Plaintiff as the joint manager of a Hindu temple asked for a declaration that the first defendant was not entitled to a right of way over the courtyard of the temple.

The defendant pleaded that the plaintiff was not entitled to maintain the action without first obtaining a vesting order under section 112 of the Trusts Ordinance.

At the conclusion of the case, the District Judge reserved judgment and then made order giving plaintiff an opportunity to obtain a vesting order under the Ordinance.

Held, that the plaintiff was not entitled to cure the defect of his title by obtaining a vesting order after the institution of the action.

Held, further, that under the circumstances the failure of the defendant to appeal from the order giving plaintiff time to obtain a vesting order cannot be regarded as an acquiescence on his part to this order which would preclude him from raising the question in appeal.

A PPEAL from a judgment of the District Judge of Jaffna.

H. V. Perera, for defendant-appellant.

N. E. Weerasooria (with him E. B. Wickramanayaka), for plaintiff-respondent.

September 1, 1932. GARVIN J.—

The plaintiff in this action sought a declaration that the first defendant is not entitled to a right of way over what was described as the southern courtyard of the temple referred to in the plaint. The first defendant in his answer pleaded upon the merits that he was entitled to such a right of way and as a matter of law pleaded that the plaintiff could not maintain the action as the temple and its properties were not vested in him. The case went to trial upon a number of issues, among them the following:—Can the plaintiff maintain this action without obtaining a vesting order under section 112 of the Trusts Ordinance. The plaintiff, I may here say, claimed to be joint manager with the second defendant who evidently was made a party because he refused to join the plaintiff in bringing this action. The case went to trial and evidence was recorded on two reparate days of trial before a District Judge who apparently left the station before the determination of the case. It was continued before the District Judge who ultimately gave judgment in this case, the parties agreeing that the earlier proceedings should form part of the record of the trial. At the conclusion of the case the learned District Judge reserved judgment and then made an order upholding the first defendant's contention that the action was not maintainable by the plaintiff. He decided, however, that he would give the plaintiff an opportunity to obtain a vesting order under the provisions of the Trusts Ordinance evidently upon the assumption that if the plaintiff succeeded in obtaining such an order it would in its effect date back to the date upon which this action was instituted and thus remove the defects of title upon which the first defendant based his contention that the action was not maintainable.

With the learned District Judge's conclusion that the action was not maintainable by the plaintiff I entirely agree, but I cannot, however, agree that the effect of obtaining after trial a vesting order would be to entitle the plaintiff to the relief he claimed, provided, of course, that in other respects he showed his right to such relief. 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.

It was urged by counsel for the respondent that the order made by the District Judge, which is dated February 15, 1929, is an order from which the defendant should have appealed without waiting till after the plaintiff had obtained his vesting order, and the Judge had delivered his later judgment, dated June 18, 1931, in which he dealt with all the other issues in the case. In the earlier order, the learned District Judge, having decided that the plaintiff was not entitled to maintain the action

and having also elected to give him an opportunity to obtain a vesting order under the provisions of the Trusts Ordinance, stated as follows:—
“Let the case be mentioned on the 27th instant. If by that time plaintiff has taken steps under section 112 of the Trusts Ordinance, this case will be laid by till after the results of his steps. If no such steps are taken on or before the 27th, action will be dismissed with costs.” While I agree that this is an order which was appealable and from which it might perhaps have been as well for the defendant to have appealed at the first instance, it remains to be considered whether the defendant has deprived himself of his right to appeal from the consequences of this order, merely because he did not do so at a time at which he might have entered an appeal had he been so minded. A party is not, of course, bound to appeal from every interlocutory order and has the right to exercise his right of appeal upon all points when the proceeding in the Court below is determined by a final judgment. But there are cases of this Court in which it has been strongly indicated that it would be competent for the Appeal Court in certain circumstances, where a party fails to appeal from interlocutory order which goes to the root of his case, to hold that he must be taken to have acquiesced in that order. In this case the only question for us, therefore, is whether it could fairly be said that the defendant has acquiesced in this order and is, therefore, debarred from inviting us to consider at this stage whether or not the learned District Judge was right. This is not a case in which by reason of the failure of the defendant to appeal from the interlocutory order further and lengthy proceedings relating to the matters in dispute were occasioned, or where in consequence of the reversal of the order made by the learned District Judge, further proceedings or a further trial have been rendered necessary. The effect of the order was merely to suspend further proceedings, and if the plaintiff failed within ten days of the order to avail himself of this previous order, judgment would automatically have been entered dismissing his action; and, thereafter, if somebody else and not the plaintiff was vested with the property of the temple his action would again fail. Apart from the steps taken by the plaintiff in a separate proceeding to vest himself with title no step in prosecution of this action was taken. What happened was that immediately the plaintiff obtained his vesting order, the record was sent to the District Judge, before whom this trial took place and he thereupon wrote the judgment which was delivered in this case. I do not think that, in these circumstances, we can hold that the defendant acquiesced in the order of the District Judge, which appears to have been made as has been already stated on the assumption that if the plaintiff availed himself of the opportunity accorded to him and obtained a vesting order he would be entitled to the remedy claimed by him.

For these reasons, I would set aside the judgment of the learned District Judge, and direct that the plaintiff's action be dismissed with costs both here and in the Court below.

DALTON J.—I agree.

Appeal allowed.