

PASUPATI
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of the lessor could not set up his adverse title against the landlord as a valid defence in an action of ejection. The principle is that he came in by collusion with the tenant who could not deny the landlord's title, and that unless he was also precluded from denying the landlord's title, the tenant would have only to part with the property to another person in order to bring the landlord's right in dispute. Our former order of remand did not preclude the Judge from declining to adjudicate on the question if such adjudication became unnecessary upon the facts found by him. Nor is the refusal to adjudicate on the question for the purposes of this suit a bar to the second defendant seeking to set aside the Court sale by a fresh suit if he should be advised to do so, and if he is not barred on other grounds. The decision of the Judge is right, and we dismiss this appeal with costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
 Mr. Justice Muttusami Ayyar.*

GNANASAMBANDA (PETITIONER), APPELLANT.

1890.
 Feb. 18, 24.

v.

VISVALINGA AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code, s. 244—Appeal against order—Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor.

The pandaram of a mutt being empowered under a decree to nominate a person to be the head of a subordinate mutt, subject to the approval of the Subordinate Court, made a nomination and died before the Subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination and made a fresh nomination. The Subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order :

Held, (1) that an appeal lay against the order complained of ;

(2) that the person, whose nomination had been confirmed, was a necessary party to the appeal ;

(3) that the nomination first made was revocable for good cause, and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge.

* Appeal against Order No. 104 of 1880.

APPEAL against the order of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, on execution petition No. 18 of 1889 in original suit No. 38 of 1881.

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The facts of original suit No. 38 of 1881 appear in the report of the appeal against the original decree, see *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(1).

The final decree passed by the High Court in the above appeal was (so far as relates to the subject of the present report) as follows :—

“ This Court doth order and decree that the appellant’s claim that the properties at Tiruppanandal and Benares belong to the Adhinam at Dharmapuram and to the possession of those properties be, and is, hereby dismissed ; that his claim to a declaration of his right to appoint tambirans to management at Tiruppanandal and Benares and to a direction that possession of the said properties be transferred to a tambiran whom he may appoint, be, and is, hereby dismissed ; that, in other respects, the decree of the Lower Court is reversed ; that it is hereby declared that the appointment of Kumarasami, the original defendant by Ramalingam as his junior and successor and the will in favor of the said Kumarasami are illegal ; that such appointment and will are hereby set aside so far as they relate to the mutts at Tiruppanandal and Benares and other subordinate mutts and their endowments and the endowments of the Benares and other charities in the plaint mentioned ; that the respondent has no right or title to the aforesaid mutts or properties ; that the appellant is entitled, as the head of the Dharmapuram Adhinam, to see that a competent Dharmapuram tambiran is appointed as the head of the mutt at Tiruppanandal ; that the Subordinate Judge of Kumbakonam, in order to fill up the now vacant office of tambiran of the Tiruppanandal mutt, do direct the appellant to name a tambiran from among the tambirans of his Adhinam, competent to discharge the duties of managing tambiran of the Benares (Kasi) mutt at Tiruppanandal ; that if the Subordinate Judge sees no objection to the fitness of the person so named for the office aforesaid, he do appoint him as such managing tambiran, but that in case the Subordinate Judge should object to the person so named by the appellant as aforesaid, the Subordinate Judge do appoint a competent tambiran of the Dharmapuram Adhinam as managing tambiran of the Benares mutt at Tiruppanandal ; that he do thereupon direct the appellant to invest him with arukuttu, sundaravadam and cloth as usual and to certify to such investiture ; that upon such investiture being certified, the Subordinate Judge do place the person so appointed and invested in possession of the Benares mutt at Tiruppanandal of the immoveable properties mentioned in the schedule annexed to the plaint, &c.”

On 21st January 1889 the plaintiff presented execution petition No. 18 of 1889 and prayed that proceedings be taken for the appointment of a tambiran. The Subordinate Judge accordingly directed the petitioner to nominate a competent tambiran : and on 11th February 1889 he nominated Ponnambala Tambiran. The

(1) I.L.B., 10 Mad., 375.

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Judge issued a public citation with reference to Ponnambalam's fitness for the appointment and fixed 2nd March for the determination of the matter. The plaintiff died, and on the last-mentioned date his successor, as pandaram of Dharmapuram, applied to be brought on to the record in his stead. His application having been granted, he withdrew the nomination of Ponnambalam, alleging that he was not a fit person for the appointment, and sought to nominate Saminatha Tambiran in his stead. The Subordinate Judge held that he was not entitled to revoke the nomination made by his predecessor or to make one himself. It accordingly became necessary to proceed with the enquiry into the eligibility of the original nominee. This was done by the successor in office of the Subordinate Judge who made the orders above referred to, and in the result he made an order (which was the order now appealed against) confirming the nomination of Ponnambalam and directing the pandaram to invest him with *arakuttu*, &c., as provided in the decree of the High Court.

The pandaram preferred this appeal, the representative of the defendant in original suit No. 38 of 1881 and Ponnambala Tambiran being joined as respondents.

Bashyam Ayyangar for respondent No. 2 objected that no appeal lay against the order of the Subordinate Judge. [A question was raised by the Court as to the *locus standi* in the appeal of respondent No. 2 on the ground that since his appointment had not been finally confirmed he might be regarded as merely a candidate for the office; but the argument was allowed to proceed.] The above objection was based on the contention that neither clause (c) nor any other clause of section 244 of Civil Procedure Code was applicable to the case: but the objection was overruled.

The Advocate-General (Hon. *J. H. Spring Branson*) and *Krishnasami Ayyar* for appellant.

The evidence shows clearly that respondent No. 2 is unfit for the office and his nomination cannot be allowed to stand. The appellant is the holder of the office to which the right of nomination is attached under the decree and he is entitled to submit to the Court the name of a person whom he regards as fit. Nothing was in fact done on the nomination of the late pandaram. If the view were correct that the right of nomination under the decree was personal to him his death certainly before making a

nomination, and probably in the event which occurred results in a dead lock.

Bashyam Ayyangar & Pattabhirama Ayyar for respondents.

As to the inference drawn from the evidence, the duty of the Court is to see whether the nominee is reasonably competent: it has not to enquire whether the best possible nomination has been made. In any view the appellant's nomination is invalid, for the decree does not admit of a second nomination in the event of the first not being accepted; in such a case the matter rests in the hands of the Court alone. The nomination under the power created by the decree is not revocable: compare the case of a power limited to a certain class under a will.

For the case of an attempt to make an appointment with the power of revocation, see *Piper v. Piper*(1), *Worrall v. Jacob*(2) and compare *Eastwood v. Clark*(3).

JUDGMENT.—This is an appeal from the order of the Subordinate Judge appointing one Ponnambala Tambiran as the head of the mutt at Tiruppanandal in execution of the decree in appeal No. 13 of 1885. The late Pandara Sannadhi at Dharmapuram nominated him on the 11th February 1889, and thereupon the Subordinate Judge issued a citation in order to ascertain if there was any objection to his appointment. Meanwhile the Pandara Sannadhi died, and his successor, the appellant before us, put in a petition on the 11th March withdrawing the nomination made by his predecessor and nominating one Saminatha Tambiran instead. On the 16th March the late Subordinate Judge held that the appellant had no right to withdraw the nomination made by his predecessor and that the power to nominate given by the decree had been exhausted by the nomination already made. He then called for evidence to see if Ponnambalam was fit for the office for which he had been nominated, and the present Subordinate Judge completed the enquiry and made the order appealed against.

In connection with the citation issued, he referred to a number of petitions (which are, however, no legal evidence) and mahazar-namahs from several persons residing in Southern India and interested in the mutt, and stated that a great majority of them showed that the person named by the appellant was most eligible.

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(1) 3 M. & K., 159. (2) 3 Merivale, 256. (3) L.R., 23 Ch.D., 136.

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He then proceeded to consider the specific objections urged as to Ponnambalam's fitness and held that no misconduct nor incompetency for the appointment was sufficiently proved. He accordingly appointed him as the head of the mutt at Tiruppanandal and directed the appellant to invest him with *arukuttu* and *sundaravadam*, the insignia of the office. Hence this appeal.

It is contended that no appeal lies, and that Ponnambalam was not a party to the decree in appeal No. 13 of 1885, but the appellant's predecessor was a party to the decree and it declared his right to see a competent tambiran appointed to Tiruppanandal. The appellant is, therefore, clearly entitled to object by way of appeal to any improper appointment made by the Subordinate Judge, which is, in his opinion, prejudicial to the interests of the institution. In order that Ponnambalam's interest may not be prejudiced, we consider that he is a necessary party to this proceeding as the person to whose appointment the appellant objects.

We have no doubt that the late Subordinate Judge was in error in holding that a nomination once made cannot be withdrawn for good cause. The late Pandara Sannadhi, and, therefore, the appellant was entitled to withdraw it, if there was any valid objection to it. Until the Subordinate Judge acted upon the nomination, there was a *locus poenitentiae*. The person nominated may die or refuse the appointment, or it may be that some misconduct or valid ground of unfitness was discovered subsequent to his nomination. Neither the terms of the decree nor the intention which is to be collected from them support the anomalous construction put by the Subordinate Judge upon the decree. As regards the objection urged against Ponnambalam's appointment, we do not consider it necessary to discuss the evidence at length. It may be that misconduct is not sufficiently proved to warrant the dismissal of a trustee from office, but we are satisfied that there was enough in the evidence to disallow Ponnambalam's claim as a candidate for the responsible and important position of trustee of the mutt at Tiruppanandal. We must observe with reference to the specific charges brought against him concerning his conduct, whilst in charge of Rajan Kattalai at Teruvarur, there are several matters against him in evidence, which he ought to have explained, but has not explained satisfactorily. We are unable to say that his own evidence is not, as pointed out by the learned Advocate-General, extremely unsatisfactory. We,

therefore, set aside his appointment and direct the Subordinate Judge to enquire if there is any objection to the appointment of the person nominated by the appellant, and, if his appointment is also found on enquiry to be open to objection, to proceed to appoint a competent Dhurmapuram Tambiran to Tiruppanandal.

The Advocate-General has also filed a petition for revision of the order of the Subordinate Judge. We do not consider it necessary to pass a separate order upon it.

The respondents will pay the appellant's costs.

APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Handley.*

QUEEN-EMPRESS

v.

GURUVADU AND ANOTHER.*

1890.
March 26.

Criminal Procedure Code, s. 307—Duty of Sessions Judges as to referring cases tried with a jury.

The discretionary power to refer cases conferred on Sessions Judges by Criminal Procedure Code, s. 307, should always be exercised when the Judge thinks that the verdict is not supported by the evidence.

APPEAL against the conviction and sentence in sessions case No. 56 of 1889, Bellary.

The Acting Sessions Judge said :—

“The jury found the prisoners guilty of theft. It is a question of credibility, and I do not think it incumbent on me to send the case to the High Court, though being personally doubtful whether the verdict is justified by the evidence. There will probably be an appeal.”

Mr. Wedderburn for the Crown.

JUDGMENT.—This is another case of the unsatisfactory result of a trial by jury under the present law. The Sessions Judge says that he is personally doubtful whether the verdict is justified by the evidence, but that he does not think it incumbent upon

* Criminal Appeal No. 46 of 1890.