APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

1889.
Jan. 23, 24.
Feb. 4.

PONDURANGA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

NAGAPPA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Religious Endowments Act—Act XX of 1863, *ss.* 3, 4, 11, 12—*Suit by members of a temple committee, burden of proof—Form of decree.*

Suit by the members of a temple committee appointed under Act XX of 1863 against one claiming to be the hereditary trustee of a Hindu temple for possession of certain temple property, for a declaration of their right to receive certain annual dues and for a perpetual injunction restraining defendant from interfering with those dues:

Held, the burden of proving that the temple was of the class mentioned in s. 3 of Act XX of 1863 lay on the plaintiffs.

On its appearing that the defendants' ancestor was not the founder of the temple but was appointed trustee by the Government, as also were his successors in the office of trustee, of whom all were not members of his family:

Held, (1) the plaintiffs were entitled to a decree declaring the temple in dispute to be of the class mentioned in Act XX of 1863, s. 3, and as such, subject to their jurisdiction;

(2) the plaintiffs were not entitled under Act XX of 1863, ss. 4, 11 and 12, to be put in possession of the property of the temple or in receipt of its income.

APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge of Tinnevelly, in original suit No. 59 of 1884.

The plaintiffs represented the Vishnu Temple Committee appointed in 1864 under the Religious Endowments Act—Act XX of 1863, and claimed the management and control of the Ramasami temple at Palamcottah under section 3 of that Act: the plaint prayed (1) for possession of the temple properties; (2) that the Court should establish the plaintiffs' right to receive certain annual dues; (3) for an injunction restraining the defendants from interfering with these dues; (4) for further relief.

The defendants' case was that the temple in question was not of the class referred to in section 3 of the Religious Endowments Act, but was governed by section 4, and that the trusteeship of the temple was hereditary in his family.

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* Appeal No. 99 of 1887.

The Subordinate Judge dismissed the suit. The plaintiffs preferred this appeal.

The further facts of the case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusami Ayyar and Parker, JJ.)

Mr. *Subramanyam* and *Kalianaramayyar* for appellants.

Rama Rau and *Sankaran Nayar* for respondents.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Tinnevelly who dismissed the appellants' suit with costs. The appellants are members of a Devastanam Committee appointed under Act XX of 1863, and the minor respondent is the son of one Vengu Mudali, the late trustee of Kodanda Ramasami temple at Palamcottah, in the district of Tinnevelly. On Vengu's death in 1882, a dispute arose between the parties to this appeal as to whether the *tasdik* allowance payable to the temple ought to be paid to the trustee whom the Committee might appoint, or to the respondent as hereditary trustee. In January 1883 the Collector of Tinnevelly ordered that the payment be postponed for six months, that the appellants might meanwhile sue to establish their right to the temple; hence this litigation.

The contest in the suit was whether the temple was of the class mentioned in section 3 or 4 of Act XX of 1863, and whether the suit was barred by limitation as alleged by the respondent. Further, the plaint prayed for a decree (1) for possession of the temple and its properties, (2) for a declaration of the appellants' right to receive the *tasdik* payable to the temple, (3) for a perpetual injunction restraining the respondent from interfering with the collection of the *tasdik* and other allowances due to the institution, and (4) for such other relief as might seem proper to the Court in the circumstances of the case. The Subordinate Judge was of opinion that the temple in question was not of the class mentioned in section 3 of Act XX of 1863, that it was not necessary to decide the second question, and that, even if the institution came under section 3, the appellants were not entitled to recover possession either of the temple or its properties. There can be no doubt, nor is it denied, that the *onus* of proof is on the appellants. We agree with the Subordinate Judge that the appellants would not be entitled to possession of the temple and its properties even if it were found to be subject to their juris-

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diction. It is provided by section 11 of Act XX of 1863 that no member of a Committee shall be capable of being or shall act as the trustee of a temple for the management of which such Committee shall have been appointed, and as it is the lawful trustee or manager of the temple for the time being that is entitled to possession of its properties and to the receipt of its income, the appellants are not at liberty to claim to be put in his place. As regards the injunction prayed for in the plaint, we do not consider that this is a proper case for a perpetual injunction under section 54 of Act I of 1877. The appellants' counsel draws our attention in this connection to section 12 of Act XX of 1863, but it appears to us to be limited to such property as was actually in the possession of the Board of Revenue when the Act was passed. Under that enactment the Committee has, subject to the restrictions imposed by section 4, the same powers that the Board of Revenue had under Regulation VII of 1817, but those powers were primarily powers of supervision and control designed to ensure due appropriation by the existing trustees of temple endowments to the purposes for which they were destined. We may therefore observe that the only relief which it would be proper to award if appellants established their claim is a declaration that the temple in question falls under section 3 of the Act and is subject to their supervision and control. The substantial question, however, for decision in this appeal is whether the finding of the Subordinate Judge, that the temple is not shown to come under section 3 is, as argued by appellants' counsel, contrary to the weight of evidence on the record.

The evidence on which the Subordinate Judge rests his decision is mainly documentary, and he refers further to the evidence of the plaintiffs' tenth witness and of the defendants' first and second witnesses. The main point to be kept in view in coming to a finding upon the evidence is whether at the time of the passing of Act XX of 1863 the nomination of the trustee of the temple was vested in, or exercised by, the Government or any public officer, or whether such nomination was subject to the confirmation of the Government or of any public officer. As observed by the High Court in *Samī* v. *Rajagopala*(1) it was certainly not intended that the wrongful assumption of power either by the

(1) Second Appeal No. 644 of 1884 (unreported).

Government or by a public officer to constitute a trustee should place the temple in the category of institutions which it was the intention of the Legislature to transfer to the Committee appointed under the Act. The true construction of section 3 is that the power of nomination or confirmation must be lawfully vested in the Government or a public officer or lawfully exercised by them; and it is therefore necessary to see whether the actual exercise of such power is referable to a legal origin, either to the exercise of a like power by the former Government, or to the terms of the deed of endowment or to the grant of endowment made by the Government or to the power to provide a competent trustee when a religious institution has no competent trustee. It must also be borne in mind that acts of public officers done in the exercise of general supervision and control over trustees under Regulation VII of 1817 should be distinguished from the right to nominate a trustee or to confirm such nomination which alone is constituted as the test of the Committee's jurisdiction. With these general observations, we proceed to consider the evidence in this case.

The temple now under consideration came into existence in 1805. Though it existed during the time of Ranee Mangammal, and it might be regarded as ancient on that ground, yet it ceased to be used as a place of public worship in the last century when the district passed under the Muhammadan rule. It had no place even in the list of Hindu temples prepared by Mr. Lushington in 1803 after the introduction of the British rule. Though it is alleged for the respondents that the ancient temple was demolished by the Muhammadans and the place was used for storing gunpowder, yet such oral evidence on the point as we are referred to is merely hearsay and legally inadmissible. On the other hand, there is reliable evidence to show that the stone image was never removed from the place, that both the principal stone and copper images now in existence existed also during the period of Hindu rule, and that at least a portion of the temple as it exists at present is ancient. We can only say upon the evidence that the temple was renewed as a place of public worship in 1805 though with a fresh establishment, organization and endowment. It is not pretended that respondents' family had anything to do with the management of the institution at any time prior to that period, his case being that from the time of his great-grandfather

who became a trustee in 1805 as shown by exhibit III, the trusteeship has been hereditary in his family. The first trustee of the temple was one Vengu Mudali, the respondents' great-grandfather, and he was dharmakarta of the institution from 1805 to 1829; exhibit III which is a copy of the Collector's order issued to the Tahsildar when the temple was revived in 1805 shows that he offered to perform the *kumbabhishegam* and to take up the position of dharmakarta and conduct the puja and other temple charity properly and to organize a new establishment, and that the Collector accepted the offer and arranged for the *padittaram* or daily allowance being paid, created mirassi right in the establishment which was then about to be newly organized by Vengu Mudali and prescribed the order in which consecrated water was to be served to worshippers. The document conveys the impression that the Collector relied on Vengu Mudali's management as likely to prove efficient, accepted his offer to become dharmakarta and render other service, and revived the ancient temple as a place of worship, thereby carrying out the policy of showing consideration to the religious institutions of the country inaugurated on the introduction of the British rule. The document, however, does not state whether the trusteeship was intended to be hereditary in Vengu Mudali's family or to be a personal recognition of his munificence and piety. Exhibit VI wherein Vengu Mudali's trusteeship was referred to in 1837 states that Vengu Mudali was appointed dharmakarta by the Collector in consideration of the service which he rendered in bringing back the Ramasami idol from Alagia Mannar Covil, locating it in the new devastanam and performing the consecration ceremony at his own expense. It appears from exhibits IV and VII that the grant for *padittaram* or daily puja, the *tasdik* allowance, and the festival allowance were all made by Government, though Vengu Mudali suggested such grants either as necessary or as beneficial to the institution. Though it is alleged for respondent that Vengu Mudali gave a new site for use as a gunpowder magazine and got the site of the temple in exchange for it and that he rebuilt the temple, yet there is no reliable evidence in support of such assertions. He may have possibly improved the temple or repaired it, but we are unable to accept the suggestion that he founded the temple anew, and must, on that ground, be regarded as a huckdar or a trustee

with inherent heritable interest. We see no sufficient reason for saying that the statement in exhibit VII that Vengu Mudali was appointed by the Collector was incorrect as alleged for the respondent. The next trustee was Giyanasigamani Mudali, the adopted son of Vengu Mudali. There is no evidence to show whether he became a trustee by right of inheritance or whether the Collector appointed him as trustee out of regard for Vengu Mudali's family, and the appellants have not been able to produce any order on the subject from the Collector's record; but exhibit S shows that in 1833 the Collector treated him as the lawful trustee of the temple. It appears further that in 1834 the Collector suspended him from office for neglect of duty on the ground that his conduct was open to suspicion, and that in 1837, the Collector finally dismissed him from trusteeship (see exhibits Y, Z and DD). Although it is alleged that this dismissal was an arbitrary proceeding on the part of the Collector, there is no evidence to show that such was the case and that the Collector passed the order otherwise than in the *bonâ fide* discharge of his duty under Regulation VII of 1817. This shows that even if Giyanasigamani was a hereditary trustee, the hereditary right of the family ceased.

The next trustee was one Arumugam Pillai, and he was appointed by the Collector, when Giyanasigamani was dismissed. The institution was in his charge until 1842, when the Government withdrew from all interference in the management of Hindu temples. Thus, from 1805 to 1842, there were three trustees, and according to the evidence, the first and the third were appointed by the Collector, and the second was dismissed by him for neglect of duty, and the third was in no way connected with the respondents' family.

In 1842, the management of the temple and its properties were made over to three trustees—Giyanasigamani Mudali, Subbramaniya Pillai, and Palaniya Pillai (exhibits A to C). It appears that the three trustees were selected, as was generally the case when there was no hereditary or adinam trustee, with reference to the wishes of the people interested in the institution. Though Giyanasigamani again became a trustee, yet he gained the position as one of three joint trustees, and there is no evidence that he then asserted that the trusteeship was hereditary in his family or that the association of two other trustees with him was incompatible with his hereditary right.

In 1845, Giyanasigamani died, and his son, Vengu Mudali, took his place, and there is no evidence about his appointment. From 1842 to 1864, the management of the institution was vested in three trustees, and although the Subordinate Judge treats the matter as of no importance and observes that the co-trustees were either servants or dependants of Vengu's family, still we consider it material in relation to the claim of hereditary and sole trusteeship now set up for the respondent. We have also to note that there is no satisfactory evidence that the co-trustees were not men of position and independent judgment and that they were selected in 1842 as men of local influence interested in public estimation in the temple.

Of the three trustees, Subramaniya Pillai died in 1863, and exhibits GG and HH prove that the Collector appointed Periya Tambya Pillai in his stead. Again, it is in evidence that Palania Pillai and Periya Tambya ceased to do their work in 1873, and that, on the suggestion of the respondents' father, the appellants dismissed them. The result of the evidence is that the Collector appointed the first trustee in 1805, suspended and dismissed the second trustee in 1834 and 1837; that he then appointed the third trustee; that he constituted three joint trustees in 1842; and that he appointed a successor to one of them when Act XX of 1863 was about to come into operation. There is not only no public document which contains a recognition that the trusteeship was hereditary in the respondents' family, but the conduct of the respondents' ancestors also negatives such belief in his family. It is not likely that Vengu Mudali would have omitted to obtain a sanad of huckdarship if he had desired to secure it for his descendants. Nor is it likely that the Collector would have directed in August 1805 that a stone be fixed on the land granted as inam to the temple with an inscription that such grant had been made by Government for its support if he had not desired to institute a permanent memorial of the fact that the temple owed its endowment to the Government. Nor would Giyanasigamani have failed to set up his huckdarship when the Government severed its connection with religious institutions in 1842. It is also not likely that in 1873 the respondents' father, who had been a trustee from 1845, and who, as such, must have had adequate means of knowledge, would have submitted to the appellants' jurisdiction from 1864 to 1882 and asked them in 1873 to dismiss his co-trustees for neglect

of duty. The first time there was any mention of hereditary trusteeship was in 1864, when a statement (exhibit VIII) was filed by Vengu Mudali's agent before the Inam Commissioner. In this Vengu Mudali was described as huckdar, but there is no evidence to prove, as alleged for the respondents, that it was brought to appellants' notice. The next time when the respondents' father claimed huckdarship was in 1872 when he signed an account submitted to the appellants as huckdar. The Committee at once repudiated his statement and called upon him to account for claiming a status which he did not possess. Exhibit I shows that the basis on which the respondents' father rested his claim was that the temple had been in ruins for a long time prior to 1805 and that it had been organized at a considerable expense in 1805 by his grandfather. It appears from exhibit G that the appellants declined to accept the explanation or recognize him as huckdar, and from the accounts and reports which he since submitted that he omitted to sign as huckdar. It is suggested for the appellants that the success of the trustees of two other temples in the district in original suits Nos. 91 of 1867 and 11 of 1871 inspired the respondents' father with a desire to make an attempt to assume a status which he did not possess, and that he abandoned the attempt when the appellants repudiated his claim, and continued to submit to their jurisdiction until his death. The suggestion derives support from exhibits XII to XIV, the attempt made by the respondents' father in 1872, the correspondence which then ensued and the abandonment of that attempt as evidenced by the numerous accounts and reports since submitted by him to the appellants ending with exhibit MM 3, dated December 1880

We are unable to adopt the finding of the Subordinate Judge for several reasons. In the first place, he treats Vengu Mudali of 1805 as if he was the founder of the institution, while all that could be fairly claimed by him was that he rendered important service in connection with its revival. At all events, there is no conclusive indication that his family acquired any inherent interest in the temple as a reward for his munificence. The Subordinate Judge does not give due effect to exhibits III, IV, and VII, and overlooks the fact that the temple owes all its endowments to the Government, and that the Collector appointed Vengu Mudali. He assumes again without any evidence that Giyanasigamani was arbitrarily removed by the Collector, and fails to consider that the

hereditary right, if any, thereby ceased. He fails further to notice that the constitution of three trustees as a managing body was incompatible with the alleged existence of a competent hereditary trustee in 1842. He fails also to notice the conduct of the family from 1834 to 1880 which discloses no trace of hereditary trusteeship, while there is positive evidence showing that the Collector nominated trustees once in 1805, again in 1837, and again in 1863, besides constituting three trustees in 1842. He does not also attach weight to the fact that the temple owed all its endowments to the Government, and that there is not a single public document which contains a recognition of hereditary trusteeship, and that the Collector's interference in nomination is referable to a legal origin.

We set aside the decree of the Subordinate Judge, declare that the temple in dispute is of the class mentioned in section 3 of Act XX of 1863, and is as such subject to the jurisdiction of the appellants, and direct that the appellants' claim to other reliefs be disallowed, and that the appeal be allowed to the extent indicated above with costs throughout to be paid out of the respondents' estate.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1889. Apl. 17, 25.

VENKATA NARASIMHA (PLAINTIFF), APPELLANT,

v.

KOTAYYA AND OTHERS (DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

Defamation—Privilege—Petition to Revenue officer—Presumptions as to malice.

Certain raiyats in a zamindari village addressed a petition to the Tahsildar praying that the Village Munsif might be retained in office notwithstanding the Zamindar's application for his removal. The petition imputed criminal acts to the Zamindar, who now sued the petitioners for damages on the ground that the petition contained a false and malicious libel. It was found that in fact the communication was made *bonâ fide*, and that there was some ground for some of the imputations:

Held, the petition was a privileged communication and the alleged libel was not actionable.

The question when malice may be presumed, discussed.

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* Second Appeal No. 1725 of 1888.