TIRUGNANA SAMBANDHA PANDARA SANNADHI v. NALLATAMBI.

redemption, but the party is left to pay himself the sum for which the estate is pledged out of the rents and profits of the estate. The result is that upon the facts found no right to eject or redeem had accrued at the date of the suit.

The decrees of the Subordinate Judge must be reversed and that of the District Munsif restored. The respondents will pay appellants' cost in this and the Lower Appellate Court.

PRIVY COUNCIL.

P. C.*
1893.
June 21.
July 15.

RAMALINGAM PILLAI (PLAINTIFF),

v.

VYTHILINGAM PILLAI (DEFENDANT).

[On appeal from the High Court at Madras.]

Law applicable to religious institutions—Succession to the office of dharmakarta—Act XX of 1863—Religious endowments—Custom and usage.

On a question of the right of succession to the office of dharmakarta of a devasthanam or temple at Rameswaram in Madura, and in such cases the only law applicable is the custom and practice, which are to be proved by evidence.

Both the Courts below found that, according to the established usage, the succession was provided for by each successive dharmakarta initiating a pandaram; and, whilst in office, appointing him as his successor. It followed that the appointment of a dharmakarta by one who had already ceased to hold the office (having been removed under Act XX of 1863, s. 14) was not in accordance with usage, and was therefore invalid.

The person whom the displaced dharmakarta had attempted to appoint was head of the mutt from which preceding dharmakartas, as it appeared, had been taken. Besides the above cause of invalidity in the appointment in question, the evidence supported the finding that the displaced dharmakarta made his attempt to appoint the head of the mutt to succeed him in office in furtherance of his own interests, and did not *bonâ fide* exercise his powers, if any. This finding invalidated the whole appointment and applied to the headship of the mutt as well as to the office of dharmakarta.

APPEAL from a decree (8th November 1888), affirming a decree (10th September 1886) of the Subordinate Judge of East Madura.

This appeal arose out of a suit brought by the appellant against two defendants to obtain a declaration that he was the

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* *Present:* Lord HOBHOUSE, Lord MORRIS and Sir RICHARD COUCH.

lawful dharmakarta or manager, duly appointed by the late one, of the ancient devasthanam at Rameswaram in the Madura district. The claim was valued at Rs. 20,00,000. According to the usage of this institution the dharmakarta was necessarily a pandaram of the Vellala order, of whom there was a mutt at the same place, and the head of the mutt had been appointed dharmakarta. The late dharmakarta was one Sanamada Pillai, during whose management more than Rs. 10,000 had been misappropriated of the money belonging to the trust. In proceedings instituted under section 14 of the Religious Endowments Act XX of 1863, the District Judge, on the 2nd March 1883, directed his removal from the trusteeship, and the High Court confirmed this decision on the 30th January 1884. He had, since then, on this account been convicted of criminal breach of trust, and had been sentenced to a term of imprisonment. The District Judge had also appointed a receiver, under whose management he placed the endowment until a trustee should be lawfully appointed. On the 30th January 1884, as stated in the plaint, the late dharmakarta, Ramalingam Pillai, appointed the plaintiff as his successor to the office, with power to act at once independently of him. This he purported to do by the document which is set forth in their Lordships' judgment, where also are stated all the facts of this case.

In October 1884 the appellant brought his having been appointed as dharmakarta to the notice of the District Judge and applied for official recognition of his right and title to manage the endowment.

In November 1884 the first defendant resisted his claim and contended that he had a better title to the office by virtue of prior appointment. The District Judge directed that the rival claimants should establish their right to the office of dharmakarta in a regular suit, and that the receiver should meanwhile continue in management. The plaintiff then brought this suit and the first defendant brought original suit No. 48 of 1885. Both suits were tried together, and the evidence was, by consent, recorded in this suit. The Subordinate Judge dismissed both with costs, and the plaintiff and the first defendant appealed from his decision. Both appeals were heard together: the first defendant's appeal was dismissed, and this appeal stood over for consideration, and is dealt with in this judgment.

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In the High Court both appeals were heard together on the 2nd July 1888. The first defendant's appeal against the dismissal of his suit failed at once. The appeal in the present plaintiff's suit was afterwards, on the 8th November 1888, dismissed by the judgment which is the subject of this appeal.

In the present suit the Subordinate Judge decided that the appointment was invalid for the following reasons: first, that the late dharmakarta had ceased to hold office before he made the appointment; secondly, that the document purporting to appoint made a present transfer of the trusteeship, the custom only authorizing such nomination to operate on the vacancy by death; thirdly, that the transaction was not *boná fide* for the sole benefit of the institution, but to secure specified advantages for Ramalingam Pillai; and fourthly, that there had been a failure to prove the contention that the office of dharmakarta of the devasthanam followed the right of headship of the mutt at Rameswaram, this contention being, in fact, an after-thought.

The High Court (*Muttusami Ayyar* and *Wilkinson*, JJ.) taking up each of the above grounds, concurred in the opinion that they were reasons for dismissing the suit. As to the usage of the institution in regard to the appointment of a dharmakarta, they found that the evidence proved that there were six cases during the last forty years in which the predecessor admitted the successor shortly before his death to the order of pandarams and appointed him as his heir. This was in accordance with the mode of succession mentioned by the Judicial Committee, with reference to this institution, in *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*(1). As to Venkatachelam's succession in 1816 it was held by that committee to rest upon nomination by his predecessor. Adverting to the succession of Ramanadha in 1793, that committee refused to accept the interference of the Zamindar of Ramnad in connection with it as an indication of the usage of the institution. There was no evidence before the High Court as to any case of prior succession. They agreed, therefore, with the Subordinate Judge that, according to the established usage of the religious foundation, each dharmakarta initiated a Vellala, making him an ascetic, and thereupon appointed him as his successor whilst in office and shortly before his death.

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(1) L.R., 1 I.A., 209.

The Judges added with reference to the second of the Subordinate Judge's grounds that there was, in one sense, a present transfer of trusteeship, and that there was no similar instance in the usage of the temple. Upon the fact of Ramalingam Pillai having been deprived of his office before he made the appointment, they said:—

"In the absence of a special usage, the right of nominating "a successor must be taken to be an incident of the preceding "pandaram's status as dharmakarta, and to cease with the loss of "that status. The late trustee, it must be borne in mind, was "removed from dharmakartaship on 2nd March 1883, whilst the "appellant was appointed by him on the 30th January 1884. It "would be unreasonable to say that a person who forfeits by his "misconduct his claim to a fiduciary position is entitled to select "a successor for that position, or, in other words, that a power "depending on the existence of a special status survives that "status. We are referred to no such appointment either in the "history of the institution concerned in this case or of any similar "institution. It may be that when a dharmakarta nominates a "successor *bonâ fide* whilst in office, but is subsequently removed "from dharmakartaship for misconduct to which the successor "is not a party, his right of succession is not open to question, "but that is not the case before us. The pre-requisites of a valid "appointment would exist in the one, while they do not exist in "the other."

As to the absence of *bonâ fides* they said:—

"According to the appellant's own evidence, it was arranged "that he should protect the dismissed trustee during his life and "it is his intention to pay for his use Rs. 5,000 when the temple "is placed in his possession. He stated further during his cross-"examination that he paid the late pandaram's travelling ex-"penses and vakil's fees and other charges in connection with "the Sessions case brought against the latter. Though document "A provides for appellant's management, his evidence shows that "it was Kumarasami Pillai who managed, though apparently "under his orders. The result was not only a partial diversion "of the matum income to provide for the exigencies of the late "pandaram, but also the alienation of the matum village of "Aiyamputtee, which the appellant was unscrupulous enough "to say belonged to Kumarasamy, while it really belonged to the

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"matum. Further, the correspondence referred to by the Sub-"ordinate Judge shows that the late pandaram had facilities to "influence the management of the devasthanam through the "appellant. With these facts before us, we cannot say that the "Subordinate Judge was not warranted in finding that the ap-"pellant's appointment was made by the former pandaram in "furtherance of his own interests and that it was not a *bonâ fide* "exercise of his power, if any.

"As to the contention that succession to dharmakartaship is "appurtenant to the right of succession to the mutt, the Sub-"ordinate Judge observes that it is an after-thought. There is "no averment in the plaint to that effect, nor is there any trace "of it in the issues framed or in the evidence produced by the "appellant. The usage of the institution shows only that the "chiefship of the mutt and the dharmakartaship were held by one "and the same person, and discloses no instance in which the two "offices were held by different persons. Documents filed in the "suit in which the right of succession was the subject of contro-"versy between the then pandaram and the Zamindar of Ramnad, "and the statements they contain as to the origin of the right of "management are no legal evidence under section 22 of Act I of "1872 and prove nothing more than that the devasthanum and the "mutt were ancient institutions and that the heads of the mutt "became hereditary dharmakartas on account of the interest they "took in the temple and of endowments they obtained for it from "zamindars and rajas and of contributions made by them when "the temple was dilapidated and needed pecuniary help. They "explain how the dharmakartaship came to be united with the "chiefship of the mutt, but by no means indicate that in no event, "can the former be severed from the latter or that the dharma-"kartaship became appurtenant to the chiefship of the mutt. It is "explained in the case of the *Giyana Sambandha Pandara Sanna-"dhi* v. *Kandasami Tambiran*(1) that ascetics in charge of mutts "were enabled to assume management of some of the important "devasthanams in Southern India by reason of their professed "devotion to spiritual matters and to religious charities. Though "ascetics became trustees of temples, yet they were responsible, "in common with laymen who were trustees, for breach of trust,

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

"and both were liable to be dismissed for breach of trust, mis-"feasance or neglect of duty under section 14 of Act XX of "1863. It follows that when an ascetic in charge of a mutt is "dismissed from the office of dharmakarta of a public temple, "there is a statutory disseverance of the two offices in the in-"terests of the last-mentioned institution, and that the ascetic-"trustee and those who claim under him are in no higher position "than a dismissed lay trustee. We do not desire to be under-"stood as holding that if the right of succession to the dharma-"kartaship had prior to the dismissal vested in some one else, "or if the right of nominating to the vacancy in trusteeship "belonged to some independent body of persons, that right would "cease with the dismissal of the dharmakarta for the time being. "It is pointed out by the Court below that the plaintiff and two "of his witnesses deposed that appointment of pandarams was "made for both offices at one and the same time and not for the "mutt alone. We must, therefore, over-rule the contention that "the dharmakartaship is an incident to the right of succession to "the mutt." The High Court dismissed the appeal with costs.

On this appeal Mr. *J. D. Mayne*, for the appellant, contended that the High Court had overlooked the argument arising out of the fact proved that the nominated dharmakarta, who was a pandaram belonging to the ancient mutt connected with the devasthanam and head of that mutt, was qualified by his position, and was the person proper to be appointed with regard to the custom. The succession to the office of dharmakarta to the devasthanam had been shown to go according to the custom to the head of the mutt. The plaintiff's succession to the latter and his control of its property were undisputed. The succession of such a pandaram was valid in consequence of the connection between the mutt and the devasthanam and the appointment was not invalidated by reason of its having been made by the displaced dharmakarta. The High Court was wrong in holding that the appointment was invalid on principle and opposed to the usage of the temple; wrong, also, in holding that the appointment was invalid, because it was a transfer; wrong, again, in holding that a personal motive by entering into the transaction could render the appointment invalid. The succession to the office of dharmakarta should not have been held to be separable from the headship of the mutt; and there was nothing in the

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conduct of the case to prevent the appellant from availing himself of that contention. As to the four grounds upon which the judgments below had proceeded:—upon the first, the removal of a trustee under Act XX of 1863, s. 14, only operated for the benefit of the endowment and could not have the effect of rendering inoperative the appointment of a new trustee in his place, in the only manner in which the constitution of the endowment directed that the appointment should be made. Upon the second ground, it was submitted that the present was not a case of transfer, but in reality one of succession. As to the third ground, there was nothing to show that the mutt had been merged in the devasthanam, as the original Court seemed to infer, but was an institution to which the other had itself become an accretion; with this, that no person would, by usage, become the head of the devasthanam who was not head of the mutt. As to the fourth ground, it was submitted that the plaintiff was not implicated in the improper motives of the late trustee, and that the important question was, not what were the motives actuating the maker of the appointment, but whether the appointment was in itself a proper one. In regard to this, the evidence as to the custom showed it to have been, not only a proper appointment, but the only one for which there was the authority of custom; and as to the propriety of the choice, if choice there was, there was the opinion of the Subordinate Judge that the plaintiff, as between the two claimants, was by far the preferable one.

The respondent did not appear.

Afterwards, on the 15th July, their Lordships' judgment was delivered by Sir *Richard Couch*.

JUDGMENT.—The question in this appeal is whether the appellant is the lawful dharmakarta or trustee of the ancient temple at Rameswaram in the district of Madura. The temple is one of the class of religious institutions described in section 4 of Act XX of 1863, and, according to immemorial usage, the dharmakarta should be a "Vellala pandaram" or ascetic of the Vellala caste. The last lawful dharmakarta was one Saminada Pillai *alias* Setu Ramanada Pandaram. In 1882 a suit was brought in the District Court of Madura against him and three other persons who were said to be agents and managers under him, alleging an embezzlement of Rs. 15,681 of money belonging to the temple by him

and his agents. By the judgment given in that suit on the 2nd March 1883 it was found that he, Ramanada Pandaram, was responsible for the whole sum found to be embezzled, viz., Rs. 14,855-10-0, and a decree was given against him for that sum with interest under section 14 of Act XX of 1863. He was also directed to be removed from the trusteeship of the temple under the provisions of the same section. On the same day an order was made by the District Court appointing a manager to be in charge of the temple until a new pandaram was appointed according to law. The judgment of the 2nd March 1883 was confirmed on appeal by the High Court of Madras on the 30th January 1884. Subsequently to the 2nd March 1883 and before January 1884, Ramanada Pandaram was charged with criminal breach of trust, and was afterwards convicted of it and sentenced to suffer simple imprisonment.

On the 30th January 1884, the day on which the High Court confirmed the order of removal, and whilst he was under the charge of criminal breach of trust, Ramanada Pandaram executed a deed of appointment of the appellant in the following terms :—

"In holding the office of dharmakarta of Rameswaram deva-"sthanam, mutt, &c., we have had to conduct the management of the "said devasthanam through other persons, being ourself quite igno-"rant of reading, writing and arithmetic, and the consequence has "been that some mistakes were committed which resulted in loss to "the devasthanam and trouble to us. Having in view the interests of "the said devasthanam, mutt, athinam, &c., and considering that you "are a relation of ours by blood and a descendant of the same ancestry "as ourself and that you are a man of learning and good character, we "have this day and according to the established custom invested you "with kashaya (dyed cloths), imparted the upadesam (spiritual instruc-"tion) appertaining to the asramam (stage of life), given you the "appellation of Sethu Ramanadha Pandaram and appointed you as "dharmakarta of the said devasthanam, mutt, &c. You are to be our "successor from this day with the right and privilege of appointing "your successor, &c., and to manage and conduct all the business of "the said devasthanam, mutt, at all times and independent of us."

It has been laid down by this committee that the only law applicable to such an appointment as this professes to be is to be found in custom and practice, which are to be proved by testimony. Both Courts have found that, according to the established

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usage of the religious foundation, each dharmakarta initiated a Vellala layman and made him an ascetic, and thereupon appointed him as his successor whilst in office and shortly before his death. It is clear from what has been stated that the appointment of the appellant was not in accordance with the usage. It was made by a person who had ceased to be the dharmakarta.

The contention of the learned counsel for the appellant that the temple and the mutt are inseparable institutions, the mutt being the original institution, and that the head of the mutt must be the head of the temple, is not supported by any evidence. The headship of the mutt and of the dharmakartaship appear to have been held by the same person, but in the case in which there is evidence in the record of an appointment it is to be the dharmakarta, and this appears to be the principal office. Priority is given to it in the statement in the plaint of the usage and in the appointment of the appellant. The Subordinate Judge says that the trusteeship being the more important of the two offices almost absorbed the headship of the mutt, so much so that the distinct existence of the mutt was very nearly forgotten and the succession came to be regarded as for the trusteeship alone. This is in their Lordships' opinion proved by the evidence referred to in his judgment.

Another objection to the appointment of the appellant is that both Courts have found that it was not made *bonâ fide*. The Subordinate Judge, referring to the circumstances which had been proved, says:—"All these convince me that the appointment of "the plaintiff was not made *bonâ fide* in the interests of the insti-"tution, but was for the personal interests of the late trustee." The Judges of the High Court, also referring to the proved facts, say:—"With these facts before us, we cannot say that the Sub-"ordinate Judge was not warranted in finding that the appellant's "appointment was made by the former pandaram in furtherance "of his own interests and that it was not a *bonâ fide* exercise of "his power, if any." This finding of both Courts invalidates the whole appointment. It applies to the headship of the mutt as well as to the office of dharmakarta.

On both the grounds which have been stated, their Lordships are of opinion that the appeal was rightly dismissed by the High

Court and they will humbly advise Her Majesty to affirm its decree and to dismiss this appeal.

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Appeal dismissed.

Solicitor for the appellant—Mr. *R. T. Tasker*.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

H. W. BROWN AND ANOTHER (CREDITORS), APPELLANTS,

v.

T. J. FERGUSON (JUDGMENT-DEBTOR), RESPONDENT.*

1893. March 22, 23. April 7.

Civil Procedure Code—Act XIV of 1882, *s.* 351—*Insolvency—Mortgage to secure a barred debt since renewed—Fraudulent preference—Voluntary transfer.*

On 1st January 1886 a partnership theretofore existing between A and B was dissolved and the deed of dissolution provided, *inter alia*, for the execution by B, on demand, of a mortgage on the Plantation house (then subject to a subsisting mortgage in favour of the Agra Bank) to secure the repayment of a debt due by the firm to the trustees of A's marriage settlement. A suit against the firm was pending at the date of the deed of dissolution, and it was dismissed by the Court of first instance and an appeal was preferred to the High Court. Before the appeal came on for hearing the debt to A's trustees was barred by limitation, but A by a letter consented to pay it, and the trustees demanded the execution of the mortgage as agreed on and offered to pay off the Bank. Shortly afterwards, viz., in December 1888, the appeal came on in the High Court, which held that the appellant's claim was valid and called on the Court of first instance for a further finding. On 2nd January 1889 B executed a mortgage of the Plantation house in pursuance of the above agreement, and in June the trustees paid off the Bank. In April the High Court in the above appeal passed a decree for the appellant. In consequence of this decree B became involved in pecuniary difficulties: in October he found himself insolvent and ceased to carry on business, and in February 1890 he applied under Civil Procedure Code, s. 344, to be declared an insolvent. His application was opposed by the holders of the High Court decree on the ground that the mortgage of 2nd January 1889 had been executed with the object of defeating their claim:

Held, that the execution of the mortgage of January 1889 afforded no reason for rejecting the application under Civil Procedure Code, s. 351, since it was supported by consideration and did not amount to an act of fraudulent preference, not being a voluntary transfer.

Butcher v. *Stead*, L.R., 7 Eng. and Ir. App., 839, followed.

* Appeal against Order No. 97 of 1891.