APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915. February 11, 15 and 23.

28 M.L.J. 571

C. T. N. NARAYANAN CHETTIAR (DEFENDANTS 2-4, AND 11-13), APPELLANTS,

v.

V. S. V. LAKSHMANAN CHETTIAR (DECEASED) (PLAINTIFF, DEFENDANTS 5, 6, 8-10, AND LEGAL REPRESENTATIVES OF THE DECEASED FIRST PLAINTIFF), RESPONDENTS.*

Trurtees of a temple—Transfer of management—Void or voidable—Setting aside, if necessary—Suit by trustees to recover temple properties and for accounts—Indian Limitation Act (IX of 1908), *art.* 91 *or* 124, *applicability of* –*Some trustees, joined as defendants—Denial of their title by plaintiffs—Abandonment of the denial—Decree in favour of plaintiffs and defendants if can be given—* De facto *trustees—Expenses during management—Right for reimbursement—Right to retain possession of trust property—Indian Trusts Act (II of* 1882)*, sec.* 32*—Decree for possession and for account—Provision for account of expenses incurred in the final decree.*

The plaintiffs, who were the *hukdars* (trustees) of a temple brought the suit on the 30th January 1911 to recover possession of the temple properties from the defendants to whom the trustees had made over the management of the temple under an agreement dated 21st June 1901. The plantiffs alleged in the plaint that the ninth and the tenth defendants (who were also originally *hukdars*) had lost their right to the office owing to their neglect to discharge its duties and that they were joined as defendants merely because they asserted a right to it. But at the trial in the original Court the plaintiffs abandoned this contention. The defendants contended, *inter alia*, that the suit was bad for non-joinder of all the trustees as plaintiffs and was barred under article 91 of the Limitation Act, and that the defendants were entitled to be reimbursed out of the trust properties for expenses properly incurred by them during their management and to retain possession of the properties until they were so reimbursed. The lower Court passed a decree in favour of the plaintiffs and the ninth and the tenth defendants for possession and a preliminary decree for accounts against the defendants.

Held, that the objection as to non-joinder was not sustainable, but that a decree could be passed in favour of the plaintiffs and the ninth and the tenth defendants as trustees with the consent of the latter and the other defendants.

Kokilasari Dasi v. *Mohunt Rudran and Goswami* (1907) 5 C.L.J., 527, distinguished.

The transfer to the defendants being void, did not require to be set aside. Article 91 of the Limitation Act did not apply to the suit but article 124 was

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* Appeal No. 236 of 1912.

the article that was applicable, and under that article the suit was not barred.

Malkarjun v. *Narhari* (1901) I.L.R., 25 Bom., 337 (P.C.), followed.

Gnanasambhanda Pandara Sannadhi v. *Velu Pandaram* (1900) I.L.R., 23 Mad., 371, explained.

Sidhu Sahu v. *Gopicharan* (1913) 17 C.L.J., 233 referred to.

A trustee of a public charitable endowment, like a trustee of a private trust, is entitled to reimburse himself all expenses properly incurred in connection with the trust, and has a first charge enforceable only by prohibiting any disposition of the trust property without previous payment of such expenses—not, that is to say, in the ordinary way by sale of the property subject to such charge.

It is the duty of the Court especially in the case of a public charitable trust to take the trust property out of the possession of persons not entitled to hold it, while making due provision for any claims that they may have in respect of expenditure properly incurred in connection therewith.

Held, consequently, that the defendants were not entitled to retain possession of the suit properties, but that the preliminary decree should direct that accounts should be taken as to what was due to the defendants from the trust, leaving it to be determined by the final decree how such claim, if established, should be enforced.

APPEAL against judgment of C. V. VISWANATHA SASTRIYAR, the Subordinate Judge of Rāmnād, in Original Suit No. 58 of 1911.

The material facts appear from the judgment of the High Court.

K. Srinivasa Ayyangar, S. Srinivasa Ayyangar and *A. Krishnaswami Ayyar* for the appellants.

S. Sundararaja Ayyangar for the second respondent.

C. V. Anantakrishna Ayyar for the respondents Nos. 4 and 5.

S. T. Srinivasagopala Achariyar for the ninth respondent.

WALLIS, C.J. AND COUTTS TROTTER, J.

The following JUDGMENT of the Court was delivered by WALLIS, C.J.—This is an appeal by some of the defendants against a decree in favour of the plaintiffs in a suit brought by certain trustees as *hukdars* of a temple to recover possession of the temple properties from the defendants (appellants) to whom the trustees had made over the management of the temple under an agreement (Exhibit 1), dated 21st June 1901. Four questions were argued before us. In the first place it was said that the suit is bad for non-joinder, as, though all the *hukdars* including the ninth and tenth defendants were impleaded, the plaintiffs in paragraph 16 of the plaint stated that these defendants had lost the office owing to their neglect to discharge its duties, and that they were joined merely because they asserted a right to it. At

NARAYANAN v. LAKSHMANAN. — WALLIS, C.J., AND COUTTS TROTTER, J.

the trial this contention was abandoned by the plaintiffs, and a decree was passed in favour of the ninth and tenth defendants with their consent as well as of the other defendants. In these circumstances, I do not think *Kokilasari Dasi* v. *Mohunt Rudranand Gosami*(1) cited for the appellants has any application. In that case the plaintiff persisted both in the original and the lower Appellate Courts in denying the joint trusteeship of his minor brother whom he had made defendant; and it was only after this issue had been finally decided against him, that he applied in the second appeal that a decree might be passed in favour of himself and this defendant jointly. Here the contention was abandoned during the trial and the title of the defendants Nos. 9 and 10 as trustees was admitted.

The second contention was that the suit was barred by limitation under article 91 of the Indian Limitation Act as the plaintiffs did not sue within three years to set aside the transfer, Exhibit I. The High Court having already held that this transfer was void, Exhibit G, and this being so, it does not require to be set aside. The Limitation Act merely prescribes within what periods suits must be brought and cannot be construed as of itself creating an obligation to sue where none existed. In *Malkarjun* v. *Narhari*(2), their Lordships of the Judicial Committee clearly distinguished between sales which were a nullity and sales which were only voidable and valid until set aside. At page 350 after pointing out that the words "to set aside an adoption" in one of the articles were incorrect as an adoption may be declared invalid but cannot be set aside, their Lordships observed that there is no such difficulty in the case of suits to "set aside a sale" in the same Act "because a sale valid until set aside can be legally and literally set aside; and any body who desires relief inconsistent with it may and should pray to set it aside." See also *Sidhu Sahu* v. *Gopicharan*(3). This is a more recent decision of their Lordships than *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(4), which is relied on by the appellants. In that case two persons Nataraja and Chockalingam shared the management of a religious endowment, and successively transferred their respective rights of management by registered

(1) (1907) 5 C.L.J., 527.
(2) (1901) I.L.R., 25 Bom., 337 (P.C.).
(3) (1913) 17 C.L.J., 233.
(4) (1900) I.L.R., 23 Mad., 271 (P.C.).

instruments to a third party in 1868 and 1869, Chockalingam who was a minor being represented by his mother. In 1892, Velu the son of Nataraja sued to recover the trusteeship joining Chockalingam as defendant as he was apparently unwilling to sue. Their Lordships held that article 124 of the Indian Limitation Act was applicable and that, as the defendants had held adversely to the plaintiff's father, Nataraja, for more than twelve years the plaintiff's suit was barred. They did actually rule as contended by the appellants, that the suit was barred under article 91 of the Indian Limitation Act because Nataraja had failed to set the transfer aside in three years which is what is now contended. Adverting to the case of the defendant Chockalingam who was minor at the date of the sale of his share, their Lordships, with a view of showing that his claim was also barred, observed that he attained majority in 1880 "and had by article 44 of the Act three years for setting aside the sale by the guardian." Mr. K. Srinivasa Ayyangar relies on the fact that, although their Lordships might have simply said that Chockalingam had a further period of three years to sue under section 7, they expressly stated that he had three years under article 44 which is for suits to set aside a sale by a guardian, although the sale was one which in an earlier part of the judgment they had held to be void; and he invites us to hold on this authority, that sales which are void *ab initio* become valid under the provisions of the Limitation Act if not set aside within three years by suit. Such a view, as already pointed out, appears to be inconsistent with another part of the same judgment and to be opposed to the ruling of their Lordships in the later case in *Malkarjun* v. *Narhari*(1) and we are not prepared to accept it as correctly representing what their Lordships intended to lay down. This very decision of their Lordships is express authority that article 124 is the article applicable, and under that article the suit is not barred. The other cases cited were cases of sales by guardians which were not void and have no application to the present case.

The third point is as to the alleged improper rejection of evidence. It appears from the B diary that, after the evidence had been closed and during the arguments for the defence, it was observed that no issue had been framed about the validity of

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(1) (1901) I.L.R., 25 Bom., 337 (P.C.).

NARAYANAN v. LAKSHMANAN. — WALLIS, C.J. AND COUTTS TROTTER, J.

the agreement (Exhibit I), and leave was given to the plaintiffs to ask for a further issue on 11th April 1912. This the seventh issue is as follows:—

"Is the agreement and arrangement mentioned in the plaint as the one under which the defendants got into possession illegal and void in law, having regard to its nature, the circumstances and the objects for which it was made and are the plaintiffs entitled to all or any of the reliefs asked for; and if it is valid and legal under special circumstances and for special objects, are the circumstances and objects such as to make it valid and good?"

Reading this with the pleadings and with Exhibit I the agreement in question it would appear that the question intended to be raised was whether such an agreement of this nature, even if ordinarily void, might in special circumstances be valid and, if so, whether such special circumstances existed in the present case. At the further hearing, when the defendants wanted to call evidence as to the practice of the temple the Subordinate Judge objected that this evidence should have been given at the trial of the other issues and that the question of usage did not arise on the seventh and other additional issues. We think the special circumstances mentioned in the issue referred to the recitals in Exhibit I as to the circumstances in which that document came into existence. It says nothing about a usage under which Exhibit I could be supported and we think the Subordinate Judge was justified in refusing to allow a defence of this kind to be raised at this late stage of the case.

The fourth question relates to the form of the decree which makes the appellants liable to account for what may be found due from them but gives them no right to recover anything that may be found due to them for expenses properly incurred out of their own pockets in the course of de facto management. It is contended that they are entitled to be reimbursed and to retain possession of the temple properties until they are so reimbursed. The decision, as yet unreported, in *Abkan Sahib* v. *Soran Bivi Saiba Ammal*(1) on which the appellants rely, does not on examination support the proposition but rather the reverse, as it is mentioned in the judgments and appears from the printed papers

(1) (1915) I.L.R., 38 Mad., 260.

that the de facto trustee in that case had in an earlier suit claimed to retain possession of the temple properties until he was reimbursed and that this claim was rejected by the District Judge whose decree was affirmed by this Court in *Afghan Sahib* v. *Choram Bivi*(1). There is no reason for allowing trustees of public charitable endowments any larger rights against the trust property than are recognized in the case of private trustees by section 32 of the Indian Trusts Act. That section says that a trustee is entitled to reimburse himself all expenses properly incurred in connection with the trust and that he has a first charge enforceable only by prohibiting any disposition of the trust property without previous payment of such expenses—not that is to say in the ordinary way by sale of the property subject to the charge. No authority has been cited before us to show that in the case of either private or public trusts the Court is bound to leave the trust estate in possession of a person not entitled to the character of a trustee merely because he has expended money on it whilst acting as trustee. On the contrary it would appear to be the duty of the Court especially in the case of a public charitable trust to take the trust property out of the possession of persons not entitled to hold it whilst making due provision for any claims they may have in respect of expenditure incurred in connection therewith. Turning now to the facts of the present case, the defendants' case on the pleadings and at the trial was that they were entitled to remain in possession until recouped under an express agreement supplemental to Exhibit I. It is only after the rejection of this contention by the Subordinate Judge that the defendants fell back in appeal on this alleged equitable right. Apart from this we do not think the appellants are entitled to any modification of that part of the preliminary decree which directs the defendants to give up possession to the plaintiffs, but we are prepared to amend paragraph 2 of the preliminary decree by directing accounts to be taken in respect of temple as between the plaintiffs and defendants Nos. 6, 8, 9 and 10 of the one part and defendants Nos. 2 to 5 and 11 to 13 of the other part, so as to enable the latter to establish any claim they may have against the trust properties on the taking of the accounts, leaving it to be determined by the final decree how such claim, if established,

(1) Appeal Suit No. 147 of 1902.

NARAYANAN v. LAKSHMANAN.

WALLIS, C.J. AND COUTTS TROTTER, J.

should be enforced. Otherwise the appeal fails and must, we think, be dismissed with costs. Fresh evidence may be taken if the modification of the preliminary decree should be found to render it necessary.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

1915. February 1 and 2 and March 1.

AVULA CHARAMUDI (FIRST DEFENDANT), APPELLANT,

v.

MARRIBOYINA RAGHAVULU AND ANOTHER (PLAINTIFFS NOS. 2 AND 3), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 54—Agreement to sell land not creating any interest therein—Rule of perpetuities, not offending—Specific Relief Act (I of 1877), sec. 27 (b)—Indian Contract Act (IX of 1872), sec. 37.

A contract to convey or reconvey immoveable properties, *whenever demanded*, for a certain amount is only a personal contract and does not create any interest in immoveable property and is therefore enforceable and not void as contravening the rule against perpetuities.

South Eastern Railway v. *Associated Cement Manufacturers (1900), Limited* (1910) 1 Ch., 12 at p. 33, followed.

Kolathu Ayyar v. *Ranga Vadhyar* (1915) I.L.R., 38 Mad., 114, distinguished.

Per Curium.—The contract is also enforceable according to section 37 of the Indian Contract Act (IX of 1872) against the representatives of the contracting parties.

SECOND APPEAL against the decrees of J. W. HUGHES, the District Judge of Nellore, in Appeal No. 68 of 1910, preferred against the decree of V. BHASHYAM AYYANGAR, the District Munsif of Kavali, in Original Suit No. 489 of 1908.

The following statement of facts is taken from the judgment of the lower Appellate Court:—

"First defendant is the undivided father of second defendant and brother of the third defendant. He is the manager of the family. On the 13th of July 1905 it was found that plaintiff was indebted to the defendants in the sum of Rs. 1,100. The case for the plaintiff is that on that date he executed a mortgage deed for Rs. 600 and a sale-deed conveying the

* Second Appeal No. 2058 of 1913.