PRIVY COUNCIL.*

NATARAJA THAMBIRAN (DEFENDANT),

v.

KAILASAM PILLAI (PLAINTIFF), RESPONDENT [AND TWO CONNECTED APPEALS].

1920, June 7.

[On Appeal from the High Court at Madras.]

Religious endowment—Mutt—Head of mutt—Trustee of temples—Appointment of successor—Compromise to avoid prosecution—Invalidity—Code of Civil Procedure (XIV of 1882), sec. 539.

By the usage of a mutt the pandara sannidhi, or head, had power to appoint his successor, and was trustee of the endowments of certain dependent temples. In 1894 the pandara sannidhi appointed the appellant as chinna pattam, or junior head, with a right to succeed as head. This appointment was not made bona fide in the interests of the mutt, but under a compromise whereby he had avoided a threatened prosecution for forgery of a will purporting to be that of his predecessor and appointing him as successor. The appellant having succeeded as pandara sannidhi, suits were instituted in 1905 to remove him from being trustee of the mutt properties and of the temple properties.

Held, that the appellant's appointment as head of the mutt was invalid and that consequently he never became trustee of the temples; but that on the finding which was not challenged on appeal, that there was no evidence that the head of the mutt was a trustee of the mutt properties, the suit to remove him from the headship of the mutt could not be maintained under section 539 of the Code of Civil Procedure, 1882.

Ramalingam Pillai v. *Vythilingam Pillai*, (1893) L.R., 20 I.A., 150; I.L.R., 16 Mad., 490 (P.C.), followed and applied.

CONSOLIDATED APPEALS from a judgment and decree (December 15, 1918) of the High Court affirming the decree and reversing another decree, both dated March 31, 1913, of the Temporary Subordinate Judge of Rāmnād.

The litigation related to the Tiruvannamalai Mutt, situate in the district of Madura, and certain dependent devastanams or temples. The present appeal arose out of a suit (No. 1 of 1905), against the present appellant, Nataraja, and two others claiming a declaration that none of the defendants was a lawful trustee of the mutt or the devastanams and a second suit (No. 2 of 1905),

* *Present*: Lord BUCKMASTER, Lord DUNEDIN, Sir JOHN EDGE and MR. AMEER ALI.

NATARAJA THAMBIRAN v. KAILASAM PILLAI.

brought by other plaintiffs against Nataraja and another, claiming a declaration that neither was the lawful trustee of the devastanams.

The District Judge, who tried the suits, found that Nataraja was not a trustee of the mutt or of the devastanams. He was however of opinion, upon the authorities, that the pandara sannidhi as head of the mutt was a corporation sole and that section 539, Civil Procedure Code, did not apply. On that ground, and without recording any evidence, he dismissed both suits; in suit No. 2 he held that so long as Nataraja was head of the mutt he was by its usage the rightful dharmakarta of the temple.

Upon appeals by the plaintiffs to the High Court, MUNRO and ABDUR RAHIM, JJ., held that there was no reason why the properties belonging to the devastanams should not be protected if waste or mismanagement, which were alleged, were proved. They accordingly allowed the appeal in Original Suit No. 2 of 1905; they adjourned the appeal in Original Suit No. 1 of 1905 pending the answer to a reference which they made to the Full Bench, "Does the head of a mutt hold the properties constituting its endowment as a life tenant or as trustee?" The Full Bench held [see *Kailasam Pillai* v. *Nataraja Thambiran*(1)] that the head of the mutt was not a trustee save in so far as it was shown that he held particular properties in trust: at the same time they refused to regard him as a life tenant. Upon the case coming again before MUNRO and ABDUR RAHIM, JJ., they said:

"The general reply given by the Full Bench is that, in the absence of evidence to the contrary, the head of a mutt is not a trustee. The appellant contends that he should be allowed to adduce evidence on the point and we think that contention reasonable. We therefore reverse the decree of the District Judge and remand the suit" (i.e., No. 1 of 1905) "for disposal according to law."

The two cases after the remand were transferred to the Temporary Subordinate Judge of Rāmnād. They were tried by him, together with a third suit (No. 19 of 1912) brought by a different plaintiff for a declaration that he had been duly elected head of the mutt by the thambirans or disciples. In that suit the

(1) (1910) I.L.R., 33 Mad., 265 (F.B.).

following issue, which was not specifically raised in either of the two suits of 1905, was framed amongst others:

"Whether the appointment of the defendant to chinna pattam of Tiruvannamalai Adhinam Mutt by the late Thandavarayan Desikar was made mala fide to serve his own purposes and therefore invalid?"

The facts with regard to that issue appear from the judgment of their Lordships.

All these suits were tried together and were dismissed; and with regard to suit No. 19 of 1912 there was no appeal. As regards suit No. 1 of 1905, the Subordinate Judge found that there was no evidence to show that the pandara sannidhi was a trustee of the mutt properties, and he dismissed the suit, holding that it was not maintainable under section 539 of the Code of Civil Procedure. With regard to suit No. 2 of 1905, he held that it was maintainable under that section, as relating only to the devastanam properties. He, however, found that Nataraja had been appointed chinna pattam, with the right to succeed as pandara sannidhi, as the result of a bona fide compromise of disputes between him and Thandavarayan, and that the appointment was valid.

Appeals in the two suits of 1905 were heard together by the High Court, which affirmed the decree in suit No. 1 so far as it referred to the office of pandara sannidhi and its endowments, and reversed it in other respects; the decree in suit No. 2 was reversed, and it was declared that Nataraja was not a lawful trustee of the devastanams and the endowments thereof, and ordered that he be removed and that the lower Court should appoint a fresh trustee. The learned Judges (WALLIS, C.J., and NAPIER, J.) were of opinion that the lower Court having found that there was no evidence that the head of the mutt was a trustee, and that finding not being disputed, suit No. 1 of 1905 was properly dismissed, under the decision already given, so far as it referred to the mutt and mutt properties. They found, however, upon the evidence, that the appointment of Nataraja was made not in the interests of the mutt but in furtherance of the appointing pandara sannidhi's own interests, and that it was therefore invalid; they held accordingly that Nataraja was not a trustee of the temple properties, there being, in their view, nothing in their decision upon the first point which

NATARAJA THAMBIRAN v. KAILASAM PILLAI.

precluded the Court from so holding. The learned judges further held that the suits were not barred by limitation, rejecting a contention that time began to run under article 120 of Schedule I, of the Indian Limitation Act, from the date of the appointment of Nataraja as chinna pattam and not from that of his succession as pandara sannidhi.

Nataraja appealed from the decree in suit No. 2, and both parties appealed from the decree in suit No. 1.

Upjohn, K.C., and *Kenworthy Brown*, for the appellant.—Both suits should have been dismissed. The pandara sannidhi as head of the mutt is a corporation sole and as such is entitled to hold the endowments; he is entitled to the trusteeship of the temples according to the custom governing the institution. Section 539 of the Code of Civil Procedure, 1882, has no application to either suit. There was no such express or constructive trust as is referred to in that section. Reference was made to *Vidyapurna Tirthi Swami* v. *Vidyanidhi Tirthi Swami*(1), *Kailasam Pillai* v. *Nataraja Thambiran*(2), and *Shanmuga Chettiar* v. *Narayana Ayyar*(3). The High Court should not have reversed the finding of the Subordinate Judge as to the motive of Thandavarayan in appointing the appellant. The evidence showed that the appointment was in the interests of the mutt as it was a settlement of the disputes with regard to the succession. The appellant was ordained and consecrated as chinna pattam, and in 1902 the general body of tambirans recognized and adopted him as pandara sannidhi, affirming his right to the office, to which the trusteeship of the temples is attached by custom.

De Gruyther, K.C., and *Dubé*, for the respondent.—The evidence shows that the appointment of the appellant was made in order to avoid the threatened prosecution; it was not made in the interests of the mutt but for indirect and personal motives, and is consequently bad: *Ramalingam Pillai* v. *Vythilingam Pillai*(4). The head of the mutt holds the properties both of the mutt and of the temples in trust, and the suits were maintainable under section 539 of the Code of Civil Procedure, 1882, in respect of both trusts. But even if the suit with regard to

(1) (1904) I.L.R., 27 Mad., 455. (2) (1910) I.L.R., 33 Mad., 265 (F.B.).
(3) (1917) I.L.R., 40 Mad., 743.
(4) (1893) L.R., 20 I.A., 150; I.L.R., 16 Mad., 490 (P.C.).

the headship of the mutt and its properties could not be maintained, it was rightfully held that the appellant was not trustee of the temple property.

Upjohn, K.C., in reply.—There being no evidence that the mutt properties were held in trust, the cross-appeal fails. The appellant remaining head of the mutt, he should not have been removed from the trusteeship of the temple properties. Considerable incovenience will arise from the severance. Under section 539, the Court was not bound to remove the appellant from the trusteeship, and should not have done so, seeing that no mismanagement by him was proved.

The JUDGMENT of their Lordships was delivered by

SIR JOHN EDGE.

Sir JOHN EDGE.—These are three consolidated appeals. One of the appeals is from a decree of the High Court of Madras made in a suit (No. 1 of 1905) in which Shunmugam Pillai and Kailasam Pillai were the plaintiffs, and Nataraja Tambiran, Ramalinga Tambiran and Sankaralinga Tambiran were the defendants. That suit was instituted in the District Court of Madura on May 1, 1905, and by it the plaintiffs sought a declaration that none of the defendants was a lawful trustee of the Tiruvannamalai Mutt and of certain dependent devastanams or temples, and other reliefs. Another of the consolidated appeals is a cross-appeal from the decree of the High Court in that suit. The other of the consolidated appeals is an appeal from a decree of the High Court made in a suit (No. 2 of 1905), in which Kaliswara Gurukal, Vadugaiatha Gurukal, and Suppiah Gurukal were the plaintiffs, and Nataraja Tambiran and Sankaralinga Tambiran were the defendants. The latter suit was instituted in the District Court of Madura on July 2, 1905, and by it the plaintiffs sought a declaration that neither of the defendants was the lawful trustee of the same devastanams, or the endowments of those temples, and other reliefs. The consent in writing of the Advocate-General for Madras was obtained under section 539 of the Code of Civil Procedure, 1882, for the institution of each of these suits. The main contention in each suit was whether Nataraja was a trustee or held in some other capacity. On March 14, 1906, the District Judge found that Nataraja was not a trustee of the mutt or of the devastanams, and that no suit lay under section 539 of the Code

NATARAJA THAMBIRAN v. KAILASAM PILLAI. — SIR JOHN EDGE.

of Civil Procedure, 1882, in respect of the mutt or of the devastanams, which in his opinion went with the mutt, and by his decree dismissed the suits. From those decrees there were appeals to the High Court. In each of the appeals the High Court set aside the decree of the District Judge and remanded the suit for trial.

On the remand the suits came on for trial before the Temporary Subordinate Judge of Ramnad, who will hereafter be referred to as the trial Judge, by whom they were by consent tried together with a suit which was instituted in 1912 by one Ponnambala Desika against Nataraja, alleging that he and not Nataraja was the lawfully appointed head of the mutt. Separate issues were framed in each of the three suits, and evidence was recorded. The trial judge by his decree dismissed the suit of 1912; that decree was not appealed against and became final.

The trial Judge found in suit No. 1 of 1905 that there was no evidence to show that the head of the mutt was a trustee of the mutt or of its properties, and by his decree dismissed that suit. The trial Judge apparently considered that, so far as that suit was concerned, it was not necessary to find whether Nataraja was a trustee of the devastanams and the properties with which they were endowed. That decree in suit No. 1 of 1905 was appealed to the High Court, and neither on that appeal, nor in these consolidated appeals was any attempt made to challenge the correctness of the finding of the trial Judge in suit No. 1 of 1905, that there was no evidence to show that the head of the mutt was a trustee of the mutt or its properties. The devastanams and their endowments were not property of the mutt, but admittedly they are held as trust property by the person who is for the time lawfully the pandara sannidhi or head of the mutt, and the pandara sannidhi holds them as a trustee of religious and charitable trust properties, to which section 539 of the Code of Civil Procedure, 1882, would apply. The trial Judge also by his decree dismissed the suit No. 2 of 1905. That decree was appealed to the High Court.

The appeal to the High Court in suit No. 1 of 1905 was numbered 317 of 1913 in the High Court file, and the appeal

in Suit No. 2 of 1905 was numbered 318 in that file. The appeals were heard together by the High Court, and all the evidence which had been recorded in those suits and in the suit of 1912 was before the learned Judges before whom the appeals in the suits of 1905 came for hearing. The High Court by its decree in Suit No. 1 of 1905 confirmed the decree of the trial Judge, in so far as it dismissed the plaintiffs' suit in respect of the office of pandara sannidhi of the mutt and its endowments, and reversed that decree in other respects, and by its decree in Suit No. 2 of 1905 reversed the decree of the trial Judge, and declared that Nataraja was not the lawful trustee of the devastanams and the endowments thereof, and directed the lower Court to appoint a fresh trustee of the said devastanams, and to place the trustee so appointed in possession of the said devastanams and endowments.

In 1894 Thandavarayan Desikar, who was the then pandara sannidhi or head of the mutt, and had as such head of the mutt the right to appoint his successor, appointed Nataraja, a defendant to the suits, as his successor, and chinna pattam or junior head of the mutt. The only question which their Lordships consider necessary to decide in these appeals is whether that appointment was a valid appointment. Admittedly, the head of the mutt holds the devastanams and the properties with which they were endowed as a trustee, whether he is to be considered as a trustee of the mutt itself or not. Thandavarayan Desikar died in 1902.

The validity of the appointment of Nataraja was questioned in the suits of 1905, mainly on the allegations in the plaints in those suits that Thandavarayan was a trespasser, and had not been appointed head of the mutt by Arumuga Desikar who had died in 1893 and was the head of the mutt. The validity of the appointment of Thandavarayan as head of the mutt has been established and cannot now be questioned. It was, however, alleged in the plaint in each of the suits that Thandavarayan in 1893 appointed Nataraja as his successor "out of fraudulent and sinister motives." The meaning of that allegation is that the appointment of Nataraja was an invalid appointment as not made bona fide in the interests of the mutt, and was made by Thandavarayan in furtherance of his own interests, and an appointment so made would not be an

NATARAJA THAMBIRAN v. KAILASAM PILLAI. — SIR JOHN EDGE.

appointment made in the bona fide exercise of the powers of the head of the mutt, and would be invalid: see *Ramalingam Pillai* v. *Vythilingam Pillai*(1). Inferentially, but not expressly, the allegation that the appointment of Nataraja had been made from fraudulent and sinister motives by Thandavarayan was denied by Nataraja in his written statement. In the latter of the suits of 1905 Nataraja in his written statement alleged that the appointment "was made with the best motives and in the best interests of the institution," that is, of the mutt. A direct issue as to the validity of the appointment of Nataraja should have been framed in each of the suits of 1905, but was not. The omission of such a framed issue did not, however, take any of the parties by surprise. Documentary evidence from which it might be inferred that the appointment of Nataraja had been made by Thandavarayan not bona fide in the interests of the mutt but for his own protection was filed and subsequently witnesses were called to speak to facts, whose evidence if reliable led to the conclusion that the appointment was not made in a bona fide exercise of the power to appoint a successor. Briefly stated, the motive which influenced Thandavarayan to appoint Nataraja as his successor was alleged to have been Thandavarayan's desire to avoid the risk of being prosecuted on a charge of murder and a charge of forgery of a will, charges which Nataraja was making, and to avoid the question raised by Nataraja that Thandavarayan himself had not been appointed the head of the mutt. It is not necessary to consider whether those charges were or were not well founded.

The Subordinate Judge considered that the witnesses who gave evidence in support of the case that the appointment of Nataraja was not made bona fide in the exercise by Thandavarayan of his power of appointment were interested witnesses, and found that the appointment was not the result of a corrupt bargain between Thandavarayan and Nataraja, but was made in bona fide settlement of disputes of doubtful claims in respect of a certain place.

On Appeal to the High Court, the learned Chief Justice in his judgment said:

(1) (1893) L.R., 20 I.A., 150; I.L.R., 16 Mad., 490 (P.C.).

"In the plaint, as already stated, the plaintiffs attacked the first defendant's (Nataraja's) appointment on the ground that Thandavarayan under whom he now claims was not himself the lawful pandara sannidhi and also on account of the circumstances under which the first defendant's appointment was made. This last question, though distinctly raised in the pleadings, was not, to say the least, very clearly taken in the issues in these two suits (the suits of 1905), but it was the subject of the fourth issue in the third suit (the suit of 1912) which was tried with them: 'Whether the appointment of the first defendant to the chinna pattam by the late pandara sannidhi was made mala fide to serve his own purpose, and therefore invalid?' It is, I think, clear that the parties in these two suits also went to trial on this issue, and that we are bound to deal with it."

NAPIER, J., in his judgment in the appeals to the High Court said on the same subject:

"I am satisfied that the matter was treated as an issue in the present suits (the suits of 1905), and that the non-existence of a specific issue at the trial was not considered of any importance, that being the issue in the other suit,"

that is, in the suit of 1912. It appears to their Lordships that the learned Judges of the High Court were justified in treating the question whether Nataraja's appointment as head of the mutt was or was not a valid appointment as an issue upon which the parties to the suits of 1905 went to trial, and that for determining that issue the learned Judges were entitled look at the evidence which was recorded in the suit of 1912 and was before them.

The Chief Justice found that the appointment of Nataraja by Thandavarayan was not in bona fide settlement of doubtful claims, and was in pursuance of an arrangement between them of a very different character, by which Thandavarayan agreed to exercise his powers of appointment for the purpose of obtaining an advantage to himself and in furtherance of his own interests.

NAPIER, J., after a careful review of the evidence, found:

"In the result I am satisfied that Thandavarayan would not have appointed Nataraja his opponent, as his successor, were it not for his desire to secure himself from further opposition. In my opinion, he did not appoint him in the true interests of the mutt. He consented to an arrangement of an unusual character under

NATARAJA THAMBIRAN v. KAILASAM PILLAI.

Sir JOHN EDGE.

which he parted with a considerable portion of his temporal rights with an eye solely to his own security, and under pressure of great danger to himself."

Their Lordships find as facts that Arumuga Desikar, who was in 1893 pandara sannidhi, or head of the mutt, died on May 23rd 1893, and that Thandavarayan at once claimed the succession to the headship of the mutt, alleging that he had been appointed on May 22, 1893, by Arumuga as his successor, and also alleging that his appointment had been confirmed by Arumuga by his will of that date. That claim was at once challenged by Nataraja, who alleged that he himself had been appointed by Arumuga as his successor, that Thandavarayan had not been appointed, and that the will was a forgery. Thandavarayan presented the alleged will for registration. The registration of the will was successfully opposed by Nataraja on the ground that it was a forgery; Nataraja also alleging that Thandavarayan had murdered Arumuga. The Registrar found that the will was not genuine. Nataraja threatened to prosecute Thandavarayan. Thandavarayan asked the witness Narayanasami Desikar to get Nataraja to compromise and not prosecute. This witness met Nataraja and asked him not to prosecute, as prosecution was a big matter, and would bring disgrace to both sides. Nataraja insisted that if a compromise was to be effected he should be made chinna pattam, that is, junior head of the mutt, with a right to succeed to the position of pandara sannidhi or head of the mutt, and be given sufficient properties to maintain his position. This witness said that he advised Thandavarayan to comply with Nataraja's demands. Chockalinga Thambiran, who was one of Nataraja's witnesses, admitted in cross-examination that Nataraja "was arranging to take further proceedings after the registration of the will was refused." Those further proceedings must have been criminal proceedings. There is abundant other evidence from which it is to be inferred that Nataraja was threatening to institute criminal proceedings against Thandavarayan. Chockalinga also admitted in cross-examination that one Ramasami Ayyar brought Nataraja to Thandavarayan and settled the disputes between them.

Their Lordships entertain no doubt that the appointment of Nataraja as his successor in the office of pandara sannidhi, or head of the mutt, was not made in the interests of the mutt by

Thandavarayan, but was made by him solely in his own interests as the result of a compromise by which he avoided the risks of a criminal prosecution for a forgery of the alleged will of Arumuga, of which he had unsuccessfuly attempted to procure registration. Their Lordships consequently hold that Nataraja never was validly appointed head of the mutt, and never having been the lawful head of the mutt, the trusteeship of the devastanams and their endowed properties did not vest in him, and that the decrees of the High Court, the subjects of these two consolidated appeals, are right.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs, and that the cross-appeal should be dismissed without costs.

Solicitor for appellant: *Douglas Grant.*

Solicitor for respondents: *H. S. L. Polak.*

A.M.T.

PRIVY COUNCIL.*

RADHAKRISHNA AYYAR AND ANOTHER (APPELLANTS),

v.

SWAMINATHA AYYAR (RESPONDENT).

1920, December 3.

[On Appeal from the High Court of Judicature at Madras.]

Procedure—Appeal to Privy Council—Certificate of High Court—Code of Civil Procedure (V of 1908) sec. 109 (c), O. XLV, r. 3—Madras Estates Land Act, 1908, sec. 52, sub-sec. (3)—Puttah decreed under earlier Act—Res judicata—Special leave to appeal refused.

A certificate granted by a High Court upon a petition under Order XLV, rule 3, Code of Civil Procedure, for leave to appeal to the Privy Council should show clearly whether it is intended to certify merely that the case falls within section 110 of the Code or that it falls within section 109 (*c*) and section 110 as a case otherwise fit for appeal.

Upon a petition under Order XLV, rule 3, for leave to appeal from a decree of the High Court in a suit for the recovery of Rs. 4,605 rent, the High Court certified "that as regards the subject matter and the nature of the questions involved, the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council."

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* *Present*: Lord BUCKMASTER, Lord PHILLIMORE, Sir JOHN EDGE, Mr. AMEER ALI and Sir LAWRENCE JENKIN