

Sathappayyar Vs. Periasami

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Court : Chennai

Decided On : Aug-13-1890

Reported in : (1891)ILR14Mad1

Judge : Muttusami Ayyar and ;Best, JJ.

Appellant : Sathappayyar

Respondent : Periasami

Judgement :

Muttusami Ayyar, J.

1. This is a regular appeal preferred by defendant No. 1 from the decree of the Subordinate Judge of Madura, in the plaintiff's favour. The appellant is the paradesi or representative for the time being of a religious foundation called Sathappayyar's mutt, which is situated at Sivaganga, in the district of Madura; and the respondent is the present zamindar of Sivaganga, who succeeded to the zamindari upon his father's death in 1883.

2. The matter in contest between them is the appellant's liability to be removed from possession of the mutt and its endowments in order that they may be made over either to the respondent or to an ascetic whom he may hereafter appoint. The respondent insisted on the appellant's removal from his position, first, because he was a married man living with his wives instead of being an ascetic who had

renounced all secular ties, and, secondly, because he had violated the trusts of the institution by diverting the income of the endowment from its legitimate objects and mispending it upon his family and for his own purposes. Admitting his status as a married man, and the fact that he had two wives living with him, the appellant contended that the representative of the mutt was not bound to be an ascetic. He denied the alleged breach of trust and the respondent's right to interfere with the management of the mutt or its endowments. He urged further (i) that the Subordinate Judge had no jurisdiction to entertain the suit, (ii) that it was bad for misjoinder of causes of action, (iii) that it was not maintainable without the sanction prescribed by Section 539, Code of Civil Procedure, or Act XX of 1863, (iv) that the claim was *res judicata*, (v) that it was barred by limitation, (vi) that the respondent was not entitled to rely on matters which might have been, but had not been, urged by Rane Kattama Natchiyar, his predecessor in title, in Original Suit No. 20 of 1867, (vii) that he had no cause of action at all, and that, if he had any, he could only sue to compel the appellant duly to perform the trusts of the institution. The Subordinate Judge overruled all the preliminary objections, and held on the merits that the *paradesi* of the mutt must be an ascetic, that the appellant was guilty of breach of trust, and that the respondent was entitled to ask the Court to remove the appellant from his position and to provide for the due performance of the trusts of the mutt by a competent person. On this view of the case, he passed a preliminary decree declaring that the appellant had rendered himself unfit for holding the mutt and its endowments, that he was liable to be ousted therefrom, that unless he obtained an order from the Appellate Court within three months staying further proceedings, the Subordinate Judge would, after issuing a notification in as public a manner as the circumstances of the case might require, calling for candidates for the headship of the mutt and after consulting the wishes and opinions of the appellant and the respondent, proceed to appoint, as a new trustee, such person as might, by his qualifications and character, promise to advance the interests of the Institution, and after such appointment, to place the office and the properties in suit in his possession, removing the appellant therefrom. The Subordinate Judge directed also that the respondent's claim for *mesne profits* be dismissed and that the appellant do pay the respondent proportionate costs. Hence this appeal. The respondent too has objected to the

decree under Section 561 of the Code of Civil Procedure.

3. The institution came into existence in June 1734 under document I, which purports to be a 'charity-grant' and to evidence a gift of land made by the first zamindar of Sivaganga to his guru or religious preceptor Sathappayyar. Thus, the relation between the grantor and the grantee was that of disciple and preceptor. The grant was made in perpetuity and designed to endure so long as the sun and moon last and the line of disciples continues to exist. The grant purports also to have been made with power to alienate by sale or gift, but the power of alienation could only have been intended to be exercised consistently with the trusts mentioned in the instrument and without prejudice to the same. Though the transaction is described to be a gift of land, yet the document is termed a dharmasashanam or charity-grant. The land at Sivaganga, as comprised within the boundaries mentioned in the deed of endowment, is declared to be given in order that a muttam may be built thereon, that Sivayoga nishtai and other penances may be performed, and that the expenses of the necessary establishment may be paid. The first object of the gift or the first specific trust created by the document consists, therefore, in the erection and maintenance of a mutt in perpetuity, in the performance therein by the paradesi or head of the mutt for the time being of Sivayoga nishtai and other penances, and in the maintaining of the necessary establishment. Two more lands are described in the document to be granted for the performance of the annual gurupuja and for dehapuja.

4. Sivayoga nishtai is a form of meditating on god Siva in conventional use among paradesis or men of piety, and it consists in uttering alternately for a certain time, once in the morning and once in the evening, the two sacred words of five and eight letters, respectively, called panchaksharam and ashtaksharam with one's attention devoutly centered in God and in the attitude prescribed for religious meditation. In substance the expression denotes a form of worship and prayer. The expression 'gurupuja' signifies the annual ceremony performed by the head of the mutt for the time being in honour and for the spiritual benefit of his guru; and the word 'dehapuja' means, in polite language, the self-support of a person who has a sacred or religious status.

5. Apart from the specific trusts indicated by the terms of the grant, there are two more trusts to be noticed. The first of them consists in the distribution of food among paradesis or Sudra ascetics and others whenever gurupuja is performed, but it must be observed that it is not an independent trust, but only the accompaniment or incident of gurupuja according to religious usage. The other trust consists in opening and keeping up a water-shed in the mutt for the supply of drinking water to the poor during the hot season. Though the appellant denied in his evidence that it was customary to open and maintain a water-shed as part of the mutt charity, yet he admitted that the fact was otherwise in Exhibit P, as was deposed to by several witnesses cited by the respondent. The maintenance, therefore, of a water-shed for supplying drinking water during the hot season as part of the mutt charity rests on custom rather than on the original grant. Document I states that succession to the office of paradesi of the mutt shall be in the line of disciples, but it is silent as to how and by whom the successor is to be chosen. It was, however, finally determined in Original Suit No. 20 of 1867 that the right of appointment vested in the head of the mutt for the time being, and that it did not require to be confirmed or ratified by the zamindar. It is also in evidence that the paradesi presiding over the institution first makes a person his disciple by initiating him in what is called 'Brahmamantram,' then teaches him 'Sivayoga nishtai' and other penances and appoints him as his successor. After the death of the original grantee there have been five cases of succession, as shown below:

1 |

| Guru Sathappayyar or |

| original grantee. |

2 |

| Kailasa |

| Sathappayyar. |

3 |

| Muttunatha |

| Sathappayyar. |

4 |

| Chitananda |

| Sathappayyar. |

5 |

| Muthananda |

| Sathappayyar. |

6 |

6. As regards the status of these representatives of the mutt, the first three had renounced all secular ties and then entered the order of ascetics or paradesis. The fourth was a married man who left a widow surviving him, the fifth was a widower when he became a paradesi, and the sixth is a married man living with his two wives. It would seem that the third paradesi died without appointing his successor, and that it was the zamindar who selected him. It was probably in advertence to this fact that the High Court observed in its judgment in Second Appeals Nos. 569 of 1870 and 226 of 1871 that it was not to be understood as expressing any opinion against the zamindar's right to appoint a successor in the event of the last holder of the office failing to do so. The foregoing is a summary of facts throwing light on the nature and constitution of the mutt and on its trusts so far as they can be collected from the terms of the grant and the usage of the institution.

7. As to the preliminary objections to the suit, the question of misjoinder is not pressed in appeal. The contention regarding jurisdiction is that under Act XX of 1863, the District Court is the proper forum. This would be so if the institution were endowed and dedicated to any section of the public either as a place of worship, such as a temple, or a religious establishment where religious instruction is to be had like a public mutt. For Act XX of 1863 only replaced Regulation VII of 1817 so far as religious institutions are concerned, which, as shown by its preamble and its provisions, dealt with trusts, express or implied, created for public purposes, But the grant in the case before us discloses no intention to confer a benefit either upon the people in general or upon any class of sectarians; on the other hand, the grantor desired only to perpetuate the spiritual family of his guru by providing for succession in the line of his disciples and the religious services designated Sivayoga nishtai and gurupuja performed by the grantee by enjoining their continuance by his disciples. Neither the general public nor any section of the people had an interest either in the erection and maintenance of the mutt or in the performance of the prescribed religious duties, the motive for the grant being the

grantor's conviction that the performance of such services in perpetuity by the class of persons named by him in the mutt and with the aid of funds provided by him was an act of religious charity which would ensure the prosperity of his family. The original grantor and his descendants are thus the only persons interested in seeing that the institution is kept up for their benefit in accordance with the intention of the former. Although a few paradesis and others are fed when gurupuja is performed and a water pandal is maintained in the mutt during the hot season, these were not contemplated as independent charities in which any class of the public was to have a direct and independent interest. The decision in *Jusagheri Gosamiar v. The Collector of Tanjore* 5 M.H.C.R., 334 proceeded mainly on the ground that the Board of Revenue were bound under Section 4 of Act XX of 1863 to restore every endowment created for some religious purpose, which was in their possession, to the trustee entitled to its management. In *Agri Sharma Embrandri v. Vistnu Embrandri* 3 M.C.R., 198 it was held that the jurisdiction of the ordinary Courts was not excluded when the plaintiff sued only to establish his right to share in the management of a temple. Neither of these decisions is in point. It may be, as argued by appellant's counsel, that the oral evidence for the respondent is meagre so far as it tends to show that the mutt is the zamindar's private charity, but it is materially corroborated by the nature of the grant and the description of religious and other duties required to be performed in perpetuity. I am of opinion that the Subordinate Judge is well founded in holding that the trusts of the institution concerned in this litigation are in the nature of private trusts.

8. Another contention was that the zamindar had no cause of action. This rests mainly on the fact that Exhibit I does not state expressly that the grant is to be resumed, and that the paradesi is to be removed from his position as the representative of the mutt either if it is not kept up or if the prescribed religious service is not duly performed, but that on the contrary it enables the grantee and his disciples to alienate the land given by sale, gift, &c.; I consider that this contention was properly disallowed by the Subordinate Judge. Exhibit I shows that the land in dispute was given for a specific religious purpose in order that that purpose might be carried out in perpetuity for the benefit of the grantor's family, and the respondent, as the representative of that family for the time being, is

entitled to step forth when that purpose is neglected and the produce of the land is misapplied, and to ask the Court to prevent the misappropriation, and to see that the income of the endowment is applied to its legitimate purposes.

9. Again, Exhibit E, the inam register of Marudavayal, describes the grant as jivitam for the support of Sathappayyar's mutt at Sivaganga. Exhibits K, L and M, which are inam title-deeds, describe the land given as held in trust for the support of the mutt, and confirm the grant as one not to

be interfered with only so long as the conditions of the grant are duly fulfilled. Exhibits A, N and O also lead to the conclusion that the grant was conditional and not absolute.

10. The objection that the suit could not be maintained without the sanction prescribed by Section 539 of the Code of Civil Procedure is also not tenable, the section purporting in its terms to relate to trusts created for public purposes. The preliminary questions which remain to be considered are those of limitation and res judicata. As to the former, the suit is certainly not barred, the object with which it is brought being to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object. It is not simply a suit to remove a person from the management of an endowment on the ground that, although it is duly administered, the defendant has no personal right to administer it. If the appellant's removal from his position as paradesi of the mutt is part of the relief claimed in the plaint, it is only claimed as necessary to ensure due appropriation of the endowment to its original trusts. In this view of the nature of the claim, it falls, as suggested by the respondent's pleader, under section [Section 10:- Notwithstanding anything herein before contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.] Suits against express trustees and their representatives. of the Act of Limitations. Article 143:- Description of suit. Period of limitation. Time from which period begins to run. Like suit when the plaintiff has become or breach of condition. Twelve years. When the forfeiture is incurred or the condition is broken.]

to which our attention has been drawn on the appellant's behalf, is not applicable to suits in which the property has vested in trust for any specific purpose and there has been a continuous breach of trust.

11. Neither is the respondent's claim *res judicata* by reason of the decree in Original Suit No. 20 of 1867. That was a suit instituted by Ranee Kattama Natchiyar and her lessee to recover half of the village of Marudavayal from the present appellant together with monies collected by the execution-creditor in Original Suit No. 107 of 1865 and to set aside the attachment, made at his instance, in execution of the decree in the same suit. The ground of claim then urged as against the appellant was that the right of appointing heads of the mutt in dispute vested in the representatives of the grantor and that no zamindar appointed the appellant to the office. The High Court held on second appeal that the appellant was appointed by his predecessor in office, that the right of appointment vested in the latter unconditionally, and that the zamindar had no such right as he claimed except when the representative of the institution died without nominating his successor. The ground upon which the present suit is brought is that by reason of his status as a married man and of misappropriation of the endowment to his own purposes the appellant has become unfit to retain his office or continue in charge of the mutt and its endowments. Neither of these matters was the subject of adjudication in the previous suit, and in this sense the claim is not *res judicata*. But it is argued for the appellant that he had married prior to his accession to the office in 1858 and that his status as

a married man and his omission to rebuild and live in the mutt were grounds of attack upon which the ranee did not choose to rely, though they were available to her when she brought Original Suit No. 20 of 1867, and that her omission to do so precludes the respondent from urging them now in support of his claim. It may be that such omission is evidence that there was no breach of trust, but I am not prepared to say that when the breach of trust is clear, its condonation by a prior beneficiary is binding upon his successor so as to enable the trustee to take advantage of his own wrong and justify the continuance of the breach. In this case the disqualification and the misfeasance imputed to the appellant are said to have

continued even subsequent to the former suit and up to the date of the present action.

12. Passing on to the merits, the first question to be considered is whether appellant's status as a married man incapacitates him for presiding over the mutt. The Subordinate Judge has decided it in the affirmative, but the contention for the appellant is that a married man is not incompetent to preside over the mutt. The usage of the institution conveys the impression that either an ascetic or a married man is eligible for the office. In former times there was a conventional notion that the management of a religious charity by an ascetic was more disinterested than that of a married man, and, therefore, likely to prove more beneficial, but when the usage of the institution is clear on this point, we are not at liberty to ignore it. In ordinary parlance, the words *paradesi* and *mutt*, no doubt, designate a *Sudra* ascetic and the institution presided over by him, but they are of themselves inconclusive, since there are mutts in this presidency of which the representatives are not ascetics. Though the direction in Exhibit I is that succession should be in the line of disciples, it loses much of its significance when it is remembered that the succession ordained by the copperplate grant of 2nd May 1733, which was produced and acted upon in Original Suit No. 20 of 1867, was that of sons and grandsons. In Second Appeal No. 569 of 1870, which arose from that suit, the High Court, which then had before it both that grant and Exhibit I, observed that the phrase, in regular succession of sons and grandsons, should not be taken literally, but that succession by disciples qualified to discharge the peculiar trusts was in the contemplation of the parties. Referring to the appellant's evidence that the *paradesi* for the time being makes one his disciple by initiating him in what is called *Brahma mantram* and qualifies him for discharging the peculiar trusts of the mutt in question by teaching him *Sivayoga nishtai* and other penances, it does not appear that the successor must belong to the order of ascetics, though it is clear that he must be a qualified disciple in the sense indicated above. This view receives strong corroboration from the course of succession from the early part of this century. That the fourth *paradesi* left a widow surviving him at his death is clear from the judgment in Original Suit No. 110 of 1838, Exhibit F. The *Sudder Amin Pundit* says distinctly that 'since it is proved that the defendant is a woman married by the said *Sathappayya* (the fourth *paradesi*), and that the said person

lived with the said defendant, it follows that the plaintiff (fifth paradesi) should give food and raiment to the said woman and protect her to the end of her lifetime.' To this observation the Subordinate Judge declines to give effect and remarks that the Sudder Amin Pundit erred in directing the fifth paradesi to maintain the widow of the fourth, and that it might be that the latter did not live with his wife after he had become paradesi. But I do not deem it proper to impugn a judgment which has become final and hazard a statement at variance with it on mere conjecture. Another material fact overlooked by the Subordinate Judge is the conduct of successive zamindars from the time of the fourth paradesi to the date of the present suit. It is urged that the fifth was a widower, but there is nothing to show that he belonged to the order of ascetics as contradistinguished from that of grahastas. Nor does it appear that the Court of Wards raised any objection to the appellant's succession in 1858, whilst his evidence is that he was then not only married but had two wives as at present. It is, again, strange that Ranee Kattama Natchiyar should have ignored his status as a disqualification, if, as is now suggested, it should have rendered him according to the known usage of the institution ineligible for the office. The result of the evidence is that of the six paradesis who represented the mutt during a period of about 150 years, the first three belonged to the order of ascetics, the fourth was a married man, the fifth was a widower, and the sixth is a married man, whilst the grant did not enjoin, either expressly or by necessary implication, the status of an ascetic as a qualification, and whilst for more than fifty or sixty years there has been no trace of a consciousness either among the zamindars or the paradesis that such status is indispensable. The conclusion, therefore, I come to is that the paradesi for the time being may be either an ascetic or a married man, but that he must be initiated by his predecessor in Brahma mantram and in Sivayoga nishtai and other penances and to this extent be a qualified disciple.

13. I agree, however, in the opinion of the Subordinate Judge that the trusts of the mutt have altogether been violated, and the income of the endowment has been misapplied for a series of years. It is proved that the mutt building has ceased to exist and that no attempt has been made to restore it for more than twenty years. Though the appellant states that he attempted twice to rebuild it, but that he was prevented by the zamindar from doing so there is no evidence to corroborate his

interested statement. It appears also that no Sivayoga nishtai or any other penance nor gurupuja has been performed for more than ten years. Several witnesses cited by the respondent depose to that effect, and the appellant has called no evidence in answer to it, although considerable evidence must be available, if, as stated by him, he has continued to perform them in his own house. Another act of mismanagement shown by the evidence is the mortgage of portions of the endowment without adequate necessity. Although the alienees state that the money raised by the mortgage was applied to the payment of arrears of poruppu, the appellant has produced no evidence to explain why the poruppu was not regularly paid from the income derived from the lands. According to the Kurnams of the villages in which the lands are situated their average income is sufficient for the payment of poruppu and for the due execution of all the trusts. It is, again, in evidence that whilst no attempt has been made to keep up the mutt or restore it, the income of the endowment has been spent upon the improvement of the appellant's family house. The period during which these acts of mismanagement have continued shows that it has been wilful, and their continuance after the promise made at the inam inquiry to restore the mutt and after the execution of the kararnama A indicates that the mismanagement has been perverse as well as wilful. I, therefore, concur in the opinion that the appellant has been guilty of breach of trust for a series of years, and that in the circumstances of this case, it is necessary to remove him from management in order to ensure due performance of the trusts of the institution. On this ground I am of opinion that the appeal fails, and that it must be dismissed with costs.

14. As to the memorandum of objections, the first question is whether, in the contingency that has arisen, the respondent is entitled to the reversion of management of the endowment. By Exhibit I it is provided that the endowment should continue in perpetuity and that it should be administered by the head of the mutt for the time being. Consequently no right can be deduced from its terms for the respondent either to resume the endowment or to manage it in person. Though the trust created is one intended for the exclusive benefit of his family, all the members of that family are not plaintiffs in this suit. The only right which the respondent has as the representative and manager for the time being of the grantor's family is a right to claim due performance of the trusts of the institution by

a person competent to perform them according to the intention of the grantor and the usage of the institution.

15. Another contention is that the removal of the appellant creates a vacancy, that the power of appointment vests in the zamindar for the time being, and that the appellant, who is found to be guilty of breach of trust and dismissed from his office, ought to have no voice in the appointment of a new trustee. The appellant, who is dismissed, has lost his status as a paradesi of the institution, and the right to name his successor, which is an incident of that status, cannot subsist after the status itself has been lost. The direction, therefore, so far as it recognizes any right in the appellant to name a successor, must be set aside.

16. In the absence of a qualified disciple in whom the right of succession has already vested, the beneficiaries, who are the members of the zamindar's family, are the only persons interested in the appointment and entitled as such to express an opinion regarding the fitness of the proposed new trustee for the office. The case is then analogous to that of a vacancy arising from the death of a paradesi without appointing his successor, The proper decree is to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts as new trustee with the concurrence of the rest of his family, to direct him to do so within a given time, and, upon his doing so, to confirm such appointment after notice to the other members of the respondent's family, and to direct that upon such confirmation the properties in dispute be made over to the person newly appointed to be administered so as to carry out the trusts of the institution in accordance with its usage. The decree should further direct that on default of the zamindar's doing so, the suit do stand dismissed with costs. I see no reason to interfere with the decree of the Subordinate Judge so far as it dismisses the respondent's claim to mesne profits. The decree appealed against will be modified as indicated above.

17. There will be no separate costs on the memorandum of objections.

Best, J.

18. This is an appeal by the defendant against the decree of the Subordinate Judge of Madura (Bast) declaring that the appellant has rendered himself

disqualified to hold the office of head of a certain mutt and is liable to be ousted therefrom and from the possession of the properties appertaining thereto.

19. The suit was brought by the zamindar of Sivaganga, alleging that the properties in question were given by the zamindar's ancestors 'to the guru Sathappayyar in order that a mutt might be built on item No. 1 of the plaint schedule and concentrated meditation on Siva and other devotions might be performed, for the expenses of gurupuja and charities, with a view to the everlasting prosperity of the members of the zamindar's family,' that the said properties were held by Sathappayyar, and after him by succeeding gurus till they came to the possession of the present appellant, who has disqualified himself for holding the mutt and its properties by reason that he, (a) instead of being an ascetic, has intercourse with women and indulges in other pleasures, and, (b) instead of appropriating the income of the mutt to the devotions and charities thereof, he expends the same on women and his issue and for his own purposes.'

20. It is further alleged in the plaint that, in consequence of misconduct as above on the part of appellant, he was, in January 1883, removed from the headship of the mutt by plaintiff's father, who also attached the properties of the mutt, since which appellant 'without any regard to the devotions and charities which should be conducted in the mutt, with a view to the benefit of his issue and departing from the course of succession in the line of disciples,' has arranged that his son should get the properties in dispute after his death. Thus the son was included as the second defendant in the suit, and though the decree is silent on the point, the Subordinate Judge has in his judgment stated that his appointment by the first defendant (now appellant) is 'clearly fraudulent and unsustainable.' The son, however, is not a party to this appeal.

21. The first objection now urged is that the Subordinate Judge had no jurisdiction to entertain the suit, it being one coming within the scope of Act XX of 1863. But even assuming that the suit might have been brought under that Act, I do not find anything in that Act making it obligatory on parties to proceed thereunder and not otherwise. Section 14 merely provides that any person or persons interested in a temple 'may, without joining as plaintiff any of the other persons interested therein,

sue before the Civil Court,' (i.e., the District Court, see Section 2). As remarked in *Syed Amin Sahib v. Ibram Sahib* 4 M.H.C.E. 112--'The enactments in Sections 14 and 15 are enabling and intended to give to the persons described and who are individually not interested otherwise than in connection with others the right to sue individually;' and the proviso in Section 18 that 'no suit shall be entertained under this Act without a preliminary application being made to the Court for leave to institute such suit' was, I take it, intended for the protection of trustees, &c., from a multiplicity of suits. The wording of Section 14 is merely enabling and permissive and intended to apply to the case of only a few of the interested parties suing in the interest of the public. Where all the parties interested join in bringing the suit, and where, therefore, no special sanction of the Court is necessary, I see no reason why the suit should not be entertained in a Court having jurisdiction to entertain ordinary suits of the same value. Moreover, in the present case, the institution happens to be a private one created for the benefit of the plaintiff's family. I agree, therefore, with the Subordinate Judge in finding that this objection is not valid.

22. It is next objected that the suit is bad for want of sanction of the Collector under Section 539 of the Code of Civil Procedure, if not for want of sanction of the District Court under Section 18 of Act XX of 1863. It follows from what I have already said that I do not think the case is one requiring the previous sanction of the District Court under the latter Act, which, it is to be observed, only requires such previous sanction for the entertainment of a suit under that Act--and the present is not a suit brought under that Act; while as to Section 539 of the Code of Civil Procedure, not only has it reference to public charities, but just as is Section 14 of Act XX of 1863 so also is this section merely enabling and permissive, its object being to allow of two or more persons interested in a public institution to sue without joining all the others interested in the same, the previous sanction of a public official being prescribed in order to prevent a multiplicity of suits which might otherwise be brought.

23. It is next contended that the present suit is barred by Sections 13 and 43 of the Code of Civil Procedure as the present objection that appellant is a married man living with his wife and children might and ought to have been taken in the former

suit brought against him by the late Ranee of Sivaganga-- the judgments in which suit (1) in the Court of First Instance, (2) in the Appellate Court, and (3) in Second Appeal respectively are filed as Exhibits G., H. and J. That was a suit to remove this appellant from the office of guru on the ground that he had no right to it in consequence of his not having been appointed by the zamindari. If the fact of his being a married man disqualified him for the office, I think that this objection to him would not then have been lost sight of, for his marriage undeniably dates from a period prior to that suit. Though this objection to him might have been taken, then I am not prepared to say that it ought to have been taken. In any case the present suit alleges acts of misappropriation of the mutt property of more recent date, which could not have been urged in the former suit. I agree, therefore, with the Subordinate Judge in holding that the present suit is not barred either as res judicata or under Section 43 of the Code of Civil Procedure.

24. We now come to the main question which is the subject of the fourth issue recorded in the Court below in the following words: 'whether the allegation in clauses (a) and (b) of paragraph 3 of the plaint are true, and if so, has the first defendant become disqualified to continue as the head of the mutt?'

25. Clauses (a) and (b) of paragraph 3 of the plaint are as follows:

(a) Instead of being an ascetic he keeps intercourse with females and pursues other pleasures.

(b) Instead of appropriating the income of the said mutt for the up-keep of the devotions and charities of the mutt, he expends it on women and his issue and for his own purposes.

26. It is admitted at the hearing that by the 'females' in clause (a) and 'women' in clause (b) are meant only the defendant's wives, that no actual immorality is laid to his charge, and that the meaning of these two clauses is nothing more than that he lives with his wives and children and maintains them with the produce of the lands given for the maintenance of the mutt.

27. The question, therefore, narrows itself to this:--'Is defendant disqualified for the office of guru by the fact of his living with his wife and children and devoting to their maintenance the produce of this property given as an endowment for the office of guru?'

28. My opinion as to the first part of this question is that the mere fact of the defendant being a married man cannot be held to disqualify him for the office of paradesi of the mutt. Had such been the case, no doubt the objection would have been taken in the Ranee's suit of 1867. Moreover, it is seen from the evidence that the two immediate predecessors of the defendant were both married men and it is also in evidence that defendant was already married when he succeeded to the office of paradesi of the mutt in question. Further, as is seen from the judgments in the suit of 1867, in the copper plate produced in that suit, the succession prescribed was to 'sons and grandsons,' see Exhibit J. On a consideration of all these circumstances I come to the conclusion that the mere fact of the defendant being a married man and living with his wives and children is not a valid ground for removing him from his office of paradesi of the mutt.

29. But there remains the question whether he has by misappropriating the proceeds of the endowments rendered himself liable to dismissal from this office. It is proved that the mutt itself has ceased to exist and no attempt appears to have been made to restore it notwithstanding the defendant's undertaking at the inquiry before the Deputy Collector on behalf of the Inam Commissioner (in 1864) that he would 'build a separate muttam within a period of six months' (Exhibit E) and his subsequent promise to the same effect in the karar A, dated 22nd June 1878. At the same time the defendant's own family house has been improved. Moreover it is shown that the ceremonies for the performance of which the endowment was made have not been performed for some years past. The defendant has entirely failed to prove the performance of these ceremonies at his house, as stated by himself examined as the sole witness for the defence. He has also admittedly mortgaged portions of the endowed property, whereas, as appears from the evidence of the kurnams examined on behalf of the plaintiff, the income of the endowed lands was sufficient for both payment of the poruppu and also for the expenses of the pujas, etc., for which the endowment was made. There can be no

doubt, I think, as to the fact of the defendant having for years past misapplied the income of the endowed lands to the maintenance of his wives and children and to the improvement of his family house. This fact alone is sufficient to justify his removal from the office and to uphold the Subordinate Judge's decree to that effect.

30. I would therefore uphold the decree of the Court below modified as suggested by my learned colleague.

31. I agree in disallowing mesne profits and dismiss the respondent's objections taken under Section 561 of the Code of Civil Procedure except in so far as it relates to the first defendant having a voice in the appointment of the new trustee.

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