Privy Council Appeal No. 167 *of* 1924.

Manickavachaga Desikar and others - - - - - *Appellants*

v.

Paramasivan *alias* **Ramaswami Desikar and others** - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1928.

Present at the Hearing:

LORD PHILLIMORE.
LORD ATKIN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD PHILLIMORE.]

The plaintiffs in this suit who are respondents in this appeal claimed that they and the defendants were members of a joint undivided Hindu family, that the right to appoint to the office of Kilamadam Swamiyar vested in the family, and that the first plaintiff had been appointed to the office by the members of the family and installed and was entitled to hold the office. The defendant No. 1, however, had unlawfully claimed to have appointed to the office his infant son, defendant No. 2. The plaintiffs therefore brought this suit against defendants Nos. 1 and 2 and certain other members of the family, and claimed a declaration that the first plaintiff was the lawful holder of the office and an injunction restraining defendants Nos. 1 and 2 from setting up the title of defendant No. 2 and from imparting Upadesam as such Swamiyar or from receiving the fees and perquisites of the said office, and from receiving any portion of the income of the said Kilamadam village. The plaintiffs also claimed that delivery should be given to the first plaintiff of certain idols, vessels and jewels. The first and second defendants denied that the right to appoint to the office in question rested

with the family, said that neither the plaintiffs nor the defendants had any such right of appointment and submitted that such a right would be invalid in law. They claimed title for the second defendant as having been appointed by the last previous holder.

The seventh defendant set up in his turn a similar appointment by the last holder.

The plaintiffs applied to amend their claim and the amendment was, after certain interlocutory proceedings, allowed. By the amendment they set up an alternative case according to which the primary right to appoint vested in the last office holder and the right of the family only accrued by way of lapse if the last office holder had failed to appoint, and they averred that he had failed to appoint and that the right, therefore, had accrued to the family.

Both the Subordinate Judge and the High Court on appeal held that neither defendant No. 2 nor defendant No. 7 had been appointed as they severally alleged by the last office holder. Both Courts held that the last office holder had died without making any appointment.

The seventh defendant has not appealed. The first and second defendants are now appealing to His Majesty, but they have not sought to disturb the concurrent decisions of the two Courts on this head. They are now relying only upon their title by possession and the supposed infirmity of the plaintiffs' title.

There is no doubt that in some sense there has been a religious institution at this place from the twelfth century. However the priesthood may have descended previous to the year 1803, it is known that at that date one Minakshinatha was the Guru or Swamiyar and that he had a brother named Perumal, that the office passed from Minakshinatha to Perumal's daughter's son, one Subramania, whether by virtue of the family's claim to appoint or by nomination of the last holder, is not certain; that Subramania was succeeded by Ramaswami Ayyar, who was the younger brother of Kalyanasundaram Ayyar, both being grandsons of Perumal in the male line. How Ramaswami Ayyar came to be appointed is not clear, but when he died in the lifetime of his elder brother, the elder brother took possession of the village and the building, and when his claim to the rents of the village was disputed on the ground that they belonged to the Guru, and that there was no Guru, and that he as a married man could not be Guru, he bought a boy named Satyagari and purported to constitute him Guru, having made an agreement with the boy through his guardian that he, Kalyanasundaram, should receive the emoluments appertaining to the office, making a certain allowance to the actual holder Satyagari.

When Kalyanasundaram died, leaving a widow Minammal and two sons, the widow continued to occupy and manage the property, with Satyagari continuing as Guru for some years. Then he quarrelled with her, ceased to be an ascetic, which was

a necessary condition of being the Guru, married and went away in the year 1854, having been in office since 1836. Minammal then, whether in her own right or as acting for her sons, who were both still infants, appointed the younger one, Ramaswami Desikar, who died in 1907.

Thereupon the office remained vacant for a considerable time, but eventually in 1913 the present plaintiff, No. 2, was appointed by his family, and on 25th April in the same year he and his father brought the present suit.

That, in the first instance, the right of appointment belongs to the predecessor, and that any patron or patrons who appoint a Guru will by so doing part at the same time with the right to future appointments so long as each Guru in turn appoints his successor, cannot now be disputed. The plaintiffs in effect gave up the primary title under which they had at first claimed, and the Courts have decided against it. But if the Guru for the time being dies or resigns before appointing his successor, who is to appoint ?

One suggestion made for the appellants was that some family or families of the Chetty caste to whom the Guru imparts Upadesam may be held to have a proprietorship in the emoluments of the office, and to have thereby acquired the right to appoint. That anyone who pays fees or gives gifts in respect of spiritual benefits may, so long as it is a voluntary business, choose whom he thinks right to be his minister in spiritual things, and to be the recipient of his fees or gifts, is certain, and if these Chetty families think well to treat the second or the seventh defendant as their personal Guru, the Court cannot say nay. But if a Chetty family or a congeries of Chetty families may be patrons according to law, so might the plaintiff family be patrons, and the claim made for the Chettys has no support from the actual practice.

The only other suggestion to make, and this does not seem to have been mentioned till the case came before their Lordships' bar, was that the patronage in case of lapse devolved upon the Government ; but no sufficient reason was given in support of this eleventh-hour suggestion.

Still, no doubt, the plaintiffs must show a title under which they can recover. According to law the right of patronage may vest in a family, and this patronage may be exercised by appointing someone who is not a member of the legal family, as in the case of Subramania, who, though a relation in blood, derived his descent in the female line. Such an appointment might carry with it the danger that Subramania might have exercised his power by appointing a successor from his father's family. But he did not, and their Lordships find that the next Guru was a member of the plaintiffs' family in the male line. When he died, his elder brother successfully claimed to appoint the successor, being the boy whom he bought for this purpose. When that boy retired, the representative of the plaintiffs' family, possibly

with the consent of other members, at any rate, acting for all the male descendants of Kalyanasundaram, appointed the fifth Guru, who was in undisturbed possession for 53 years. If the hereditary right to appoint to the office is a possible legal right, and in their Lordships' opinion it is a possible legal right, there is sufficient evidence of its exercise. It must be remembered that the right now supported is not a right to appoint on every vacancy, but only a right to appoint by lapse, and therefore a right which would only occur at rare intervals. Their Lordships think that the conclusion at which the Courts in India have arrived is sound.

There is, however, a certain correction to be made in the form of the decree of the Subordinate Judge, which was affirmed in terms by the High Court. Part of the decree is expressed in these terms :—

> "That the defendants 1 and 2 be and are hereby restrained from setting up the title of second defendant as Kilamadam Swamiyar or Pandyanattu Mudanmaiyar Esanya Sivacharyar from imparting Upadesam as such Swamiyar or from receiving the fees and perquisites of the said office and from receiving any portion of the income of the said Kilamadam village."

Their Lordships on first perusal saw some cause to hesitate in supporting a decree which might seem to interfere with the religious practices and obligations of Hindu worshippers ; but it was pointed out to them that it was not proposed to restrain the second defendant from imparting Upadesam or receiving fees therefor, but only from so doing *colore officii* as Kilamadam Swamiyar. So taken, it may stand so far.

Then with regard to the restraint from receiving any portion of the income from the village, it was pointed out to their Lordships that some of the Chettys who were supporting the appellants in this appeal were in receipt of the income or some of the income from the village, which, so long as they received it, they might give to whom they pleased, and, therefore, if they so pleased, to the second defendant. To meet this difficulty it was suggested that after the word village should be added the words, "payable to the Swamiyar as such." This variation will not affect the incidence of the costs.

Their Lordships will therefore humbly recommend His Majesty that, subject to this variation in the form of the decree of the Subordinate Judge, this appeal should be dismissed with costs.

In the Privy Council.

MANICKAVACHAGA DESIKAR AND OTHERS

v.

PARAMASIVAN *alias* RAMASWAMI DESIKAR AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

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