

(1894) 10 MAD CK 0008
In the Madras High Court

Alagappa Mudaliar

APPELLANT

Vs

Sivarama Sundara Mudaliar and Others

RESPONDENT

Date of Decision : 25-10-1894

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 28

Citation : (1894) 4 MLJ 288

Judgement

1. This is an appeal from the decree of the Subordinate Judge dismissing the suit without costs. The judgment of the Subordinate Judge which on

the substantial issues of fact (the 1st, 2nd, 3rd and 6th is in the plaintiff's favour, proceeds upon contain grounds of law upon which also the

arguments in the hearing of the appeal turned. The judge's findings on the facts were not questioned. It is found as a fact that by agreement

between the three brothers a sale of certain properties by auction was effected and the plaintiff became the purchaser. The terms of the whole

arrangement are set out in Exhibit E. This sale included among other things the huk right of Vachakarapatti Choultry, the lands attached to the

Choultry and certain other lands the Kudivaram of which is vested in the family. As to these latter it is asserted on the defendant's behalf that they

also are part of the charity property. There has been no finding on the point.

2. The Vachakarapatti Choultry is one of several charities managed by the family to which the parties belong. It is admittedly a public charity.

There is no direct evidence as to the conditions fixed by the founder for the management of the choultry and its property or for the devolution of

the right of management. In the Inam statement made by the plaintiff's fattier Thittarappa, Chidambaranatha who is described as the latter's great

grandfather and manager of the charity, appears under the heading ""name of the original holder."" In another column it is said ""the Inam was granted to my ancestors by the Carnatic Rajahs for the purpose of conducting charity in the choultry etc."" Thittarappa, it appears, was one of three brothers who having previously divided among themselves their family property, in 1871, proceeded to divide the family charities. It is recited in the deed of 26th May 1871 that it was at first settled to manage in common the charities attached to the family, but that they had since come to another arrangement with regard to the same. Under that arrangement the Choultry now in question fell to the share of the plaintiff's father. He died in July 1877 leaving 2 sons Alagappa and Sivarama Sundara the plaintiff and defendant No. 1 and a third, then a minor, now defendant No. 2. In the same year it was agreed between the two adult brothers, that although the hukdarship was common to three, it should be registered in the name of the eldest the defendant No. 1. This is all the evidence adduced with regard to the management of the Choultry and it is not likely that more would be forthcoming, in as much as it appears from the pedigree that the grandfather and great grandfather of Thittarappa each left only one son. Judging from the scanty materials available, we think it must be taken to have been the intention of the founder of the Choultry that the office of manager should be held in common by the family of the original holder. No other rule of succession can well be suggested. The fact that in 1871 a division of the charities then belonging to the family took place is by itself no ground for holding that any other rule than that above stated holds good with regard to this choultry. It was argued by the plaintiff's Vakil that although the office of superintending religious or charitable institutions cannot be alienated like ordinary property, it is competent to any one member of the family interested to renounce or waive his right in the matter, Manchuram v. Pranshankar I. L R 6 B 298 Our attention was also called to the cases in which it has been held that one person may by force of the law of limitation lose his right to such an office and another may in the same manner acquire it. It is true that there is an apparent inconsistency in holding that by operation of law an alienation may be effected which cannot be effected by an act of the party. It may be suggested that the explanation lies in the fact that the law of limitation is a law of a general and positive character and that no exemption from it is allowed in the case

of charitable or religious offices. It is well settled that such offices cannot be alienated by the act of parties. The question then is whether the arrangement made in the present case amounts to an alienation. If it was a mere arrangement for the more convenient management of the choultry, reserving to the plaintiff's brothers their right of control and, if necessary, of resumption of actual management, then it might be said that there would no interference with the supposed will of the founder and that the arrangement would be lawful. To that extent it seems clear that any coparcener jointly entitled to management may waive his rights. But the transaction now before us is of a very different character. It is clearly intended that the brothers other than the plaintiff shall divest themselves altogether of all right of control over the choultry. For the future it was intended that the right of management should devolve in the line of Plaintiff and his heirs to the exclusion of his brothers. In our opinion it makes no difference that the alienee is a member of the same family. (See *Kuppa Gurukul v. Dorasami Gurukul*, I. L. R. 6. M. 76 and *Narayana v. Ranga*, I. L. R. 15 M 183 We think the Subordinate Judge was right in holding the alienation to be invalid.

3. The next question is whether the judge was right, in consequence of this ruling and for the other reasons given by him, in dismissing the suit altogether. His main reason for dismissing it was that in his view the stipulation that a formal document should be drawn up and registered showed that neither party intended to be bound until that was done. The Judge refers to *Ridgway v. Wharton*, 6 H. L. C. 238

4. In our judgment, the Subordinate Judge has misunderstood the law and the observations made in the case cited. The plain question is whether in fact the terms of the agreement have been definitively settled, or whether the matter rests in the stage of negotiation. Here there is no doubt that terms of the arrangement had been finally determined. There was a full and complete agreement between the parties and they must, as observed by Lord Cranworth, be bound by it, notwithstanding that they intended to have a formal agreement drawn up. 6. H. L. C. 268

5. Then it is said that, as part of the agreement is void and therefore cannot be enforced, the plaintiff ought not to have a decree (sic) specific performance as to the remainder. But for the offer made before us by the plaintiff's vakil, there, would certainly be a difficulty in decreeing specific

performance in part. The plaintiff is by the contract under an obligation to pay Rs. 7,500 as the price of two properties. It is not clear whether he has paid the money, or not. However, he is willing to pay it as the price of the one property only in respect of which the agreement is lawful. That being so, no question arises as to the apportionment of the money between the legal and the illegal parts of the transaction. The plaintiff being content to pay the whole consideration, we see no reason why the defendants should not be compelled to perform that part of the contract which is lawful. The defendant's Vakil could not suggest that there would be anything inequitable in such a decree; he only objected that the plaintiff's offer was not made in the court below. This is a matter with which we can deal in our order as to costs.

6. On behalf of the defendant No. 3 the minor son of defendant No. 1, a further objection is taken to the frame of the suit. It is said that he was improperly made a party to a suit for specific performance, because he was not a party to the contract and no other cause of action could properly be joined in this suit. It is clear that against him there can be no decree for specific performance, and indeed the plaintiff does not ask for such relief against him. But the plaintiff is interested in having him before the court in order to obtain an adjudication against him as well with regard to the existence of the contract as with regard to the question whether the contract is of such a nature as to be binding on him. The objection that such a decree as is required against the defendant No. 3 is one which cannot be combined with a decree for specific performance against the other defendants appears to us to be met by Section 28 of the Code of Civil Procedure. According to that section all persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative in respect of the same matter. The reasons for giving this latitude are explained in *Honduras Railway Company v. Tucker* L. R. 2 Ex. D 301 where also specific performance was part of the relief claimed. We observe that this authority is not mentioned in *Luckumsey Ookerdu v. Fazulla Cassumbhoy*, I. L.R 5 B 189 a case somewhat resembling (sic) present. It appears to us that there is here one and the same matter, namely, the contract between the plaintiff and his adult brothers in respect of which he has a right to relief against them and also against the minor defendant. It is immaterial that the relief is not the

same in born cases Janokinath Hookerjee v. Runjun Chuckerbutty I L. R. 4 C 949 and Rajdhur Chowdhry v. Kallkristna Bhattacharjya, 8 C,

963). Certainly the present case is within the reason of the rule, for it would be most inconvenient to leave to be decided in another suit against the

minor defendant the question above mentioned. Of these questions, the latter has been left undetermined, although in the written statement of the

minor defendant there is an allegation that the arrangement between the three brothers is prejudicial to his interests. If the plaintiff desire to have any

decree against the minor defendant, there must be a finding on the issue whether the said arrangement was made in fraud of the interests of the

minor defendant. There must also be findings on the 8th, 9th, 10th and 11th issues.

7. As to the memoranda of objections, we see no reason to interfere in the matter of costs on which the Subordinate Judge has exercised his

discretion.

8. Findings on the evidence already recorded are to be returned within one month from the date of the receipt of this order and seven days will be

allowed for filing objections after the findings have been posted up in this Court.