
(1931) 03 MAD CK 0006
In the Madras High Court

Appasami Pillai

APPELLANT

Vs

Ramu Tevar

RESPONDENT

Date of Decision : 16-03-1931

Acts Referred:

Evidence Act, 1872 — Section 32

Citation : AIR 1932 Mad 267 : 136 Ind. Cas. 340 : (1931) 34 LW 776 : (1931) 61 MLJ 887

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—This second appeal arises out of a suit by one Ramu Tevar to recover certain properties of which he had been appointed

trustee by their owner Nilambal Achi, who endowed them for puja and other purposes of Sri Sundaramurthi Swami. Nilambal Achi died on the

28th of May, 1923. The plaintiff alleges that he was managing the properties on behalf of Nilambal Achi during her life-time and continued to be in

possession after her death. He leased them to the 3rd defendant on the 9th of June, 1923. Defendants 1 and 2 prevented the 3rd defendant from

obtaining possession. They claimed to be reversioners to the estate of Nilambal Achi's father Appa Pillai, after Nilambal Achi's death. But the 2nd

defendant sold his share of the property to the 1st defendant and has no further interest in this suit. The 1st defendant contended that on Appa

Pillai's death his two widows, Thayyamuthu Achi and Kamalathachi, succeeded to his estate, that after their death the estate devolved upon their

daughters, Nilambal Achi and Palanivelu Achi, and after the death of Palanivelu Achi, Nilambal Achi became the sole owner and that on her death

on the 28th of May, 1923, defendants 1 and 2, the reversioners, became entitled

to the property. The plaintiff meets this case by relying upon a gift of the suit property by Appa Pillai to Nilambal Achi at the time of her marriage. Both the Lower Courts have decreed the plaintiff's suit. The 1st defendant appeals.

2. The first point, therefore, that arises in this second appeal is whether the gift to Nilambal Achi by Appa Pillai was true. One important evidence of this gift is Ex. M-2, which is a deed executed by Thayyamuthu Achi on the 20th of September, 1879, in which she recites the gift by her husband and herself to Nilambal Achi as stridhanam at the time of the marriage and purports to execute a formal conveyance in pursuance of the oral directions of her husband. The learned Advocate-General who appears for the appellant contends that the recitals in Ex. M-2 are not admissible in evidence. He relies on the decisions in *Brij Lal v. Inda Kunwar* (1914) ILR 36 A. 187 : 26 M.L.J. 442 (P.C.), 19 CWN 370 (Privy Council) and 21 CWN 225 (Privy Council) . These are all decisions of the Privy Council and it is laid down in these cases that where a widow effects an alienation for alleged necessity, recitals of existence of such necessity in the document itself are not evidence of the existence of the necessity. In *Brij Lal v. Inda Kunwar* ILR (1914) 36 A. 187 : 26 M.L.J. 442 (P.C.) it is laid down:

Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Hoard that to substantiate the allegation there must be some evidence aliunde.

3. The use of the words ""by themselves"" shows that the recitals are not inadmissible in evidence and the effect of the observation is merely that without other evidence they are not enough to prove the necessity. The judgment of the Privy Council makes no reference to Section 32 of the Indian Evidence Act. From the report of the case in *Lola Brij Lal v. Mt. Inda Kunwar* ILR (1914) 36 A. 187 : 26 M.L.J. 442 (P.C.) it appears that Sir E. Richards, K.C., the learned Counsel for the appellant, relied on Section 32 of the Indian Evidence Act, but none of the reports shows that there was any admission in the mortgage deed or sale deed which would be strictly covered by Section 32 of the Evidence Act. In 19 CWN

370 (Privy Council) it is observed:

To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her

can be supported only by proof aliunde that such debt was contracted or such alienation was made for valid and legal necessity, etc.

4. No reference was made to Section 32 of the Evidence Act either in the argument or in the judgment. It must be assumed that the recitals in the

document concerned in that case were not covered by Section 32. The same remark applies to the decision in 21 CWN 225 (Privy Council) and

to Marimuthu Pillai v. Velu Pillai (1915) 32 I.C. 908. The decision in R. Ramachandrayya v. B. Janakiramayya (1914) M.W.N. 874 relates to an

alienation by a guardian on behalf of a minor and does not help us in this case. But apart from all the above remarks the present case is not one of

an alienation for necessity. Ex. M-2 is more in the nature of an admission of a preceding gift rather than a case of a new attention. I doubt if the

principle of the above cases applies to a case like the one before me. In my opinion the recitals in Ex. M-2 are admissible in evidence. Vide also

Sita Ram Singh v. Khub Lal Singh ILR (1925) 5 Pat. 168. There is also other evidence in the case from which a gift by Appa Pillai to his daughter

can be inferred, for example, Ex. U seems to furnish strong evidence in support of the plaintiff's case. The main part of the document is simply the

report of the Revenue Inspector. To the report a statement made before the Revenue Inspector by the present 1st defendant is appended. Though

this statement makes reference to the transfer by Neelambal Achi of her lands to Sri Sundaramurthi Swami, no dispute was raised as to her title to

the lands or her capacity to grant them to the deity. The only claim made in that statement is that he was her heir after her death in respect of the

trusteeship. It is open to the Court to infer from this document that he never meant to question her title. When it is remembered that Thayyamuthu

Achi was the step-mother of Neelambal Achi and not her mother and thus there is no suspicion of collusion, it is open to the Court to infer that the

gift by Appa Pillai to Neelambal Achi was proved. I am, therefore, bound in second appeal to accept the finding of the Courts below in this case

that the gift to Neelambal at the time of her marriage was true.

5. The next question that arises in the case is whether even then the plaintiff is

entitled to maintain the suit. Both the Lower Courts- find that the plaintiff was appointed trustee by Neelambal Achi, but it is contended for the appellant that this appointment is invalid: Neelambal Achi had previously executed a deed of settlement, Ex. A, dated 23rd November, 1899, under which she appointed one Kandaswami Thevar, her cousin and his sons and grandsons and so on for generations to continue to conduct the said charities after her life-time for ever, and it is contended that having appointed Kandaswami Thevar she had not, thereafter,, power to appoint another trustee. Kandaswami Thevar died in 1914 during her life-time and probably because he showed no inclination to undertake the trust, Neelambal appointed the plaintiff as trustee in 1913 and though the appointment of the plaintiff might have been invalid and useless in the event of Kandaswami Thevar surviving Neelambal Achi and accepting the trust, I do not see why the appointment should be held to be invalid in the events that happened, namely, Kandaswami having predeceased Neelambal Achi and his two widows not accepting the trust. In the first place I doubt whether the words ""sons, grandsons and so on for generations"" in Ex. A should be construed as words of limitation and not as words of purchase. It is true that if an estate is granted to a person and his sons and grandsons for generations these words merely indicate the nature of the estate taken by the grantee, namely, an absolute estate. One may also assume that this rule applies even to trusteeship; but in the present case the document does not say that the trusteeship is conferred upon Kandaswami Thevar, his sons and grandsons and so on for generations but it simply says that the said dharmas ought to be conducted after her life-time and Kandaswami Thevar and his sons and grandsons and so on for generations should continue to conduct for ever the said charities. Even assuming that this sentence can be regarded as a sentence conveying trusteeship to Kandaswami Thevar absolutely, seeing that Kandaswami has not accepted the trusteeship during the life-time of Neelambal Achi, though the trusteeship was to take effect only after her death and seeing that he did not survive Neelambal so as to have an opportunity of accepting it after her death, it seems to me that the trusteeship never vested in him at all and did not descend upon his heirs. The learned Advocate-General contended that even if Kandaswami Thevar did not accept the

trusteeship during the life-time of Neelambal Achi it was open to his heirs to accept it after Neelambal's death, because he contends that the estate conferred by the document which is not a will but a deed of settlement is a vested estate in the trusteeship after Neelambal's death, that is a vested remainder in the trusteeship. This might have been so if Kandaswami had accepted the trusteeship during Neelambal's life-time, Krishna Pillai Vs. Arunachela Chettiar, but as he never accepted it I think the estate conferred by the settlement deed remained only a contingent estate and when he died there was nothing to be transmitted to his heirs. No authority has been cited on either side in support of the respective contentions on this part of the case and the matter is one of first impression and I hold that in such a case no estate descended upon the heirs. On this view the plaintiff is a validly appointed trustee, even though he was appointed without waiting for Kandaswami's refusal. But even assuming that the above view is incorrect and that some estate descended to the heirs of Kandaswami we have to see the conduct of Kandaswami's heirs. Kandaswami left two widows and these are defendants 4 and 5 in the case. The 4th defendant is a sister of the 2nd defendant and half-sister of the 1st defendant. They filed a written statement which shows that they were not anxious to have the trusteeship and that they were anxious to support defendants 1 and 2. Their statement in paragraph 6 of the written statement shows that their attitude is adverse to the trust. The mere fact that they proceed to state further, ""If the Court holds that Neelambal Achi was legally entitled to endow the said properties for charities, we are prepared to manage the same"" cannot conceal the fact that they were really in collusion with the 1st defendant who was acting adversely to the trust, and their primary contention being that Neelamhal Achi had no power to endow the suit property for charities they must be taken not to have accepted the trust and their willingness to manage the trust on the happening of some contingency cannot be regarded as an acceptance. On this ground also, the appointment of the plaintiff as trustee becomes operative. But even if I am incorrect in the view I have taken about the construction of the written statement, still it is now clear that the plaintiff is the only trustee who is willing to act because after the decree of the Lower Appellate Court, the 5th defendant never filed an appeal to the High Court. The 4th defendant filed Second Appeal No. 1233 of 1927. She died and the appeal abated. So

far as the 5th defendant is concerned, taking her written statement, with her subsequent conduct in not appealing, one must infer that she is not anxious to be a trustee. Once the finding that there is a trust is reached, it is the idol that is really entitled to the suit properties. Who exactly should be the trustee representing the idol is really a different matter. Any difficulty in deciding that question ought not to prejudice the rights of the idol. It has been held in several cases that a de facto trustee can maintain a suit to recover trust properties. See *Mahomed Ibrahim v. Sundaram Chetti* AIR 1926 M. 1066 *Benarsi v. Altaf Husain* (1921) 62 I.C. 171, *Kasi Chetty v. Srimathu Devasikamony Nataraja Dikshitar* (1913) M.W.N. 181 and *Moideen Bibi Ammal by agent Montana Sahib Vs. Rathnavelu Mudali*, . It is true that in the decision in *Kasi Chetty v. Srimathu Devasikamony Nataraja Dikshitar* (1913) M.W.N. 181 the plaintiff was in possession of the property in suit and it was held that he was entitled to maintain a suit to eject a tenant. But it is not clear from the other cases that the prior possession in the de facto trustee was an essential element in upholding his right to maintain the suit. It is clear from the cases mentioned above that the conclusion arrived at in those cases was not based upon the well-known principle that a person without title but who had possession can maintain a suit to recover possession from a trespasser who does not claim under leave and licence of the lawful owner but on a different principle, namely, that a de facto manager of a trust should be allowed to maintain a suit which is for the benefit of the trust in spite of some defect in his title as trustee. This, of course, does not mean that any person can call himself a trustee and maintain a suit to recover trust properties from trespassers. It is not that a de facto trustee is like a next friend of a minor, but in the present case the plaintiff is a person appointed trustee by Neelambal Achi. He entered on the duties of the trustee. He leased out suit properties to the 3rd defendant. It is by reason of bona fide acts of this kind that he should be regarded as the de facto trustee and I think as such de facto trustee he is entitled to maintain the suit whether he actually had prior possession or not. But even if it were otherwise the right to possession in Neelambal Achi certainly passed to him for it is now found that he is the reversioner to Neelambal's estate. That would be enough to enable him to maintain the suit.

6. For all these reasons the second appeal fails and is dismissed with costs.