

(1927) 05 MAD CK 0040
In the Madras High Court

Chockalingam alias Appasami Mudaliar	APPELLANT
Vs	
Duraiswami alias Rathnasabapathi Mudaliar and Others	RESPONDENT

Date of Decision : 04-05-1927

Acts Referred:

Citation : AIR 1928 Mad 327 : (1928) ILR (Mad) 720 : 108 Ind. Cas. 305 : (1928) 54 MLJ 479

Hon'ble Judges : Srinivasa Aiyangar, J;Kumaraswami Sastri, J

Bench : Full Bench

Judgement

Kumaraswami Sastri, J.—This appeal arises out of a suit-filed by the plaintiff claiming to be the trustee of the three endowments which are referred to in the plaint as the Chidambaram, Mailam and Alapakkam charities, for a declaration that he has been legally and validly appointed trustee by Murugayya Mudaliar, the previous trustee, for recovery of possession of the properties mentioned in the plaint and situate in British India, for costs and further relief.

2. The plaintiff is the son-in-law of the last trustee Murugayya Mudaliar while the 1st defendant is his brother's son. The 1st defendant claims that he is the properly constituted trustee. There is no dispute that Murugayya Mudaliar was the last trustee and that he executed Exhibits I and II appointing the 1st defendant as trustee and revoked the appointment by Exhibits H and H-I appointing the plaintiff as trustee. The Subordinate Judge was of opinion that Exhibit I is invalid but that Exhibit II is valid and binding and that both by virtue of Exhibit II and by virtue of certain proceedings in the Pondicherry Court the appointment of the 1st defendant is valid and is not defeated by the subsequent wills, Exhibits H and H-I, in favour of the plaintiff. Hence the appeal.

3. There is no dispute about the relationship as set out in the geneological table annexed to the plaint from which it appears that Pichya Mudaliar the propositus had two sons, Thoppai Muthia Mudaliar and Thoppai Sabapathi Mudaliar, that Thoppai Muthia Mudaliar had three sons, Ananda Thandavaroya Mudaliar, Ayyasami Mudaliar and Periyasami Mudaliar; that Ananda Thandavaroya Mudaliar

had three sons, Murugayya Mudaliar, Velayutha Mudaliar and Nataraja Mudaliar, and that Velayutha Mudaliar's son is Rathnasabapathi Mudaliar, the 1st defendant.

4. The three charities were founded under the three deeds, Exhibits A, B and C. The first Exhibit A is dated the 15th of January, 1862, and is executed by Thoppai Muthia Mudaliar and Thoppai Sabapathi Mudaliar and his three sons. It refers to what is known as the Chidambaram charities. The charities were all to be performed in British India and the lands endowed were all situate in British India. As regards devolution the material portion of the document runs, as follows:

The said donors further stated that the management of the said Nanja and Punja lands and the said sum of Rs. 2,000 shall be with the said Ayyasami Mudaliar, one of them, that he shall keep the sum with him and pay interest thereon at 10 per cent., and out of the interest and out of the income of the said nanja and punja lands, after deducting the sircar kist, shall be conducting the charities of the said Thoppai Mudaliar's chatram and the charities of the said temple for ever so long as the sun and the moon last, that after his life time, the persons appointed by him shall conduct the aforesaid charities as aforesaid and that they shall in future have no manner of right, title or interest in the said lands and Rupees two thousand.

Exhibit B which relates to what is known as the Mailam charities is dated the 19th of April, 1867, and is executed by Thoppai Muthia Mudaliar, Thoppai Sabapathi Mudaliar, and Thoppai Muthia Mudaliar's son Ananda Thandavaroya Mudaliar. This deed endowed properties both in Pondicherry and British India and relates to the performance of the charities in British India and Pondicherry. The deed constitutes Ayyasami Mudaliar as the first trustee and gives him power to appoint a person after his lifetime. The third deed Exhibit C which relates to what is known as the Alapakkam charities is dated the 24th of January, 1874, and is executed by Ananda Thandavaroya Mudaliar, and Ayyasami Mudaliar is constituted as the trustee and the devolution is on the male heirs of Ayyasami Mudaliar. There is no power of appointment given.

5. The correct translation as regards the power of devolution given in the first two documents is thus given by the Subordinate Judge in his judgment:

that he himself should at the time of his death appoint a person to administer the said charities after his death.

6. Exhibit I is dated the 29th of June, 1913, and it purports to be an agreement regarding the administration of the dharmam. It is executed by Murugayya Mudaliar in favour of Rathnasabapathy Mudaliar, the 1st defendant. After reciting that Thoppai Muthia Mudaliar the grandfather endowed properties for dharmam and that his son Ayyasami Mudaliar conducted the dharmam and appointed the executant Murugayya Mudaliar to administer the dharmam which he has been conducting, it goes on to state:

Since in order that the said dharmams may be conducted regularly and for ever, it is absolutely necessary that they should be conducted by the descendants of Muthia Mudaliar who instituted the dharmams originally the following agreement has been entered into by us:

For the reasons aforesaid the said Murugayya Mudaliar appoints his younger brother's son, Rathnasabapathi Mudaliar, for conducting the said dharmam after his (Murugayya Mudaliar's) lifetime.

Further he appoints the said Rathnasabapathi Mudaliar to administer the dharmam relating to the chatram also which the said Ananda Thandavaroya Mudaliar has constructed in Alapakkam in Cuddalore taluk in British territory.

7. Exhibit II which is dated the 6th of March, 1914 is executed by Murugayya Mudaliar in favour of Rathnasapathy Mudaliar, It begins as follows:

As some particulars have not been recited in detail in the agreement in the matter of the administration of charities which has already been executed on the 29th June, 1913, as between these persons, the present agreement in the matter of the administration of charities has been executed.

Then it gives the history of the three charities and the names of the successive trustees and states that the executant Murugayya Mudaliar was conducting the charities according to the trust constituted. Then it goes on as follows:

As considering that I am now advanced in age the following agreement has been executed as between us in order to ensure the proper performance of the charities in future. For the aforesaid reasons, I, the aforesaid Murugayya Mudaliar, do hereby declare that I have appointed Rathnasabapathy Mudaliar alias Duraiswami Mudaliar, one of the sons of my junior brother Ananda Velayuda Mudaliar, in order to perform the said charities properly in future as heretofore and that I have hereby transferred to the said Rathnasabapathy Mudaliar all the privileges and powers vested in me by my junior paternal uncle, the said Ayyasami Mudaliar, so far as the aforesaid administration of the charities is concerned.

The said Rathnasabapathy Mudaliar alias Duraiswami has also consented to administer the said charities.

However, I, the said Murugayya Mudaliar, reserve to myself the power to give during my lifetime, whenever necessary, my advice to the said Rathnasabapathy Mudaliar alias Duraiswami in the matter of the administration of the said charities.

8. I may state here that this clause about advice does not mean much as there is nothing to compel Rathnasabapathy Mudaliar alias Duraiswami Mudaliar to accept the advice and act up to it. Exhibit II was impugned by the plaintiff as a forgery. It appears from the proceedings in the Pondicherry Court, a copy of the judgment in which has been filed as Ex. IV, that a suit was filed in Pondicherry against Murugayya Mudaliar by Rathnasabapathy Mudaliar for possession of the

deeds relating to the charity and for possession of the charity properties in Pondicherry on the ground that Rathnasabapathy Mudaliar was the only constituted trustee, and that the genuineness of Exhibit II was impeached by Murugayya Mudaliar, as also the validity of the appointment of Rathnasabapathy Mudaliar. An issue was directed by the Pondicherry Court as regards the genuineness of the document and two experts were examined. Murugayya Mudaliar did not let in any evidence and remained ex parte when this question was tried and the French Court found Exhibit II to be genuine. He then appeared and raised the question as to the right of the defendant to get possession of the documents relating to the trust. The first court held that Exhibit II did not empower Murugayya Mudaliar to appoint the 1st defendant as trustee so as to give a present right for the recovery of deeds and property but the appellate court reversed the decision. Murugayya Mudaliar died during the pendency of the proceedings in appeal and the present plaintiff was brought on record. The Subordinate Judge finds Exhibit II to be genuine both on the evidence and because of the decision of the Pondicherry Court.

9. It has been argued by the appellant that it is improbable that Exhibit II would have been executed by Murugayya Mudaliar as it appears there were proceedings in the French Court, for partition which resulted in seals being put on the house of Murugayya Mudaliar, that the feelings between the parties were strained, that the deed of partition executed shortly before contains no indication that Murugayya Mudaliar was going to divest himself of the management, that it is extremely unlikely that Exhibit II would have been executed shortly after the partition, that Exhibit II is not registered in any form that required Murugayya Mudaliar's presence and assent and that : there is difference in signatures. I confess that there is considerable force in the argument of the appellant, but Murugayya Mudaliar did not contest the genuineness of Ex. II, which was found by a competent court in Pondicherry to be genuine. I do not think there are sufficient grounds for reversing the view of the Subordinate Judge as to Exhibit II. After Ex. II was executed, Murugayya Mudaliar cancelled the appointment under Ex. II first by the will Ex. F and then by another will Exhibit G appointing different persons as trustees and lastly by Exhibits H and H-(I) in favour of the plaintiff his son-in-law. There is no dispute as to the genuineness of Exs. H and H-I and the question is whether Exhibits H and H- (1) give the plaintiff a right as against the first defendant who was constituted trustee under Exhibits I and II.

10. So far as the Alapakkam charities constituted by Exhibit C are concerned, it is clear that Ayyasami Mudaliar had no power of appointment given to him. The deed expressly states that the trusteeship after the lifetime of Ayyasami Mudaliar is to descend to his male heirs, and Murugayya Mudaliar has left two sons, Subramania Mudaliar and Kunchithapada Mudaliar. As "regards this charity neither the plaintiff nor the 1st defendant has any right.

11. It is argued that Murugayya Mudaliar prescribed for a trustee involving powers of nomination and that although the original deed did not give him the

power he is entitled to nominate, and reliance is placed on Annasami Pillai v. Ramakrishna Mudaliar ILR (1900) M 219 : 11 MLJ 1. There is nothing in the evidence or in the conduct of Murugayya Mudaliar to show that he prescribed for any such power as regards the Alapakkam charities. The mere fact that he executed Exhibits I and II and H and H-(I), would not show that he prescribed for any such power.

12. It is argued by Mr. Bhashyam that the plaintiff is under the will of Murugayya Mudaliar entitled to get the properties from the defendants although it may be his duty to hand them over to Murugayya Mudaliar's sons. I do not think that having regard to the present suit which is one in ejectment any relief can be given to the plaintiff unless he proves his own title. The infirmity of the 1st defendant is no ground for giving any relief to the plaintiff. It will always be open to persons who are really entitled to sue the defendants and get possession if they establish their claim.

13. As regards the other two charities, two questions arise, the first as to the validity of Exhibits I and II and the second as to the force of the judgment of the Pondicherry Court. I have already referred to the suit filed in the Pondicherry Court by the 1st defendant against Murugayya Mudaliar. As regards Exhibit I, the Subordinate Judge finds that it is invalid as it was obtained under coercion and undue influence.

14. The facts which led up to Exhibit I and which are not disputed before us are shortly these. Prior to the execution of Exhibit I, Murugayya Mudaliar and the 1st defendant were members of an undivided family. Disputes arose owing to Murugayya Mudaliar wanting to marry his daughter to the plaintiff and the 1st defendant wanted to prevent the marriage and get a partition of the properties. The 1st defendant filed a suit in Pondicherry claiming a partition and during the absence of Murugayya Mudaliar in Chidambaram he got the house of Murugayya Mudaliar sealed. Then there was some mediation and Exhibit I was executed the day before the seals were removed. The Subordinate Judge believes the evidence that Murugayya Mudaliar did not freely and voluntarily execute Exhibit I, but did so on pressure and to get the seals removed. He believes the plaintiff's 2nd and 3rd witnesses who state that the 1st defendant wanted Murugayya Mudaliar to execute Exhibit I, before he asked the seals to be removed. I agree with the Subordinate Judge in thinking that Exhibit I is Invalid.

15. The law is clear that in cases of powers of nomination given to trustees to appoint successors, they should be executed bona fide in the interests of the trust and not to secure a personal advantage. This is the law even as regards ordinary powers and I think it applies a fortiori to cases of religious or charitable trusts, where elements of personal gain or advantage should find no place in the appointment, the benefit to the institution being the sole consideration.

16. As regards Exhibit II it was executed on the 6th of March, 1914. The deed of partition Exhibit III is dated the 23rd of February, 1914. The evidence of the

plaintiff's 2nd and 3rd witnesses whom the Subordinate Judge believes shows that at the time Exhibit I was executed the 1st defendant wanted an immediate transfer of the trust to himself and that Exhibits I and II and the partition deed were really parts of one transaction. In fact Exhibit II begins by stating that as some particulars have not been recited in detail in Exhibit I, the present agreement was executed to supply the details which were not mentioned in Exhibit I. If Exhibit II is treated as a ratification of Exhibit I, it is clear that, Exhibit I being absolutely void as being a fraud on power having regard to the circumstances under which it was executed, Exhibit II would be invalid as a ratification of Exhibit I. There can be no question that a void transaction cannot be ratified. Mr. Varadachari argues however that Exhibit II could be taken as a fresh appointment. Having regard to the facts of the case, I doubt whether Exhibit II can be treated as a fresh appointment where, on the face of it, it states that it was executed to supply certain omissions in Exhibit I. But even if it is taken to be a fresh appointment, the onus is heavily on the 1st defendant to show that on the date on which Exhibit II was executed, the influences which led to the creation of Exhibit I were entirely absent and that Exhibit II, was uninfluenced by any considerations except the good of the trust. I need only refer to 23 Hals., Section 53, *In re Wright : He gan v. Bloor* LR (1920) 1 Ch. 108 , *Zopharm v. Duke of Portland* (1870) LR 5 Ch. A and *Humphrey v. Dmies* (1859) 28 LJ Ch. 406. Exhibit II purports to be an immediate transfer of the right to the office, and, as I have pointed out, the power to advise gives no effective control to Murugayya as the power is merely advisory.

17. It is clear from the deed constituting the Mailam and Chidambaram trusts that the devolution of trusteeship is not to be hereditary in the line of the founders but by successive appointments and so no question arises as to the transfer by one trustee to the next in the line of succession.

18. It has been held that a trustee is not entitled to transfer such a trust in his lifetime. In *Narayana v. Ranga* ILR (1891) M 183 : 1891 2 MLJ 19 , *Muthuswami Aiyar and Shephard, JJ.*, held that the transfer of a religious office was invalid except possibly in the case of transferees in succession. The learned Judges observe:

According to general principles, a religious office cannot, *prima facie*, be made the subject of alienation. The succession to such an office is governed in the first instance, by the will of the founder, and, in the absence of direct evidence on that point, by usage of the particular institution from which the founder's will may be inferred. A religious office appears to us to stand with reference to alienability on a different footing from private property.

After referring to *Kuppa v. Doraiswami* ILR (1882) M 76, the learned Judges observe:

Unless the alienee is the sole heir, the alienor might be under the temptation to make the office the subject of bargain and thereby defeat the intention of the

founder. ***** we are not prepared to dissent from the dictum above quoted and to hold that in the absence of special usage, an alienation would be valid if made in favour of any person other than the sole immediate heir.

I may also refer to Sennayan Chetty Vs. Sinnappan Servai, where it was held that renunciation of a non-hereditary religious office is invalid even though it is to the next heir of the releasor and Rajam Bhattar v. Singarammal (1918) 36 MLJ 355. I have already set out the terms of the deeds constituting the trust to show the nature of the power of appointment conferred. It seems to me to be clear from the wording that what was contemplated was that the testator should reserve to himself the power of making the appointment till the time of his death. I find it difficult to construe the words as giving him the power to make the appointment so as to divest himself during his lifetime of the power of management. It should be remembered that this is a case of charitable trust, and having regard to the interests of the institution it is difficult to strain the words in the deeds constituting the trust so as to give the trustee absolute irrevocable power to transfer the trust during his life time and to make such transfers irrevocable unless the deed of transfer itself reserves the right of revoking it. Where power is given to appoint a trustee "at the time of his death", there should, to make any appointment valid, where it is by deed inter vivos to take effect at once, be proof that there were circumstances showing that the person making the appointment had a reasonable apprehension of death and it is always subject to the condition that if the trustee making the appointment recovers the transfer is not to operate. The obvious intention of the author of the trust is to authorise the appointment of a successor and not to authorise an abdication. If owing to illness, old age, absence from India or other cause the trustee is not able to act, the obvious remedy is by application to court to appoint a trustee. Such a power cannot be arrogated by the trustee. Otherwise a trustee can before his death appoint another person, under the plea that he is unable or unwilling to perform his duties. There is nothing except the recital in the deed of appointment that the trustee was in apprehension of death or was physically unable to carry out the trust. Cases have been referred to where in English Law a power of appointment if executed by a deed inter vivos is irrevocable unless the deed itself reserves the power of revocation. In the case of religious trusts, where the deed constituting the trust clearly expresses an intention that the appointment should be made only at the testator's decease, the trustee cannot give the go by to it by executing it without putting a revocable clause. Though the deed inter vivos to take effect after his death may satisfy the requirements, such a deed must always be subject to the controlling clause in the deed of trust and, even though the express power of revocation is not reserved, I would, having regard to the terms of the trust deed, hold that it is subject to revocation. It is clear that the appointment of the 1st defendant has been revoked by the will in favour of plaintiff.

19. The next question is as to the effect of the proceedings in the Pondicherry Court rendering any contentions in this suit res judicata.

20. As regards the Chidambaram charities I think it is clear that the Pondicherry Court had no jurisdiction in the matter, as the properties are all situate in British India and the trusts are all to be performed in British India. The action in the Pondicherry Court was merely an action in personam against, the trustee to deliver up the documents of title and for purposes of that adjudication it became necessary to see whether the appointment of the plaintiff was valid. In *Companhia de Mocambique v. British South Africa Company* LR (1892) 2 QBD 358, Wright, J., after referring to the authorities observes as follows:

The proper conclusion appears to be that, speaking generally, and subject to qualifications depending on personal obligations, it is a general principle of jurisdiction, that title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the courts of that country, and this conclusion is in accordance with the rule ordinarily adopted by the jurisprudence of other countries (see Story's Conflict of Laws, Sections 551-555). It does not in any way involve a denial of jurisdiction to give relief in personam, or against property in this country, in any case where title to the foreign land is not directly involved or can be proved as a fact by the judgment of a competent court in the foreign country.

21. Story in his Conflict of Laws states- the law as follows in Article 551:

In respect to Immovable property every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be for ever incapable of execution in rem.

In Article 591, the law is thus summarised:

If the matter in controversy is land, or other Immovable property, the judgment pronounced in the forum rei sitae is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case; for no other court can have a competent jurisdiction to enquire into or settle such right or title. By the general consent of nations therefore in cases of immovables, the judgment of the forum rei sitae is held absolutely conclusive On the other hand, a judgment in any foreign country, touching such immovables, will be" held of no obligation.

22. In *Boyse v. Colclough* (1854) 1 K & J 124 : 69 ER 396, it was held that Irish courts had no jurisdiction over Immovable properties in England and that any declaration as to the validity or invalidity of any will by Courts in Ireland cannot so far as it relates to lands in England be treated as a bar to a suit.

23. Dicey in his Conflict of Laws thus states the rule as regards Immovable property as follows:

All rights over, or in relation to, an Immovable (land) are (subject to the exceptions thereafter mentioned) governed by the law of the country where the Immovable is situate ex situs.

It is unnecessary to consider the exceptions as they do not touch the present case.

24. The question as to the jurisdiction of foreign courts to deal with the subject matter in British India before the principle of *res judicata* can be applied is also considered in *Maqbul Falima v. Amir Hasan Khan* ILR (1914) A 1, which decision was confirmed by their Lordships of the Privy Council in *Mussammatt Maqbul Fatima v. Amir Hasan Khan* 20 CWN 1213. I may also refer to the judgment of Abdur Rahim, O. C. J., in *Shiyali Subraya Chetty v. Calve Subraya Chettiar* (1916) 5 LW 740, where the learned Judge has considered the question of jurisdiction of French Courts over properties situate in British India so as to constitute any adjudication in Pondicherry Court *res judicata*, and I am in entire agreement with the views of the Officiating Chief Justice. I do not think the decision of the Pondicherry Court renders the question as regards the Chidambaram trust *res judicata*.

25. As regards the Mailam trust the case stands on a different footing. A number of properties comprised in the trust are within the jurisdiction of the Pondicherry Court. The trusts to be performed are the annual feeding of Brahmins in Melachalam, Tindivanam taluk (British territory), Ubhayam in the Skanda Shashti festival in the temple in Pondicherry (French territory), expenses in connection with the lighting of another temple in Pondicherry (French territory) and the maintaining of a chattram in Pondicherry (French territory). It is clear that with the exception of the annual feeding of Brahmins in Mela-chalam, all the other trusts are to be performed in Pondicherry. The parties to the Pondicherry litigation were residents of Pondicherry and it cannot be said that the Pondicherry Court had no jurisdiction to adjudicate upon the question as regards the Mailam charities. It is impossible to separate the trust relating to the property in British India from the trust relating to property in Pondicherry or to appoint two trustees, for the courts in Pondicherry would be bound by their own decision and would not recognise another trustee appointed in British India to perform the trusts in so far as they are in Pondicherry. This is not a case where it can be said that the Pondicherry Court had no jurisdiction to decide the question in controversy in so far as it related to the performance of the major portion of the trust or the right to be in possession and management of the properties, as the trust property is situate in Pondicherry. This case is therefore clearly distinguishable from the Chidambaram charity. If it were possible to separate the charities in so far as they relate to properties in British India from the charities in Pondicherry and to give effect to the deed of trust by constituting plaintiff as trustee of the portion of the property situate in British India, I would do so, but that is, having regard to the terms of the trust which make no separate appropriation of the incomes of the trust property to the particular charities named, obviously impossible. I am not prepared to hold that the decision of the Pondicherry Court is not a sufficient ground for our upholding the claim of the 1st defendant.

26. In the result I allow the appeal in so far as it relates to what is described in the plaint as Chidambaram charity and declare that the plaintiff is the person entitled to be the trustee and to be in possession and management of the properties appertaining to that trust, and the defendants or such of them as are in possession will deliver the property to the plaintiff.

27. As regards the Alapakkam and Mailam charities the plaintiff's suit will be dismissed.

28. As regards costs as neither party has succeeded in all his contentions, I think the proper order will be to direct each party to bear his costs throughout.

Srinivasa Aiyangar, J.

29. Questions of great difficulty and considerable legal interest have been raised and argued in the course of the discussion of this appeal. By the courtesy of my learned brother I have had the advantage of perusing beforehand the judgment just delivered by him and I should not have deemed it necessary to write a separate judgment were it not that I felt persuaded that it might be useful to restate some of the propositions from a slightly different standpoint.

30. The appeal was argued on both sides with considerable learning, by Mr. Bhashyam for the appellants strenuously and by Mr. Varadachariar for respondents with great clearness and cogency. The appellant before us was the plaintiff in the suit from which it has arisen. The suit has been dismissed in its entirety by the learned Subordinate Judge. The claim relates to the office of trusteeship in respect of three charities which have been respectively called in the course of the argument the Chidambaram, the Mailam and the Alapakkam charities. In the judgment of my Lord just delivered, the genesis and history of the charities and other particulars regarding the same have been set out and I do not think it necessary to re-capitulate the same. The plaintiff-appellant has claimed the office of trusteeship in respect of all these charities. That claim necessarily involves the denial of the claim set up by the 1st defendant to the office of trusteeship in respect of the same charities. The plaintiff's claim to the office is based on an appointment by the late Murugiah Mudaliar. On such a claim the question with regard to the trusteeship of what are called the Alapakkam charities may easily be disposed of. As the plaintiff claims on the basis of an appointment by Murugiah Mudaliar, the question arises whether Murugiah had himself any such power of appointment. Exhibit C is the instrument of trust relating to the Alapakkam charities. The said deed is purported to be executed in favour of Ayyasami Mudaliar, the trustee appointed therein, and the provision in it for succession to the office of trusteeship is.:

that the said dharmam shall after the lifetime of yourself be administered by your heirs.

It must be observed that the plaintiff does not claim under the original deed of trust or the scheme of succession provided thereby but under and by virtue of

appointment by Murugiah. It has been argued that Murugiah had acquired by prescription a right to appoint his successor, because in and by the will of Ayyasami he gave such a power of appointment. It is difficult to see how Ayyasami was entitled, contrary to the terms of the deed of trust, to grant such power or prescribe a different line or mode of succession. There is no evidence worth the name or any materials on which such acquisition of power contrary to or different from the original deed of trust can be inferred. The bare fact is that Murugiah purported to appoint a successor and from that alone the inference of a completed acquisition of right by prescription cannot be held to be proper. It must be remembered that Murugiah was in the line of male heirs of Ayyasami and by the mere fact of his having excluded his brothers from the office of trusteeship he could be regarded only as having prescribed for sole trusteeship. If the acquisition, by prescription, of such right to appoint, should be recognised on such slender material, nothing would be easier than to frustrate the provisions in the deeds of endowments and to change the scheme for succession in the office of trusteeship. I agree therefore that Murugiah had no power to appoint his successor. The plaintiff's claim in respect of the Alapakkam charities thus fails.

31. As the plaintiff's title in respect of the Alapakkam charities has had thus to be negated it is unnecessary to discuss the claim of the 1st defendant with regard to the same. The plaintiff who seeks the recovery of the properties relating to the endowment having failed to make out his title, it is unnecessary to make any pronouncement with regard to the 1st defendant's title in this case.

32. As regards what are called the Chidambaram and Mailam charities, Murugiah at first during his lifetime appointed by Exhibit J the 1st defendant to be trustee in his place after his own life-time. It has been found by the lower Court that Ex. 1 was brought about by undue influence and that therefore the appointment thereunder could not be regarded as valid. That finding has not been challenged before us. But the 1st defend-and also claims to have been appointed under Exhibit II. That appointment was one to take effect even during the lifetime of Murugiah himself. This document Exhibit II has been impeached as a forgery. The lower court has found the document to be genuine. I am not satisfied that it is a forgery. There is no indication in the terms of the document that it is not a genuine document. It may also be observed that if the 1st defendant was fabricating a document by which he was to be appointed a trustee, it is very unlikely that he would have inserted a provision therein reserving to Murugiah the appointer powers of supervision over the management of the charities during the lifetime of Murugiah. The learned vakil for the appellant argued strenuously and at great length that, having regard to the finding that Exhibit I was brought into existence by undue influence, the burden of proving that the appointment under Exhibit II was at a time when the undue influence had ceased was heavily on the defendant. The determination of the question of burden of proof in such cases depends largely on the circumstances and the facts of each particular case. The occasion for the exercise of undue influence, the nature of the influence and several other matters would have to be taken into consideration in determining

whether at a subsequent period or point of time the undue influence should be regarded as having continued or ceased. But having regard to the fact that the marriage was over and that the partition between the parties had also been completed and carried out, there is no reason whatever to suppose that the undue influence which was brought to bear when Exhibit I was executed, lasted or continued until the execution of Exhibit II. On my finding that even if the burden of proof should be held to be on the 1st defendant affirmatively to establish that the undue influence, which was operative when Exhibit I was executed, must have ceased some considerable time before the execution of Exhibit II, it seems to me unnecessary to refer to or discuss the cases cited on the question of burden of proof.

33. At one stage of the case I was impressed by the argument regarding the genuineness of Exhibit II by reason of the absence of any reference to it in Exhibit K and other documents. But it has been pointed out that Exhibit K was subsequent to the 1st defendant's suit in the French Court and there can be no doubt that after the institution of that suit by the 1st defendant Murugiah must have made up his mind to impeach Exhibit II. There is therefore no force in that argument.

34. I am not persuaded that the finding of the lower court with regard to the genuineness of Exhibit II is incorrect. Soon after the execution of Exhibit II it was that the 1st defendant filed an action in the French Court against Murugiah for the recovery of the office of trusteeship on the ground that he has been validly appointed trustee by Murugiah and also for the recovery of the key and the documents" relating to the charity properties, and it was thereupon that Murugiah purported by Exhibit K and the succeeding wills made by him, to revoke the appointment. Ultimately the French Court of Appeal held in favour of the 1st defendant that he had been properly appointed trustee by Murugiah and that he was entitled to the office of trusteeship and the management of the charities. For the defendant this adjudication is relied upon as operating by way of *res judicata*. For the plaintiff-appellant it has been contended that it could have no such effect. Mr. Bhashyam for the appellant argued that Section 13, Civil Procedure Code, refers only to suits instituted by plaintiffs on foreign judgments and cannot be held to apply to defendants. For this he has relied upon the decision of the Allahabad High Court, *Maqbul Fatima v. Amir Hasan Khan* ILR (1914) A 1. This case was no doubt confirmed and not reversed by the Judicial Committee of the Privy Council. See *Mussamat Maqbul Fatima v. Amir Hasan Khan* 20 CWN 1213. Section 13 of the Civil Procedure Code is general and is not so termed as to be applicable only to plaintiffs suing on foreign judgments. The suit to which the decision of the Allahabad High Court referred was one for a declaration that a certain issue was *res judicata* in a foreign Court. For such a declaration no suit was obviously sustainable. I am therefore unable to regard the mere fact of the confirmation by their Lordships of the Judicial Committee of the decision in the Allahabad case as tantamount to an approval by their Lordships of every expression of opinion by the learned Judges. of the Allahabad

High Court.

35. After all the case in *Louis Castrique v. William Imrie* (1869) LR 4 HL 414 was not a case by the plaintiff on a foreign judgment and the defendant was held entitled to non-suit the plaintiff on the basis of the foreign judgment. Having regard to the very clear terms of Section 13, Civil Procedure Code, it seems to me impossible to accept the contention of the learned vakil for the appellant in the matter.

36. Then Mr. Bhashyam argued that the rule of *res judicata* set out in Section 13 must be construed as referring only to the actual decree passed by the court and not extending to the grounds of decision or to the issues decided. His contention was that when a foreign judgment directs the payment of money by the defendant to the plaintiff it is in the nature of a debt and the judgment itself is only proof of the debt and no more. In this matter the difference may be considered between the terms of Section 11 and Section 13, Civil Procedure Code. Section 11 refers to the decision with regard to the issue also. Section 13 speaks only of the matter directly adjudicated upon by the foreign judgment. Having regard to the language of Section 13, it seems to me that while Mr. Bhashyam's contention that refers only to a decree cannot be accepted, still at the same time it cannot be said that every issue decided by the foreign Court is binding upon the British Indian Court. Every issue, albeit necessary for the decision of the matter in dispute cannot be regarded as a matter directly adjudicated upon. Many issues are in their nature merely ancillary. Thus it cannot be held that if a person's adoption is held valid by a foreign Court and on that ground some property is decreed to him the finding on the adoption is binding on the British Courts. If otherwise it would result in greater effect being given to the judgment of the foreign Court than even to the local tribunals. The decision of the Court should be regarded not merely as relating to the delivery of money or property, but to the recovery of a particular fund or property on the title set up. In other words, the expression "matter directly adjudicated upon" should be held as undoubtedly to include the right set up by, limited only to the particular relief granted or refused.

37. Accepting therefore to this extent the contention on behalf of the appellants, I have come to the conclusion that the finding of the French Court with regard to Ex. II being genuine is not binding on this Court as *res judicata* as the issue cannot be regarded as a matter directly adjudicated upon. But as I have already indicated I have come to the conclusion on the evidence in the case that the finding of the lower Court with regard to its genuineness is correct.

38. The next question that arises for consideration is whether the decision of the French Court that the 1st defendant was the validly appointed trustee is *res judicata* with respect to Chidambaram and Mylam charities. The solution of that question depends on (1) whether it was a judgment of a court of competent jurisdiction, (2) whether it was a judgment on the merits, and (3) whether that was the matter directly adjudicated upon by the French Court. The learned vakil

for the appellant argued that the French Court was not a Court of competent jurisdiction at any rate in respect of all the Immovable property relating to the trust situate in British India. There can be no doubt that the jurisdiction referred to in Section 13 is not local or municipal jurisdiction under the CPC but jurisdiction according to the principles of private international law. There can also be no doubt that under the rules of private international law if the action should be regarded as one relating to Immovable property the law applicable is the law of the country in which the land is situate. But I am unable to accede to the contention on behalf of the appellant that the suit in the French Court was one for the recovery of Immovable property. Taking the suit as a whole it seems to me that it cannot properly be described in legal language as a suit for property or as one for a declaration of title to property but the only description of the suit which can be regarded as satisfactory is to regard it as one for the office of trusteeship.

39. What then is the law applicable to the recovery of the office of trusteeship? Whatever might have been the state of things in the world in former times, there can be no question whatever, that having regard to the increasing international amity and intercourse, many trusts may come to be constituted the properties relating to which may happen to be situated in different sovereignties. It is not impossible to imagine in these days of growing internationalism a person constituting a trust to which are endowed properties situate in France, England, America and elsewhere. If the strict rule of the *lex situs* should be applied, it would follow that in regard to the trusteeship of the trust, different Courts might come to hold differently having regard to the law applicable, and whereas the French Court might hold "A" was the proper trustee, the English Court might hold that "B" was such trustee as the Courts of another country might hold that "C" was the trustee entitled. I am therefore inclined, on a proper application and appreciation of the principles of private international law, to hold that with regard to the question relating to the office of trusteeship the Court of competent jurisdiction within the meaning of Section 13 of the CPC is the Court of the country which is the court of what may be regarded as the domicile of the trust. I am aware that the expression "domicile" may be regarded as inappropriate with regard to trusts. I am not also unmindful of the difficulties that often may arise in determining any such question of domiciles.... But, after all, a single trust comprehending properties situate within various sovereignties is not unlike a corporation for legal purposes and there is no reason or principle why such a trust should not for purposes of jurisdiction also be regarded as having or acquiring a domicile.

40. With regard to the persons the demonstration of the domicile is determined having regard to various considerations, such as original domicile, change of domicile, intention to go back to the original domicile, subjection and so forth. I do not see why similarly with regard to trusts there should not be recognised a domicile based on the place where the trust is made, the domicile of the trustees, the place where the trusts are to be performed, the place where the

trust property is situate and so on.

41. The expression therefore in Section 13 namely " the Court of competent jurisdiction" should, for purposes of actions relating to the recovery of the office of trusteeship, be held to refer to Courts of the country which have jurisdiction in what may be called the domicile of the trust.

42. The suit in the French Court by the first defendant cannot properly be regarded as a real action but only as a personal action for a declaration of rights and the recovery of the office. The " Immovable property such as it may be follows the office wherever situate. The plaintiff in the present action as the ultimate defendant in the French suit was a domiciled French subject and submitted himself to the jurisdiction of the French Court in that action, and after such submission it is impossible that we could hold that a French Court was not a Court of competent jurisdiction.

43. There can be no doubt that, whether right or wrong, the decision of the French Court was a decision on the merits, and there can also be little doubt that the matter directly adjudicated upon by the French Court was the right of the first defendant to hold the very office of trusteeship.

44. It therefore follows that if the French territory could be regarded as the domicile of the Chidambaram and Mylam trusts, the decision of the French Court should be regarded as a decision by a Court of competent jurisdiction.

45. With regard to Chidambaram, the position is this. The whole of the property dedicated to the trust is situate in British India and all the trusts are also to be performed in British India. No doubt the trust may be regarded in a manner as made in French territory and the trustees are also French subjects. But in the case of such a trust on the reason of the thing the decision should, it seems to me, be that having regard to the entire trust property being in British India and the performance of the trust being also here, the trust should be regarded as a trust of British domicile or subject to the jurisdiction of British Courts. In other words, the office of trusteeship should be regulated only by British law.

46. There may be difficulties no doubt in the way of deciding what may be regarded as the domicile of the trust. But even with regard to the case of domicile of persons there are difficulties and the mere existence of difficulties need not deter a court of law from laying down the rules and principles applicable. If therefore the trust in respect of the Chidambaram charities was a trust of British domicile it follows that a French Court was not a Court of competent jurisdiction with regard to it and the decision of the French Court cannot operate as res judicata in respect of the Chidambaram charities.

47. If there is no binding adjudication with regard to the office of trusteeship by the French Court then it follows that we in this appeal have to decide with regard to the office. I have already held Ex. II to be genuine.

48. The question then is whether the appointment of the 1st defendant under Ex.

II should be regarded as a mere confirmation of the appointment under Ex. I or as comprehending a fresh appointment, secondly;;, whether the appointment is valid and thirdly, whether it was a revocable appointment and has been validly revoked or not.

49. With regard to the first of these questions, it is no doubt true that in form the Ex. II would seem to be an instrument by which the appointment made under Ex. I was merely confirmed, but in substance it is not by any means merely such an instrument. By Ex. I the appointment of the 1st defendant was to take effect after the lifetime of the appointer. Under Ex. I it would seem that the appointment was contemplated to take effect immediately even though the appointer reserved for himself certain rights of supervision over the management. The operative portion of Ex. II clearly includes and involves a fresh appointment by force or virtue of the instrument itself. Therefore any infirmity attaching to Ex. I cannot be regarded as continuing to attach to Ex. II. If it were necessary I should have been prepared to hold that there is nothing invalid about the appointment under Ex. II even though it may be regarded as amounting to a transfer of trusteeship. The principle on which such a transfer of trusteeship is forbidden by law is based primarily on the provisions of the trust deed and in the second place on the office of the trusteeship being regarded in law as *res extra commercium* and any transfer therefore of the office as being opposed to public policy. The proper view to take would be, having regard to all the terms of Ex. II. that the appointer did really intend the appointment to take full effect only after his death and that that was the reason why while he contemplated the appointee taking charge of and looking after the charities at once he should do so only under the supervision of the appointer.

50. In Ex. A the deed of trust relating to Chidambaram charities the provision is that "after the said Ayyasami Mudaliar the persons appointed by him shall conduct the aforesaid charities". In Ex. II Murugiah the appointer refers to the fact that he is advanced in age and the implication is necessarily that he is making the appointment because he is advanced in age and unable himself to look after properly the management of the charities. Though the document would in terms seem to constitute an immediate transfer of the office still, it is significant that the appointer reserves to himself rights of supervision....

51. The question then is whether, having regard to the entire nature of the document and the circumstances under which it was made, it can be regarded either as a violation of the provisions of the deed of trust or as being against public policy. It seems to me that it cannot be. Though under the instrument of trust the trustee is authorised to appoint his successor to carry on the management after his lifetime, still it cannot be so construed as to deprive the trustee of the power of appointing a successor *bona fide* if for reasons of illness, age or other infirmity he should really become and be incapable of carrying on satisfactorily the management of the trust. Such a construction would be calculated to defeat the very purpose of the provision.

52. As regards such an appointment being against public policy, one can appreciate the argument if the transaction was one really of the alienation of the office for consideration or for any other ulterior personal advantage to the appointer himself, or even on the ground of any motive other than the benefit of the trust. But when the document purports merely to effect an appointment in exercise of the power possessed or given there is nothing in the circumstances to indicate that it was anything but a bona fide exercise of the power. It seems to me that the appointment, though intended to take effect immediately, cannot be regarded as opposed to public policy. There is nothing in public policy which requires that a man who can appoint his successor after his lifetime may not so appoint during his lifetime. It depends really on the provisions of the instrument of trust. I am satisfied that it was a bona fide exercise of the power. It has been held in many cases that even alienations of offices to persons next in the order of succession may be regarded as not opposed to public policy.

53. Applying a similar principle to this case I do not see what there is opposed to public policy in a trustee, who can appoint his successor after his death, appointing one there and then to look after the office because he the appointer has become old and incapable of looking after the management properly. But it is not really after all necessary for me to express any final decision on this point because there is the further question of the revocation of the appointment by the appointer. It has been contended on behalf of the appellant that under Exhibit D Murugiah should himself at the time of his death appoint a person to administer the dharmams. There are no such limitations as to the time of appointment in the original deed of trust Exhibit A. It is therefore very doubtful whether it is open to one trustee appointing a successor under the power of appointment to seek to lay further limitations on the exercise of the power. No cases have been cited and no legal principle was relied upon in support of any such contention. But even assuming that the limitation would be valid, it cannot be said that the expression "at the time of his death" means actually at the exact moment of death, but could be regarded merely as indicating that the appointment should be made having regard to all the circumstances at the end of his life, or at the time when there is reasonable apprehension of early termination of life. It has been argued for the respondents that the power of appointment once exercised the appointment cannot be revoked, and for this purpose some decisions in English cases were cited and relied upon. On an examination, all the cases turned out to be cases merely of the exercise of the power of appointment in respect of private rights and benefactions. No doubt when the power is given to be exercised in favour of private persons, the exercise of the power must be bona fide but on such exercise rights are created, and as the intended rights or benefits have thereupon accrued and there being no power to divest such right or take away such benefit, the power of revocation has been refused to be recognised except when specially given and also specially reserved. But the ground of such a rule or principle is not applicable to the case of what is clearly a public trust. The exercise of the power of appointment of a trustee cannot be

regarded as a benefit to the donee or the appointee. The public are the beneficiaries and the exercise of the power is in the interests of the trust. The very reason of the thing would require that there should be power of revocation till the moment the appointment is intended to take effect. To hold otherwise in the case of public trust would lead to disastrous results and the appointing authority would have merely to look on and remain helpless if it should once make the appointment and find thereafter sufficiently early before the appointment takes effect that for some reason the appointee is or has become absolutely unfit to hold the office. Having regard therefore to what may be regarded as the general scope and purpose of the power of appointment in this case I must refuse to regard as applicable the technical rules relating to the exercise of power in the case of private rights and parties. If, however, it should be regarded that the provision that the appointment should be made only at the time of the death of the appointer was binding on Murugiah, then it follows that any appointment made before the apprehension of death except at the time of death cannot be regarded as valid or can only be valid as a provisional appointment subject to confirmation or revocation. But I for my part am disposed to base my judgment on the broader ground that in the case of public trust, power of appointment, unless there is something to the contrary in the instrument of a trust itself, should be regarded as a power to be exercised at or about the time when the appointment is to take effect having regard to the state of things then and that therefore any appointment so called previously made is in its very nature revocable. There can be no doubt in this case that there has been a revocation of the appointment. It cannot also be said that such a revocation was made mala fide because it cannot be said that a trustee who sees the appointee rushing to grab the rights in the manner that the first defendant did, was wrongly regarded by the appointer as unfit. In any case that Murugiah acted really bona fide in the interests of the trust is amply borne by his seeking thereafter to appoint only some member of the family who would accept the office undertaking to manage the charities and it was only when he failed in his attempts to get a member of his own family to take up the management he appointed finally the plaintiff, his son-in-law.

54. I therefore agree in the conclusion that in respect of the Chidambaram charities there has been a valid appointment of the plaintiff by Murugiah and that the 1st defendant had no such right at the time of the appointment of the plaintiff as would prevent the appointment of the plaintiff from taking effect.

55. As regards what are called the Mylam charities they are called so because the suit is instituted in a British Indian Court. It is clear that all the items of property except a very small item * are admittedly in French territory, and most of the charities to be performed under the trust are also in French territory. It has also been admitted before us that the part of the charities to be performed within British India is not separable from the rest of the trust. The trust had its origin in French territory and the domicile of the trustee is also in French territory.

56. Having regard to all these circumstances, it seems to me that we must come to the conclusion that what may be called the domicile of the trust is French territory and not British India. If so, it follows that the French Court was a Court of competent jurisdiction and that the decision of that Court with regard to the appointment of the 1st defendant and the recovery by him of the office in respect of the said charities is covered by Section 13 of the Civil Procedure Code.

57. In the result therefore I agree that so far as the Alappakkam and Mylam charities and the properties pertaining thereto are concerned, the plaintiff's suit must be dismissed and that so far as the Chidambaram charities are concerned, the decree of the lower court should be reversed and there should be a decree in favour of the plaintiff. I also agree to the order as to costs.