

(1897) 10 MAD CK 0016
In the Madras High Court

Ganapati Ayyan and Another

APPELLANT

Vs

Savithri Ammal and Another

RESPONDENT

Date of Decision : 05-10-1897

Acts Referred:

Citation : (1898) ILR (Mad) 10

Hon'ble Judges : Subramania Ayyar, J;Shephard, J

Bench : Division Bench

Judgement

Shephard, J.—After deciding all the other issues in the appellants' favour, the Subordinate Judge dismissed the suit on the ground that they

had failed to prove such an interest in the subject-matter as to entitle them to maintain it. It is first to be observed that this point was not taken in the

written statement and was not included in any of the thirteen issues, though it was taken and overruled in the proceedings before the Collector

when sanction to prosecute the suit was asked for and granted to the plaintiffs. It has been repeatedly held in this country that such a suit as the

present may be instituted by any member of the class intended to be benefited by the charity for the support and preservation of which the aid of

the Court is invoked. According to the document which evidences the institution of the charity the class for which it was intended comprised

Brahmans generally. The document does not restrict the charity to any particular sect, nor does, the oral evidence show that the alleged founder

Gopalakrishna Ayyan excluded from his bounty such Brahmans as the plaintiffs might properly be taken to represent. The circumstance that the

Brahmans entertained by him were ordinarily Japtas or travellers does not, especially when taken with the language of the instrument of dedication,

indicate any intention to restrict the charity to Brahmans answering to one or other of those descriptions. For these reasons, I think the Subordinate

Judge was wrong in dismissing the suit on the ground of want of interest in the plaintiffs, I have now to consider the several points raised on behalf

of the respondent, Gopala Ayyan, who is the adopted son of the alleged founder of the charity. It was first contended that the story told by the

plaintiffs' witnesses and recited in the instrument of 1878 and again in the agreement of 1881 relating to the adoption, was a pure invention, that

Gopalakrishna Ayyan never made any arrangement or gave any instructions such as are attributed to him, and that his widows and mother never

had any real intention of dedicating property to charitable purposes. Although the instrument of 1878 was executed only ten days after his death

and actually written by the second respondent's father, although the same facts are recited in the agreement of 1881 to which the second

respondent's father was a party, and although the same individual representing one of the widows, insisted before the Tahsildar in 1883 that the

charity should be maintained as it had been instituted by the adoptive father of the second respondent, we are asked to say that the idea of

dedicating property to charity originated solely in the minds of the widows, and was carried out merely as a scheme for preserving to them as

against a child who might be adopted some control over the property of their deceased husband. A more hopeless contention can hardly be

conceived. It seems necessary to observe that there is a strong presumption in favour of the truth of statements recorded in writing by persons who

are under no disability, and that the Court is most reluctant to hold that the parties did not mean what they said. I think there can be no doubt that

the widows intended to create or confirm a valid trust, and further I agree with the Subordinate Judge in finding that they acted in conformity with

directions given by their deceased husband. The question then is whether the evidence justifies the finding that there, had been a previous

declaration of trust by the husband. The plaint alleges that fifteen years before his death he had set apart certain lands for charitable purposes and

there is some general evidence in support of 1/2 of the allegation. It certainly is proved that, for some years, he had been carrying on the charities

which are mentioned in the instrument of 1878, and it is probable that he did so with the proceeds of the Adhichapuram lands. But I do not think it

is proved that he dedicated any particular lands or even any particular share to this purpose. The evidence is wholly wanting in the precision and

detail requisite for the proof of such a dedication, when no written instrument executed by the alleged founder is produced. It is not unimportant

that he did execute a registered deed for the benefit of a Siva temple.

2. But I think there is another ground on which the plaintiffs' claim may be supported. As an act done by the widows in pursuance of the

instructions of their husband, the deed of settlement of 1878 would be inoperative as against the adopted son. Regarded as " an incomplete gift

made by the husband and carried out by the widows, it could not stand on a higher footing than would a will executed by Gopalakrishna Ayyan,

and the interest of the adopted son clearly could not be defeated by a will. But if the directions given by Gopalakrishna Ayyan to the widows

regarding his charities, and the mode of maintaining them are associated with the direction to take a child in adoption, it may fairly be inferred that

he did not intend an adoption to take place, except on the condition that his directions as to the charities are observed. This is the view of the

matter which the widows actually took, for the father admits that they would not have taken his son unless he had consented to maintain the

charities. The written agreement made in respect of the adoption shows that the adoption was made on that condition and on the other terms

mentioned in the instrument of 1878. If the condition had been originated by the widows, it might not have been binding on the adopted son, but

seeing that the husband's authority was qualified by a condition which he was at liberty to impose, and that the condition was insisted on when the

authority was exercised, I think the adopted son is in no other position than he would be, if Gopalakrishna Ayyan himself had taken him in

adoption, at the same time declaring that he did so only on the condition of certain property being set apart for charity. As there would have been

no adoption if the requisition of the widows had not been obeyed, and as the widows were entitled and indeed bound to make that requisition, I do

not think it is open to the adopted son, now to repudiate the condition. In this view of the facts, the decision in *Lakshmi v. Subramanay* ILR 12

Mad. 490 applies.

3. The decree of the Subordinate Judge will be reversed. It being necessary to

provide for the conduct of the charity and the second defendant

having, in consequence of his conduct, forfeited his right to act as trustee, we must direct the Subordinate Judge to inquire and submit the name of

some competent person willing to accept the office. The trustee when appointed will be subject to the superintendence of the Tanjore District

Board, and his accounts will be opened to the inspection of the managing member of the founder's family for the time being. The Subordinate

Judge will also ascertain the probable average income of the endowments and submit a scheme for the disposal of the income in accordance with

the wishes of the founder. On the occasion of a vacancy, the President of the Local Board to appoint a successor out of the founder's family, if

possible. The Subordinate Judge will be at liberty to apply for further directions. The second defendant must pay the plaintiffs' costs in this and in

the lower Court.

The report is to be submitted within three months from the date of the receipt of this order, and seven days will be allowed for filing objections

after the report has been posted up in this Court.

Subramania Ayyar, J.

4. I wish to make a few observations only, with reference to the contention urged on behalf of the second defendant, that the dedication of the

lands to the charity in question is not binding upon him.

5. The evidence clearly proves that the second defendant's adoptive father Gopalakrishna Ayyan, shortly before his death and during the illness

which terminated fatally, directed his widows to make the dedication referred to and authorized the adoption of a son to him. Accordingly ten days

after his death, they executed Exhibit A and handed over possession of the property dedicated to the person who was entrusted with the

management of the affairs of the charity, and about two or three years after Exhibit A the second defendant was adopted. It is also established that

the natural father of the second defendant gave him in adoption with the full knowledge of the alienation and acquiescing in it and that, but for such

acquiescence, the second defendant would not have been adopted.

6. The contention on behalf of the second defendant was twofold, first, that though the second defendant was adopted in 1881, yet his title related

back to the date of the adoptive father's death, and as Exhibit A was later, the alienation is not binding on him; secondly, even if his rights accrued

from 1881, still he is entitled to set aside the alienation. The first part of the contention may be dismissed from notice, for it is too late to question

the doctrine that the adopted son's rights arise from the time of the adoption. *Bamundoss Mookerjea v. Mussamut Tarinee* 7 M.I.A. 169 . The

second part of the contention alone requires some consideration. Now under the nuncupative will of Gopalakrishna Ayyan--such in my view do the

instructions evidenced by Exhibit A amount to compare *Hari Chintaman Dikshit v. Moro Lakshman* ILR 11 Bom. 89 the direction that the

property be devoted to the charity and that the authority to adopt, both should be given effect to only after his death. Though in fact the second

defendant was adopted two or three years subsequent to the execution of Exhibit A, yet his case cannot possibly be put on a higher footing than if

he had been adopted at the moment of the adoptive father's death. Let us, for argument, suppose that such was the case. It is clear that the

direction as to the allotment of the property to the charity was an oral devise, which became operative the moment the testator died and as ex

hypothesi, the second defendant's title to his adoptive father's estate accrued then and not earlier, it is difficult to see how on principle the

defendant could be entitled to question the alienation. For, unlike the case where the adoption takes place before the will comes into force, the

adopted son's right, according to the supposition, comes into existence simultaneously with the right of the charity. How then can the former

derogate from the latter right? Even if the above view were unsustainable (though it is not easy to see how it could be), the second defendant must

nevertheless be held bound by the alienation. For the circumstances in which the adoption took place rendered it conditional on the alienation not

being challenged by the adopted son, and the case would then be clearly governed by the decision in *Lakshmi v. Subramanya* ILR 12 Mad. 490

Narayanasami v. Sama-sami ILR 14 Mad. 172 and *Basava v. Lingangauda* ILR 19 Bom. 428.

7. If, from the hypothetical case, we turn to the actual facts of the case before us, there is no doubt that the title of the adopted son could not

"affect the right of the charity; for the latter right had vested long before the adopted son's right arose. The second defendant's rights must

therefore be held to be subject to that created in favour of the charity by the oral devise, and it is hardly necessary to point out that Exhibit A does

not evidence an alienation by the widows, but is a mere formal declaration executed by the persons appointed by the testator to bring into

existence such written evidence of his disposition and who held possession of the property devised till they transferred the same to the duly

constituted manager of the charity only as the trustees for the charity. Compare *Bhaskar Purshotam v. Sarasvatibai* ILR 17 Bom. 486.

8. In the view I have taken of the case, it has become unnecessary to consider, supposing that the direction to transfer to the charity amounted not

to a devise, but to a mere power to transfer at the discretion of the widows, whether the execution of such power, before the power to adopt was

exercised, would not disentitle the adopted son to question the alienation.

9. I, therefore, concur in the conclusion arrived at by my learned colleague.