

(1928) 04 MAD CK 0034
In the Madras High Court

K. Swaminatha Aiyar

APPELLANT

Vs

Jambukeswaraswami Temple and Others

RESPONDENT

Date of Decision : 26-04-1928

Acts Referred:

Citation : AIR 1930 Mad 372

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Division Bench

Judgement

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by plaintiffs 1 and 2 who are the trustees of Sree Jambukeswaraswami temple against the defendants for possession of the properties mentioned in the Sch. A which according to the plaintiffs were dedicated by one Karupanna Pillai towards a kattalai known as the Dadhyodana kattalai under a deed Ex. C, dated 4th July 1891. The deed Ex, C was executed by Karupanna Pillai whereby he constituted himself as the first trustee, made provisions for the succeeding trustees, gave the properties mentioned in the deed towards this kattalai and gave also the particulars as to the expenses that are to be incurred. The material portions so far as it concerns this appeal are in paras.4, 5 and 7 of the deed. Para. 4 runs as follows:

Subsequent to my death, my son Subrahmania Pillai and Muthuswami Pillai son of Subramania Pillai of Tiruvannavanallur and (3) Davaraya Pillai son of Muthiah Pillai of Omandur, Musiri Taluk-these three shall either unanimously, or a majority of them, enjoy the properties as managing members and shall, out of the income thereof, conduct the charity permanently in the manner before mentioned.

2. Paragraph 5 runs as follows:

Neither myself nor the managing members of the charity who shall be conducting the charity shall have any right to alienate the same in any manner such as hypothecation, othi, sale, gift, etc Should any such alienation be made, it shall not be valid. But myself and those that succeed me as managing members shall have the right to sell the same only if other properties of value equivalent to

these charity properties are available and if the income out of such other properties is likely to exceed that of these properties; and to buy with the sale proceeds, such other properties for the above charity.

3. Paragraph 7 runs as follows:

Some of my relations have asked me for a site to construct a choultry to conduct feeding there and I have also promised to so give. In the event of their asking for such cite the ground in the spot in item 1 below, to the east of the north to the south bazars in the eastern side of the trunk road shall be handed over. After my death, the managing member of the choultry, after it is built shall also join in the management and conduct of the present charity with the managers that succeed me. Should the managers above referred to, neglect the management, the supervisor of the devasthanam should also join in the management and conduct it either unanimously with them, or by a majority.

4. The case for the plaintiffs is, that Devaraya Pillai who was the last surviving trustee alienated the lands in the Sch. A properties which were comprised in the trust deed, Ex. C, without any necessity, that he purported out of the consideration for this sale deed to purchase lands in Sch. D which belonged to him. In other words the trustee sold to the trust the lands belonging to him purporting to do so under the powers conferred under Clause 5 Ex. C, that such a sale is invalid and not binding on the trust, that defendants 35 to 37 who are the sons of the deceased Devaraya Pillai objected to the sale, on the ground that their father had no power to sell the properties which were joint family properties, that the other defendants are in possession of these properties, the items in the plaint and that the plaintiffs are entitled to get back the properties with mesne profits.

5. The Subordinate Judge passed a decree in favour of the plaintiffs. Some of the defendants have not appealed. The only defendant who has appealed is defendant 1. Out of items 1 to 32, the subject matter of this suit, defendant 1 purchased items 1 to 24 and we are concerned only with these items as none of the other defendants have preferred an appeal. Items 2, 13 and 14 have been given to defendant 10, so that, we are not concerned with those items. The sale deeds under which defendant 1 claims are Exs. 7, 10 and 9 (supplemental sale deed by Devaraya Pillai to defendant 1). Ex. 7, is a sale deed by Devaraya Pillai to defendant 1 of items 1 to 18 and 26 for Rs. 2,400. Ex. 10 is another sale deed by Devaraya Pillai to defendant 1 of items 19 to 23 for Rs. 250. It appears that suits were filed for the recovery of possession of these items by defendant 1 but objection was taken that the whole money was not paid because the purchaser had executed a mortgage Ex. 8 for a portion of the consideration. The suit for possession was dismissed by the Subordinate Judge and in order to assure his title Ex. 9 was executed by Devaraya Pillai which purports to be a confirmation of the previous sale deeds. Ex. 3 is a sale deed of the said Devaraya Pillai to himself as manager of the trust and Ex. 14 is a sale deed by Devaraya Pillai to the suit trust, of the properties comprised in Sch. D and this sale deed is dated 30th

December 1917.

6. The first question that arises for our consideration is whether the sale deeds of the Sch. A properties are valid. There can be little doubt that the properties comprised in the Sch. A are trust properties and that defendant 1 was aware that the trustee was dealing with the said trust properties. He had notice of the trust and the terms of the trust deed. Under Clause 5 it is stated distinctly that alienations shall be void and the only exception made is in the case where other lands which fetch larger income are to be purchased out of the sale proceeds of the land dedicated. There can be little doubt that on the evidence on record the title to the Sch. D properties is not free from doubt. The Subordinate Judge holds that it has not been shown that there was any justifying necessity as would enable the father to sell the joint family properties. But apart from that defendant 1 has to show that the conditions in which are required by the deed of trust to validate the transaction exist. This is not simply a case where a mere representation is sufficient and a bona fide belief in the representation would validate the sale, there being no duty on the part of the purchaser to see to the application of the money. The case here goes much further. It is not contemplated that the trustee can sell the property without any negotiations for the purchase of the other properties and keep the money with him, nor is it contemplated that he can invest the moneys realised by the sale of the trust properties for some time and then utilize the same for the purchase of new properties. The author of the trust clearly wanted to prevent any money being lost or otherwise utilised in the interval and practically wanted both the transactions of selling and purchasing to be of a simultaneous nature. It is clear from the finding of the Subordinate Judge which is also supported by the evidence that these conditions were not fulfilled. The trustee instead of getting the money from the purchaser allowed him to mortgage to him every property sold and it is not a thing which is contemplated by the trust deed. Again we find that the trustee instead of purchasing other properties has conveyed his own properties to himself and the law is clear that a trustee cannot do so. He cannot buy the properties of the trust himself and he cannot sell any of his properties to the trust, the mischief in both the cases being the likelihood of a conflict between his interest and his duties as a trustee. The law does not go into the question of whether the transaction is beneficial or not. We may refer in this connexion to *Wright v. Morgan* [1926] A.C. 788, and *Peary Mohan Mukerjee v. Manohar Muherjee* AIR 1922 P.C. 235 and also *Godfrey*, on Trust p. 324, 4th Edition. For these reasons, we are of opinion that the sale by the trustee to defendant 1 of trust properties is invalid and we confirm the decree of the Subordinate Judge as regards the items comprised in the Sch. A.

7. The next question for consideration is whether defendant 1 if he has paid the whole or any portion of the consideration for the sale to him is entitled to any relief. On this part of the case we are clearly of opinion that if we set aside the sale and if the purchase money or any portion thereof has been paid by defendant 1, he is entitled to get back the same from the trustee and he being

dead he can recover the same from his legal representatives defendants 35 to 37. On this part of the case the vakil for defendants 35 to 37 says that he had no opportunity to show that consideration was not paid by defendant 1. We have got on one side the statements made by the deceased trustee who seems to have all along supported defendant 1 that the whole money was paid and on the other hand it is stated by the vakil for the defendants 35 to 37 defendants that the consideration was not paid or at least a portion of the consideration was paid on the date of Ex. 9 and we think that a finding is necessary on this point to adjudicate the amount which defendant 1 is to get back. It is argued by the vakil for defendants 35 to 37 that defendant 1 is entitled to no remedy in this suit but we do not see any reason to hold that a separate suit is necessary. All the parties are before us and if we set aside the sale by the trustee to defendant 1. we fail to see why we should not give effective relief to the other party by making the trustee who sold the properties reimburse defendant 1 with any money which may be proved to have been paid as consideration for the sale.

8. A legal objection is taken by Mr. Ramachandrier to the maintainability of the suit. His argument is that the trustees of the Jambukeswaraswami temple have no right to file a suit as the conditions under the deed of trust which entitle them to claim as trustees have not been Milled. His argument is that the trustees of the choultry are also trustees of the Jambukeswaram temple and that the latter should act with the former trustees and could not file a suit independently of the trustees of the choultry. There is no evidence that the trustees of the choultry took any part in the management of the trust. For the past 13 years we find nothing done by the trustees of the choultry and there is nothing to find that they accepted this trust and before we can hold that they have got any interest in the temple trust it should be proved that the trustees of the choultry accepted the temple trust. The mere statement in the trust deed, that the future trustees to come into existence should also have rights of management would not make them trustees. Further there is this difficulty. No such plea was raised and no issue was framed on that point and if such an issue was raised the trustees of the temple would have joined them as defendants in the case if they would not join as plaintiffs. We do not think that the objection raised at this late stage is valid. Moreover, the trustees of the Jambukeswaram temple are really interested in seeing that the trust properties are properly managed and the kattalai regularly performed and we do not see why they should not sue to recover trust properties as trustees of the Jambukeswaram temple which is the beneficiary.

9. Plaintiff 3 was brought on record on his application to cure any defect which may arise as regards non-joinder of parties should it be found that plaintiffs 1 and 2 are not legally entitled to maintain the suit. The trust not being hereditary, plaintiff 3 can come in only when there are no trustees to represent the trust. The finding of the Subordinate Judge is, and we agree with him that plaintiffs 1 and 2 are competent to file the suit and there is no reason why we should declare plaintiff 3 also a trustee and give him any relief in this suit. We say nothing in this suit as regards his right to be declared a trustee. All we say is that

there is no reason to give him a joint decree with the plaintiffs. If he likes he can file a separate suit to have his rights as trustee established.

10. With reference to the memorandum of objections filed we think that plaintiffs 1 and 2 are entitled to mesne profits on the properties which are found to be in possession of defendant 1 till the date of possession and not merely till the date of the decree as ordered by the Subordinate Judge. As regards the rate we do not think there is any ground to increase the rate allowed by the Subordinate Judge. This disposes of all the points in the case.

11. We direct the principal Subordinate Judge of Trichinopoly to submit a finding as to the amount which defendant 1 paid towards the consideration for the sale deeds executed by the trustee Devaraya Pillai in his favour. The parties are at liberty to adduce further evidence. The finding will be submitted within one month from the reopening of the Trichinopoly Court. Time for objections seven days.

12. The memorandum of objections filed by plaintiff 3 is dismissed without costs.

13. No orders are necessary on the C.M.P. Nos. 3598 of 1923 and 3767 of 1924 and they are dismissed.

14. In compliance with the order contained in the above judgment, the Subordinate Judge of Trichinopoly submitted the following:

FINDING

Issue:

What is the amount which defendant 1 paid towards the consideration for the sale deeds executed by the trustee Devaraya Pillai in his favour?

15. My finding on the issue is accordingly to the effect that the sales in question have consideration to the extent of Rs. 650 only.

16. This appeal and the memorandum of objections coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following judgment:

Kumaraswami Sastri, J.

17. "We accept the finding of the Subordinate Judge and find that Rs. 650 was the consideration which was paid in respect of the sales in favour of defendant 1. Defendant 1 will be entitled to a decree for this amount against defendants 35 to 37 to the extent of the family properties in their possession and the assets of their father in their possession. In other respects we confirm the decision of the lower Court and the appellants will pay the costs of the plaintiffs-respondents 1 to 3 and each party will bear his own costs as regards the other reliefs sought.