
(1927) 10 MAD CK 0048
In the Madras High Court

K. Venkataraya Prabhu

APPELLANT

Vs

Vasudeva Prabhu and Others

RESPONDENT

Date of Decision : 20-10-1927

Acts Referred:

Citation : AIR 1928 Mad 897 : 108 Ind. Cas. 294

Judgement

1. This appeal arises out of an order passed by the Subordinate Judge dismissing the petitioner's application to execute the decree passed in O.S. No. 78 of 1914. The facts leading up to the execution application are shortly these. Upendra Prabhu and Ramakrishna Prabhu were brothers and succeeded to certain properties as reversioners. O.S. No. 78 of 1914 was filed by Ramakrishna Prabhu against Upendra Prabhu for partition and a compromise decree was passed. By the compromise decree certain properties were set apart for the performance of religious trusts and Schedules A to D relate to the trust and its performance. Schedule A refers to the Immovable properties set apart for the trust, Schedule B. refers to the moveables, Schedule C, refers to the performance of the trust and the various acts to be done by the trustee and Schedule D refers to the properties which are made the security for the due performance of the trusts by the trustee. Upendra Prabhu the elder brother was constituted by the rajinama decree the trustee, but as he was old and blind his son, Srinivasa Prabhu was allowed to be in actual management of the trust properties and to perform the trust. The rajinama decree provided that if there was default in performing the duties mentioned in Schedule C, then Ramakrishna Prabhu the plaintiff in the suit was given the right to get possession of all the immovable and moveable properties in execution. As regards the rights of Ramakrishna Prabhu after taking possession the decree runs as follows:

When the plaintiff would accordingly take possession of the said properties he will be fully entitled to collect the value of the moveable properties which are found wanting and the amount fixed for the expenses of the viniyogas which are left unperformed and also the amount of Court costs together with interest thereon at 12 per cent. per annum on the liability of the immovable property

mentioned in D list attached hereto and belonging to the defendant. The plaintiff should take possession of the property accordingly collect the produce thereof, pay the tirva of the same and perpetually get performed all the viniyogasshown in C list without obstruction and any omission whatever. And the property called "Padi" consisting of S. F. No. 23/10, 3, 8, 7, 1,. 11, 4 & 27/1; 2, 7, 4, 9 out of the property-allotted to his share must be liable in that respect. Besides he should spend the amount collected for the acts left unperformed.

2. The decree goes on to state that both Ramakrishna Prabhu and Upendra Prabhu should act jointly as regards the repairs to the trust house, the distribution of rice to the poor and the cutting of trees standing on the trust property. Upendra Prabhu the trustee committed default and this led to the proceedings in execution. The matter came upon two occasions to the High Court and it was decided that the decree was executable, that Upendra Prabhu committed default which was gross and persistent and that he is not entitled to any relief against forfeiture. Ramakrishna Prabhu went on with the execution and recovered the properties in Schedule A. Further proceedings were taken by him as regards making good by the defendant of certain properties which he said were missing and for other relief. Ramakrishna Prabhu died before the decree could be fully executed. He, however, executed two documents. The first is Ex. M. dated 24th September 1920. It is a registered deed of trust which after referring to the execution proceedings empowered the appellant to conduct the further execution proceedings and take possession of the properties. The deed states that Ramkrishna Prabhu appointed the appellant as his sole representative and relinquished all his rights in his favour and conferred them on the appellant so that the appellant and his male children may from generation to generation perform the duties of trustee. In spite of this document however, proceedings were continued by Ramakrishna Prabhu. The next document that Ramakrishna Prabhu executed is a will Ex. L, dated 5th May 1923. It recites the previous document. The material portion of the will runs as follows:

As per the trust deed executed by me in -favour of Venkataraya, he alone without any sort of objection from Annappa (elder brother) should become entitled to and should realise all reliefs which have accrued or may hereafter accrue against the respondent Srinivasa Prabhu. My intention that Venkataraya should collect all amounts in respect of all claims of whatever nature against Srinivasa Prabhu as expressed both in the settlement deed and trust deed executed by me in his favour, I have made it more explicit by this document.

3. On the death of Ramakrishna Prabhu the appellant applied to execute the decree but his application was dismissed on the ground that Ramakrishna Prabhu had no power to leave either the deed of settlement or the will.

4. The main contention of Mr, Srinivasa-gopalachari for the appellant is that as default has been committed by Upendra Prabhu who was constituted trustee by the compromise decree, by virtue of the terms of that decree has lost all his rights, that thereupon Ramakrishna Prabhu his brother became entitled solely to

the rights of the temple and that the clause in the decree.

that the plaintiff should take possession of the property accordingly, collect the produce thereof, pay the teerva of the same and perpetually get performed all the viniyogas

confers on him the right to appoint his successor. We are unable to uphold this contention having regard to the terms of the compromise decree. It should be remembered that the property which was set apart for the performance of these trusts was not joint family property so as to give any rights of survivorship but property which Ramakrishna Prabhu and Upendra Prabhu got as reversioners. They were tenants-in-common and we think that Upendra Prabhu's son has as much right to take part in the appointment of trustees on the death of Upendra Prabhu and Ramakrishna Prabhu as either Ramakrishna Prabhu or his sons. The use of the words "perpetually get performed" does not by itself give an estate descendible to Ramakrishna Prabhu and his heirs. We need only refer to *Raja Ram v. Narasinga* [1892] 15 Mad. 199 which refers to and follows the decision of the Privy Council in *Tulsi Pershad Singh v. Ramnarain* [1886] 12 Cal. 117, where similar words in cases of grants were held not to convey a heritable estate. It should also be remembered that even when Upendra Prabhu commits default and Ramakrishna Prabhu takes possession, Upendra Prabhu or his heirs have to be consulted as regards the various acts relating to the trust and the repairs to property. The general rule of law is that the founder of a trust or his heirs have got the right to appoint trustees in case of failure of trustees, or where the deed of trust does not make provision for the appointment of trustees to succeed the incumbents mentioned in the deed. In the present case we do not think the rajinama decree contemplates "what is to happen on Ramakrishna Prabhu's death. No power is given under the decree to Ramakrishna Prabhu to appoint a successor. If Upendra Prabhu had not committed default and continued, it cannot be said that under the deed his son would succeed to the exclusion of Ramakrishna Prabhu's branch. If the words "perpetually get performed" do not by themselves vest the trusteeship in Ramakrishna Prabhu's heirs, it is difficult to see, how Ramakrishna Prabhu could, because he survived Upendra Prabhu, cut out Upendra Prabhu's branch. No authority has been cited for the proposition that in cases where two or more persons create a trust with properties belonging to each absolutely, the surviving trustees has the right to appoint trustees in the absence of any express power conferred on him. The general rule is that the heirs of the founder or founders have such a right.

5. It is argued by Mr. Srinivasagopalachari that we should apply the analogies of the law of powers in England and hold that the power of appointment goes by survivorship where there are several trustees. Assuming this is the law in England, we think it unnecessary to go into this question, as there is nothing in the compromise decree which provides for subsequent trustees, or how the trust should devolve on the death of Ramakrishna Prabhu and Upendra Prabhu. We are of opinion that the equitable rule in such cases will be to vest the power of

appointment of the trustee or trustees in all the founders or their representatives and not to give it to one of such founders or his representatives, merely because he happens to survive the other trustee. We think the Subordinate Judge was right in holding that the nomination of the appellant as trustee was not valid.

6. We, however, think that in the circumstances of this case it is not necessary for us to dismiss the execution application as such a course would prejudice the trust.

7. The general rule of law is that no trust should fail or be prejudiced for want of a properly constituted trustee. The properties here are dedicated to the idol and the execution is for the benefit of the idol and the trust constituted by the deed. So far as the conduct of the parties is concerned, it has been found that Srinivasa Prabhu who was allowed to be in management of the trust has been guilty of persistent breaches of trust. It appears that Ramakrishna Prabhu and the present appellant have been doing their best to recover the properties for the trust and see that the trusts are properly performed. The appellant's elder brother is said to be a lunatic. An order of the District Court has been produced which supports the allegation. As regards" Upendra Prabhu's other sons, they have taken no steps to protect the interests of the trust. The dismissal of this application may lead to questions of limitation and to complicated proceedings. We think we have ample power to direct that execution be continued by any person who may be appointed as the next friend or the representative of the idol for carrying on the proceedings which relate to the recovery of the trust properties dedicated to the idol and to safeguard the properties recovered in execution pending the proper appointment of trustees. We think that the interest of the trust would be safeguarded by our empowering the appellant to execute the decree and bring into Court all the moneys recovered in execution and to give security for the value of the move-able properties recovered. He will also give security for two years mesne profits in respect of any immovable property he may recover. It will be open to the members of both the branches to appoint a trustee, failing which the only course would be for the persons interested to get a trustee appointed by appropriate legal proceedings. The properties recovered in execution by the petitioner would then be handed over to the trustee or trustees who may be legally appointed. We reverse the order of the lower Court.

8. As regards costs as the appellant has substantially failed in the contention raised by him, we think the proper order would be to direct each party to bear their own costs throughout.