

(1941) 12 MAD CK 0023
In the Madras High Court

Kanagavelu Nadar and Others

APPELLANT

Vs

Sooravali Subbier and Others

RESPONDENT

Date of Decision : 19-12-1941

Acts Referred:

Citation : AIR 1942 Mad 438 : (1942) 55 LW 183 : (1942) 1 MLJ 353

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This second appeal arises out of a suit for recovery of possession of the property comprised in Schedule A by the plaintiff who was a trustee of certain charities under a scheme decree in O.S. No. 13 of 1922, on the file of the Sub-Court, Madura. The said property admittedly belonged to the charity but it was sold on 7th December, 1924, by the first defendant who was then a trustee of the charity for Rs. 2,212, to the second defendant. The second defendant firm was adjudicated insolvent and all its properties and effects including the said property vested in the Official Assignee of Madras, who by a conveyance, dated 7th May, 1929, sold this property among other properties to the firm of Maya Nadar Bros, and on the date of this suit the said property vested in defendants 4 to 6. The fourth defendant died during; the pendency of the litigation and defendants 8 to 10 who are the appellants herein are legal representatives. The fifth defendant was adjudicated an insolvent and the Official Receiver, Madura as representing his estate is the 7th defendant in the suit.

2. The sale in favour of the second defendant was impeached by the plaintiff on the ground that it was in excess of the powers of the trustee and invalid. Both the Courts have answered that question in favour of the plaintiff and this finding is not challenged in second appeal by Mr. Sitarama Rao, learned Counsel for the appellants. But the main contention urged by him is that his clients and defendants 6 and 7 are entitled to recover the properties comprised in the B Schedule or the Rs. 2,212 the purchase price paid for the sale of A Schedule property before the plaintiff can recover possession of the said A Schedule

property. Both the Courts have negated this contention and declined to give the relief asked for on behalf of defendants 4 to 7.

3. To appreciate the contention of Mr. Sitarama Rao a few facts are necessary. On 7th December, 1924, two documents came into existence, viz., Exs. C and C-I. Ex. C purports to be a declaration of trust executed by the first defendant. The recitals in the said deed are that as the A Schedule property which was dedicated to charity was not yielding proper income, he for the benefit of the said charity settled the price of the said property at Rs. 2,212 and completed the sale deed in favour of N. K. K. Venkatarama Aiyar, the second defendant herein, that in substitution of A Schedule property through the said document Ex. C, he was setting apart of his free will the property comprised in B Schedule which is also worth Rs. 2,212 and which belonged to him so that the income of the said property may be utilized for the said charity. Ex. C-I is a deed of absolute sale in favour of the second defendant by the first defendant for Rs. 2,212. He recites almost the same facts as in Ex. C. In the said document also occurs the recital that A Schedule property which was being sold was not yielding any income and therefore he had to sell this property to the second defendant and that in substitution thereof he was giving his own property. To provide against any loss that the second defendant may sustain by reason of the conveyance he provided the following security, viz., the B Schedule property. The clause relating thereto runs thus:

If any encumbrances or litigations should arise and you should incur a loss, you shall get the undermentioned second item of property shown) as security for the same; to this effect is the deed of absolute sale of punja land executed by me out of my free will.

4. The contention of Mr. Sitarama Rao is that for the price of Rs. 2,212, B Schedule property must be deemed to have been conveyed by the first defendant to the trust and therefore it had the benefit of that property and the trust must reconvey the property under Schedule B or pay the price thereof because while getting A Schedule property, it cannot be allowed to retain the benefit it had from the money received from the second defendant. The contention of Mr. T. M. Krishnaswami Aiyar is that this plea for the recovery of B Schedule property or its price was not specifically raised in the pleadings though no doubt there was a plea in the written statement of defendants 4 to 6 that the plaintiff should have no right to get the cancellation of the sale without repaying the defendants the purchase price and amount spent by them. Again there was no assignment of the covenant relating to the security in Ex. C-I in favour of the second defendant or his assignors by the Official Assignee. Mr. T. M. Krishnaswami Aiyar also stated that the plaintiff's case is that the B Schedule property is also charity property and is not property belonging to the first defendant. In fact an issue (Issue II) was raised in the case but that was not gone into by both the Courts.

5. The learned District Munsif observed that he considered it unnecessary to

decide the said issue. The learned Subordinate Judge dealt with the case on the assumption that the property belonged to the first defendant. The view he took was that the transaction represented by Exs. C and C-I in effect amounted to an exchange between the first defendant in his personal capacity and the first defendant in his capacity as trustee, that he took the trust property in exchange for his own and sold the trust property and appropriated the sale proceeds himself. Baking this view he held that the defendants 5, 6 and 8 to 10 cannot claim possession of the property described in Schedule B or any charge on the property on the ground that their predecessor in interest did not purchase the B Schedule property from the Official -Assignee and. further that there was no warranty of title given by the Official Assignee in favour of their predecessor in title and there was no assignment by the Official Assignee of the covenant relating to security in Ex. C-I in favour of the predecessor in title. The question is whether the view taken by the learned Subordinate Judge is sound and whether any relief can be given to defendants 5, 6 and 8 to 10 in this suit.

6. After listening to the arguments of learned Counsel on both sides, it seems to me that the view taken by the learned Subordinate Judge that the transactions represented by Exs. C and C-I amount in law to an exchange is not correct. The substance of the transaction is that the first defendant as trustee sold the A Schedule property to the second defendant and for the purchase price he conveyed his own property to the trust. If the matter is viewed thus, the question is when the sale of A Schedule property is set aside on the ground that there was no valid necessity to sell that property, whether the trust is not bound to refund the benefit it had by virtue of the sale. If the question related to a private trust and even if it is assumed that the purchase was by the trustee himself, there can be no doubt that the trustee or his alienee will be entitled to call upon the trust to surrender the benefit the trust had by virtue of the sale in his favour. This, principle is recognised by the Legislature in Section 62 of the Trusts Act which so far as is material for the present discussion runs, thus:

Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or re-transferred by the trustee, if it remains in his hands unsold, or, if it has been, bought from him by any person with notice of the trust, by such person. But in such case, the beneficiary must re-pay the purchase-money, paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property.

The contention of Mr. Krishnaswami Aiyar is that that provision will not apply to a case of public religious trust and that the conveyance of A Schedule property must be deemed to be void and the trust is not bound to refund any benefit which it had received and in fact no benefit was received because the first defendant appropriated the purchase price for himself. I am not inclined to agree with the contention of Mr. Krishnaswami Aiyar that the transaction is void. The sale can only be held to be-voidable on the ground that it was in excess of the

powers of the-trustee. His contention that the transaction is void is based on the ground that the transaction must in law amount to an exchange and the trustee must be deemed to have conveyed the A Schedule property to himself and then sold it under Ex. C-I. As I have-already stated I am not inclined to take this view of the transaction.

7. Again the question is not whether the transaction is void or voidable but whether a trust is entitled not only to recover the trust property which has been wrongfully conveyed but also retain any benefit it had from the transaction. I do not see why the principle in Section 62 should not be held applicable to the case of public religious trusts. I am inclined to hold that the principle is an equitable one which would apply to the case of a trust whether public or private.

8. But the question is whether the appellants are entitled to get any relief in this suit. In the written statement no relief was asked for the reconveyance of the B Schedule property or the sum of Rs. 2,212 though no doubt they asked for a refund of the purchase price. Further the title to B Schedule property was not gone into. Instead of remanding the suit for trial on Issue II, I think it is more desirable that the question of title to B Schedule property i.e. whether it is charity property or property belonging to the first defendant and if so whether the fourth defendant should not be given the relief which he is entitled to if it is found to be property belonging to the first defendant may be left for investigation in a separate suit. Learned Counsel for the appellant has also no objection to this course being adopted.

9. In the result the second appeal is dismissed. But as I am deciding the case on a view quite different from that taken by the learned Subordinate Judge I direct each party to bear their own costs in the second appeal.

10. Leave to appeal refused.