

(1898) 10 MAD CK 0002
In the Madras High Court

Mayandi Chetty

APPELLANT

Vs

Samia Pillai and Others

RESPONDENT

Date of Decision : 20-10-1898

Acts Referred:

Citation : (1898) 8 MLJ 296

Hon'ble Judges : Subrahmania Aiyar, J; Moore, J

Bench : Full Bench

Judgement

Subrahmania Aiyar, J.—The point for decision in appeal is whether the respondent's liability as trustee to pay to the appellant the sum of Rs.

100 in accordance with the directions of the respondent's sister who left him her property subject to that trust, was extinguished as found by the

District Judge. No evidence, oral or documentary, appears to have been produced to show that there was between the parties any agreement to

extinguish that liability. The sole circumstance in which the Judge's decision that it was extinguished rests is the fact that subsequent to the creation

of trust, the appellant took from the respondent, Exhibit A, a hypothecation bond for the sum in question which was made payable within a year

from the date of the document with interest at 3 per cent, per annum and enhanced interest at 21- per cent, in default of payment within the time

fixed. Now, is this circumstance by itself sufficient legal evidence to show that the parties had come to an agreement that the trust obligation was

to cease. The rules bearing on questions like the present will be found succinctly stated in Pothier on Obligations and Donat's Civil Law in those

parts of the treatises where the learned authors deal under the head of novation, with the subject of creditors and debtors agreeing to substitute a

fresh obligation for a pre-existing one. Pothier observes "" If, subsequent to the contracting of a debt some act passes between the debtor and creditor, allowing a further time, or appointing a different place for payment, or authorizing a payment to some other person than the creditor or agreeing to take something else in lieu of the sum due, or by which the debtor engages to pay a larger sum or the creditor to accept a smaller, in these and similar cases according to the principle that a novation is not to be presumed, it should be decided that no novation has taken place, and that the parties intended to modify, augment or diminish the obligation and not to extinguish the old debt and substitute a new one unless the contrary is particularly expressed (Vol. I, pages 386 and 387, Edn. of 1806)."" Donat states the rule to the same effect, thus ""There is never any novation produced by the bare fact of a second obligation unless it appears that the creditor or debtor have had an intention to extinguish the first. For otherwise both obligations will subsist. If the creditor and debtor agree to make some change in a former obligation whether it be by adding to it a mortgage, a surety, or some other security, or by taking the same away, whether it be by augmenting or diminishing the debt or by fixing a longer or shorter term of payment or by making the debt conditional if it was pure and simple, and simple if it was conditional. All these changes and others of a like nature do not make any novation, because they do not extinguish the first debt, unless it were expressly said that it should be null, and the first obligation subsists although it be not particularly mentioned that it is reserved, or that the said changes are made without an intention to innovate (Vol. 2, paragraphs 2306, 2307).

2. It follows from the above statements of the law that the presumption against the extinction of the respondents' prior obligation is not rebutted by the appellants having accepted Exhibit A from the respondent without more. The view taken by the District Judge cannot, therefore, be supported.

3. We must reverse the decree of the lower appellate Court and restore that of the District Munsif with the modification as to the rate of interest which will be 6 per cent, per annum instead of 24 per cent, since that rate cannot be awarded, the right to claim it under Exhibit A being barred by limitation. The respondent will pay the appellant's cost in this and the lower appellate Court.

Moore, J.

I concur