
(1961) 07 MAD CK 0010

In the Madras High Court

Case No : Letter Patent Appeal No's. 4 and 5 of 1958

M.S.V.V. Thayanayagi Achi

APPELLANT

Vs

C.T.C.T. Chidambaram Chettiar and Others

RESPONDENT

Date of Decision : 28-07-1961

Acts Referred:

Trusts Act, 1882 — Section 66

Citation : AIR 1962 Mad 406

Hon'ble Judges : Ramacuandra Iyer, O.C.J.; Ramakrishnan, J

Bench : Division Bench

Judgement

S. Ramachandra Iyer, Offg.C.J.

(1) The appellant in these appeals is the wife of one Venkatachalam Chettiar, a businessman belonging to the Nattukotti Chetti community, who

had an ancestral family money-lending business and considerable Properties in Burma, besides other properties in this country. In accordance with

the custom of the community moneys by way of Stridhana and Seemurai were presented to the appellant by her father at the time of her marriage

and those moneys were Entrusted to her father-in-law for the purpose of investment and improvement of his business at Burma. It is stated that

moneys entrusted came to Rs. 16,575-0-3 oil 13th April 1940 and that the amount due at present would be very much above Rs. 20.000. It was

held by, this Court in several cases that moneys presented to a bride on the occasion of marriage, In accordance with the custom of the

community, which is handed over to the husband's people for the purpose of investment is held in trust by the person who receives the moneys on

her behalf, the trustee having a power to invest the trust monies in his own business.

(2) In the year 1943, the appellant's son filed. O. S. No. 48 of 1943 on the file of the Sub-Court Devakottai, against his father and others for a partition of the joint family properties in India. That suit was evidently conceived to get an adjudication as to the binding nature of the debts, which had by then been contracted by Venkatachalam Chettiar. The appellant, in pleaded as the third defendant in the suit filed a written statement claiming that her stridhanam amount, having been invested in the family business, should be paid or alternatively for a charge therefore on the properties, which were the subject matter of the partition suit. The Court held that the debts were binding on the son. It also negated the claim of the appellant to a charge on the Indian properties for the amount due to her in respect, of the entrustment made, with Venkatachalam Chettiar's father at the time of the partition. Appeals were filed both by the appellant and her Son to this Court against the decision of the Sub-ordinate Judge, but without success.

A. S. No. 215 of 1944 was the appeal filed by the appellant. Patanjali Sastri and Shahabuddin, JJ., who disposed of the appeal held that it had been amply proved that the moneys presented to the appellant by her father on, the occasion of her marriage were invested in the family business of her husband in Burma, as was usual with Nattukottial Chetties and that the sum came to Rs. 16575-10-3 on 13-4-1940. The learned Judges however rejected her claim to a charge on the Indian properties on the ground that it had not been established that, We stridhanam moneys, or any portion thereof, contributed to the acquisition of the suit properties.

(3) The judgment of this Court was delivered on 18-12-1945. In the meanwhile, certain creditors of Venkatachalam Chettiar applied to the Sub Court at Devakattai to adjudicate him an insolvent in I. P. No. 1 of 1945. An order, of adjudication was made on 27-12-1945. When the Official Receiver sought to bring the insolvent's properties to sale, a composition arrangement was entered into between the insolvent and his creditors. To that arrangement the appellant and her son were also made parties. Under the arrangement the creditors of the insolvent agreed to receive, only 40 per cent of their claim and to realise that 40 per cent from the properties of the insolvent and his son in Burma, in the first instance. The composition scheme was approved and the adjudication was annulled on

9-9-1946. The appellant who was also a party to the Composition, and who was entitled to a preferential payment from out of the assets in Rangoon, agreed to receive 40 per cent of her stridhanam amount, which by then came to Rs. 20,000, along with other creditors. During the following year, a sum of Rs. 32,000, was realised from the Rangoon properties, but the expenses for the collection took away Rs. 22,000/-. The balance of Rs. 10,000/- was distributed to the various creditors. Venkatachalam Chettiar had still to pay to the tune of Rs. 77,000/- even as per the composition deed.

It was then that formidable difficulties came in the way of realisation of the Burma assets. The land legislation and other enactments in that country, the occupation by rebels of several portion of the property and the communist propaganda rendered it impossible for the trustees of whom

Venkatachalam Chettiar was himself one, to collect the outstandings or realise their dues. The creditors thereupon applied to the Court to set aside

the annulment and read judge Venkatachalam Chettiar as insolvent. The appellant also filed a petition claiming that she would be entitled to recover

her stridhanam moneys from out of the assets of the insolvent as she had the first charge in respect of the same; she prayed for appropriate reliefs

therefore before the properties were brought to sale. The Subordinate Judge of Devakattai set aside the composition and re-adjudged

Venkatachalam Chettiar as insolvent. He negatived the claim of the appellant on the, short ground that as there was no imminent danger of the,

properties being sold, no directions in regard to the execution of the decree can be given.

Appeals were filed in respect of both the riders to the District Judge of Ramanathapuram, who affirmed the adjudication. But the learned District

Judge held that the appellant would be entitled to a charge on the Indian assets to the extent of Rs. 10,000, which represented the Burmese assets

for which she had a charge and which went, to pay off the creditors of the insolvent. On further appeal to this Court against the latter part of the

order Basheer Ahmad Sayeed, J., set aside the declaration of the lower Court that the appellant would be entitled to recover a sum of Rs.

10,000/- with a charge therefore on the Indian assets of the insolvent. The learned Judge, however, gave a certificate under clause 15 of the

Letters Patent, which has resulted in the present appeal.

(4) On behalf of the appellant, Mr. Kesava Aiyangar, contended as follows: The stridhanam moneys of the appellant were trust moneys in the

hands of the insolvent and those moneys having been Invested the Rangoon business, there will be a charge for them over the assets of the firm. As

the sum of Rs. 10,000 was received from Burma, that amount was impressed with a charge in her favour and those would be her moneys. That

sum having been paid to the insolvent's creditors under the scheme of composition, it should be held that on the composition being set aside all the

parties were relegated to their original position. Equity and justice require that the appellant should, be given, a charge over the Indian assets by

why or substituted security.

(5) The doctrine of substituted security finds application generally, in cases of mortgages where it has been held, that the mortgagee could have the

debt paid off out of the mortgaged property, or anything that is substituted for it. For example, if a mortgaged property is acquired by the

Government under the provision of the Land Acquisition Act, and a sum of money deposited as compensation for such acquisition the mortgagee's

right will, in that case be transferred over to the amount of compensation deposited. There are also other instances in which if another property is

substituted for mortgaged property the mortgagee will have a right to proceed, against the, substituted property. In all those cases some other

property, is substituted or takes the place of the original property Subject to mortgage the security on the latter is transferred to the former. That

rule cannot obviously apply where there has been no such substitution. In a case where moneys belonging to a beneficiary are entrusted to the

trustee and the trustee utilised the money to purchase a property the beneficiary would undoubtedly have a right to recover the money out of the

property. That is a case where the trust money is traced to and the property itself.

But in the present case the sum of Rs. 10,000 the trust money is not traceable to any property in India. The Indian properties have been

purchased, as shown in the earlier suit, long before any moneys from Burma came to India. The sum of Rs. 10,000, itself had been paid over to the

creditors of the insolvent What the appellant claims in this case is therefore got

to proceed against any substituted property. She prays for reimbursement for what she had parted with under the, Infructuous composition and for that purpose she wants a Charge on other, assets, which were not acquired out of the trust moneys. Whether such a claim can be accepted have to be decided on a consideration of the extent of rights possessed by a beneficiary in the properties or assets of the Trustee.

(6) When a trustee fails to perform the obligations imposed on him under the trust deed, there will be a breach of trust and the beneficiary will have

a right to proceed against the former personally to recover the amount due. This, however, is not the only right of the beneficiary. Where the trust

property could be identified in the hands of the trustee, he can recover it. where the trust property, Consists of money and the trustee mixes up

those moneys with his own, the beneficiary would be entitled to recover the same out of the moneys in the hands of the trustee. Section 66 of the

Indian Trusts Act enacts,

Where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled, to a charge on the whole fund, for the amount due

to him.

This section applies to a case, where. the trustee commits a wrong when he mingles trust property with his own. But there may be cases as the

present one where the trustee commits no wrongful act by mingling his property with the trust fund. For example, where the settlor himself

authorises mingling of the trust funds with the moneys of the trustee or to invest them in his business. Even in such a case the principle of section 66

has been held to apply. Thus there can be no distinction between a rightful and wrongful disposition of the trust property by the trustee, so far as

the right to follow the trust property is concerned. The beneficiary in such a case would be entitled to have a right of priority to have his moneys

paid out of the moneys in the hands of the trustee vide Official Assignee of Madras v. Muthayee, Achi, 1937 Mad WN 493.

(7) The principle on which the beneficiary's right to preferential payment rests has been stated in the classic passage in the Judgment of Jessel M.

R. in Hallet's estate, 1880 13 Ch D 696 thus (page 708):

The modern doctrine of equity as regards property disposed of by persons in a fiduciary position is very clear and well-established doctrine. You

can, if the sale was rightful, take the proceeds of sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of sale, in a

sense adopting the sale for the purpose of taking the proceeds, If you can identify them. There is no distinction, therefore, between a rightful and a

wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you

cannot identify the proceeds. The proceeds may have been invested together with money belonging to the person in fiduciary position, in a

purchase. He may have bought land with it, for instance, or he may have bought chattels with it. Now, what is the position of the beneficial owner

as regards such purchases. I will first of all, take his position when the purchase is clearly made with what I will call, for shortness the trust money.

although it is not confined, as I will show presently, to express trusts in that case, according to the now well established doctrine of equity the

beneficial owner has a right to elect either to take the property purchased or to hold it as a security for the amount of the purchase money laid out in the

purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount

of the trust money. But in the second case, where a trustee mixed the money with his own, there is the distinction, that the cestui que trust, or

beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simple and purely, but with a mixed

fund. He is however, still entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase; and that charge

is quite independent of the fact of the amount laid out by the trustee.

This principle was examined in *The Official Assignee of Madras Vs. The Devakottah Nagarathar Sri Meenakshi Vidyasala Paripalana Sangam*,

Coutts & Trotter, C. J., laid down certain propositions as undisputable. They are:-

1. That if the trustee keeps the sums entrusted to him entirely separate from his own moneys as by putting them in cash in a bag to use Sir G.

Jessel's instance, or by putting them into a separate account at a bank, the cestui que trust can follow them.

2. That if the trustee can be shown to have converted the trust money into a specific thing such as a piece of land, or a definite parcel of goods

remaining in his possession, the cestui que trust can take that land or those

goods as representing his money or claim a lien on them for the money expended on the purchase.

3. Then comes the more common case where the trustee has mixed up the trust money with his own. I think here it is clear that if the trustee has bought land or goods out of moneys which are partly his own and partly those of the cestui que trust the cestui que trust can claim a charge on the property for the amount of his funds which was expended in the purchase. That is not always easy of ascertainment, and the working rule appears to be that if the trust moneys have disappeared and no residue is left, the cestui que trust will be entitled to a charge on the whole until it is ascertained what portion of the purchase money was contributed by the trustee out of his own funds and not out of the trust money, the onus being cast on the trustee to prove what portion came from his own funds. When that is ascertained, the cestui que trust will only have a lien on the property for the amount ascertained to be due to the misuse of the trust money.

(8) The learned Chief Justice then considered a case where a trustee put the trust moneys into his business and on the business failing there were no actual funds in the hands of the Official Assignee, who represented the trustee. Even in that case it was held that the beneficiary could proceed against prospective assets. There was however no question in that case of two assets, to one of which alone the trust fund could be traced. The principle of that decision will not therefore apply to the present case, where admittedly the trust moneys are traceable to a particular fund only, namely, the Rangoon assets. No part of the moneys from that business could be traced to any Indian assets. As we stated earlier, this Court held that the appellant could have no charge on the Indian properties.

(9) From what is stated above, one thing is clear namely that in order to entitle the beneficiary to a preferential payment, it must appear that there is a fund to which the trust money is traceable which is still available. Where the fund is not there, no question of tracing can arise. In *Keston's Law of Trusts*-7th, Edn. the learned author states the position thus at page 383.

Equity approached the problem more abstractly and had no difficulty in recognising the continued notional existence of distinct funds which were physically mixed. This amalgam, in proper circumstances be resolved into its constituent elements. Whilst, however, the equitable relief is personal

in the sense that Equity act in personam, it presupposes the continued existence of the fund itself. It for example, the fund has been spent on a dinner, equity can do nothing.

(10) The position then is this: The trust moneys were invested in Burma. Beyond the sum of Rs. 10,000, which was received at the time of the

composition and paid over to the creditors, no other sum of money from that place is traceable in any of the Indian assets. There are no doubt

other properties in Burma over which the appellant may continue to have a charge, or a right to Preferential payment therefrom. It may also be that

by reason of the fact that the composition has failed, she could take appropriate proceedings to get back the sum of Rs. 10,000, paid to the

creditors. We prefer to express no opinion as to the right of the appellant to obtain reliefs in respondent of those matters. What we are concerned

with in this case is whether in lieu of what was, paid to the creditors, the appellant could ""have a charge over other Indian assets to the acquisition

of which no part of the money from Burma could be traced. on that question there can be only one answer viz., it could not be so done.

(11) We agree with Basheer Ahmed Sayeed J., in the conclusion he has arrived and dismiss these appeals, in the circumstances. without any order

as to costs.

(12) Appeals dismissed.