(1945) 09 MAD CK 0005

In the Madras High Court

Nemathanpatti M.M. Pl. Annadana Chatram APPELLANT

Vs

P.K.P.R.M. Raman Chettiar and Others RESPONDENT

Date of Decision : 12-09-1945

Acts Referred:
Succession Act, 1925 — Section 333, 361

Citation : AIR 1946 Mad 209

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—This appeal arises out of a suit brought by the appellant as the managing trustee of a certain charity known as ""M.M.

PL. Annadana Chatram"" at Nemathanpatti, Bamnad district, for release of a certain land and building from attachment effected in execution of a

decree, obtained by respondent 1 (hereinafter referred to as the respondent) against the legal representatives of one M.M. PL. Palaniappa; Chetty.

Palaniappa Chetty was carrying on banking and money-lending business in various places in India and Burma with his headquarters at

Nemathanpatti. In 1923 the-respondent brought a suit against Palaniappa and others in the DistrictCourt of; Pyapone in Burma for recovery of

possession of certain lands and premises with mesne profits. During the pendency of the suit, Palaniappa died in 1925, having made a will dated

2nd June 1925 whereby he bequeathed the bulk of his separate properties-to various charities and appointed his two-sons, Chokbalingam Chetty,

the appellant herein, and Kasi Chetty, executors under the will to carry out the directions contained therein. These executors were brought on

record as the legal representatives of Palaniappa in the suit. Kasi died subsequently and his widow Alamelu Achi was substituted in his place. After a protracted trial the suit ended in a final decree, dated 16th October 1939, directing the appellant and Alamelu, Achi to pay to the plaintiff, the

respondent in the present appeal, a sum of Rs. 83,131-13-0 for mesne profits and costs. This decree was-transferred to the Court of the

Subordinate Judge of Devakottai for execution and among other properties the house property now in. question was attached by order of Court

dated 81st January 1941. The appellant objected to the attachment of the suit property on the ground that it was ""a choultry for poor feeding

having been dedicated by his, father to the said charity. The objection was overruled by order dated 1st April 1941. The appellant then filed a

petition on 9tb April 1941 under Order 21, Rule 58, Civil P.C., on behalf of ""Nemathanpatti Annadana Chatram"" as the managing trustee thereof

claiming that the building placed under attachment belonged to the Annadana Chatram charity started by his father, that he was feeding Brahmins

and other persons every day in that building and that he had no other right therein except the right of a trustee. He accordingly prayed that the

property should be declared to belong to Nemathanpatti M.M. PL. Annadana Chatram and released from the attachment. The claim was rejected

by order dated 27th July 1941 and this suit was brought on 20th. November 1941 under Order 21, Rule 63 to establish, the right claimed by the

appellant as the managing trustee for and on behalf of the charity to the property attached. The trial Court decreed the claim and raised the

attachment, but the lower appellate Court k reversed the decree an dismissed the suit holding, among other things, that no dedication of the suit

property to any charitable purpose was made out.

2. The main question for determination in this second appeal accordingly is whether there has been such a completed dedication of the suit building

for the charitable purpose of free feeding of the poor that Palaniappa or his representatives could no longer claim property in it. Before considering

the question, it will be convenient to state a few facts which form the background and as to which there has been no dispute before us. Palaniappa

Chetty became divided from his sons and his brother''s sons in 1919 and his first wife, the mother of the appellant, died in Karthigai of the Tamil

year Dunmathi corresponding to November-December 1921. On the 16th day of her death, the concluding day of the funeral ceremonies, Palaniappa started in honour of her memory the charity of feeding the poor in an old building belonging to him in his native village Nemathanpatti.

No fund, however, was set apart as an endowment for the purpose at the time. In or about September 1922, Palaniappa Ohetty began the

construction of the salt building. The accounts maintained by Palaniappa Chetty between 1923 and 1,923 have been filed as Ex. P-3 and they

show that Palaniappa was entering the sums spent for the construction of the building in a separate folio headed ""Chatram building account.

Before the construction was completed, he died, as already stated, in 1925, and the building was finished early in 1926. On its completion, an

inscription carved in stone with the words ""M.M. PL. Nemathanpatti Annadhana Dharmasala"" in Tamil was fixed above the front doorway. The

building as completed includes a small temple devoted to the deity, Sri Subrahmanya, built in the traditional style with a gopuram or turret above

the roof, a stupi or flag post and a stone peacock, the emblem of the deity, in front. Within the compound of the premises are a small tank and a

nandavanam or garden for the supply of flowers for worship in the temple. The building comprises a lecture hall and spacious pials, and the total

cost of construction amounted to about 1 1/2 lakhs of rupees.

3. Turning now to the main question, the learned Advocate-General put the case for the appellant in two ways : The legal effect of the facts

adverted to above, taken cumulatively, was to establish an appropriation, even during the lifetime of Palaniappa, of the land and the superstructure

under construction to the charitable purpose of using the same when completed for feeding the poor. Alternatively, if there was no such

appropriation during his life, the land and building were devised under his will to the ehatram charity. As reliance was placed on the recitals in the

will in support of the first branch of the contention also, it will be convenient to set out here the relevant provisions in some detail. After referring to

the members of the family, the partition of 1919, the state of his health, and the necessity for making

arrangements in respect of the matters connected with the affair of charity, namely, my estate''s private charities, which are being and have been till

now conducted by me,

the will proceeds as follows:

In respect of the properties relating to charity out of my personal properties, an account is maintained in the name and style of PL. T. and in

respect of other properties an account is maintained in the name and style of M.M. PL. Particulars are mentioned in the charity accounts as to what

amounts have been set apart till now for the respective charities and what amounts have been set apart as funds therefor till now, what amounts

have been spent till now in connexion with charities from the funds set apart therefor and what amounts have been given to others which are to be

realised. Such amounts as are to be realised should be duly realised and added to the said fund.

* * * *

Apart from the already existing building, etc., set apart for Annadhana Chatram Charity founded in Nemathanpatti the building which is now under

construction on the eastern side of the road and which is almost complete except for a small portion, should be completed and the said Annadhana

charity should be properly conducted from out of the said charity funds.

* * * *

The charities, namely, Nandavanam (flower garden), Pasumadam (cow sheds), Vedaparayanam Patasalai temple kattalais, etc, started by me in

Viralimalai should be properly conducted. The buildings situate in that village and the buildings set apart for the respective charities should be used

for that charity only. The abovementioned charities should be well conducted according to the same dittam (established scale) as they have been

conducted till now, having regard to circumstances, the then prevailing rates and prices, by increasing or decreasing their dittam according to

discretion.

Then follow certain bequests to his second wife and his daughter after which the will continues as follows:

The funds remaining after meeting the expenses of these items which are to be met from my estate as aforesaid should be added to my private

charity funds. Those who are holding the position of executors as mentioned below have authority to manage all matters connected with my private

charities and my estate as aforesaid, to conduct all that should be duly conducted to maintain accounts properly in respect therefor, to sell or

exchange, having regard to profit the circumstances and the necessity, all the movable and immovable properties except those buildings that have

been ear-marked for the respective charities.

* * * *

As I have appointed my eldest son Muthukaruppan Chettiar alias Kasi Viswanathan Chittiar and Chokkalingam Chettiar as executors for

conducting all the acts aforesaid they and after them, their eldest male heirs shall duly hold the position of the executors and they shall conduct all

matters as mentioned above.

4. As regards the suggestion that there was a dedication of the property in question to the charity by Palaniappa during his lifetime, it is to be

observed that no such case appears to have been raised in the Courts below, the only claim being that the property was given to the charity by and

under the will of Palaniappa. That being so, we do not think that it is open to the appellant at this stage to put forward such a case which plainly is

not a pure question of law. Even assuming it is a matter of legal inference from facts established by the evidence, as suggested for the appellant, we

fail to see any basis for such an inference. It would appear, no doubt, that Palaniappa had been conducting a feeding charity since the death of his

first wife and debiting the expenses in a separate folio opened in the name of the charity, but it is not proved that he had actually set apart and

appropriated any sum for the purpose as a trust fund. It is a common practice among Nattukottai Chettiars to make credit entries in their books of

account in the names of various charities which they are conducting and debit the expenses in the same account, but it has been repeatedly held

that such credit entries are not sufficient to create a trust unless corresponding sums are actually set apart and appropriated to the charities : vide

Ramanathan Chettiar v. Palaniappa Chettiar AIR 1945 Mad. 473. The mere fact, therefore, that the expenses relating to the construction of the

building in question were debited in a folio headed ""Chatram building account"" cannot be taken as showing that such expenses came out of any

trust fund so as to make the building the property of the trust. The evidence, no doubt, discloses an intention on the part of Palaniappa to devote

the building when completed to the feeding charity which he was conducting, but this is far from showing that there was a Completed dedication of

the building while it was still under construction. The learned Advocate-General could not point to any particular time or occasion when such

dedication could be said to have taken place. For all these reasons, we cannot accept the j suggestion that the building in question had been

dedicated to the charity before Palaniappa died.

5. We are, however, inclined to agree with the appellant''s contention that the building in its then unfinished state was devised under Palaniappa

Chetty''s will to the Annadhana Charity. The will is in Tamil and the official translation, quoted above, of the passage in italics is not quite accurate.

A translation closer to the original would run thus:

For the Annadhana chatram established at Nemathanpatti, besides the building which already exists, the building now under construction, on the

eastern side of the road and almost complete except for a small portion should be completed, and the said Annadhana charity should be properly

conducted from out of the said charity funds.

The point to be noted is that the words ""for the Annadhana chatram established at Nemathanpatti"" which occur at the beginning of the sentence can

fairly and reasonably be taken to qualify not only the building already in existence but also the new building which was nearing completion. Thus

construed, the passage, taken along with the later passage which excepts ""those buildings that have been ear-marked for the respective charities

from the scope of the power of alienation conferred on the executors, indicates in our view that the building in question, albeit unfinished at the

time, was devised as a specific legacy to the Annadhana charity, the context making it clear that the testator intended that the charity should be

conducted in that building when completed. We cannot agree with the learned Subordinate Judge that the discretion given to the executors to vary

the dittam, or the established scale for the conduct of the charities shows that there was no binding obligation on the executors to carry on the

charities and that the testator did not intend to divest himself and his heirs of the title to the property and to vest it in the executors as trustees for

the charity. It will be seen that the testator, after directing the payment of his debts and bequeathing some pecuniary legacies, left the residue of his

estate to the charities named in the will. It is thus clear that he did not intend that any portion of his estate should go to his sons whom he appointed

executors under the will. Under these circumstances, the expression ""private charity"" used in the will can only mean, as suggested for the appellant,

that the control and management was to continue in the testators own family as provided for in the will, and it cannot be taken to imply that no real

trust was intended to be created. The feeding of the poor is clearly a public charitable purpose, and, we are of opinion, that the will operates as a

devise of the suit property to the executors in trust for that purpose.

6. The question next arises as to whether the property is, on that ground, not to be liable to answer the respondent''s debt. It was urged for the

appellant that the position was the same as if third parties had been appointed trustees for the charities under the will, in which case the executors,

having completed the building after the death of the testator and fixed the stone inscription, must be taken to have assented to the legacy and

handed over the subject of the legacy, viz., the building, to the specific legatees so as to complete their title as against the executors: vide Section

333, Succession Act. It was accordingly submitted that, though the respondent was entitled u/s 361 of that Act to claim payment of his debt out of

the property in the hands of the legatee, he could not proceed against the property by attachment and sale in execution of his decree made against

the appellant as the legal representative, but only by a separate suit. We are of opinion that this contention cannot prevail. In the first place, it is not

correct to say that the appellant stands in the position of a mere legatee. He is the executor of the will charged with the duty of administering the

estate of the testator and carrying out the provisions of the will. The administration is not yet over, for the respondent''s debt remains unpaid. The

law casts upon an executor the obligation to discharge all the debts of the testator, of which he has notice, before paying or delivering the legacies

bequeathed under the will (Section 325, Succession Act). The appellant was thus bound to pay, or to make provision for the payment of, the

respondents'' debt before carrying out the directions of the will in regard to the Annadhana charity. Pointing out the distinction between an

unsatisfied creditor''s right to proceed against the executor and his right to follow the assets already distributed to the legatees in order to obtain

payment, Lord Davey observed in Harrison v. Kirk (1904) 1904 A.C. 1

In the first case he is exercising merely a legal right. In the other he is exercising an equitable right which is given him by the equitable doctrine of the

Court of Chancery, because he has no legal right against the legatees; he has no legal right against the residuary legatee, his only legal right is

against the executor. But the Court of Chancery in order to do justice and to avoid the evil of allowing one man to retain what is really and legally

applicable to the payment of another man devised a remedy by which, where the estate had been distributed either out of the Court or in Court

without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who

derive title from the deceased testator or intestate. In that case no doubt, equitable defences may be made to the claim. (Cf. Section 94, illust. (a),

Trusts Act.)

7. Can the ""legal right"" of an unsatisfied creditor to proceed against an asset of the testator in the hands of the executor be resisted by the latter on

the plea that he holds it as a legatee whose title has been perfected by his own breach of duty, and that the creditor could only work out his

equitable remedy in appropriate proceedings? We think not, for to admit of such a plea would be to allow a wrong-doer to take advantage of his

own wrong. It follows that the appellant, not having completed the administration of the estate and discharged the respondent''s debt, must, in

relation to the suit property, be deemed to be merely in the position of an executor, and the respondent is entitled to levy execution against the

property under the decree obtained by him. Furthermore, even if the respondent''s claim against the appellant were to be regarded as based on the

equitable right of an unpaid creditor to follow the assets in the hands of a legatee who has received the legacy, we can see no reason why the right

should not be exercised by the respondent, in the circumstances of this case, by executing his decree. It has no doubt been held in Joy Chandra

Roy and Others Vs. Satis Chandra Roy, where the legatee was a third party (the shebait of a temple) that such right can be exercised only by a

suit and not by levying execution under a judgment against the legal representative. It is unnecessary to make any pronouncement on that question

for the purposes of this appeal as we are of opinion that it can have no application to the facts of the present case. Here the appellant was a party

to the suit and to the decree made therein, and, being the executor as well as a satisfied legatee as he claims to be, must be deemed to have litigated in both capacites, and, his title in either case having been derived under the same will, whatever pleas were available to him in the one

capacity or the other must be deemed to have been concluded by the decree. It is to be noted that the will does not nominate the appellant as the

trustee of the charities but charges him as executor to carry out all the directions contained therein including those relating to the conduct of the

charities. In such circumstances, it would, as it seems to us, be carrying technicality to the verge of absurdity to hold that the respondent must bring

another suit against the appellant to enforce his right u/s 361, Succession Act. There seems to be no warrant in the section for the view suggested

for the appellant that the right under it can be enforced only by means of a general administration action.

8. Two further points have been raised on behalf of the respondent in bar of the appellant''s suit. One is that the suit is barred u/s 47, Civil P.C.

The appellant, it is said, was a party to the suit and that the objection put forward by him to the attachment of the suit property falls to be

determined u/s 47 as a question relating to the execution, discharge or satisfaction of the decree and not by a separate suit. The appellant,

however, insists at a differentiation should be made between his capacity as executor and his capacity as the specific legatee of the property in

question in trust for the Annadhana charity, and that accordingly his claim on behalf of the charity must be regarded as falling under Order 21, Rule

58 and, the claim having been negatived, the present suit to establish the right of the charity is maintainable under Rule 63 of that Order. If, as we

have already observed, the appellant must be taken, in the circumstances of this case, to have litigated in both capacities in the suit, there is no

room for such differentiation being made in the course of the execution proceedings. Reliance was placed on the Full Bench decision of this Court

in Ramanathan Chettiar v. Levvai Markair (1900) 23 Mad. 195 where it was held that a claim made by a person as a trustee on behalf of a charity

for release of trust property from attachment in execution of a decree obtained against him in his individual capacity did not fall u/s 244 of the old

Code corresponding to Section 47 but had to be dealt with u/s 278 corresponding to Order 21, Rule 58 of the present Code. There the judgment-

debtor was a trustee under an independent right which was in no manner connected with the transaction which led to the personal decree passed against him. The circumstances here, as we have indicated, are quite different and the case has no application. The respondent''s objection to the

maintain ability of the suit must therefore prevail.

9. The other plea in bar is based upon the lack of pecuniary jurisdiction in the trial Court to entertain the suit. The appellant has valued the property

in question, which has admittedly cost more than a lakh of rupees to build, at only Rs. 1000 on the plea that the property has no market value as it

belongs to a charity and is inalienable. This view was accepted by the trial Court which accordingly entertained the suit, but was rejected by the

Subordinate Judge who has held that the suit having been deliberately under-valued and the valuation not having been amended on objection raised

by the respondent was liable to be dismissed for want of jurisdiction also. The learned Judge has, however, overlooked the provisions of Section

11, Suits Valuation Act. Sub-section (2) of that section clearly provides that even where objection to want of jurisdiction was taken in the Court of

first instance at or before the first hearing, the appellate Court should not entertain the objection unless it is satisfied for reasons to be recorded by

it in writing that the under-valuation has prejudicially affected the disposal of the suit on its merits. Otherwise, the appellate Court, if it has before it

the materials necessary for the determination of the other grounds of appeal to itself, is required to dispose of the appeal, ""as if there had been no

defect of jurisdiction in the Court of first instance...."" The learned Subordinate Judge has not considered the question from this point of view. The

respondent''s learned Counsel has not attempted to show how the under-valuation, assuming that the suit was under-valued, has prejudicially

affected the disposal of the suit on its merits. The objection, therefore, on the ground of under-valuation should not have been entertained. In the

result, the appeal fails and is dismissed with costs.

