
(1969) 04 MAD CK 0036
In the Madras High Court

Rama Rao and Another

APPELLANT

Vs

V. Chandra Gopal

RESPONDENT

Date of Decision : 02-04-1969

Acts Referred:

Trusts Act, 1882 — Section 3

Citation : (1969) 82 LW 738 : (1969) 2 MLJ 460

Hon'ble Judges : T. Ramaprasada Rao, J

Bench : Division Bench

Judgement

T. Ramaprasada Rao, J.—The defendants are the appellants. The 2nd defendant is the mother; the plaintiff and the 1st defendant are her two sons. She has another son who is not a party to the action. The mother and sons effected a partition of the joint family properties under Exhibit A-1 dated 21st July, 1943. Inter alia the partition deed provided that the plaintiff should take the ancestral house in which all the parties were by then residing, and the property was estimated at Rs. 13,000. On such reckoning, the equities between the coparceners were adjusted. It is, however, expressly recited that the parties have taken possession of their respective shares and they should enjoy them absolutely. There is, thus, an absolute and unreserved allocation of the family house to the plaintiff. A translation of Exhibit A-1 was given by the learned Counsel for the appellants and by consent the same was adopted by me. The material portion of Exhibit A-1 which is the basis of the appellants' claim may be reproduced:

The living upstairs house is allotted to No. 3 (respondent) on an approximate value of Rs. 13,000. The said house when sold, if it fetches above Rs. 13,000 the excess amount shall be shared equally between Nos. 3 and 4 (respondent and 1st appellant). Similarly if it is sold for less than Rs. 13,000, the deficiency shall be borne equally between them and No. 3 (respondent), will be entitled to Recover a moiety thereof from No. 4 (1st appellant). As No. 3 (respondent) has to pay Rs. 1,760 to No. 1 (2nd appellant) and Rs. 4,258 to No. 4 (1st appellant),

the said amounts should be paid after the sale of the house within a period of 5 years. If it is not so paid, the said amount shall carry any interest at 8 annas per cent per month and No. 3 (respondent) shall pay the same. Till the said payments are made, the said property shall be charged for the amounts so due. Nos. 3 and 4 (respondent and 1st appellant) shall also be entitled to live in the said house for the period of 5 years in lieu of interest.

The property was not sold within the period of five years. Nor did plaintiff pay the defendants the sum mentioned within the period. The plaintiff alleges that he and defendants were living together and having a common mess till 1956 and thereafter they began to live separately, but in the same house. On a request by the plaintiff to vacate, the defendants evaded the issue even though the plaintiff promised to pay the amounts payable by him to equalise the shares on the date, when the defendants surrendered possession of the portion of the property in their possession. Since the defendants did not vacate, the plaintiff filed the suit. The defendants contested the suit on the main ground that the plaintiff and the 1st defendant were each entitled to a moiety in the suit house and the ownership of suit property is annexed with an obligation to sell the same and adjust the equities one way or other. On these pleadings the trial Court decreed the suit and an appeal thereon by the defendants was unsuccessful. Hence this second appeal.

2. Mr. B. V. Viswanatha Ayyar, learned Counsel for the appellants, raised three contentions before me. Firstly, his case is that under Exhibit A-1 the plaintiff was constituted a trustee for the sale of the property, and that Exhibit A-1 initially created a trust, whereunder the property was annexed with an obligation to pay the agreed amounts and a concurrent obligation to sell the same within five years. Secondly, the period of five years is only a directory covenant and non-exercise of the same within that period cannot absolve the plaintiff from his duty to sell the property. Thirdly, the plaintiff is bound to bring the property to sale and then only pay the amounts shown in Exhibit A-1 after the necessary adjustments and not otherwise. He relies on Section 3 of the (Ampassemteketh Natamal) Kutti Pokker Vs. (Ampassemteketh Natamal) Ussan Mayan and Others, , in support of his contentions. The learned Counsel for the respondent contends contra and supports the judgment of the lower appellate Court.

3. Before advertng to the contentions of Mr. Ayyar, it is necessary to analyse the scope and intent of Exhibit A-1 and particularly the above excerpt. While aliquoting the shares of each of the members of the family and while making a provision for the mother, the parties took particular care to state that the properties allotted to each of the coparceners are to be enjoyed by them and each of them has taken possession of the property allotted to him or her under Exhibit A-1. The Schedule C property in Exhibit A-1 which is the family house, was taken by the plaintiff as and towards his share and he became absolute owner of the same. There is thus an unconditional vesting of the property in the respondent in this appeal. To equalise the shares, the partition deed provided

that a sum of Rs. 4,258 should be paid to the 1st appellant and another sum of Rs. 1,760 to the 2nd appellant within five years from the date of execution of Exhibit A-1. Till such period of five years which is the outer limit prescribed for the payment the appellants are entitled to reside in the suit house. The appellants are still living in the house. The respondent has not paid the amounts as stipulated. Exhibit A-1 says that, if the amounts are not paid within the period, the said amounts shall carry interest at 6 per cent. per annum and the totality of the claims shall stand charged on the suit house. This is one limb of the excerpt. The other limb is purely optional, the option being with the respondent. It refers to a sale of the suit property if the property is sold and if it fetches more than Rs. 13,000 or less, the amounts agreed to be paid by the respondent shall be readjusted and reckoned proportionately. Thus, there is no obligation annexed to the sale and absolute ownership over the suit property which, in my view, has vested in the respondent.

4. The first contention of Mr. Ayyar can be considered. Section 3 of the Trusts Act defines a "trust" as an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the "author of the trust"; the person who accepts the confidence is called the "trustee" the person for whose benefit the confidence is accepted is called the "beneficiary". I have already observed, in the instant case, that there is no obligation annexed to the ownership of the property which is vested in the respondent under Exhibit A-1. A "trust" is created by a confidence reposed by one in another in respect of a property which is in possession of that other person with the avowed object that the property is to be held by the other for the benefit of the first person. This is not the case here. The words used are "when sold" and "if it is sold". Therefore, an absolute and unfettered discretion to deal with the suit property is vested in the respondent under Exhibit A-1. At best Exhibit A-1 discloses a contract between the parties. The distinction between a trust and a contract has to be borne in mind. Whereas there is always a fiduciary relationship between trust and cestui que trust none exists between the parties to a contract. Again, whereas the cestui que trust has beneficial interest in the trust property, the beneficiary under the contract has merely a personal claim against the promisor, and, even if the contract is specifically enforceable, certain legal rights only are available. Such rights are not the only privileges available to those having a beneficial interest in the property. One other situation is also possible. If an equitable charge is created, under an express contract, the equitable encumbrance can, at best, have an equitable lien on the property; but the person who holds the property as owner, possesses and owns it in his own right as absolute owner thereto subject only to the lien. The holder of such a property can sell or deal with it, but subject only to the lien or charge. Again, the respondent has, in the instant case, the power to deal with the property and sell it. This authority or power in him is a discretionary one and not imperative which

would be the case if a trust is created. The main distinction between power and trust has again to be remembered. If what is contemplated is that a person has the discretion to Act on his volition and if what is expressed is only a pious wish of others, who are parties to the instrument, then no such power can be misunderstood as an obligation in the nature of trust which is annexed to the immovable property.

5. Mr. Aiyar apparently is mixing up different concepts and mistaking the power given to the respondent under Exhibit A-1 and the equitable lien Created thereunder, as if it is a trust within the meaning of Section 3 of the Trusts. Act. The respondent in the instant case is not owning the property for being used or utilised for the benefit of the appellants. At best Exhibit A-1 is evidence of a contract, whereunder powers are given to the respondent without creation of any contemporaneous benefits in the property for the appellants. They are only entitled to the named sums under Exhibit A-1. The respondent has five years" time to pay the said amounts. If within the said period the respondent in his discretion sells the suit house and secures a price above Rs. 13,000, then higher amounts are payable to the appellants. If the price secured, for the suit house is less, the appellants would be entitled to lesser amounts. Even then if the amounts so reckoned or readjusted are not paid within five years, interest is payable and both the principal and interest would stand charged to the suit house. One fails to see how this equitable charge, agreed to by the parties under the contract as disclosed in Exhibit A-1, tantamounts to the creation of a trust. The ratio in (Ampassemteketh Natamal) Kutti Pokker Vs. (Ampassemteketh Natamal) Ussan Mayan and Others, , has no application to the facts of this case. The learned Judge observed, in that case that the fact that the trustees were enjoying a beneficial interest in the trust property together with the beneficiaries did not make it any the less trust property. In that case there was no dispute about the existence of a trust. If the ratio is to be adopted and applied to the instant case, it would be begging the question. ,

6. The second contention is that the period of five years prescribed in Exhibit: A-1 is directory. It may be so. Nevertheless the option to sell always remains with the respondent. But the rights of the appellants work themselves out in the manner stipulated, after the expiry of the period of five years. At the end of five years, their right to recover the amounts as noted in Exhibit A-1 ripened and they had the additional advantage to claim interest. The provisions for the payment of interest belies the concept of a trust. I am unable to agree that the appellants had a right to seek for a specific performance of the covenant to sell as against the respondent. This aspect of the case is purely academic as it is not pressed before me that any such attempt was made by the appellants.

7. I am unable to agree with the contention of the learned Counsel for the appellants that, under Exhibit A-1, a trust as known to law is created. The lower appellate Court is, therefore, right in its conclusions. The second appeal has, therefore,, to be dismissed.

8. Certain adjustments, however, have to be made in the interests of the parties and, to avoid further delay. This is more or less by consent of all parties. After hearing the learned Counsel on both sides, I make the following directions: (1) The respondent to pay a sum of Rs. 500 to the 2nd appellant on the date when both the appellants surrender vacant possession of the portion of the property in their possession. (2) The 1st appellant is entitled to withdraw the amounts deposited, by him under orders of this Court in C.M.P. No. 12877 of 1966 without reference to the respondent. (3) There is no obligation in the peculiar circumstances of this case for the respondent to pay interest to the appellants on the owelty which shall be paid under Exhibit A-1 and which is reported to have been deposited in the trial Court. (4) The appellants, in their turn, are not obliged to pay any mesne profits in consideration of their occupying the suit house which is the property of the respondent. As the parties are brothers and their mother is sandwiched between them, I consider that it is just that the appellants should be given six months' time to vacate the premises, "during which period they need not pay mesne profits towards the occupation of the portions of the suit premises. If however the appellants fail to vacate the premises within six months from this date, they would be liable to pay a sum of Rs. 50 per month towards their occupation until they surrender vacant possession to the respondent. The 1st appellant would be entitled to -withdraw the sum of Rs. 4,258 and the 2nd appellant, the sum of Rs. 1,760 said to have been deposited by the respondent in the trial Court as and towards the owelty in terms of Exhibit A-1.

9. In the result the second appeal is dismissed subject to the directions made above. No order as to costs. No leave.