
(1927) 08 MAD CK 0036
In the Madras High Court

Ramappa Naidu and Another

APPELLANT

Vs

Lakshmanan Chettiar and Others

RESPONDENT

Date of Decision : 03-08-1927

Acts Referred:

Provincial Insolvency Act, 1920 — Section 4

Citation : (1928) 27 LW 88 : (1928) 54 MLJ 272

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—This is an appeal against an order passed by the District Judge of East Tanjore u/s 4 of the Provincial Insolvency Act

declaring that the properties forming the subject matter of this appeal would vest in the Official Receiver for the benefit of the creditors.

2. The dispute relates to about 68 acres and odd of property which belonged to one Chinnaswami Naidu. He died leaving a will in favour of his

son in which, generally speaking--" we will refer to the contents of the will in detail later--he called upon his son to maintain a choultry and-carry on

in it the worship of their family deity, meeting the expenses from the income of the property, with liberty- to utilize the balance of the income for

family purposes. His son became an insolvent. The children of the insolvent, the appellants before us, maintain that these properties are trust

properties, while the Official Receiver and the creditors contend that the properties belonged to the insolvent with a charge for carrying out the

trust mentioned in the will. If the properties are dedicated to a trust absolutely, it is clear that the Official Receiver cannot claim them; on the other

hand, if the properties are only burdened with a trust, they would vest in the Official Receiver for the benefit of the creditors. The question for our

decision is whether the properties covered by the will, Ex. A, are trust properties, or whether they are properties belonging to the insolvent with a

charge for carrying out the trust mentioned in the will.

3. The answer to this question depends upon the correct construction of the will, Ex. A. It runs in the following terms : ""On the site which is situate

to the north of- my shop and house and for which I have performed the manai muhurtham ceremony, my son Gopalakrishnan, shall with the stones,

tiles and timber in my possession, construct a choultry spending an amount to the extent of Rs. 400 from and out of the out-standings set out in

Schedule A, and instal in the aforesaid choultry the picture of Sri Gopalakrishnan, now kept and worshipped by me in the house as Kula Deivam

(family deity). The monyam, the karnam and the tahsildar will be pleased to transfer the pattas for the nanja, punja, etc., properties of the value of

Rs. 8,300 set out in Schedule A in the name of the said deity Gopalakrishnaswami after my death, and my son Gopalakrishnan and his heirs from

generation to generation according to the rule of primogeniture, shall, without alienating the properties in any manner enjoy them paying sircar cist

therefor, and, conduct the charity mentioned in Schedule C and utilise the balance of the income for family purposes. if there be several heirs to my

son, the seniors shall enjoy the aforesaid properties and after deducting the amount for charity and sircar cist, distribute the balance of the income

amongst the heirs according to their shares, and shall never divide the properties. No one except the heirs shall be entitled to ask for an account of

the said income. My daughter Janaki and her husband Rangaswami Naidu shall after my death enjoy with all rights the Immovable property of the

value of Rs. 800 set out in Schedule B as stridhanam property. The balance of Rs. "" 500 remaining after deducting Rs. 400 for the construction of

the choultry out of Rs. 900, the amount of outstandings set out in Schedule A, shall be invested in the name of the said Gopalakrishnaswami and

shall be augmented by my son and his heirs. If there be, by act of Providence, no income for the payment of sircar cist, the said sircar cist shall be

paid from and out of the accretions of the aforesaid amount. In case my son or his heirs, owing to their negligence, fail to augment the income and

pay the sircar cist, efforts shall be made for payment out of the amount so as to prevent the land being brought to sale by the sircar. My son

Gopalakrishnan shall inherit all my other properties"". The nature of the charity mentioned in Schedule C will be referred to later.

4. The properties set out in the schedule consist of 61 acres. 85 cents of nunja lands, 2 acres 17 cents of punja lands, 3 acres, 40 cents of maniam

lands, 6 houses, about 12 tamarind trees, 189 cocoanut trees and 177 palm trees. Mr. Venkatachariar argues that the following features of the will

conclusively show that the properties referred to in it are trust properties:

(1) The son is enjoined to build a choultry, to instal the Kula Deivam in it for the purpose of family worship, and to conduct a charity, meeting the

expenses from the income of the properties, (2) the pattas for the schedule properties are directed to be transferred in the name of the deity

worshipped in the choultry, and (3) the last sentence in the will makes a special provision that his son Gopalakrishnan shall inherit all his other

properties. It will have been noticed that the will contains an important provision regarding the enjoyment of the surplus income; it states that the

testator's son and his heirs ""from generation to generation according to the rule of primogeniture shall without alienating the properties in any

manner enjoy them, paying sircar cist therefor, and conduct the charity mentioned in Schedule C and utilise the balance of the income for family

purposes""; and provision is also made for the management and distribution of this balance of income among the heirs. This feature is pointed out by

the respondent as showing that the real intention of the testator in making the gift was to make a provision for his family, though he called upon his

son to conduct the charity and the worship out of the income of the properties. We have to construe all these clauses together and come to our

conclusion as, to whether the properties covered by the will are properties dedicated to trust absolutely, or whether they are only properties

belonging to the insolvent burdened with a trust of carrying out the charity mentioned in the will.

5. Various cases have been brought to our notice with reference to the construction of the will. In all these cases, the decisions turned upon the

construction of the terms of the document in each case. In *Mujibunnissa v. Abdur Rahim* (1900) LR 28 IA 15 : ILR 23 A 233: 11 MLJ 58, Lord

Robertson said.:

Their Lordships have, however, considered the question whether, assuming it to

have been registered, the deed is, according to its terms, a valid deed of waqf. It will be so if the effect of the deed is to give the property in substance to the charitable uses. It will not be so if the effect is to give the property in substance to the testator's family.

This passage lays down the general test to be applied to cases of this description. Is the effect of the deed to give the properties in substance to

charitable uses, or, is its effect to give the properties in substance to the testator's family? In *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee*

(1859) 8 MIA 66, a Hindu gave all his properties by a will to his family idol with a direction that the properties should not be divided by his sons

but that the)" should enjoy the surplus profits from generation to generation. Lord Turner, J., was of the opinion that:

although the will purports to begin with an absolute gift in favour of the idol, it is plain that the testator contemplated that there was to be some

distribution of property according as events might turn out.

In *Ashutosh Dutt v. Doorga Churn Chatterjee* (1879) LR 6 IA 182 : 1879 ILR 5 C 438, a case of a gift by a lady of certain property for the

support of the daily worship of an idol with a direction that the surplus, if any, should be utilised by the family, the Privy Council held that the

property was only burdened with a trust and not absolutely dedicated, although there was a direction in the will that the heirs should have no

powers of alienation over the properties bequeathed. In *Har Narayan v. Surja Kunzmri* (1921) LR 48 IA 143 : ILR 43 A 291, the Privy Council

had to construe a will which contained two directions : (1) that the moveable and Immovable property of the testator shall be considered to be the

property of a certain idol and (2) that the surplus after defraying the expenses of the temple and the pay of the servants shall be used by the heirs to

meet their own expenses. Their Lordships' view was that by this will the testator did not intend to give the property absolutely to the idol. In *Jadu*

Nath Singh v. Thakur Sita Ramji (1917) LR 44 IA 187 : ILR 39 A 553 and *Ramanandan Chettiar v. Vava Levvai Marakayar* (1916) LR 44 IA

21 : ILR 40 M 116 : 1916 32 MLJ 101, two cases strongly relied on by the appellant, the Privy Council held, having reference to the terms of the

deeds, that the dominating purpose and intention shown in the documents was to create a trust though there were provisions in the deed for the

benefit of the heirs of the grantors.

6. Applying the principles of these decisions, we think that the learned Judge has construed the will in this case correctly. It is obvious from the

nature of the charity that its maintenance will not cost any considerable sum. The details of the charity to be carried on are thus stated in Schedule

C to the will "For presenting food and performing worship every day for my family deity Sri Gopalakrishnan installed in the choultry mentioned in

this will, a brahmin should be made to reside therein. He should be given 39 kalams of paddy every year and the said worship must be carried on.

On the Dwadasi day of each of the two fortnights of the month not less than five brahmins should be given food. As there is a chatra maniam, a

watershed must be maintained in the said choultry, from 10 days before the Chitraparva to the end of the hot season and water must be served to

all persons who come there. If the brahmin appointed for doing these things fails to conduct himself properly, my son Gopalakrishnan and his heirs

should dismiss the said brahmin and appoint a substitute. The choultry should be retiled and repairs should be carried out every year." These are

the various items on which expenditure had to be met from the income of the property already mentioned. It is obvious that the charity even if it is

conducted on a lavish scale cannot consume any considerable portion of the income. We are satisfied that after meeting these expenses a very

large amount of the income will be left intact for enjoyment by the family. Though the pattas of the properties in Schedule A have been transferred

in the name of the deity, in our opinion, the effect of it is cut down by the provision relating to the enjoyment of the surplus by the members of the

family. It was argued that the obvious intention of the testator inferable from the last sentence of the will that "Gopalakrishnan shall inherit all my

other properties" was to dedicate the properties in question to the deity, the son having been provided for in another way. But it has not been

shown satisfactorily what properties have been given to Gopalakrishnan. Having regard to all the circumstances, we take the view that the

dominating purpose and intention of the testator in executing the will was to provide for the members of his family. The maintenance and conduct of

the charity was only of subsidiary importance. We are therefore of opinion that the properties covered by the will are not properties absolutely

dedicated to a trust but are only properties burdened with a trust.

7. It is then argued that, even so, these properties cannot be sold by the Official Receiver as they are not properties of the insolvent, being free

from liability to attachment in view of the decision in *Bishen Chand Basawat v. Nadir Hossein* (1887) LR 15 IA 1 : 1887 ILR 15 C 329. Reading

that judgment carefully we are not prepared to accept this argument. We think the properties in that case were treated as absolute trust properties,

which, as we have already pointed out, cannot be said about the properties we are dealing with in this case. We are therefore of opinion that the

appellants cannot succeed in excluding these properties from vesting in the Official Receiver for the benefit of the creditors.

8. This appeal will therefore be dismissed with costs.