

(1905) 09 MAD CK 0013
In the Madras High Court

Roop Laul and Others

APPELLANT

Vs

Lakshmi Doss

RESPONDENT

Date of Decision : 05-09-1905

Acts Referred:

Limitation Act, 1963 — Article 91

Citation : (1906) ILR (Mad) 1

Hon'ble Judges : S. Subrahmania Ayyar, O.C.J.; Sankaran Nair, J

Bench : Division Bench

Judgement

S. Subrahmania Ayyar, Offg. C.J.

1. The plaintiffs Nos. 1 to 4 are the sons of one Muni Lall deceased and the fifth and sixth plaintiffs are the widow and minor daughter of a

deceased son of the first plaintiff. Muni Lall was the illegitimate son of Kundun Lall, the paternal uncle of the defendant's adoptive father Rajah

Easwara Doss. Mukund Lall, the grandfather and Teekumchand father of Easwara Doss, and Kundau Lall were Sowears and apparently

successful in their profession. Easwara Doss was certainly so and he died possessed of considerable property. The defendant (Lakshmi Doss)

when quite a boy was adopted about the year 1873 or 1874 and continued to live with his adoptive father down to the time of the latter's death in

1900 and succeeded to the estate as the solo surviving member of the family.

2. The plaintiffs seek to establish their right to a monthly payment of Rs. 35, out of certain alleged trust properties in the hands of the defendant,

and for arrears thereof. The sustainability of this claim depends upon the effect, if any, to be given to the registered instrument bearing date the 28th

January 1887 described as a settlement and executed by Easwara Dossi and the

defendant.

3. The instrument, which is in English having been drawn up by Messrs. Br.an.sou & Branson, the solicitors of the family of Easwara Doss, is a

long document containing much detailed provision with reference to the matters dealt with by it. For the present purpose it is not necessary to

summarise them all. It is sufficient to state the following. It recites that the grandfather of Easwara I Joss (who died about 1826) originated certain

charities and set apart for the purpose a fund of Rs. 2,000; that the fund accumulated to Rs. 20,000 at the death of the father of Easwara Doss;

that certain sites were acquired in Triplicane by Kundan Lall and Easwara Doss for the purpose of erecting a temple to be devoted to the worship

of Siva, buildings were constructed thereon and a temple called Camacala Cameswara Swamy Temple was established about 35 years previously

with quarters for the occupation of persons rendering service in the temple; that the institution with its said appurtenances has since been

maintained; that disbursements have also been made for the performance of a festival in the well-known shrine of Sree Parthasaradhy in the same

suburb of Madras as also in the temple in Tiruvallur; that a rest-house for the accommodation of Hindustani Brahmins travelling from the Deccan

was likewise established and has been maintained, Sadavarthi or rations being distributed to such travellers; that certain payments out of the trust

funds by way of annuities to dependents of the family were being made as directed by the father of Easwara Doss; that when Easwara Doss uncle

died about 1860 the trust funds had increased to a little over a lakh of rupees; that the same came up at the date of the instrument to about a lakh

and fifty thousand; and that it was agreed between the parties to the instrument that the trust properties should be separated from other properties

held by the parties and a regular settlement in the matter made. The instrument provides a detailed scheme for the future maintenance and

administration of the charities and trusts and for the appointment of a trustee and of a Dharmakarthi or Manager under the trustee. It enumerates

the powers and duties of the two office-holders, respectively, gives directions as to the terms and conditions as to the disbursement, duration and

lapse of the annuities with other details connected with the various matters and concludes with three schedules, schedule A specifying the trust

properties as they stood at the time, schedule B, the scale of expenditure to be made in connection with the temple, choultry, etc., and schedule C

the scale of payments to the annuitants.

4. Item No. 8 of schedule 8 is the one under which the plaintiffs claim and it runs as follows: "Rs. 35 a month to the family of Muni Lall for their

maintenance so long as his four sons and Rathakishnan Lallah, the son of Roop Lallah, who is the eldest of them and their families shall live together

same shall be paid to the said Roop Lallah and after him to the oldest male managing member of their family so long as there shall be any direct

male descendant of the said Muni Lallah; but if they or their representatives shall separate, the said sum of Rs. 35 shall be divided equally amongst

them five (that is to say) amongst the said Roop Lallah and his said son and three brothers and their respective representatives respectively and Rs.

7 a month shall be paid to each of them and continued after them to their representatives respectively with benefit of survivorship.

5. I now proceed to consider the points raised in the argument before us.

6. The first contention on behalf of the defendant was that the instrument was a mere sham or nominal document not intended to be acted upon and

not acted upon. With reference to the evidence in the case I find it impossible to accept this contention. The present is altogether unlike the

instances which the Courts had to deal with in the cases referred to by the learned Advocate-General and in which there was no charity or trust

actually brought into existence, there was no proof of the application of the alleged endowments for the maintenance thereof and the whole conduct

of the parties was inconsistent with the hypothesis of a genuine trust. There is no doubt here that a temple with appurtenant buildings and a rest-

house answering to the description thereof in the instrument were constructed by members of the family. That the worship in the one and the

distribution of alma in the other as well as the performance of the festivals in the Parthasaradhy, and the Tiruvallur Shrines and of the fathias

specified in the schedule B have been carried on with funds supplied by Easwara Doss or his predecessors, is likewise clear from the evidence.

The first plaintiff Roop Laul speaks to most of these matters, Kuppuswamiah who has been employed for 30 years to recite vedas in the temple

and who has for the same period been residing in the quarters provided for

temple servants proves that during the whole time services in the temple have been uniformly maintained Parthasaradhy Aiyangar, manager of the Parthasaradhy Shrine referred to before, testifies to the performance of two festivals at that shrine, the same being paid for by Easwara Doss during his lifetime and by the defendant subsequently. Sagu Nandan some time back a servant of Easwara Doss speaks to like performances of festivals at Tiruvallur, etc. Another witness Ram Lall gives evidence as to the performance of fathias. Janakiramayya formerly gumastah under Easwara Doss and now under the defendant, admitted that the charities mentioned in the trust deed have been carried on since prior to the time the witness became acquainted with his late employer which was before the trust deed was executed. Bunsil Lall, another witness of the defendant, was himself employed in distributing sadhavarthi in the choultry during Easwara Doss' lifetime. The defendant when in the box did not, as he could not, deny what was being done in the temple, in the choultry, and elsewhere, though he tried to dissociate the same from the trust deed by speaking of them as private charities requiring no Dharmakarthas or Manager. The unquestionable fact of the existence and maintenance of those institutions for many years in the way stated above goes to the very core of the matter and argues almost irresistibly in favour of the reality of the transaction evidenced by the instrument in question. Nor are other cogent circumstances in favour of the same view wanting, it is not easy to believe that a person, concocting a bogus document would have taken the pains to propound and work out so elaborate a scheme of management as that stated in the instrument. Undoubtedly we find Easwara Doss when purchasing the Tinnanore Jaghir (item No, 6 of the plaint, schedule 13) for a lakh and odd rupees three years after the trust deed, taking the conveyance to him as "'Dharmakhartha of Sree Kameswaraswamy Temple'" In 1897, i.e., ten years after the document in question, Easwara Doss again adopts the same description with reference to the entry in the Collector's register respecting certain house sites which had been acquired in connection with the charities previously. Stronger than all these is the evidence furnished by the will of Raja Easwara Doss executed on the same day as the instrument in question and left along with it in the custody of his solicitors. This will was not revoked, and it was admitted in the argument

that after Easwara Doss death the Official Trustee was informed that he had been appointed by the will as the successor of Easwara Doss in the office of trustee by virtue of the power reserved to Easwara Doss in the matter under the settlement. That a man getting up a fictitious trust deed should wish it to be acted upon after his death in the manner contemplated by this will, nay, select a public official for the purpose of co-operating in the matter is well nigh absurd Lastly it is difficult to discover even the slightest ground, in the circumstances of Easwara Doss then or about the time, as to why he should think of ranking a nominal document of the kind. That at the date of the deed he was not only not in pecuniary difficulties of any kind but that his affairs were prosperous, is shown by his will, It shows that his debts were small while in the shape of Government promissory notes alone, not to speak of other property, he possessed about two lakhs and-a-half excluding the lakh and fifty thousand worth of such securities stated to belong to the trust but used along with the other Government promissory notes in the salt trade then carried on by him. Nor does it appear that he was then engaged in or contemplated entering into any hazardous trade or speculation which would suggest the necessity of screening property from the claim of possible creditors. In those circumstances it is impossible to come to the conclusion that the instrument in question was any thing but genuine, executed at least so far as Easwara Doss was concerned, for ensuring the continuance of charities which his ancestors had founded and which he had himself as in duty bound kept up, and which, naturally enough, he was anxious should be administered by a machinery as efficient as he and his legal advisers could devise.

7. I can attach no weight to the two or three circumstances on which considerable stress was laid on behalf of the defendant in this connection. It does appear that even after the deed, entries in connection with the charities were made only in personal accounts kept by Easwara Doss. Though when the question is whether there was a completed dedication of a charity, the absence of separate accounts in respect of it may not be without significance, yet in, the fact of the indubitable evidence of the anterior existence of the charities and trusts in question heap, and of the unequivocal evidence thereof deliberately brought into existence in the shape of such a deed executed by both and the only persons interested in the matter

such an omission as that relied on does not outweigh the effect of ½ the former. It also no doubt appears that the disbursements on account of the different charities, even after the deed, were on the same scale as before and less than what schedule B authorised. The reasonable inference is, not that there was no charity or endowment completed in point of law, but that the trustee for the time being for reasons which cannot now be ascertained (he being dead) did not think fit to raise the scale to the maximum limit provided for. The next point made was with reference to the passage in the deed relating to the trustee's power of changing the trust property. The passage is not as clear as might be wished but its meaning to my mind is that if any of the items of the Immovable property of the trust is transferred and others substituted, the substitution need not be item for item. Certainly it does not mean that the trustee was at liberty to deprive the trust of the whole or any portion of the trust property at his will and pleasure. The other part of the instrument relied on is the proviso at the end denying to the public any vested or other interest in the charities or the properties appertaining thereto or in the management thereof. Now the provisions of the instrument defining the character of the main charities run as follows: "As to the said, temple of Camacala Cameswara Swami being item No. 1 in the said schedule A mentioned, upon trust that same shall continue to be and to be used for ever as heretofore as a Hindu temple or place of public worship of Hindus of the Shiva sect according to the rites, practices, and ceremonies, of Hindus of that sect, and for the performance therein for ever as heretofore of religious ceremonies according to the rites and ceremonies of Hindus of that sect; and to the said chuttram being item No. 2 in the said schedule A mentioned, upon trust that same shall continue to be and to be used for ever as a chuttram for the lodging and feeding of Hindustani Brahmins and Byragees to the intent that Brahmins and Byragees who come from the Deccan (whence the settler's family came as strangers into this country) may each be lodged and fed there free of charge for the space of two days after arrival in this country as provided in item 5 of the said schedule B, and as to the said agraharam being item No. 3 in the said schedule A, upon trust that same shall continue to be and to be used for ever as an agraharam or free lodging house for poor Brahmins who attend and worship and read the vedas at the said temple.

8. These unambiguous declarations are of course utterly inconsistent with the view that there were no trusts in fact whatsoever. Reading these passages and the proviso together, the intention was, apparently, to guard against the charities being treated of as public within the meaning of the Religious Endowment Act (XX of 1863) the provisions of which empower even persons having no direct interest in public institutions to start legal proceedings in their character of mere worshipers, as also within the meaning of Section 539 of the Civil Procedure Code, so as to save the trusts and charities from being involved in litigation under either of those provisions, and with a view to make the trusts subject solely to the control provided for by the deed. Even were the constructions I put on the passages relied on not right, they could afford ground for no other argument than that they purport to annex conditions of doubtful validity to trusts otherwise well established. I fail to see how they in any way go to support the view that the document is merely nominal. The same observation applies to the payments to be made to the annuitants and to those to be made towards scholarships in the Presidency College. According to the recitals in the deed, the former owed their origin to an ancestor of Easwara Doss who was not the original founder of the charities. The latter alone were introduced by Easwara Doss. Whether these or either of them would not constitute legitimate disbursements out of the trust funds, assuming there were trust funds prior to the deed as is stated therein, is not relevant to the matter under consideration as they would be in a case where, the trust being admitted, the question is whether the provisions of the deed relating to the abovementioned payments involved an improper diversion of the trust funds; of course the determination of that question will depend upon evidence and considerations not gone into, and which could not have been rightly gone into, at the trial of this case.

9. I now pass to the other main contention on behalf of the defendant. It was this. At the time of the execution of the document the defendant was young, having only not long before attained, his majority, and quite under the influence of his adoptive father. He had no independent advice, and beyond affixing his signature to the document he knew nothing of it, being altogether wanting in intelligence and incapable of understanding the contents of such a complicated instrument, so as to assent to it with that freedom of will and clearness of understanding without which there could

be no execution that can bind him. I take it that the defendant is not a man of ability though from the answers given by him to questions put at the trial, I should not conclude that he was as dull witted as he was in the argument represented to be. However this may be it is quite true that he was when he signed the document only about 20 years of age, inexperienced, and presumably under the influence of Easwara Doss. It is also probable that he did not care to follow and did not follow all the details in the document, but I have no doubt that the note appended to it that the contents were explained by the manager of Messrs. Branson & Branson to the defendant, records what in fact took place, and that the defendant knew perfectly well the substance of the transaction, viz., that it was a formal declaration of trust in regard to the charities, with which for years he must have been familiar, and of the description and extent of the properties belonging thereto as also of the right; conferred on him as Dharmakarthā which was to devolve after him on his heirs. I believe the evidence of the witnesses to the effect that prior to the execution of the instrument it was well known to the members of the family that Easwara Doss contemplated executing such a deed. And as the natural father of the defendant who appears to have lived in the family and enjoyed the confidence of Easwara Doss must have known of it, it is not easy to accept the story of complete ignorance on the part of the defendant of what was done. Nevertheless, had the execution of the instrument by the defendant involved a transfer of his property of any appreciable extent for the benefit of Easwara Doss or of something which Easwara Doss wished to serve, I should view the transaction with that jealousy with which Courts most properly regard transactions between persons standing in the fiduciary relation of parent and child, whereby an advantage is secured to the former at the expense of the latter, and hold, in accordance with the principle laid down over and over again in the decisions to which the Advocate-General called our attention, that the execution of the instrument took place under circumstances which threw upon the parties claiming under it the onus of establishing the good faith of the transaction beyond the shadow of a doubt. But, how can it be said upon the facts here, that the defendant gave away any of his property to his father or even that the latter really obtained any other advantage or benefit such as would bring the case even in the slightest degree within the spirit of the decisions referred to P In

making this observation I proceed on the assumption that the recitals as to the origin and history of the trusts and the funds thereof are true. I cannot

agree in the suggestion of the Advocate-General that the statements are myths invented by Easwara Doss. Neither the defendant nor

Janakiramayya, the gumasta of Easwara Doss, who could not entirely be ignorant of the matter, has ventured to say they are false. Janakiramayya

in his evidence added that Easwara Doss was not a man who would make false recitals. The proved facts noticed by me when dealing with the

contention that the transaction, was nominal tend, so far as they go, to confirm the view that the recitals are true. If it was possible to anybody to

disprove the statement that Mukund Lall left two thousand rupees for the purpose of charity, that it had accumulated to Rs. 20,000 in the time of

Tekumchand, to a lakh at the death of Kundun Lall and to a lakh and-a-half in 1887, that man was the defendant inasmuch as he was the person

in possession of the family papers, documents and accounts. But he has made no attempt to do so. If my views of the facts is correct, it follows

that the instrument in question brought about no transfer of the defendant's property to any one, nor did it secure any pecuniary or other similar

advantage to Easwara Doss. That Easwara Doss in treating himself as sole trustee in the instrument was not arrogating to himself what he had no

right to is clear from the case in *Purappavanalingam Chetti v. Nullswan Chetti and Ors.* 1 M.H.C.R. 415 where Holloway, J., laid down that the

custom of the country universally recognises the right of the eldest male heir of a deceased trustee to succeed as trustee to him from whom he

inherits. If it be said that the defendant has been deprived of the right of becoming trustee, after Easwara Doss it should be remembered that he has

been made hereditary Dharmakarthas with emoluments attached.

10. As the trust properties had considerably increased through the efforts of the successors of the founder, it was but natural that Easwara Doss

should have thought it prudent to leave the matter on each a footing as to admit of no question after him. The circumstance that the defendant

though in point, of law Easwara Doss son was, as a stranger in blood to the family, not likely to view, the charities with that favour with which one

born in the family would regard them, may also have suggested to Easwara Doss the advisability of obtaining the assent of the defendant to the

document. In short the execution of the instrument, in my judgment, secured no real gain to Easwara Doss, nor subjected the defendant to any real

loss, but operated merely to safeguard charities and trusts that had long existed and supplied in regard to thorn written proof, which at the time of

their humble beginnings the founder had not thought fit to provide.

11. It remains to add that had my conclusion with reference to the contention just above dealt with boon different, I should nevertheless, hold that

the defendant has precluded himself from impeaching the document.

12. First, he failed to have it set aside within the period allowed by law to him, viz., three years under article 91 of the Limitation Act. That period

must be taken to have elapsed during the lifetime of Easwara Doss itself, as the facts entitling the defendant to have the document set aside were

within his knowledge from the very date of its execution. Supposing for argument that the presumption of the continuance of undue influence would

have prevented the running of time so long as Easwara Doss was alive (a supposition on the face of it absolutely untenable) the defendant should

have sued to avoid the instrument within three years from Easwara Doss' death. Even this he did not do. The decision of the Judicial Committee in

Janki Kunwar v. Ajit Singh ILR 15 Calc. 58 where also undue influence was one of the grounds on which the objection to the document was

raised, is a direct authority against a party to an instrument who has not got it set aside within, the three years prescribed, being heard in derogation

of the rights created by the unvoiced instrument - see also Jugoldas v. Ambashanokar ILR 12 Bom. 501.

13. Apart from, as it seems to me, the above insuperable bar there are the long delay and laches on the part of the defendant. Though in 1887 he

was as a youth under the presumable influence of Easwara Doss, such objection to the influence cannot in law be taken as having necessarily

continued right through to the father's death 13 or 14 years after. In the case of these members of a joint Hindu family such a presumption will in

my view generally cease to be operative after the lapse of a reasonable period. If even thereafter, persons entering into transactions while under

this sort of influence do not with sufficient diligence seek to get rid of them, the doctrine of acquiescence ought ordinarily be held to apply to them.

This being so, the defendant cannot prima facie be held to have been under the

influence of Easwara Doss all the period the latter survived the execution of the deed; and the defendant having done nothing during that time to repudiate the deed he must in justice to Easwara Doss as well as to the plaintiffs be held precluded from questioning it. For, had he objected to the deed in Easwara Doss lifetime, the latter could have given due effect to his wishes in regard to the trusts without depending upon the defendant's co-operation in the matter. He could have effected by virtue of the power vested in him as father Kandasami v. Dorasami Ayyar ILR 2 Mad. 317 a partition between himself and the defendant and devoted the whole or whatever portion he pleased of the property failing to his just share for the upkeep of the trusts, even is really created by himself, inclusive of the annuities to the plaintiffs. It is scarcely necessary to say that though the plaintiffs were not relations legally entitled to maintenance from Easwara Does, yet it is not surprising that one of his wealth and position should have felt it but right to keep those descendants of his uncle above aotual want. The defendant having lain by till E Easwara Doss" death and made it impossible for the plaintiffs to obtain any such provision in their favour from Easwara Doss, in fairness to them, it seems to me, the defendant should not be allowed to deny the right given to them, by the deed.

15. In the view I have taken of the case, it is unnecessary to consider the Hindu Law texts and the decisions thereon, cited by Mr. Narayana Rao,

as to a father's power to give away a reasonable portion of family property for purposes of charity, independently of the assent of his sons.

16. Having come to the conclusion that the defendant is not entitled to impeach the instrument in question as a whole, I must hold that the plaintiffs

are entitled to the payment provided for in their favour by it. We are not concerned at present with the question of the right of their descendants

and successors to the continuance or the payment.

17. As regards the arrears, the claim of the plaintiffs for the period prior to Easwara Doss" death must be disallowed. Admittedly, they were in

receipt of monies from him, and, in the absence of proof to the contrary, such payments should be taken to have been made in discharge of the

obligation created in their favour by the trust deed.

18. Modifying the decree of the learned Judge I would declare the right of the plaintiffs to the payment in question out of the trust funds, in

accordance with, and subject to, the provisions of the document, and award them arrears between the death of Easwara Doss and the date of the
plaint.

19. As to the question which of the immovable properties acquired subsequent to the deed belong to the trusts there can be no doubt that

Tinnanoor Jaghir was purchased for the trusts and belongs to the same. I would not however in this suit determine which of the other items of

immovable properties in the plaint schedule that do not find a place in Schedule A of the trust-deed were purchased for the trusts and appertain

thereto. That is a question which I think ought to be determined in a suit where the trusts are adequately represented by a properly appointed

trustee.

20. I would order the defendant to pay the plaintiff's costs before the learned Judge and in appeal, not out of trust funds but personally, and bear

his own, likewise.

Sankaran Nair, J.

21. The plaintiffs sue to enforce their claims under a deed of settlement (exhibit A) executed by the late Easwara Doss and his adopted son, the

defendant on the 28th January 1887. Easwara Doss died in 1900 the main question for decision is whether this is valid, and enforceable against the

defendant. The instrument purported to vest all the properties in schedule A. in a trustee who is to pay the income thereof, with certain exceptions,

to a person called the Mooktear or Dharmakarta, who is to apply it:

(1) in performance of the charities in schedule 13,

(2) in payment of the annuities in schedule C, and

(3) who is to account to the trustee.

22. There are two exceptions.

23. For the Tiruvallur charity the payment was to be made by the trustee to Roop Lall, tin plaintiff, and if the annuitants in C desired it, the trustee is

empowered to pay them without the intervention of the Mooktear.

24. The annuities in C as they fall in are to be paid to the Mooktear for the time being.

25. The surplus is to accumulate and form a sinking fund for any extra expenditure that may be required for the upkeep of the property in schedule

A and for the marriage expenses of the children of the Mooktear provided such Mooktear be a descendant of the defendant, his cousin Bala

Perahad, the son of Easwara Doss' sister or the plaintiff's father, Muni Lall. The balance of the sinking fund is not disposed of in any way. It

accumulates. The surplus that may become available in certain contingencies out of the income devoted to the purposes in B and C may be spent

according to the discretion of the trustee for any charitable purpose not herein provided for, and any balance is to be added to the sinking fund.

26. The nucleus of the property in A is recited to consist of a sum of two thousand rupees left by Raja Mukund Lall, the grandfather of Easwara

Doss, which, in the bauds of, his eldest son Raja Teekumchand increased to twenty thousand at the time of his death, who left it to his brother

Kundun Lall, according to the recitals in A, with directions to invest the same and spend half the income in charity. In Kundun Lall's hands it

swelled to over a lakh of rupees and Easwara Doss, the adoptive father of the defendant, has increased the family fortune to more than what is

included in schedule A, which itself is more than two lakh of rupees.

27. Of the charities in B the more important so far as the estate is concerned are a temple, chuttram and agraharam. The temple was built by

Kundun Lall, - at any rate he began its construction. The chuttram and agraharam were constructed by Easwara Doss. Worship was carried on in

the temple. Deccani Brahmin travellers were fed in the chuttram and the agraharam was intended for the lodging of the Brahmins who read the

vedas in the temple. There was however no trustee and no endowment and no specific income set apart, Easwara Doss treated the money spent

on it as part of his family expenditure and it was so treated in his accounts. For the above charities are set apart Rs. 600, 1,500, 180, respectively,

two thousand two hundred and eighty in all, out of the total income of three thousand two hundred and eighty-five set apart for all the charities in B.

28. Of the balance, Rs. 360 per year go for two scholarships to students in the Presidency College and various small sums for the performance of

certain annual ceremonies which, it is stated, were till then being performed at the expense of Easwara Doss.

29. the annuities with the exception of those to the defendant and his children are payable to certain relatives who have no legal claims on the

estate.

30. The plaintiffs are come of the annuitants, who, as the descendants of an illegitimate son, have no claim to maintenance the annuity is clearly only charitable in its nature.

31. The properties in A must, therefore, be treated as belonging solely to Easwara Doss and the defendant without being charged even for the upkeep of the charities in B or the maintenance of the relatives in C, with the exception of the defendant's children, though, in my opinion, it would make no difference in (he decision of this appeal if they were so charged.

32. It is in terms declared that those shall be considered purely private charities and that the public shall never at any time have any interest therein or in any charity property. The result is that being a private trust it may be put an end to and misfeasance or malfeasance may be condoned.

33. These facts have an important bearing on the nature and validity of the instrument in question.

34. That the transaction was not intended to be merely nominal and that Easwara Doss intended to create a trust, seems clear.

35. In fact all the evidence points to that conclusion. He has been carrying on the worship in the temple, feeding his castemen from his country in

the chuttram, and maintaining the agraharam. He would naturally desire to see these charities continued and carried out. He had not sufficient

confidence in his son. The learned Judge who saw defendant in the witness-box calls him dull witted and the evidence of the schoolmaster supports

that view. Easwara Doss himself was leaving for Benares and like a good Hindu which, no doubt, he was, he naturally would desire to settle all his

affairs before leaving Madras. The annuitants are his poor relations and others whom he was helping and for whom he may be expected to make

some provision after his death. Finally a will executed by him places the matter beyond all doubt. By that Will he appointed, in exercise of the

power conferred upon him by the settlement deed, the Official Trustee of Madras to succeed him as trustee. This seems conclusive to show his

intention that these charities were to be earned out and the annuities continued after his death.

36. When the evidence is clear that the instrument was to operate at any rate after death, there is no doubt a strong presumption that the trust was

to be enforceable from its date. But the terms of the instrument and the evidence lead me to a different conclusion. Easwara Doss, the first trustee, takes the power "to alter the present investment of the trust funds by addition to the property in the schedule A set forth or by substituting other property for all or any of the parcels in the said schedule A mentioned and excluding or withdrawing any of the said parcels in the said schedule A mentioned and all property so excluded or withdrawn shall cease to be trust property subject to the trust hereof or be in any manner whatsoever affected by anything herein contained whether any property be expressly or in fact substituted for the same or not.

37. I have anxiously tried to place some construction on this provision which would not defeat the trust. But I find myself unable to do so. The power of substitution at first sight appears extraordinary as it would authorise an alienation under an ostensible pretence of a substitution, though never really intended, and the later provision that substitution is unnecessary seems irreconcilable with, any view other than it conferred absolute power on Easwara Doss not to create the trust so far as any or all these properties are concerned. He was fully aware that such power was not needed in the interests of the trust as it was not given to his successors, who had neither any power of substitution nor of withdrawal. It is no doubt possible to suggest that the trust having been created, any provision inconsistent with it may be treated as null and void. But I have to read the instrument as a whole, and take the words as I find them. If the meaning is; clear, effect if possible has to be given to the intention expressed.

Easwara Doss had same motive in reserving to himself such power. The substantial portion of the property in A was subject to the vicissitudes of the salt trade carried on by his partner. That amount was to be invested in trust "when he may think fit so to do and according to his own absolute discretion." Evidently then no means existed under the instrument of compelling the appropriation of that money to the trust, and it is also possible that it may not be available at his death. Nor was this intended as a mere illusory provision. He has sold item No. 5 in A - a valuable property.

Item No. 9 another valuable property has disappeared. This provision, which was acted upon, inclines me to think that Easwara Doss wanted an

enforceable trust to be created and in operation only from the date of his death and not before and accordingly he reserved full freedom as owner

in dealing with these in his lifetime. The evidence in the case strongly supports this view. The result of that evidence is thus stated by the learned

Judge. ""No alteration was made in his way of dealing with his properties or the maintenance of the plaintiffs and others, No property was in fact set

aside for charity. No fresh books were opened, and affairs continued to be conducted just as if no deed had ever been executed up to the time of

his death. He paid who he liked and what he liked. He sold property and bought property; and in spite of the provision in the deed that Byragees

and Brahmins should be fed for two days, he first stopped feeding them for a time and then he fed them for one day only."" I have only to add that

what he spent on charities and paid to his relatives was far below the sums specified in B and C schedules, and there is, farther, evidence in the

case, that these expenses were defrayed or annuities received not on account of any trust. The plaintiff when examined as a witness in Original Suit

No. 213 of 1900 in connection with this very matter said, that he learnt the particulars of the trust deed only after the death of Easwara Boas and

added ""I know that charities were conducted as per trust deed only when I saw the trust deed recently"" and he was the man who was to conduct

the Tiruvallur charity under A. If the plaintiff, in whom Easwara Doss seems to have placed more confidence than in any other relative, did not

know this, it may be assumed that those connected with the other charities in B are not likely to know, anything. Then as to his annuity the plaintiff

says. ""He did not tell me what he left for me. He never gave me anything as entitled to under the trust deed."" He tried in the present suit to

minimize, in my opinion unsuccessfully, the efforts of his previous statement. Other circumstances fully bear out the inference from the evidence that

Easwara Doss kept others in the dark as to the provisions in A. The transaction was apparently carried out in secret. The only attesting witnesses

were the two solicitors of the father. The person who is stated in the instrument to have explained it to the defendant was the manager of their

office. Under ordinary circumstances the plaintiff's natural father would have been an attesting witness. One of the father's solicitors under a

special power of attorney from both father and son got the document registered after Easwara Doss and his relatives left for Benares.

39. That Easwara Doss did not intend that the trust should come into existence during his lifetime seems also to be borne out by the fact that he did

not carry out the trust in favour of the Presidency College, and the plaintiff's evidence that Easwara Doss told him at the time of execution of A

During my lifetime I have been helping you and I write for the same business to continue after me"" and ""Rs. 35 will be paid every month regularly

after his death"" is significant and shows Easwara Doss' own view of the effect of the instrument. If he had indented to create an obligation binding

on himself I find it, difficult to believe that he would have so utterly neglected his duty. My conclusion is that Easwara Doss intended these

arrangements to come into force only after his death and he never intended to or created any trust enforceable in his lifetime. The plaintiff, a

volunteer, cannot now enforce it against the defendant.

40. Exhibits E and F are consistent with this view. He did not take them in his capacity of ""trustee"" in whom the properties are vested by A as

distinct from Mooktear or Dharmakartha, but as the Dharmakartha of the temple, only one of the charities in B. He did not consider himself a

trustee then; but no doubt intended them to form trust property after his death. The evidence is that he utilized the income indifferently for his

private or charity use.

41. The instrument is, in my opinion, also void for uncertainty of the subject of the trust. Easwara Doss had power to ""withdraw any property, or

to alienate, and only such properties as should remain at his death, or as he should not have sold or disposed of, were to be trust property. The

properties were to be ascertained and appropriated to the trust only at his death.

42. As to item No. 10, a lakh and fifty thousand out of the four lakhs in Government promissory notes in the name of Kalika Doss invested in salt

trade carried on by a partner, there was only a voluntary executory trust, and there is nothing to show that this sum was even converted into trust

property. There is not even a covenant by the defendant to invest on trust, in case of failure by his father to do so. the purchase of Tinnanore Estate

in the name of Easwara Doss, as a Dharmakartha of the temple, will not by itself make it temple property - see *Maharanee Brojosoondery Debia*

v. Ranee Luchmee Koonwaree and Ors. 15 B.L.R. 176 (foot note) Privy Council, It is the property of the person who advanced the money. In

any event it cannot be the subject of this trust as all such properties are vested in a trustee for the benefit of all the objects of which the temple is

only one. And as all the encumbrances on the estate which formed the consideration for the sale were family property, there is the insuperable difficulty of the absence of the defendant's consent. The rest of the properties in the plaint schedule B were not even purchased in his name as Dharmakartha. It has not been shown that these were constituted trust property or that the defendant's consent was ever obtained for such appropriation.

43. I proceed to consider the next point argued before us. As the time of the execution of the instrument, the defendant, his adoptive father, and the two unmarried daughters of the former were the only persons who had any interest in the properties therein referred to. The defendant was deprived of his undivided moiety of the properties in A and of his right to take the other moiety by survivorship on his father's death, a right of which he could be deprived only by the father entering into a partition and giving up in his lifetime possession of one-half of all the family properties to his son. He sacrificed the interests of his possible male issue and the interest of his daughters and their descendants.

44. The properties in A are of considerable value. Item No. 10 alone being one lakh and fifty thousand rupees. According to the plaintiffs (see paragraph 6 of the plaint) a lath and fifty thousand rupees in addition to the above have to be invested for the benefit to the trust. The benefit he derives is only a monthly payment to himself of Rs. 35 only for life, Rs. 20 to each of his children only for their lives - an utterly inadequate consideration.

45. On the other hand what was the father's position? From being the managing member of a Hindu family ""and the owner of a moiety, he became a sole trustee, with practically no control over him. It (A) gave him the right of nominating his successor a sufficient cheek on the defendant going against his wishes - a right which he exercised the same day by appointing the Official Trustee to the exclusion of the son. He acquired the right, with, out even the power of veto given to the son, of substituting other properties, or of entirely withdrawing any properties in A without any such substitution when they shall cease to be trust properly with the result, that he gets power of complete alienation. Under pretence of conversion or substitution, he is also thereby enabled to put an end to the trust in whole or in

part while no such power is reserved to the defendant if he succeeds or to any other trustee. He reserves to himself the power to vary from time to time the terms in B as to the mode in which the charities are to be conducted while it expressly declared that his successors are to have no such powers. The investment of a lakh and fifty thousand is at his own absolute discretion. I fail to see that he has lost, in fact, any power of control over these properties he had before; he has certainly acquired more extensive powers, while the defendant, his adopted son, the owner of half the property, is converted into an annuitant on his own estate. This adopted son was under his control and reposed full and active confidence in him. That son was not conversant with business. He had no adviser of his own to warn him against the imprudent nature of the transaction or, if he had there is no evidence that he consulted or had the opportunity to consult any, free from his father's interference. Such evidence, would, if available, have been forthcoming, as the plaintiff was on familiar terms with the deceased. His natural father was alive and was probably a competent adviser. But there is no evidence in this case whether he was aware of the nature of the transaction. The inference is, as I have already pointed out, he - was kept in the dark. This is not a family arrangement under which the defendant as a member would be benefited and where a father's influence may be legitimately and beneficially exercised. But it is a transaction which, in the form of a trust, divests the son of all his interest in the property, and vests the ownership completely in the father with powers which leave him unfettered to deal with such property. Its validity must be tested by the same rules which are applied by English Courts of Equity to transactions between persons, one of whom deriving material benefits stands in confidential relation to the other.

43. It appears to me that the father, and the same rule is applicable to a volunteer claiming under the father, with notice of the fact that active confidence was reposed in the latter, was bound to prove not only that his adopted son understood the terms of the instrument - (and they are not clear in many respects) and that he knew how it would affect him--but that he was in a position to and did form, an independent opinion on the matter. I do not suggest that he must be proved to know all the various provisions set out in A, but there must be some evidence to show, among

other things, that he was aware of the sacrifice he was making, that his father was to be a practically uncontrolled trustee, and he may not even be one.

44. It is possible, though I think it is not likely, that he was willing to give up his property. But there must be clear evidence that it was a choice

accepted by him of his own free and independent will, unbiased by his father's influence, and with full knowledge.

45. It was argued that the father took the property as trustee and that therefore there is no reason to apply the rule of English law or view the

transaction with any suspicion. I have no hesitation in rejecting this argument. The Courts interfere to protect the defendant not because the father

derives any advantage, or that the son is legally, incapable of contracting, but on the ground that he is not presumed to be a free agent capable of

forming an independent judgment so long as he is subject to parental influence. It does not accordingly matter whether the same be exercised to the

benefit of the parent himself or other persons. It may be easier for him to rebut the presumption of the exercise of his parental influence when

he derives no personal benefit. In *Allard v. Shinner* L.R. 36 Ch. D. 145 the defendant was only a trustee for an Association in which both the

plaintiff and the defendant were interested. She derived no personal benefit. The deed executed under parental influence in *Turner v. Collins* L.R. 7

Ch. A.C. 329 gave the property to the father second wife and daughter. In the case before us, however, I have already expressed my opinion that

the instrument is very much to the advantage of the father. It is unnecessary therefore to pursue the matter further. As to the "defendant's

knowledge, we have his evidence that he was not aware of the contents of A, and never understood its nature, and effect, and, on the other hand,

there is the evidence of the instrument itself that the manager of his father's solicitor's office explained it to him. "What the explanation was it is

now impossible to say. Reading the document to him would, of course, be useless. I accept his evidence to this extent that he did not know that he

was parting with a substantial portion of his property and that he never intended to part with his rights to such valuable property. But it is now

difficult to rely upon his memory to ascertain what passed so many years ago. It is possible he may have been told something about making

arrangements as to carrying on the worship of the temple, or the payment of something to the dependents, but there is no evidence about it. I have already referred to the auspicious secrecy about the execution of the instrument. Why if secrecy was not intended such persons as Easwara Doss and Messrs. Branson & Branson failed to secure the defendant's natural father as an attesting witness requires satisfactory explanation I am inclined to think that--he, clearly, was kept in the dark. It is possible that Roop Lall may have been told that a document will be executed making some provision for him, but I have already given my reasons for holding that he did not know of the contents of A, of the amount payable to himself on his own account, or for the Tiruvallur festival.

46. The plaintiff thus has not discharged the burden of proof.

47. If, however, we are to believe that the manager explained the transaction to the defendant or what is more likely that Easwara Doss or somebody else gave him some general idea that some provision is to be made for the carrying out of the family charities as heretofore, then there is evidence in my opinion of the improper exercise of parental influence.

48. The wish of the great grandfather and grandfather in favour of charity, if conveyed to him either through the instrument or any other means is calculated to exercise an almost irresistible moral pressure on a young man then leaving on the pilgrimage to Benares, certainly, far stronger, when we consider the dictates of his religion and the conditions of Hindu family life, than the posthumous pressure exercised by the memorandum of the deceased father in *Powell v. Powell* L.R. (1900) 1 Ch.D. 243 which the Court treated as "most obnoxious to the rule of the Court.

49. The recitals that the properties in A have hitherto been treated by the family as charity property, that the charities in B have been hitherto carried on, that the annuities in C have been paid in pursuance of the directions of their ancestor, were certain at that time to compel his assent to the execution of A, yet these statements are made without strict regard to truth. There never was. any charity in favour of the Presidency College, and the subsequent conduct of Easwara Doss shows that he did not intend to carry this out. Some of the others, it is true, were performed by him but at a cost far below than what is set apart by schedule B. The benefits till then conferred on the relatives are far below what is given to them by

schedule C. These recitals are undoubtedly misleading. If Easwara Doss was really anxious in his old age to devote such valuable property to

charity it is clear that he was not a safe adviser and was bound to see that his son had independent advice and was fully informed of his legal right

to disregard his ancestors' wishes, if any, and also of the fact that a portion of these properties would have sufficed for the performance of the

charities as heretofore.

50. I am, therefore, of opinion that the defendant signed exhibit A at the request of his adoptive father without knowing what he was about, that he

never intended to give up his property, and that the paternal influence was exercised against his interests.

51. I would dismiss the appeal and the memorandum of objection but without costs.

S. Subrahmania Ayyar, Officiating, C.J.

52. I am unable to agree with Mr. Road that Section 575 of the CPC governs the present case. The grounds on which Sabhapathi Chetti v.

Narayanasami Chetti ILR 35 Mad. 555 proceeds, apply here, and Lachman Singh v. Ram Lagan Singh ILR 26 All. 10 is a direct authority in

favour of the view that the decision of the senior Judge prevails in a case such as this.

53. The decree of Boddam, J., will be modified to the effect stated in my judgment.

Sankaran Nair, J.

54. I agree.