
(1919) 09 MAD CK 0013
In the Madras High Court

Sena Yasim Sahib and Another

APPELLANT

Vs

Kadur Ekambara Aiyar

RESPONDENT

Date of Decision : 13-09-1919

Acts Referred:

Evidence Act, 1872 — Section 115

Citation : (1919) 37 MLJ 698

Hon'ble Judges : Spencer, J;Krishnan, J

Bench : Full Bench

Judgement

Spencer, J.—The point of law argued in this second appeal is whether the trustee of a temple who himself mortgaged land which was

afterwards sold in court auction at the instance of the mortgagee, can sue on behalf of the temple to recover the landlord's interest, which was

dedicated to the temple by the trustee's father, or whether, he is estopped from setting up a claim against a bona fide purchaser for value that it is

trust property. The District Munsif found that he was estopped and dismissed the suit. The Subordinate Judge in appeal reversed the District

Munsif's decree and gave the plaintiff a decree for possession of the melvaram interest.

2. Estoppel in pais creates a personal disability attaching to an individual and his representative of denying the truth of a thing which he has led

others by his acts or representations to believe to be true.

3. If a trustee alienates trust property for his own purposes he acts not as trustee but in breach or repudiation of his trust. Therefore, as Telang, J.,

in *Sri Ganesh Dharmidahr Mahraj Dev v. Keshavrav Govind Kulgavakar* ILR (1890) Bom. 625 points out, the estoppel arising out of the conduct

of the mortgagor in representing the trust property to be his own property works, not against succeeding trustees, but against the heirs of the

alienor in his personal capacity. In *Syed Gulam Nabi Sahib v. Nagammal* (1896) 6 M.L.J 270 it was recognised that the right of suing for the

recovery of possession of trust property wrongfully alienated was not confined to succeeding trustees but might be exercised by the same trustee

who made the alienation in order to set right the wrong done to the trust.

4. That a man may act in one capacity when he makes a representation that a village is his private property and in another capacity when he claims

as trustee to recover the village as trust property of the idol is well illustrated by *Subbiah Chetty v. Mandleswar Katari* (1908) 19 M.L.J. 305. I

think that we should follow that decision and pronounce against the plea of estoppel in this case. As regards the decision in *Mahamaya Debi v.*

Haridar Haldar ILR (1914) Cal. 455 it seems to me that if a legal custom is found to exist whereby a shebait may transfer his turn of worship, the

act of mortgaging his turn is not an act done by virtue of his trusteeship but one which he does in exercise of his private right of worship. In that

way estoppel may arise in such cases, although it is noticeable that Beachcroft, J., who sat with Mookerjee, J., preferred to preserve his opinion

on the question of estoppel and to base his decision on the existence of a valid custom of transferability.

5. At page 468 Mookerjee, J., first lays down the principle that a mortgagor cannot set up against his mortgagee the title of another person. He

then extends this even to a case where the mortgagor is a trustee, acting in a public capacity and not for his own benefit, and he quotes an English

decision as an authority for this proposition *Deo v. Horne* Q.B. 760 at 766. The learned judge in the next step proceeds on the strength of some

American decisions to apply the same principle to cases where the trustee mortgages the trust property which he has no right to mortgage. With

due respect I am not prepared on the strength of American authorities to follow him in the application of estoppel to cases where the trustee acts to

the prejudice of the trust, especially after the recent warning expressed by the Judicial Committee of the Privy Council against the danger of Courts

in India allowing themselves to be guided by the ruling of foreign Courts. The appeal fails and is dismissed with costs.

Krishnan, J.

6. The only question raised in this second appeal is one of estoppel and it is raised on the following facts by the lower Appellate Court.

7. The plaint land originally belonged to plaintiff's father Sellam Bhattar. He dedicated the melvaram right in it to the Ekambaranatha Swami Idol in

the Big Conjeevaram Temple for the performance of certain religious ceremonies and charities in that temple and directed that the eldest member

of his family should be the trustee for the time being of the trust he created. He retained the kudivaram himself. On his death the property as well as

the trusteeship passed to the plaintiff. Sometime thereafter plaintiff mortgaged the plaint land for his own private purposes to meet the expenses of

his daughter's marriage. In doing so he did not make any mention of the trust or reserve the melvaram right. Indeed it was his case in the Lower

Courts that he mortgaged only the kudivaram right but the language of the mortgage deed being against that contention the Lower Courts have

decided that he mortgaged the whole land and that finding is not now disputed. The mortgagee sued for sale of the land and got a decree and the

land was sold in due course in Court-auction and was purchased by one Umamaheswaram Mudali. The defendants are transferees for value from

that purchaser. Plaintiff now sues as the trustee of the aforesaid trust for a declaration that he is entitled to the melvaram right in the land as such

trustee and for the recovery on behalf of the trust the melvaram due for three years before suit. The learned Subordinate Judge finding the

dedication proved held that the mortgage and the Court sale did not affect the rights of the idol and overruling the plea that plaintiff was estopped

from suing for the melvaram right by his conduct in mortgaging the whole property as his own gave a decree as sued for.

8. It is argued for the appellants that the question of estoppel has been wrongly decided by the lower Appellate Court for it is contended that the

estoppel arising against a mortgagor disputing the title he has himself granted will apply against plaintiff in whatever capacity he may sue.

9. Plaintiff is now suing solely as the trustee of the trust in favour of the idol for property in which he has no personal interest whatever. The suit is in

effect on behalf of the idol by the trustee or manager, the plaintiff. That by dedication of the melvaram right to the idol it became the property of the

idol is clear from the observation of their Lordships of the Privy Council in *Maharajah Shibaswaree Debia v. Muthoornath Acharjo* (1869) 13

M.I.A. 270. It is then difficult to see how a personal estoppel in pais arising against the plaintiff from his conduct can be pleaded in this suit or why

the idol should be made to suffer for anything done by the plaintiff in his private capacity because he happens to be trustee at the time of the suit. It

is conceded before us that in making the mortgage the plaintiff did not act in any way as the trustee of the endowment; he did not even mention the

existence of the trust. It is also conceded that the plea of estoppel will not avail if the trust were represented by any other trustee. Should we then

uphold the plea of estoppel in this case, a plea which is really more against the cestui que trust than against the plaintiff as he is claiming no

beneficial interest for himself in the suit *melvaram*, merely on account of what one may call the accident of plaintiff being the trustee? I think the

answer should be in the negative.

10. A very similar plea of estoppel was raised before a Bench of this Court in *Subbiah Chetty v. Mandleshwar Katkari* (1908) 19 M.L.J. 305 with

only this difference that whereas here the plea is based on the act or conduct of the trustee, there it was based on a representation made by the

trustee, a difference which is not material regarding the applicability of the rule of estoppel u/s 115 of the Evidence Act, and the learned Judges

rejected the plea. Their observations on page 307 are very instructive on the question and seem to me to apply exactly to the facts of this case.

11. A similar view was taken in another Bench of this Court in an earlier case in *Syed Ghulam Nabi Sahib v. Nagammal* (1896) 6 M.L.J. 270

where the right of a trustee who wrongfully alienated trust property to set right the wrong done by him to the trust by himself suing the alienee for

recovering possession was recognised. It is true, as the learned Counsel for the appellants points out, that the view taken in that case on another

point, namely, that the alienee's possession did not become adverse to the trust during the time the trustee who made the alienation continued in

office has since been departed from. See *Rajah of Palghat v. Raman Unni* ILR (1917) Mad. 4 : 83 M.L.J. 26. But this instead of weakening the

force of the decision on the first point has rather enhanced it; for it will be an anomaly if limitation by adverse possession is allowed to run against

the trust when the person representing the trust is held to be estopped from suing for possession. The trust may thus lose the property by adverse possession without the trustee being able to prevent it.

12. Our attention was also drawn to certain observations of (he Privy Council in the case of Juggut Mohini Dassee v. Mus-sammat Sookee Money

Dassee (1871) 14 M.I.A. 289 ""that a former abuse of trust, in another instance cannot be pleaded against a trustee who seeks to prevent a

repetition of abuse....and that the Court could not with any propriety say we will decline to protect the property and leave it exposed to further

loss, and decline to make a declaration that it is trust property, merely because they would not trust the plaintiff with its administration."" Though, as

pointed out by Mookerjee, J., in Sidhu Sahu v. Gopi Charan Das 18 Ind.Cas. 969 this observation in terms applies only to a repetition of an abuse

of trust, I think it in effect supports the view that a trustee who is trying to set right the wrong he has done should not be prevented from doing so

by any estoppel based on a former breach of trust by him, at any rate where he derives no personal benefit from his later action. Following the

above rulings and particularly the reasoning adopted in the case in Subbiah Chetty v Mandleshwar Katkari (1908) 19 M.L.J. 305. I would hold

that the defendant's plea of estoppel was rightly disallowed.

13. The counsel for the appellants has however drawn our attention to the cases reported in Gulzar Ali v Fida Ali ILR (1888) All. 24 Sidhu Sahu v

Gopi Charan Das (1912) Ind.Cas. 969 and Mahamaya Debi v Haridas Haldar ILR (1914) Cal. 455 which he contends support his argument that

his plea of estoppel is good in spite of the fact that this suit is brought by the plaintiff as trustee. These cases will on examination be found to be

clearly distinguishable from the present case.

14. In the case in Gulzar Ali v Fida Ali ILR (1888) All. 24, the facts show that the plaintiff Fida Ali had a very considerable beneficial interest in the

suit property and that though he sued as a trustee he was trying to recover the property for himself. The learned Judges say in the opening sentence

of their judgment ""Fida Ali virtually asks us to allow him to take advantage of his own wrong and recover the land in suit"" and they again remark

later we make no remark with regard to the beneficiaries under the trust as they, having made no effort to figure in the suit, do not appear to be

interesting themselves in the matter." It is in these circumstances that the plea of estoppel was held good against the plaintiff and we cannot

therefore take that judgment as laying down generally as the appellant's counsel urges that a trustee suing for trust property which he has

mortgaged for his own private purpose is estopped from doing so irrespective of whether he has a beneficial interest in it or not. In the case before

us as the trustee is suing entirely for the benefit of the trust and he is not attempting to take any advantage for himself it is clearly distinguishable

from the case cited, which is thus of no help to the appellants.

15. The two Calcutta cases cited in *Sidhu Sahu v. Gopi Charan Das* (1912) Ind.Cas.969 and *Mahamaya Debi v. Haridas Haldar* ILR (1914) Cal.

455 were both decided by the same Bench. In the former the question was whether a trustee can ignore an *ekararnamah* entered into by him as

trustee with the defendants by which he recognised the right of certain others to intervene in the appointment and removal of the *adhikari* or trustee

of the endowment. No question of estoppel like the one before us was raised in the case at all. The learned Judges were of opinion that the

ekrarnamah would be binding on the plaintiff trustee if it really bore the character of a deed executed for settlement of dispute even though his

successor and the beneficiaries might not be bound thereby. The case has clearly no bearing on the case before us.

16. The next case cited *Mahamaya Debi v. Haridas Haldar* ILR (1914) Cal. 455 seems at first sight to have some bearing on the question before

us for Mr. Justice Mookerjee says in his judgment that the plea of estoppel against the mortgagor disputing the title he has himself granted is a good

plea even though the property mortgaged was trust property which he had no right to mortgage. This opinion must however I think be taken with

the facts of the case before the learned Judge. The property mortgaged there was the right of the mortgagor to perform certain turns of worship of

"palas" in a certain temple and to take the emoluments attached and the offerings made. The property was thus property belonging to the *Shebait*

or trustee personally and the beneficial enjoyment of it was in him and the mortgage was by him as *Shebait*. In these particulars the case differs

materially from the case before us and could I think, therefore, be distinguished from it. It was also found in that case that the mortgagee objected to

was really a valid one according to custom as it was made to a member of the family of Shebaita and Mr. Justice Beachcroft based his judgment

entirely on that ground. The question of estoppel therefore really did not arise in the case and as Mr. Justice Mookerjee's opinion on that question

does not affect the present case it is unnecessary to examine it fully or to consider whether it should be followed. The real question in such cases as

those in Calcutta is whether the rule that a man should not be allowed to plead against his own deed and to deny the truth of a declaration, act or

omission of his which another man has believed and acted upon to his disadvantage should prevail against the rule that a trustee cannot transfer his

office of trusteeship or vary the terms of it. There is a conflict of opinion in that High Court as to the answer to that question. See Srimati Mallika

Dasi v. Ratnamani Chakarvarti 1 C.W.N. 493 and the two cases quoted above. I reserve my opinion on it in the circumstances.

17. The authorities quoted for the appellants therefore do not affect the view I have already expressed. The plea of estoppel must thus be

disallowed in the circumstances of this case and as that is the only plea raised before us in the second appeal, the second appeal must be dismissed

with costs.

18. By Court. The Memo of objections is not pressed and is dismissed with costs.