

(1925) 08 MAD CK 0026
In the Madras High Court

Thayammal

APPELLANT

Vs

Perumal Chetti and Another

RESPONDENT

Date of Decision : 06-08-1925

Acts Referred:

Citation : AIR 1926 Mad 284 : (1925) 49 MLJ 734

Hon'ble Judges : Phillips, J

Bench : Division Bench

Judgement

Phillips, J.—The appeal only deals with the question of interest, but a Memorandum of Objections has been filed by respondents 1 and 2,

defendants 2 and 3 in which the whole decree is sought to be impeached and it will be necessary to deal with the Memorandum of Objections first.

2. The plaintiff is the daughter of one Ramu Chetti, whose brothers, Perumal Chetti and Gopal Chetti, are defendants 2 and 3. In her plaint she

alleges that her father deposited with Madar Saheb, 1st defendant, a sum of Rs. 4,000 out of his self-acquisitions and directed that defendants 2

and 3 should, out of the said sum and its interest, pay the plaintiff's marriage expenses and hand over the balance to her on her attaining majority.

Both the Lower Courts have found that Ramu Chetti had no self-acquisitions and that he and his two brothers were members of an undivided

family whose whole property was held as joint family property. It has also been found that there was no entrustment to the 1st defendant, whose

legal representatives are consequently not impleaded here. In the plaint the plaintiff states that the arrangement pleaded by her was referred to in a

will executed by her father. This will is Ex. A, dated 28th January, 1906. It is not signed by Ramu Chetti, but at the end of the document we have

the recital "" as just when writing of this will was finished, it became impossible to sign it as referred to above, Nos. 1 and 2 agree to act as stated in

the will. "" This is signed by defendants 2 and 3. By that recital they undertook within two years from the date of the document to marry the plaintiff

and to pay her for her stridhanam Rs. 3,794-0-6 out of their self-acquired and ancestral properties. Both the Courts have found that the

arrangement was as recited in Ex. A and it is in evidence that on the date of the will the 1st defendant was indebted to Ramu Chetti's family in the

said sum of Rs. 3,794-0-6. The Lower Appellate Court has exonerated the 1st defendant and his legal representatives, but has held that

defendants 2 and 3 are trustees, and are bound to repay this sum with interest from the date of the plaintiff's marriage. It is now argued that the

Lower Appellate Court is wrong in holding that any trust was created and I think this contention must be upheld. No specific property was

assigned in trust for the plaintiff, but a sum of money was to be paid to her out of the whole family property of defendants 2 and 3. The entrustment

to 1st defendant having been found against, it follows that there was no specific money or property which was assigned in trust. The Lower Court

also finds that the suit is one for an account but gives no reasons for this finding and I do not understand how a suit to recover a specific sum of

money with accumulated interest can be deemed to be a suit for an account.

3. As pointed out in *Cunningham v. Foot* (1878) 3 AC 974, to constitute a trust "" there must be a trustee with an express trust and an estate or

interest in lands vested in the trustee and which, therefore, the trust must affect "". In that case an annuity was bequeathed to the testator's wife to

be paid "" out of all profits arising from all and every part of my estate and property whatsoever "" and it was held that although this might create a

charge and a liability in favour of the annuitant, the charge and the liability together do not amount to an express trust or establish fiduciary relations

which such a trust implies, because the charge was general and the liability affected everything bequeathed or devised. The very same arguments

appear to be applicable in the present case; the bequest, if any, to the daughter was to be made out of the whole family property and no specific

property was set apart as trust property. I may also refer to *Henry v. Hammond* (1913) 2 KB 515 where, J. observes : "" It is clear that if the

terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so

kept as a separate fund of the person entitled to it, then he is a trustee of that money...If, on the other hand, he is not bound to keep the money

separate, but is entitled to mix it with his own money and can deal with it as he pleases, and when called upon to hand over an equivalent sum of

money, then, in my opinion, he is not a trustee of the money but merely a debtor. "" If there is no trust, the plaintiff's suit would be barred by

limitation. Under Ex. B the money was to be paid within two years from 28th January, 1906, and consequently the plaintiff's cause of action

accrued on 28th January, 1908. She was then a minor, but it has been found that she has brought this suit more than three years after attaining her

majority. The suit is therefore barred by limitation.

4. It is then contended for the plaintiff that Ex. A is an effective will. In the first place a member of an undivided family has no power to devise

property by will. In the second place the will has not been executed, as it is not signed by the testator. As regards the second point it is urged that

even an unsigned will may be effective. Reliance is placed on the ruling in *Tara Chand Bose v. Nobeen Chander Mitter* 3 WR 138, but in that case

not only was the unsigned document produced, but there was also evidence of the witnesses who were present when it was drawn up that will was

drawn up according to the instructions of the testator, and that he signified in their presence his assent thereto. This would in effect be good

evidence of an oral will. Such circumstances and evidence are absent in the present case, for, there is no suggestion that the testator assented to the

terms of Ex. A before he died or that he made any oral will.

5. As regards the first point reliance is placed on the decision of a Bench of this Court in *Patra Chariar v. Srinivasa Chariar* ILR (1917) M 112

where it was held that a father in a joint Hindu family can, with the consent of his adult son and with the consent of his relations who are interested

in his minor son, bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent. The validity of this

decision has been questioned in a later case *Subbarami Reddi v. Ramamma* ILR (1920) M 824. but not definitely dissented from on the ground

that the testator obtained the consent of all his coparceners. In the present case

it is alleged that there were sons of defendants 2 and 3 in existence

on the date of the will and we have no evidence that the assent of their guardians was obtained. The decision in *Patra Chariar v. Srinivasa Chariar*

ILR (1917) M 1122 is not therefore applicable to the facts of the present case. I may also add with reference to the claim based on the will, that

no such claim is put forward in the plaint, the plaint being based entirely on an arrangement. It is unnecessary to decide the point but it appears to

me that the agreement evidenced by Ex. A being purely a voluntary agreement on the part of defendants 2 and 3 for there is no evidence that they

obtained any consideration for it, it would not be legally binding upon them, although they might be under a moral obligation to pay the money. It

would appear that defendants 2 and 3 were willing to pay the amount decreed against them for they did not appeal against the decree and offered

to pay plaintiff the money if 1st defendant would pay them. Unfortunately the plaintiff has been sufficiently ill advised as to press her claim for

further interest and consequently has given the defendants an opportunity of setting aside the whole decree, but possibly they may yet recognise

their moral obligation to pay the plaintiff some money as *stridhanam*.

6. In the result the Memorandum of Objections must be allowed and the second appeal/dismissed. The plaintiff's suit is dismissed with costs

throughout.