
(1933) 05 MAD CK 0006
In the Madras High Court

The Official Assignee of Madras and Another
Vs
Sampath Naidu

APPELLANT

RESPONDENT

Date of Decision : 04-05-1933

Acts Referred:

Transfer of Property Act, 1882 — Section 43

Citation : AIR 1933 Mad 795 : 145 Ind. Cas. 965 : (1933) 38 LW 610 : (1933) 65 MLJ 588

Hon'ble Judges : Bardswell, J

Bench : Division Bench

Judgement

Bardswell, J.—The suit under appeal is one for a declaration that two mortgage deeds, executed on the 18th March, 1914 and 17th

November, 1920, respectively, in favour of the predecessors of defendants 1 and 2, as well as a decree obtained thereon, are void and

inoperative in law to the extent to which these defendants seek to exercise their rights over the suit property. The plaintiff has been granted a

decree as prayed for and the defendants are appealing.

2. The suit properties belonged originally to G. Section Venkatakrishnama Chetti who had three daughters. These daughters succeeded to his

estate on his death, and the last of them died in October, 1926. On her death B. Venkatakrishnama Chetti, the son of another of the three sisters,

succeeded to the estate. The suit mortgages were executed by this B. Venkatakrishnama Chetti when he had only a spes successions. After the

death of Narasammal, the last survivor of the three sisters, he sold the suit properties on 6th December, 1926, to Ananda Mohan Chetty by whom

they were mortgaged on 21st January, 1927, to the plaintiff. As to the validity of the plaintiff's mortgage deed (Ex. A) there is no question.

3. The learned trial Judge, Sundaram Chetty, J., has held that the mortgages to the 1st and 2nd defendants cannot be deemed to have become

valid, even by an application of Section 43 of the Transfer of Property Act to them, as they were made in contravention of Section 6(a) of that Act

which runs thus:

The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere

possibility of a like nature cannot be transferred.

4. There can be no doubt but that at the time of the execution of the two mortgage deeds in question, Exs. III and II, their executant B.

Venkatakrishtnama Chetti had nothing to mortgage except his right as a presumptive reversioner and that he was perfectly aware that such was the

position. It was urged by the learned advocate for the appellants that what is recited as being conveyed in each of these two documents is not a

spes successionis but a present interest in the property but, as has been remarked by the learned trial Judge, the fact that the documents contain

these untrue recitals cannot affect the situation. What has to be looked to is the substance of the transaction and not merely the form or colour of it.

The learned trial Judge has in this connection quoted pertinent remarks from Maxwell on the Interpretation of Statutes (6th Edition, pages 207-

209) and has also referred to what was said in *Sri Jagannada Raju v. Sri Rajah Prasada Rao* ILR (1915) 39 Mad. 554 : 28 M.L.J. 650 that

It would be defeating the provisions of the (Transfer of Property) Act to hold that though such hopes or expectations cannot be transferred in

present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer not the

expectations but the fruits of the expectations, by saying that what he has purported to do may be described in a different language from that which

the legislature has chosen to apply to it for the purpose of condemning it. When the legislature refers to the transaction as an attempt to transfer a,

chance, it indicates the true aspect in which it requires the transaction to be viewed.

5. It is unnecessary to add anything to what has been said in this connection by the learned trial Judge.

6. The appellants lay emphasis on two main points, that there is in their favour a

decision of this Court in Alamanayakunigari Nabi Sab v. Murukuti

Papiah (1915) 29 M.L.J. 733 and that the illustration to Section 43 of the Transfer of Property Act also supports them. Sundaram Chetty, J. has

found himself unable to follow the decision in Alamanayakunigari Nabi Sab v. Murukuti Papiah (1915) 29 M.L.J. 17 as he finds it opposed to the

Full Bench decision in Sannamma v. Radhabhayi ILR (1917) 41 Mad. 418 : 34 M.L.J. 17 as well as to the Privy Council decision in AIR 1923

189 (Privy Council) . With reference to the illustration he has contended himself with reiterating that what has to be looked to is not the mere form

but the substance of the transaction.

7. The leading judgment in Alamanayakunigari Nabi Sab v. Murukuti Papiah (1915) 29 M.L.J. 733 is, curiously enough, that of the same learned

Judge, Tyabji, J., as, in the course of the same month delivered the judgment already quoted from in Sri Jagannada, Raju v. Sri Rajah Prasada Rao

ILR (1915) 39 Mad. 554 : 28 M.L.J. 650. In Alamanayakunigari Nabi Sab v. Murukuti Papiah (1915) 29 M.L.J. 733 Tyabji, J. has drawn a.

distinction between purporting to ""transfer the chance of an heir-apparent"" and ""erroneously representing that he (the transferor) is authorised to

transfer certain Immovable property"". Reason has, however, already been given for holding; that such a distinction cannot be drawn, at any rate

when the erroneous description is deliberately made with knowledge of its falsity. To quote again from the judgment of the learned trial Judge, if

such a distinction were allowed ""the effect would be that by a clever description of the property dealt with in a deed of transfer one would be

allowed to conceal the real nature of the transaction and evade a clear statutory prohibition"".

8. With regard to the importance to be attached to the illustration to Section 43 the remarks of the Privy Council in Mahomed Syedol Ariffin v.

Yeoh Ooi Gark (1916) L.R. 43 IndAp 256 : 21 C.W.N. 257 (P.C.) have been cited. In that case their Lordships have said with regard to the

illustrations in the Evidence Ordinance that is in force in the Straits Settlements:

It is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the

text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence

as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their

assumed repugnancy to the sections themselves. The great usefulness of the illustrations, which have, although not part of the sections, been

expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired.

9. These remarks have been considered by my Lord, the Chief Justice, as Beasley, J. in *Ramalinga Mudaliar (died) and Others Vs. S.R.*

Muthuswami Aiyar and Sons, , where he has also referred to a remark of the Privy Council in *Lala Balla Mai v. Ahad Shah* (1918) 35 M.L.J. 614

(P.C.):

Four illustrations are given. These are to be taken as part of the statute.

10. He has thus expressed himself:

I do not take either judgment to mean that under every circumstance an illustration must be taken as part of the statute. All that in my view is meant

is that a Court should not lightly disregard the illustrations merely because they do not seem to be in accord with generally accepted ideas as to the

law in other places.

11. This view I would with respect adopt. In the present instance, too, it is to be observed that not only is the illustration to Section 43 repugnant

to the provisions of Section 6(a) of the same Act but that also the question of what value is to be given to the illustration hardly arises, as there is

plain authority from the Privy Council that the law is not as stated in the illustration. This is to be found in AIR 1923 189 (Privy Council) in which it

was held, in agreement with a decision of the High Court of Calcutta, that a contract by a Hindu to sell immovable property to which he is the then

nearest reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him is void, and that

Section 6(a) of the Transfer of Property Act, which forbids the transfer of expectancies, would be futile if a contract of such a character was

enforceable. In their decision their Lordships quoted with approval the remarks of Tyabji, J. in *Sri Jagannada Raju v. Sri Raja Prasada Rao* ILR

(1915) 39 M. 554 : 28 M.L.J. 650. The Full Bench decision of this Court to which Sundaram Chetty, J. has referred in his judgment under appeal

is that in *Sannamma v. Radhabhayi* ILR (1917) 41 Mad. 418 : 34 M.L.J. 17. The

decision of the Full Bench was that Section 43 of the Transfer of Property Act could not be applied to make valid an alienation which at the time of its being made was prohibited by statute, even if the prohibition against alienation was subsequently removed.

12. There is quoted in support of the contentions of the appellants the decision of a Bench of this Court in *Muthuswami Pillai v. Sandana Velan*

(1926) 53 M.L.J. 218 but in that case Section 6(a) was not considered. Nor was it considered in the decision of the High Court, of Allahabad that

is reported in *Eshaq Lai v. Dulla* (1929) 122 I.C. 177.

13. The decision under appeal is thus clearly in accordance with authority. The appeal is, therefore, dismissed with costs in the ratio of the two

decree amounts under the mortgages.