

(1932) 03 MAD CK 0018
In the Madras High Court

Thiagaraja Mudaliar, minor, by next friend Janaki Ammal and
Another APPELLANT

Vs

Vedathanni RESPONDENT

Date of Decision : 17-03-1932

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : AIR 1933 Mad 48 : (1932) 36 LW 817 : (1932) 63 MLJ 707

Hon'ble Judges : Sundaram Chetty, J;Curgenvén, J

Bench : Full Bench

Judgement

Sundaram Chetty, J.—This appeal arises out of a suit filed by the plaintiff-respondent to recover a sum of Rs. 1,15,000 from out of the

estate in the hands of defendants, on account, of the arrears of maintenance due to her for a period of nearly 11A years at the rate of Rs. 10,000

per annum. The plaintiff's case is, that her deceased husband Ramalinga Mudaliar and his elder brother, the late Somasundara Mudaliar, were

brothers who were the last surviving male coparceners of a very rich family known as the Vadapathimangalam family, that the plaintiff's husband

died issueless on 23rd December, 1912, at Tiruvarur, and that soon after the annual ceremony of her deceased husband, she left the family house

in which Somasundara Mudaliar was living and went over to her parent's house about the beginning of the year 1914 and from that time onwards

she was living separately from the family of her husband's brother. The plaintiff's husband and his elder brother owned properties (moveable and

immovable) of the approximate value of 50 lakhs. The extent of their wet and dry lands was about 1,500 velis (about 10,000 acres). The annual

income of the family properties would be about 2 1/2 lakhs according to the

estimate given in the plaint. For more than 12 years Before his death, the plaintiff's husband was living separately from his brother in one of the family houses situated at Vijiapuram near Tiruvarur and was also in separate enjoyment of a portion of the family properties. Immediately after the death of the plaintiff's husband, Somasundara apprehended trouble on account of a possible claim being put forward by the plaintiff at the instigation of her relations for a moiety of the family properties, alleging a division in status between her husband and his brother. Feeling nervous at the idea of a possible litigation which would be fraught with disastrous consequences, Somasundara was anxious to secure some sort of admission from the plaintiff as to the undivided status of the family and with this object in view he got executed a document on 28th December, 1912, containing a recital as to the undivided status of the family and in that document he also purported to make certain arrangements for the maintenance of the plaintiff, but it was, however, distinctly understood between the parties that the provisions for the maintenance contained in the deed should not be given effect to or acted upon by them. This document was solely intended as a voucher for the recognition of the joint status of the family by the plaintiff and the real and final arrangement for the plaintiff's maintenance was agreed to be left over for future settlement at leisure on a scale commensurate with the position and status of the family. It is further alleged in the plaint, that the Immovable properties set forth in that deed as having been allotted for the plaintiff's maintenance were never enjoyed by her but continued to remain in the possession and enjoyment of Somasundara himself as part of his family properties down to his death which occurred on 17th January, 1925. During the lifetime of Somasundara, the plaintiff was making demands for adequate provision being made to her for her maintenance and he was promising to make suitable provision in conformity with the status of the family. Somasundara died issueless leaving behind him his two widows who are the 1st and 2nd defendants. In pursuance of an alleged authority given to the 2nd defendant by the late Somasundara, she adopted the 3rd defendant as her son on 1st July, 1925, having entered into an ante-adoption agreement with the natural father of the minor on 21st June, 1925. That agreement provides agreeably to the intentions of the deceased Somasundara that the plaintiff was to be

given for her maintenance Rs. 6,000 and 500 kalams of paddy per year besides being permitted to enjoy for her lifetime the lands mentioned in the

deed dated 28th December, 1912. Those lands would yield an income of about Rs. 2,500 per year. In the interests of the peace of this

respectable family the plaintiff is inclined to accept Rs. 10,000 per annum on account of the arrears of maintenance due to her.

2. The 1st defendant, senior wife of Somasundara, was disputing the validity of the adoption of the 3rd defendant and had also instituted O.S. No.

22 of 1925 on the file of the Tiruvarur Sub-Court for a declaration of the invalidity of the adoption. The 2nd defendant for herself and as guardian

of the minor 3rd defendant states that she had no knowledge of the circumstance under which and the purpose for which the registered

maintenance deed, dated 28th December, 1912, came into existence, and she accordingly puts the plaintiff to proof of the allegations made by her

in respect of it. It is admitted that the plaintiff did not receive the income of the lands set apart for her maintenance under the said deed and

therefore she should only be entitled to the profits of those lands in respect of her past maintenance after ascertainment of those profits by the

Court.

3. The learned Subordinate Judge found the case set up in the plaint to be substantially true and held that the maintenance deed in question (Ex. I)

was never intended to be acted upon and was also never acted upon. In the view that that document purporting to be a maintenance deed was

only a sham, he treated it to be inoperative and held that it would not debar the plaintiff from claiming a reasonable rate of maintenance for the

plaint-mentioned period on account of arrears due to her. Considering all the circumstances of this case, he allowed the plaintiff's claim for arrears

of maintenance at the rate of Rs. 6,000 per annum and passed a decree accordingly. As against this decision, defendants 2 and 3 have filed this

appeal, while the plaintiff has filed a memorandum of objections stating that the full rate claimed by her in the plaint should have been allowed by

the Lower Court.

4. When the present claim of the plaintiff is resisted on the strength of the registered deed, Ex. I, to which she and her husband's brother

Somasundara were parties, there is no doubt that the burden of proving that this

deed which is ostensibly a deed of maintenance was only a sham is upon the plaintiff. As observed in the decision in *Ranga Aiyar v. Srinivasa Aiyangar* ILR (1897) 21 Mad. 56 there must be clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. In order to substantiate such a case it should be shown for what purpose other than the ostensible one the deed was executed. It is necessary to understand under what circumstances Ex. I came to be executed. [His Lordship then discussed the evidence and continued:]

5. In the view I have taken of the facts disclosed in this case, I consider that the deed in question, which sounds ostensibly like a deed of maintenance, was executed nominally, or in other words, not with the intention of giving effect to that deed as an operative contract, grant or disposition, but it was brought about in this form by Somasundara with the sole object of securing a sort of acknowledgment by the plaintiff of the undivided status of her husband. This object has been achieved by the insertion of a recital to that effect as a preamble to the maintenance deed, Ex. I, but that is only a statement of a fact and not part of any contract, grant or disposition. Ex. I, if treated as a contract, grant or disposition is shown to be wholly nominal or sham and as such it is void and unenforceable. It does not represent any real agreement arrived at as between the plaintiff and Somasundara. This is not a case where oral evidence is sought to be adduced for showing that Ex. I is enforceable not according to its plain terms, but in a modified form by something being substituted for or subtracted from or added to any of the terms expressly mentioned therein.

It is only when parol evidence is sought to be let in for proving such a case, that Section 92 of the Indian Evidence Act would be a bar and render such oral evidence inadmissible. What the plaintiff seeks to prove in this case is that there was never any real disposition at all under Ex. I.

6. Evidence to prove such a plea does not come within the scope of Section 92.

7. The observations in *Harris v. Rickett* (1859) 28 L.J. Exch. 197 which was followed in *G. Ruthna Mudaliar v. K. Arumugha Mvidaliar* (1872) 7

M.H.C.R. 189 seem to be pertinent to the present case. Bramwell, J., says:

The principle of the rule is, that it must be assumed that the parties agreed that the written agreement should be the evidence of the contract. The

difficulty is, that in this case there was evidence that the parties did not agree

that the written agreement should be the evidence of the contract.

8. In *G. Ruthna Mudaliar v. K. Arumugha Mudaliar* (1872) 7 M.H.C.R. 189 the principles laid down in the case of *Pym v. Campbell* (1856) 6 E.

& B. 370 were followed, and Morgan, C.J., observes at page 196 as follows:

But it is said there is a written contract, the promissory note, and that no addition to, or variation from, its terms can be made by parol. With

respect to this, I take the law to be that, notwithstanding a paper writing, which purports to be a contract, may be produced, it is still competent to

the Court to find upon sufficient evidence that this writing is not really the contract. And the risk of groundless defence does not affect the rule itself,

though it suggests caution in acting on it.

9. It is true that this decision was given before the passing of the Indian Evidence Act. But this same principle has been adopted in later decisions

given after Section 92 of the Evidence Act had come into operation. In the case reported in *Bajinath Singh v. Hajee Vally Mahomed Hajee Abba*

ILR (1924) 3 Rang. 106 : 48 M.L.J. 339 (P.C.) their Lordships of the Privy Council have explained the scope of Section 92 of the Indian

Evidence Act in the following passage occurring at page 125:

The preamble to the Evidence Act recites that "it is expedient to consolidate, define and amend the Law of Evidence", and Section 92 merely

prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the

surrounding circumstances.

10. This observation shows that in respect of Section 92 of the Evidence Act, oral evidence is admissible to prove that an agreement in writing was

really no agreement at all but was only a sham as it was not intended to be operative. The dictum in *Woodroffe and Ameer Ali*'s commentary on

the Indian Evidence Act, namely, "'although evidence to vary the terms of an agreement in writing is not admissible, yet the evidence that there is not

an agreement at all is admissible'" has been disapproved by Ashworth, J., in the decision reported in *Lachman Das v. Ram Prasad* ILR (1927) 49

All. 680 as not being the correct law. The learned Judge says at page 685 that evidence in any shape cannot be admitted for the purpose of

showing that there was no agreement at all or, in other words, that a deed was meant to be inoperative. If this be the correct view, I am afraid that

several cases which have arisen in India, wherein deeds of various kinds have been held to be nominal or sham transactions or intended to be

inoperative on the strength of proof adduced in the shape of oral evidence and surrounding circumstance, should be deemed to have been not

rightly decided. With great respect, I have to dissent from the view expressed by the learned Judge in the aforesaid case.

11. In the case reported in (1890) ILR 17 291 (Privy Council) the Privy Council have held that a tenant, who had executed a kabuliyat containing

a stipulation which the landlord had told him would not be enforced, could not be held to have assented to it and the kabuliyat was not the real

agreement between the parties and the plaintiff could not sue upon it. This principle was followed by the Bombay High Court in the case reported

in *Navalbai Fulchand Vs. Sivubai Genu Korpe*, . Sir Lawrence Jenkins, C.J., after referring to a relevant passage in the aforesaid Privy Council

decision, observes at page 763 as follows:

So in this case if the plaintiffs were told that the document which in form is a sale-deed, would not be enforced as such against them and on the

faith of that representation Hariba executed the document, then the sale-deed cannot be upheld as against him or the plaintiffs as a sale-deed.

12. In the case reported in *Ramdhani v. Kowal Mani* AIR 1926 Pat. 156 it is observed that the authorities establish that though evidence to vary

the terms of an agreement in writing is not admissible, yet evidence to show that there is not an agreement at all is admissible. The decisions in *Pym*

v. Campbell (1856) 6 E. & B. 370, *Ruthna Mudaliar v. Arumugha Mudaliar* (1872) 7 M.H.C.R. 189 and *Baijnath Singh v. Hajee Vally*

Mahomed Hajee Abba ILR (1924) 3 Rang. 106 : 48 M.L.J. 339 (P.C.) have been cited and considered as authorities for the aforesaid principle.

These decisions are in my opinion applicable to the facts and circumstances of the present case. There is an indication in the decision reported in

Appa Dhond v. Babaji Krishnaji ILR (1921) 46 Bom. 85 that proof is permissible even where a deed is attacked as partly genuine and partly not

genuine. Sir Macleod, C J., has expressed his view on this point at page 87 as follows:

But though the Courts have in the past recognised that the ostensible owner in a benami transaction can be ordered to restore the property to its

original owner, I for my part would certainly not be willing to extend that doctrine and to hold that a transaction can be partly genuine and partly

unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion.

13. In view of all the aforesaid authorities, it should be held that the oral evidence let in by the plaintiff in this case is admissible and cannot be deemed to be obnoxious to the provisions of Section 92 of the Indian Evidence Act.

14. As I have already observed, this is not a case where oral evidence is sought to be adduced for proving that the deed is operative not in the

manner set forth therein, but in a different manner as settled by a contemporaneous oral agreement. Such a case would be one of substituting a new

and different contract for the one expressed in writing. The plaintiff in the present case does not say that Ex. I should be held to be operative not as

it purports to be but in a different manner or as a different kind of contract or grant. Such a plea would not be open to her and no evidence can be

adduced to substantiate that plea—This is the principle of the decisions in Sangira Mallappa v. Raniappa ILR (1909) 34 B. 59 and Mottayappan v.

Palani Goundan ILR (1913) 38 Mad. 226 : 25 M.L.J. 290. This is the view which my learned brother Curgenven, J., has expressed in the decision

in Dasari Lakshmiayya v. Coppolu Murachari (1929) 31 L.W. 516. Similarly in Afar v. Surja Kumar Ghose (1908) 15 C.W.N. 249 evidence to

prove that the real intention of the parties was something at variance with one of the terms of the contract and that that term should be enforced in

the manner intended but not in the manner expressed, was held to be inadmissible. These cases have really no application to the present case, in

view of the findings of fact set forth above.

15. I uphold the finding of the Lower Court, that the deed Ex. I was never intended to be acted upon as a maintenance deed. If it was not meant to

be really operative as between the parties and to be acted upon, then it is virtually a sham and would not be an effective bar to the present claim of

the plaintiff.

16. It follows, therefore, that the plaintiff is not bound to claim only the profits of Andiyur village provided for her in Ex. I on account of the arrears

of maintenance now claimed by her. It is left to the discretion of the Court to fix a proper and adequate rate of maintenance, having due regard to

all the circumstances of the case. The learned Subordinate Judge has dealt with this question in the light of the authorities bearing on this point and

has paid due attention to the special circumstances disclosed in this case. There is nothing to show any waiver or abandonment by the plaintiff of

her claim for the arrears of maintenance. The evidence shows that she was making demands on Somasundara for the decent provision for her

maintenance from time to time but that Somasundara was somehow postponing the same holding out promises only. The learned Subordinate

Judge has referred to some of the circumstances in paragraphs 80 to 82 of his judgment. His observations are as follows:

The plaintiff was born and bred up in a rich family. She was married to a member of a much richer family. She lived with her husband in very high

style for nearly 14 years. After a year of her husband's death she went to live separately and she was looked after by her affluent brothers. She

was with them till 1922 when they separated. From 1922 she is living separately in one of the houses set apart to a brother. Her brothers met all

her wants. The plaintiff's own means are little. She had ornaments worth about Rs. 14,000 or 17,000. Some of them she sold and converted into

cash... She performed pilgrimages to Benares, Rameswaram and other places all of her own accord and with her own money or with the help of

her brothers and even then nothing was given to her by Somasundara Mudaliar.

17. I am in entire agreement with these observations. There is no evidence to show that the plaintiff incurred any debts for the purposes of meeting

the expenses of her maintenance, etc. After a careful consideration of all the facts and circumstances, the learned Subordinate Judge has fixed a

lower rate of maintenance than what is claimed in the plaint on account of the arrears and allowed at the rate of Rs. 6,000 a year, i.e., Rs. 500 per

ensem. Considering the vast magnitude of the estate, the rate allowed by him cannot cause any hardship to the adopted son (3rd defendant); nor

can it be considered to be unduly high or excessive. I consider that the rate allowed is moderate and perfectly reasonable. In this view, no higher

rate can be allowed to the plaintiff as claimed by her in the memorandum of objections.

18. In the result, I would dismiss both the appeal and the memorandum of objections with costs.

Curgenven, J.

19. I confess to having felt some hesitation in deciding whether the view of this case taken by the Lower Court and by my learned brother is

justified by the evidence; that is to say, whether the plaintiff's claim to arrears of maintenance can be allowed in spite of the provisions of the

maintenance deed, Ex. I.

20. I fully agree that it is clear from all the surrounding facts, - the removal of the plaintiff's husband, Ramalinga Mudaliar, to his brother

Somasundara's house in spite of the opposition of his wife and others, the extreme and almost indecent haste with which the maintenance deed

was put through, although there is no reason to suppose that any claim of this character was made upon Somasundara or any wish expressed for

such provision, the state of distress and seclusion in which the widow must have been at the time, the gross inadequacy of the provision made for

her in the deed, the abstention of the plaintiff from availing herself of the maintenance so provided, - that this is not a case of voluntary acceptance

after discussion of the terms of the provision made. It is quite evident that Somasundara was a masterful personality, that he intended to have things

all his own way, and that he succeeded in imposing his will upon his brother's widow and such advisers as may have been available to her at the

time. It is also pretty clear that he procured the execution of Ex. I with a view to avoid claims being made upon him at some later date when the

plaintiff perhaps would be in a better position to assert them, - whether such claims might take the form of an allegation of divided status or of a

demand for maintenance commensurate in amount to the whole value of the estate. There are sufficient indications to justify the conclusion that to

no part of the document can the plaintiff have given her free consent except indeed to the concession to her of the jewels which are now claimed as

her own. So far I have no hesitation in accepting the conclusions of the learned Subordinate Judge. My only doubt has been whether all these

circumstances are not equally compatible with the theory, not that the document was intended by the parties to be inoperative but that the plaintiff

was compelled to execute it by the exertion of undue influence on the part of

Somasundara. It seems clear that if the plaintiff wants to establish her version of the circumstances she must exclude this possible alternative, because it would have required her to get the deed set aside before she could make an independent claim to arrears of maintenance, and since the period of three years allowed under Article 91 of the Limitation Act has long since expired this form of relief would have been closed to her. It has in fact been suggested on behalf of the appellants that the plaintiff has been forced to make out that the deed was nominal in order to get over the difficulty created by limitation. It is necessary therefore to decide specifically that the document was really intended by the parties to it to be nominal and that the theory that the plaintiff was so influenced by her brother-in-law as to execute it as an acceptance of his terms is not a true explanation of the evidence. As to this, I think in the first place that quite a plausible reason has been given for inserting the maintenance provisions in the document. The brothers had been living apart, and so far as external indications went it looks as if quite a good case for separation in status having occurred might have been made. The allegation that Somasundara was uneasy upon this score is very probably true and is borne out by the express recital in the document that he and Ramalinga had been living as members of one and the same undivided family. He was therefore anxious to make the widow subscribe to a declaration of this character, without making it appear that this was the sole purpose of the document obtained from her. As to the extreme inadequacy of the provision made, my learned brother is a better judge of this than I am and I am prepared to accept his view that it reveals the sham character of the document rather than that the plaintiff's consent was extorted. The evidence relating to the house provided for the widow is then said to betray the real truth, because in the first place it was so situated that she could not with any self-respect live in it and in the second, Somasundara actually leased it for a period of three years after the maintenance deed had been executed. It is clear that he must at least have known that she would never want to occupy it. Lastly, there is the circumstance that Somasundara kept the document in his own possession, which is easily understood if he looked upon it merely as a declaration that he and his brother had been undivided in status. We have to read the oral evidence in the light of

these considerations. It is true, as pointed out for the appellants, that not much of it can be said to come from an independent source. It is to be regretted I think that the plaintiff herself should have been examined on commission. Such a course, especially in a claim of this magnitude, ought very rarely to be allowed and I can see no good reason why this lady should not at least have given her evidence direct to the Court even if it had to be taken in chambers. As matters stand the trial Court was deprived of the opportunity of seeing the witness depose and of recording its impressions of her demeanour. The learned Subordinate Judge comments favourably upon the quality of the evidence she gave and as to this I can find no reason to differ from him. She appears to have told a consistent and straightforward story, which is borne out by the testimony of her two brothers, P. Ws. 3 and 6. The learned Subordinate Judge has refused to act upon the evidence of P.Ws. 2 and 4, but there seems no reason to discredit the attester, P.W. 5, and the fact that his evidence is somewhat vague, natural enough after so long an interval, certainly does not incline me to believe it. On the main point, that the document was intended to show that the brothers were joint, he seems to be quite clear. One important witness, K.G. Srinivasa Mudaliar, who attested the deed, has been examined by neither party. It is difficult to surmise with whom his sympathies would have been. He is related to both sides and the plaintiff admits that she has deposited her savings with him. But the evidence of the Vakil, D.W. 8, goes to show that in another litigation he was fighting against the plaintiff's adviser, Gopala-swami Mudaliar. Reasons have been given for the inability to examine the other persons who took part in the execution of Ex. I. It would perhaps be unreasonable to expect better oral evidence of the circumstances in which the deed originated, and I agree that such evidence as has been produced is inconsistent with the general consideration to which I have alluded. On the whole I think that there are sufficient grounds for holding that the finding of fact reached by the learned trial Judge is correct.

21. On the question of application of Section 92 of the Evidence Act, it is to be observed that Ex. I comprises, or purports to comprise, three matters, - a declaration of status, a release by Somasundara of any rights he may possess in the jewels, etc., and a provision for maintenance. The

declaration of status is a mere recital and is not in the form at any rate of a contract or of a term in a contract, and I do not think that for the purpose of applying Section 92 it has to be so regarded. As regards the jewels, etc., it is not denied that the plaintiff was allowed to retain these articles. It is argued that they were in fact her own property and that the provision was only inserted in order to lend an appearance of completeness to the document as a settlement of all her claims. It would have been better if the title of the plaintiff to those articles had been more explicitly examined at the trial but I think there can be little doubt that, possibly, with some trivial exceptions, they formed her own stridhanam property. It is significant that in the ante-adoption agreement subsequently entered into between the 2nd defendant and the 3rd defendant's natural father (Ex. C) there is a clause stating that

As Janaki Ammal's (2nd defendant's) jewels, gold, vessels, etc., silver vessels, etc., and stridhana properties belong to her exclusively and as

Somasundara Mudaliar Avergal's estate has no right whatsoever thereto, the adopted boy has no right or concern whatsoever therein,

and this was probably how matters stood in the case of the plaintiff also. I agree therefore that this term of the document may be treated as nominal

equally with the provision for maintenance. If so, I think it is clear that the case reduces itself to one of a wholly nominal contract, and the learned Advocate-General has confessed himself unable to contend that Section 92 can be applied to such a document; and as my learned brother has

shown, there is no legal obstacle in the way of proving it to be a sham. Such proof having been adduced, the way lies open to the plaintiff to claim arrears of maintenance irrespective of the terms of the deed. I agree that the rate of maintenance fixed by the Lower Court should be accepted and that the appeal and the memorandum of objections should be dismissed with costs.

22. We certify for two sets of fees in the appeal.