

(2002) 08 MAD CK 0176
In the Madras High Court
Case No : A.S. No. 704 of 1986

Vagesa Mudaliar (Dead), Sikkavalam Chatram Trust (Family Trust), Jegathambal, V. Srinivasan and V. Ramdoss

APPELLANT

Vs

Dakshinamurthy Mudaliar, Kalyanasundara Mudaliar, Shanmugha Mudaliar, Vaithiyalinga Mudaliar, Gopalakrishna Mudaliar, Santhana Mudaliar, Subramaniam, Rajappa, Tiruvengadam, Neelathanni (Dead), Baskarathanni, Renganayagi, Jayaraman, Balakrishnan, Jayanambhu Sultan Bivi, Bhanumathi, Vadivazhaghi, Jayalakshmi, Anjammal, S. Kasthuri, Thangaraju, V. Sethuraman, U. Kathan, Shonamuthu, Govindasamy, Velu, Kathan, Rathnam, Sukkaravelu, Pakriswamy, Anbalaghan, Anjan, Ramalingam, Venkatarama Naidu, Murugan, Periyyan, Jagannathan, Swamiappan, Nagamuthu, Rasappan, Velayan, Durairaj, Haja Allauddin, Arumugham and Rathinam

RESPONDENT

Date of Decision : 23-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : (2002) 4 LW 370

Hon'ble Judges : P. Shanmugam, J;K. Sampath, J

Bench : Division Bench

Advocate : Srinath Sridevan, for the Appellant; V. Chandrakanthan, for Respondents 1, 10 and 11, Pushpa Sathyanarayana, for T.R. Rajaraman, for Respondent 20, for the Respondent

Final Decision : Allowed

Judgement

K. Sampath, J.—The plaintiff in O.S.No.84/82 on the file of the Subordinate Judge's Court, Nagapattinam, filed the appeal before this Court and pending appeal, he died and his legal representatives have come on record as appellants 2 to 4.

2. For easier appreciation of the facts of the case, it would be necessary to have the genealogy extracted.

GENEALOGY Thiruvengkata Mudaliar (Died)
 ----- " " Velu Mudaliar (Died) Vaithilinga
 Mudaliar ----- (Died) | | ----- Subba Mudaliar
 Ramalinga | | (Died) Mudaliar(Died) Thiruvengkata Sankara- ----- |
 (Died-1940) murthy | | | (Died-1941) Ramiah (Died)= | | -----
 Neelathanni(D10) | | | Baskarathanni(D11) | | 1.Natesa
 ----- | Mudaliar(Died- " " | on 26-9-1981) Singaravelu
 Krishnasamy | 2.Vagesa Mudaliar (Died) (Died) | (Plaintiff) | | |
 3.Kalyanasundara ----- Balakrishnan(D14) | Mudaliar (D2) 1.
 Kunjithapatham= | Renganayagi(D12) | 2. Jayaram D13) | |
 ----- " " " " " Ramalingam
 Shanmugham Vaidilingam Gopala- Santhanam (Died) (D3) (D4) krishnan (D6) |
 (D5) ----- " " " Subramanian Rajappa
 Thiruvengkata (D7) (D8) (D9)

3. The case in the plaint is as follows:

The ancestors of the plaintiff and defendants 1 to 14 belonged to a very affluent family. They had a lot of wet and dry lands, buildings and sites in various villages in Nagapattinam Taluk. The original ancestor was one Thiruvengkata Mudaliar. He had two sons Vaithilinga Mudaliar and Velu Mudaliar. Vaithilinga Mudaliar in his turn had two sons Thiruvengkata Mudaliar and Sankaramurthy Mudaliar. Thiruvengkata Mudaliar had five sons Ramalingam, Shanmugham, Vaithilingam, Gopalakrishnan and Santhanam. Ramalingam died leaving behind three sons, Subramaniam, Rajappa and Thiruvengkata. Sankaramurthy's sons were Natesa Mudaliar, Vagesa Mudaliar, the plaintiff in the suit, and Kalyanasundara Mudaliar. Natesa Mudaliar died on 26-9-1981. His son is Dakshinamurthy. Dakshinamurthy is the first defendant while Kalyanasundara Mudaliar is the second defendant. Thiruvengkata Mudaliar's sons Shanmugham, Vaithilingam, Gopalakrishnan and Santhanam are respectively D-3, D-4, D-5 and D-6. Ramalinga Mudaliar's sons Subramanian, Rajappa and Thiruvengkata are defendants 7 to 9.

Velu Mudaliar had two sons Subba Mudaliar and Ramalingam Mudaliar. Subba Mudaliar's son was Ramiah. His wife is Neelathanni, the 10th defendant, and her daughter Baskarathanni is D-11. Velu Mudaliar's other son Ramalingam Mudaliar's sons were Singaravel and Krishnasamy. Singaravel's son was Kunjithapatham. His wife Ranganayagi is D-12. Singaravel's other son Jayaraman is D-13. Krishnasamy's son Balakrishnan is D-14. Defendants 15 to 22 are the alienees and defendants 23 to 45 are the lessees.

Senganni Sankaramurthy set apart properties for family charities. After Thiruvengkata Mudaliar, his sons Velu Mudaliar and Vaithilinga Mudaliar were managing the choultry and the properties set apart for charity. After them, the heirs of Vaithilinga Mudaliar, viz. Thiruvengkata Mudaliar and Sankaramurthy Mudaliar on the one hand and Velu Mudaliar's heirs on the other were managing the Trust for 6 faslis each alternatively. In suit item 2, Thiruvengkata Mudaliar had constructed a Vinayagar Temple and was performing pooja, neivedyam, etc. and

on the Anniversary days of Senganni Sankaramurthy and on other days they were performing annadhanam. The right to manage the Trust was being shared alternatively by the two branches for 6 faslis each. Thiruvengada Mudaliar and his brother Sankaramurthy Mudaliar had a partition deed executed on 28-2-1916, as per the terms of which, it was agreed that Thiruvengada Mudaliar as long as he was alive, would manage for 6 faslis and after him, Sankaramurthy Mudaliar and after the lifetime of both of them, the eldest male member in their families would have to manage for 6 faslis. In accordance with that arrangement, Thiruvengkata Mudaliar and after him Sankaramurthy Mudaliar were trustees managing the Trust.

On 2-10-1933 there was a partition entered into between Sankaramurthy Mudaliar and his sons, in that the earlier arrangement dated 28-1-1916 was referred to and it was affirmed that after the lifetime of Thiruvengkata Mudaliar and Sankaramurthy Mudaliar, the eldest male member in the two families would have to manage the Trust. As per that arrangement, the eldest male member of Sankaramurthy Mudaliar, Natesa Mudaliar was the trustee managing the Trust till he died on 26-9-1981. After his death, the plaintiff being the eldest male member in the two families, became entitled to manage the Trust. After the death of Natesa Mudaliar, the plaintiff caused a notice to be issued to his son Dhakshinamurthy, the first defendant in the suit on 22.5.1982, in that reference was made to a partition dated 2-1-1974, as per the terms of which Natesa Mudaliar and others partitioned the Trust properties and the items allotted to Natesa Mudaliar were partitioned between D-1 Dakshinamurthy and D-2 Kalyanasundara Mudaliar on 15-4-1982 and in that partition, certain items were allotted to the plaintiff and the plaintiff should take possession of those properties. The plaintiff objected to the arrangement by first notice dated 21-6-1982. The first defendant sent a reply on 23-6-1982 stating that he did not know about the partitions in the years 1916 and 1933 and that the plaintiff could not ask for right to manage the Trust on the basis of those documents. This contention was wrong. The Trust was family Trust and that had to be run for ever. Only for that purpose, a lot of properties had been endowed; choultry had been put up and it was also being maintained. A brahmin was housed in the choultry and for pilgrims and travellers facilities were given. Later on, the choultry was not managed properly; some portions of the choultry also fell down. The heirs of Velu Mudaliar, viz. defendants 11 and 12 and the second defendant had alienated the Trust properties and appropriated the proceeds with them. Those alienations were invalid and would not bind the Trust. The alienees, viz. defendants 15 to 22 had been included for a complete adjudication and defendants 1 to 14 had been made parties as they could claim right in the Trust properties. Defendants 22 to 45, who are lessees of the trust properties, had also been made parties. Defendants 3 to 9 were the heirs of Thiruvengkata Mudaliar. The plaintiff and defendants 1 and 2 were the heirs of Sankaramurthy Mudaliar. The partition between Thiruvengkata Mudaliar and Sankaramurthy Mudaliar would bind them, as also the partition of the year 1933 in which all the three sons of

Sankaramurthy Mudaliar had signed and they would get rights only as heirs and as per the partition deed. Though the heirs of Velu Mudaliar were entitled to be in management for 6 faslis, still in view of the fact that they had alienated the trust properties, they had forfeited their rights. Only the plaintiff had the right to be in management. The rights of Velu Mudaliar branch for 6 faslis ended in fasli 1388. After that, Natesa Mudaliar as the eldest male member of the other branch got right for 6 faslis and after his death, the plaintiff as the eldest male member, had become entitled to be in management. It was enough if the leasehold rights of the trust properties with defendants 23 to 45 were declared. Defendants 1 to 16 were in possession and enjoyment of the trust properties. The lands were fertile lands and they had to account from 26-9-1981. The prayers in the plaint are: (1) for declaration that the plaintiff is the trustee of the plaintiff family chatra trust, (2) for recovery of possession of the suit properties, (3) for an account of income from 26-9-1981, and (4) for future income.

4. The first defendant filed a written statement and the same was adopted by defendants 2, 4, 5, 7 and 8 and it is as follows:

The claim of the plaintiff for declaration that he was the sole trustee of the Trust could not be granted. It could not be said that the other claimants had lost their rights. The suit was not maintainable. As per the partition dated 28-1-1916, Thiruvankata Mudaliar was managing the Trust till his death in 1940. As per the terms of the subsequent partition dated 2-10-1933 there was a variation, in that, instead of "Mootha Varisugal" as found in the document, the words "Moothavaroi ullavar" had been inserted. The terms relating to the trust in the 1916 and 1933 documents did not come into effect. At the time of the death of Thiruvankata Mudaliar, the management was with the branch of Velu Mudaliar. In the very next year, the grandfather of the first defendant Sankaramurthy Mudaliar died. He did not get a chance to manage the trust. Thereafter, as per arrangement among the sons of Thiruvankata Mudaliar and Sankaramurthy Mudaliar, each branch was entitled to be in management for 3 faslis. This arrangement was known to the plaintiff and suppressing this, he could not claim absolute rights as per the 1916 and 1933 documents. In respect of the right to 3 faslis belonging to Sankaramurthy branch, the first defendant's father Natesa Mudaliar and the second defendant Kalyanasundara Mudaliar had divided the properties among themselves and they had been paying kist; they had been enjoying the income from the properties separately; the lessees in respect of the lands in the enjoyment of the plaintiff, had filed petitions for fixation of fair rent; on 2-1-1974 there was a partition among the senior most members of the branches and in that partition, A Schedule properties were given to the first defendant's father Natesa Mudaliar. The plaintiff did not object to that nor did he take action against Natesa Mudaliar and others. Even before that, an extent of 5 acres 59 cents was being cultivated by the first defendant and he was paying lease for the Trust. An extent of 2-1/2 acres was being cultivated by the second defendant and on the basis of the partition dated 2-1-1974 the very sharers had other partitions effected. The first and the second defendants when approached him for partition

of A Schedule properties, the plaintiff did not agree. In those circumstances, defendants 1 and 2 had a partition effected on 15-4-1982 and in that partition, they set apart B Schedule properties to plaintiff's share and informed the plaintiff by notice dated 22-5-1982, to which the plaintiff sent a reply on 21-8-1982. It was not open to the plaintiff to say that the partition dated 2-1-1974 was not valid and unenforceable. The suit properties had not been fully endowed to the Trust. From the income of the properties, brahmin pilgrims had to be fed, the choultry had to be maintained and lighted. Compared to the properties and the income therefrom, the amount to be spent for charity was negligible and therefore, the parties had right to deal with the properties. It had also been held in the proceedings before the Land Reforms Authorities and the Agricultural Income Tax Department that the partition dated 2-1-1974 was valid. The third defendant had filed a suit in O.S.No.7/77 on the basis of the partition dated 2-1-1974 for himself and the other sharers in respect of B Schedule properties. A preliminary decree had also been passed. The present suit had to be dismissed.

5. The 11th defendant filed a written statement and the same was adopted by defendants 10, 16 and 17. It is contended in the written statement as follows:

The suit was not maintainable. He could not ask for absolute right as trustee. He had not obtained permission u/s 92 of the Code of Civil Procedure; there was a mistake in the genealogy; the name of Thiruvenkata Mudaliar was wrong; it should have been Ramalinga Mudaliar; his daughter Senganni was married to Sankaramurthy Mudaliar; they had no issue; Sankaramurthy Mudaliar put up the suit choultry; he also dug a well on 4.10.1855; he set apart 10 velis of his nanjai land, 5 mahs of punjai land and swornathaya sites for performance of certain charities; he gave a written statement regarding this before the Tahsildar of Kivaloor Taluk; he appointed himself as the trustee and after his lifetime, his wife's brother Velu Mudaliar was appointed as trustee and after him, his descendants had to manage the Trust in consonance with that; after Sankaramurthy Mudaliar, Velu Mudaliar functioned as trustee; only the branch of Velu Mudaliar had right; Vaithilinga Mudaliar's branch did not have any right; against the wishes of Senganni and Sankaramurthy Mudaliar, Velu Mudaliar's brother Vaithilinga Mudaliar had participated in the management of the Trust by having a partition on 17-5-1895 between him and the sons of Velu Mudaliar, viz. Subba Mudaliar and Ramalinga Mudaliar; as Subba Mudaliar and Ramalinga Mudaliar, though they had been given rights to manage for their life, in view of their old age they could not manage, on 15-11-1908 they released their rights; in view of that, the branch of Vaithilinga Mudaliar did not have any right; the plaintiff had no right to ask for any relief; notwithstanding that Vaithilinga Mudaliar had no rights whatsoever, his sons Thiruvengada Mudaliar and Sankaramurthy Mudaliar had an arrangement between them under a partition dated 28-2-1916 and as per the terms of the said partition, Thiruvengada Mudaliar was managing for 6 faslis till his lifetime; he passed away in 1940; at that time the management was with the branch of Velu Mudaliar; Sankaramurthy

Mudaliar died in the very next year in 1941; he did not get a chance to manage the Trust; the terms of the partition did not come into effect; the plaintiff could not seek any rights; there was a partition arrangement in the branches of Thiruvengkata Mudaliar and Sankaramurthy Mudaliar on 2-10-1933, as per the terms of which, after Thiruvengkata Mudaliar, Sankaramurthy Mudaliar and after him the eldest male member of the two families would have to be in management; there was change of the right to succeed in spite of "mootha varisugal", it became "moothavar"; if the 1916 partition was accepted, the third defendant Shanmugha Mudaliar had a right to manage along with the plaintiff; the arrangement under 1916 and 1933 documents enabling the branch of Vaithilinga Mudaliar for managing the Trust for 6 faslis did not come into effect; each sub branch in Vaithilinga Mudaliar branch was managing the Trust for 3 faslis; the 3 faslis right of the branch of Sankaramurthy Mudaliar was divided among Natesa Mudaliar, the plaintiff and the second defendant into three shares and they were paying kist separately and lessees had also taken steps; a minor portion of the income from the suit properties was adequate for performing the Trust; it could not be said that the entire extent had been endowed for Trust; it was also not mentioned in the statement given on 4-10-1855 by Senkanni Sankaramurthy Mudaliar that the properties could not be alienated; it should be said that the properties were only burdened with Trust; there was only a partial dedication and the partition dated 2-1-1974 was a valid partition and it had come into effect without asking for cancellation of the said partition; the plaintiff could not claim absolute right; the partition had been accepted by the authorities under the Land Reforms Act and they had been dealing with the properties and disposing them of; even the properties given to Natesa Mudaliar and other sharers had been sold; the partition had come into effect and accepted by all the trustees; the plaintiff could not ignore the said partition; the suit was liable to be dismissed.

6. The 12th defendant filed a written statement and the same was adopted by the 14th defendant. The written statement is identical with the statement filed by defendants 10, 11, 16 and 17. He was in enjoyment of the suit 1st item. Nobody could interfere with his enjoyment. The suit was liable to be dismissed.

7. The 20th defendant filed a written statement that she purchased the properties in R.S.No.100/2 on 18.6.1982 on the basis of the partition dated 15-4-1982; she was a bona fide purchaser for value; the Suit was liable to be dismissed against her. Defendant 22 stated in his written statement that he sold the suit item 21 to the 14th defendant Thangaraj on 27-7-1981, that he got it under an exchange deed dated 20-6-1981, that Thangaraj was a bona fide purchaser for value and that the suit was liable to be dismissed.

8. Defendants 6, 9, 13, 15, 18, 19, 21 and 22 to 45 remained ex parte.

9. On the above pleadings, the lower Court framed the following issues:

1. Whether the suit properties are the plaintiff's family Trust properties?

2. Whether the plaintiff is entitled to have a declaration that he is the trustee?
3. Whether the defendants are liable to account for the income from the properties?
4. Whether the purchasers/defendants are bona fide purchasers?
5. To what reliefs the plaintiff is entitled to?

10. On his side, the plaintiff, examined himself as P.W.1 and marked documents Exs.A-1 to A-13. On the side of the defendants, the first defendant examined himself as D.W.1 and the 4th defendant as D.W.2. On their side, Exs.B-1 to B-34 have been marked.

11. On the basis of the materials on record, the learned Judge found that it could not be held that the suit properties were the family Trust properties of the plaintiff, but the properties were burdened with Trust. On issue No.2 the learned Judge found that the plaintiff was not entitled to have a declaration that he was the sole trustee of the properties or that the defendants were liable to render an account. On issue No.4 the learned Judge held that it was not necessary to give a finding. In that view, by judgment and decree dated 25-4-1985 the learned Subordinate Judge dismissed the suit.

12. Mr. Srinath Sridevan, learned Counsel for the appellants, submitted that the lower Court was in error in holding that the suit properties were not Trust properties, but were only burdened with Trust totally ignoring the admission in the evidence by the defendants. The lower Court overlooked that Senkanni Sankara Mudaliar had dedicated the suit properties for the maintenance of a choultry and feeding of brahmins therein and that the properties were being managed in the family of Thiruvenkata Mudaliar and his sons as set out in the plaint. The lower court had not given adequate consideration to the partition effected on 28-1-1916, as per the terms of which it was agreed that the trusteeship should be performed by Thiruvenkata Mudaliar in respect of 6 faslis by turn for his lifetime and after his lifetime by Sankaramurthy Mudaliar and thereafter, the eldest member of the two families. The learned Judge was in error in holding that the partition dated 28-2-1916 was not given effect to. It had not given adequate consideration to the subsequent partition dated 2.10.1933, which affirmed the earlier partition of the year 1916. The lower court was in error in accepting the partition dated 2-1-1974, which gave a go bye to the arrangements, which had come into effect in 1916 and 1933. The lower Court below failed to see that defendants 2, 11 and 12 had made alienations of the Trust properties and retained the sale proceeds and in as much as the sale of Trust properties was not valid, the alienees, viz. defendants 15 to 22 did not derive any right under the sales. All the three sons of Sankaramurthy Mudaliar signed in 1933 partition and therefore, the terms therefore were binding on them. It should also be held that in as much as the members of Velu Mudaliar's branch had alienated the properties, they had forfeited their right to manage. The Court below failed to see that there was no limitation on the number of

brahmins to be fed and therefore, the income from the suit properties could not be considered to be excessive vis-a-vis the obligation.

13. Mr.V. Chandrakanthan, learned Counsel for respondents 1, 10 and 11, sought to support the judgment of the lower Court and submitted that the properties were only burdened with trust, that there was no total dedication of the properties, that the conclusion reached by the Court below was correct and that no interference was called for. He further contended that so far as the first defendant was concerned, he was not guilty of any alienation and his right to management could not be overlooked. Even otherwise, according to the learned Counsel, in as much as the plaintiff was no more, the first defendant was the eldest male member of the branch of Sankaramurthy Mudaliar and therefore, he was entitled to manage the Trust and the plaintiff could not claim any such right. So far as defendants 10 and 11 were concerned, the learned Counsel submitted that in as much as the properties were only burdened with trust, the alienations by them could not be challenged.

14. Mrs. Pushpa Sathyanarayana, learned Counsel representing the 20th defendant, submitted that the alienee from the second defendant was a bona fide purchaser for value without notice that the property was a trust property and that her interest must be protected in the event of this Court coming to the conclusion that the suit properties were absolutely dedicated to trust.

15. The points for consideration are:

1. Whether there was a total dedication of the suit properties?
2. In case, it is found that there was total dedication, whether the plaintiff's heirs would be entitled to a declaration that they have absolute rights with regard to management of the properties? and
3. Whether the first defendant can claim any right for management?

16. As regards the genealogy, except for the mistake with regard to the original owner that the original owner was Ramalinga Mudaliar and not Thiruvankata Mudaliar, the parties have agreed that the genealogy is correct. The lower Court has also found so. This finding is confirmed.

17. On 4-10-1855 Sankaramurthy Mudaliar gave a statement before the Tahsildar of Kivalur Taluk. In that he stated as follows:

"I have erected a choultry and Thiruvasal on the site immediately to the north of Road No.1 within the limits of Sikkaralam Village at a cost of Rs.2000/- and odd. I have taken steps to excavate a pond on the southern side of the road and to open a garden on the tank bund and the work is in progress. To sweep and light to the choultry and Thiruvasal and cook and serve food to brahmins that resort thereto, I have given lodgings therein to brahmins and I have been feeding brahmins and conducting the charity. To defray the expenses thereof, I have endowed the said choultry and Thiruvasal from out of what is left of the nanja,

punja and other lands standing registered in my name in the said Themangalam Village after excluding therefrom the 10 velis of nanja and the punja landa, house site, etc. appertaining thereto which I have made a gift of to my brother-in-law Velu Mudaliar, son of Ramalinga Mudaliar, and to which he is to take and enjoy with all rights after my lifetime by living jointly with my wife as one family or separately in case they do not agree, with 10 velis of nanja and 5 mahs of punja and Co. and Swarnadhayam house sites or in all 10 velis and 5 mahs of lands as well as the trees, etc. thereon, the rent from tenants, and other profits thereof. So the registry of the said lands standing in my name should be cancelled and transferred to the name of the said choultry and Thiruvasal. I shall be Dharmakarthar, look after the cultivation and collection of money in respect of the said lands. After my lifetime, the aforesaid Velu Mudaliar who is fit to maintain the said charity and in whom I have confidence, shall from generation to generation look after the management of the said choultry, Thiruvasal, etc. as Dharmakarthar. The said charity shall be conducted by means of the income from the said lands and surplus thereof shall be utilised in executing repairs to the choultry and Thiruvasal whenever they are found necessary.

I pray that orders may be issued to give due effect to this arrangement."

18. Under this document, he appointed himself as the Dharmakarthar to perform the charity and to look after the cultivation and collection of money in respect of the said lands. He further stated that after his lifetime, Velu Mudaliar was to maintain the charity and should from generation to generation look after the management of the said choultry and Thiruvasal as Dharmakarthar. He specifically stated that the charity had to be conducted with the income from the lands and surplus thereof had to be utilised in executing the repairs to the choultry and Thiruvasal whenever they were found necessary.

19. This is followed by a partition in the branch of Vaithilinga Mudaliar on 17-5-1895 as would be evident from Ex.A-1 dated 28-2-1916 partition between Thiruvenkata Mudaliar and Sankaramurthy Mudaliar. It is mentioned in Ex.A-1 that there was a partition effected on 17-5-1895 in the branch of Vaithilinga Mudaliar and in that, certain properties were set apart for choultry. There is also a reference to a Will dated 23-9-1915. The relevant portion in the partition deed runs as follows:

;rpf;ftyk; fpuhkj;jpy; ek;Kila FLkgj;jpy; Vw;gl;oUf;fpw rj;jpuk;; jh;k tprhuizia ek;Kila jfg;gdhh; jh;kfh;;j;jhthapUe;J bra;J te;jgof;Fk; 1915k; tUc&k; brg;lk;gh; khjk; 23e; njjpapy; ek;Kila jfg;gdhh; Vw;gLj;jpapUf;fpw capy;gof;Fk; 6 gryp tprhuizia ek;kpy; jpUnt";fpl Kjypahh; cs;s tiuapy; mtUk; mtUf;Fg; gpwF r";fu K:h;j;jp KjypahUk; ek; ,Uth;fSf;Fg; gpwF ek; ,Uth;fWila FLk;gj;jpy; thhprfspd; K;j;jth;fs; ghf gj;jpuj;jpy; fz;lgoF;Fk; ehk; elj;jp te;jg;gof;Fk; 6 grpyt tprhuizia Kiwna elj;jp tUfpwJ/ ;

It provides that management for 6 faslis to be with Thiruvenkata Mudaliar as long as he was alive and after him Sankaramurthy Mudaliar had to be in

management and after their lifetime, the eldest member of the two families to be in management for 6 faslis. There was a partition effected on 2-10-1933 affirming the earlier partition under Ex.A-1. With regard to the person to manage, while 1916 document said that "iruvargaludaya kudumbathil varisugalil Moothavargal" while the 1932 document said "moothavaroi". Thiruvenkata Mudaliar, junior, died in 1940. On 4-5-1943 there was an alleged partition between the legal representatives of Thiruvenkata Mudaliar. In 1948 Singaravelu Mudaliar died. In 1974 under Ex.B-27 there was a partition between the branch of Velu Mudaliar and the branch of Vaithilinga Mudaliar. According to the plaintiff, though his name was mentioned in the document, he did not accept it and he did not also sign the document and no effect whatsoever could be given to that. According to the learned Counsel, the Trust had come into effect and there was total dedication and the alienations by the trustees in 1980 were void.

20. A reading of the various documents relating to the Trust clearly shows that there was an out and out dedication of the properties and the finding by the lower Court that there was only partial dedication cannot be sustained. The learned Judge was not at all justified in misreading the various documents and without any basis whatsoever, holding that the properties were large in extent and for performing the charities mentioned in the documents, the income from the properties was too much.

21. In MENAKURU DASARATHARAMI REDDI AND ANOTHER VS. DUDDUKURU SUBBA RAO AND OTHERS AIR 1957 SC 797 relied on by Mr. Srinath Sridevan, learned Counsel for the appellant, the law is stated as follows:

"Dedication of a property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to and follows, the property which retains its original private and secular character.

Whether or not dedication is complete would naturally be a question of fact to be determined in each case in the light of the material terms used in the document. In such cases it is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole. The use of the word "trust" or "trustee" is no doubt of some help in determining such intention; but the mere use of such words cannot be treated as decisive of the matter. The answer to the questions whether the private title over the property was intended to be completely extinguished or whether the title in regard to the property was intended to be completely transferred to the charity can be found not by concentrating on the significance of the use of the word "trustee" or "trust" alone but by gathering the true intent of the document considered as a whole."

It is further stated in the said decision as follows:

"In some cases where documents purport to dedicate property in favour of public

charity, provision is made for the maintenance of the worshipper who may be a member of the family of the original owner of the property himself and in such cases the question often arises whether the provision for the maintenance of the manager or the worshipper from the income of the property indicates an intention that the property should retain its original character and should merely be burdened with an obligation in favour of the charity.

If the income of the property is substantially intended to be used for the purpose of the charity and only an insignificant and minor portion of it is allowed to be used for the maintenance of the worshipper or the manager, it may be possible to take the view that dedication is complete. If, on the other hand, for the maintenance of public charity a minor portion of the income is expected or required to be used and a substantial surplus is left in the hands of the manager or worshipper for his own private purpose, it would be difficult to accept the theory of complete dedication.

It is naturally difficult to lay down a general rule for the solution of the problem. Each case must be considered on its facts and the intention of the parties must be determined on reading the document as a whole."

22. As already noted, a reading of the documents leaves us with no doubt that there was a total dedication. Not even a minuscule part of the income is set apart for any other purpose. The conclusion arrived at by the lower Court is unacceptable that there was no total dedication. When once it is found that there was total dedication, then naturally the alienations in derogation of the Trust cannot be supported.

23. Section 77 of the Indian Trusts Act, 1882 provides as follows:

"A trust is extinguished -

- (a) When its purpose is completely fulfilled; or
- (b) when its purpose becomes unlawful; or
- (c) when the fulfilment of its purpose become impossible by destruction of the trust property or otherwise; or
- (d) when the trust, being revocable, is expressly revoked."

Section 78 provides that,

"A trust created by Will may be revoked at the pleasure of the testator.

A Trust otherwise created can be revoked only -

- (a) where all the beneficiaries are competent to contract by their consent;
- (b) where the trust has been declared by a non-testamentary instrument or by word of mouth - in exercise of a power of revocation expressly reserved to the author of the trust; or

(c) where the trust is for the payment of the debts of the author of the trust and has not been communicated to the creditors - at the pleasure of the author of the trust."

24. In our view, the Trust in the instant case, cannot get extinguished nor can there be a revocation of the Trust. There is no provision in any of the documents for revocation of the Trust and there is no question of the beneficiaries consenting to the revocation of the Trust. It is also settled that the trustee does not have a right to sell the trust property, unless the deed of trust confers such a power

25. It has been held by a Division Bench of the Bombay High Court in *Ramabai Govind Vs. Raghunath Vasudeo*, as follows:

"Where an executor under a Will, who is in the position of a trustee, amalgamates the trust estate with his own managing it as one unit, and subsequently purchases new property out of such mixed estate in his own name, the presumption is that the property has been purchased by the trustee out of the trust fund mixed up though it may be with his own property. Unless and until the trustee succeeds in establishing before a Court of law that no part of the trust property formed part of the consideration for the purchase of that property and he had purchased it out of his own separate property or properties, he would not be able to claim the property as his own and the beneficiary or the cestui que trust would be entitled to that property.

If the trustee transfers such property to a third person and the beneficiary brings a suit against the transferee for recovery of such property, the onus of proving that the property in suit was purchased from the mixed fund is not on the plaintiff but the onus is on the defendant to prove that the property had been acquired by the trustee from his self-acquisitions. Once it is proved by the plaintiff that there was a mixed fund made up of the personal properties of the trustee as well as the trust property, the plaintiff's part of the case is established and it is not open to the Court to enquire as to whether the property was purchased from the corpus or from the income.

Merely because the property is vested in the trustee or the legal owner, the trustee is not entitled to sell the same. He is not the full owner of the property in the real sense of the term, because there is a beneficial interest and the ownership therein carved out in the property. The legal ownership which vests in the trustee is for the purposes of the trust and the administration of the provisions of the trust."

26. It is not disputed that the branch of Velu Mudaliar has been dealing with the property as if it is their own. There can therefore be no doubt that the branch has forfeited its right. So far as the first defendant is concerned, in his written statement he has taken a stand that the suit properties have not been dedicated absolutely and that the income from the properties would be enormous and the money required for the charity is very meagre. When he has taken such a stand

against the interest of the Trust, he cannot be allowed to have a right of management.

27. So far as the 20th defendant is concerned, she claims to be a bona fide purchaser for value. As a prudent purchaser, she should have looked for encumbrance and if only it had been done, she would have known that the properties were trust properties. The alienation in her favour cannot therefore be sustained. Though all the parties, who contested the suit have been served, except for D-1, D-10, D-11 and D-20, others have not chosen to appear before this Court either in person or through Counsel. Now that we have taken the view that there was total dedication of the suit properties and our specific finding is that except for the plaintiff's branch, others have forfeited their rights to manage, the appellants are entitled to succeed.

28. We find all the points in favour of the appellants. The persons in possession of the Trust properties have to render accounts for the income from the Trust properties. The appeal shall stand allowed. The judgment and the decree of the lower Court are set aside and the suit O.S.No.84/82 shall stand decreed as prayed for. However, there will be no order as to costs.