

(1938) 05 MAD CK 0012
In the Madras High Court

Vedakannu Nadar and Others

APPELLANT

Vs

Nanguneri Taluk Singikulam Annadana Chatram through its
huktdars Medai Dalavoi Ranganatha Mudaliar and Others

RESPONDENT

Date of Decision : 06-05-1938

Acts Referred:

Citation : AIR 1938 Mad 982 : (1938) 48 LW 829 : (1938) 2 MLJ 663

Hon'ble Judges : Venkatasubba Rao, J;Abdur Rahman, J

Bench : Full Bench

Judgement

Abdur Rahman, J.—Two suits for ejectment, out of which these appeals arise, were filed in the name of a public charity known as

Nanguneri Taluk Singikulam Annadana Chatram by the plaintiff as a huqdar (which is here used for a manager of a trust) sometime in 1921 against

a number of tenants and were decreed by the Subordinate Judge in March, 1935. Having regard to the fact that the suits were filed on behalf of a

charity, which was neither registered nor a juristic entity, it is fairly obvious that they could not proceed, but since they have gone on for this length

of time and even succeeded in the trial Court, it may well be argued that the defect was one of wrong description merely and should not be

allowed to prevail at this stage. We have therefore decided to go into the other question relating to the right of the plaintiff and after his death,

which occurred while the suits were still pending, to that of his heirs to institute and maintain these actions.

2. The facts which are relevant for this purpose may be shortly stated. These properties appear to have belonged to one family at one time and

were endowed for the purpose of a chatram (which may be regarded as a Dharmasala or an inn) long ago. The origin of the endowment is lost in

obscurity. The parties however agree that the properties belonging to this family were divided in three shares. The plaintiff and one Alagappa

Mudaliar claimed 5/12 and 6/12 out of these properties respectively while defendant 1 stated that she was entitled to 2/12. Some arrangement

appears to have been arrived at between them in regard to these shares but we are not concerned here with what was allotted to each of them. It

appears that following the arrangement regarding their private properties, these three branches managed this charity and considered themselves to

be entitled as "huqdars" in the endowed properties to the same extent until 10th February, 1914, when Alagappa Mudaliar assigned his rights in

those properties to the original plaintiff in consideration of a sum of Rs. 1,300. In view of the present contention raised on behalf of the parties, I

shall have to examine this document in its appropriate place. To resume the narrative, it appears that Alagappa took no interest in the management

and in view of the transfer effected in 1914, the original plaintiff instituted these suits for ejectment in 1921 in which the huqdar of 1/12 interest in

the endowed property was impleaded as first defendant but Alagappa or his heirs, as he is also said to have died subsequently, leaving three sons

behind him and who are stated to be alive even now, were neither impleaded as plaintiffs nor as defendants.

3. The only question that we have now been called upon to decide is, if Alagappa or his sons were necessary parties to the suit and whether in

their absence, these suits "could be maintained. This objection was specifically raised by the defendants in their written statements and having been

decided against them by the lower Court, it has been again taken in the grounds of appeals and pressed before us. In fact, the learned Counsel for

the appellant has argued this as a preliminary point and has stated that it would be unnecessary to go into others if we agreed with this contention of

his. He urges that it was absolutely necessary for the original plaintiff and his heirs to implead Alagappa and his heirs as plaintiffs and if he or they

refused to join as such, he or they should have been added at least as defendants. But the plaintiffs refused to join them either as plaintiffs or

defendants and it is therefore contended that the present plaintiffs have no locus standi to maintain these actions in their absence.

4. In order to determine this question, it is essential to examine the deed of transfer executed by Alagappa Mudaliar in 1914 (Ex. F) and adjudicate

on its validity. This deed purports to convey 6/12th share in the properties in suits to the original plaintiff, which have been stated to belong to the executant of the document and over which the charities are declared to have a charge merely. It is common case of the parties now, that this statement in the document is entirely incorrect and the properties belonged to the charity itself. Basing his contention on this fact, it was argued by Mr. Patanjali Sastri that the consideration was paid by the original plaintiff to Alagappa Mudaliar as a price for the properties alone but since the properties did not belong to the vendor, they could not have passed to the original plaintiff and the money paid by him must be deemed to have been paid for nothing and wasted; but the duty of conducting the charities should nonetheless be held to have devolved on him as he contends that the share in the properties was sold subject to a charge in regard to charities, and since this share in the properties was found not to belong to the vendor; the charge or burden on the properties and the right to manage the charities should still be found to have been transferred to the original plaintiff as the right to manage the charities was merely ancillary to the ownership which had been transferred to the plaintiff. On the other hand, it is contended by Mr. Doraiswami Aiyar for the appellants that on a true construction, the document must be taken to have been executed with the object of transferring the property as well as the right of conducting the charities and the price should be taken to have been paid not only for the properties but for the right attached to these properties as well. In view of the fact that no attempt was made by the original plaintiff to get rid of the transaction covered by this deed on account of a mutual mistake of parties as to the transferor's title, if the parties were really under a mistake, or on account of fraud, if the transferor knew at the time of the sale that he had no title to the property, or at all events on account of failure of consideration, we were asked to draw the inference that the parties were fully conscious of the fact that Alagappa had no title to the properties at the time of the execution of the sale deed and that the document was executed in this manner to avert a charge of illegality which would otherwise be patent on the face of it; as in that case it would have to be stated in the document that a trustee's right of conducting charities was being sold to another co-trustee. It was also put to us alternatively that if we did not agree with the above contention, it must be held that there were no specific

words in the deed which could be construed to have transferred the right of conducting charities; and while in the former case the transfer of the right of a trustee to a co-trustee for consideration would be void being against public policy, there would be no transfer at all in the latter case. In either case, the original plaintiff and his heirs, it is urged, have no right to sue alone particularly when Alagappa or his heirs were not impleaded even as defendants.

5. Having read the document as a whole, I am unable to agree with the contention put forward by Mr. Patanjali Sastri. It is true that at the commencement of the sale deed the properties have been stated to have belonged to the family and a charge only has been declared to be existing in regard to the charities; but the conveyance of the properties with "absolute rights" read along with the reasons of transfer contained in the document leaves no doubt in my mind that the right of managing the charities was intended to be conveyed to the original plaintiff. This is very clearly brought out by the penultimate sentence in the sale deed which reads as follows:

Hereafter, I shall have no claim of any kind in respect of the schedule mentioned properties or duty or right of conducting the charities.

6. The words "claim" and "right" used in this sentence are significant and point very clearly to the intention of the parties.

7. Mr. Patanjali Sastri's argument did not take notice of the fact that it was not only the duty of conducting charities but its right as well which was transferred to the original plaintiff and the price which was paid must be taken to cover both the properties and the right of management. Moreover it is not correct to say that the right to manage the charities was merely ancillary to the properties conveyed under the deed of sale. There is a great deal of force in the contention that if the words "absolute rights" are not taken to cover the right of management, there are no other words in the sale deed under which this right could be held to have been transferred.

8. It would not perhaps be incorrect to infer from the litigation (O.S. No. 32 of 1916) which followed soon after the execution of Ex. F, when these properties were claimed to belong to the original plaintiff, but to substantiate which no evidence had been produced by him, that the parties to the document were under no misapprehension as regards the nature of the

properties transferred under this deed. In view of the words of the deed, however it is unnecessary to rely on this circumstance as, in my opinion, this document was intended to convey the right of management to the original plaintiff, and that the consideration was paid either wholly or at all events partially for this right as well. There was only one contract between the parties and it must be held, as was found to be the case in *Redgrave v. Hurd* (1881) 20 Ch. D. 1 to be entire and indivisible in character. It is impossible to divide Ex. F into bits as Mr. Patanjali Sastri urges us to do and detach one portion of its contents from the rest and give effect to it.

9. I must for the above reasons hold that the right to conduct the charities was transferred to the original plaintiff for consideration by Alagappa Mudaliar.

10. The next question then to decide is, if the alienation of the huq right was valid or in other words, was it possible for the huqdar or trustee to transfer his right of management of the endowed property to the original plaintiff for consideration? Reliance was placed by the learned Counsel for the appellant in this connection on a Privy Council decision in (1876) L.R. 4 I.A. 76 (Privy Council) . The question which came up for consideration in that case was whether the uralars (trustees) of Tracharamana Pagoda could lawfully alienate their right to manage the said pagoda?

It is true that this case was in respect of a transfer of the trustees' rights in properties endowed for religious purposes, and the case which we are now called upon to decide relates to a charitable trust. But there is no principle or reason to hold that a decision on this point in regard to trusts of religious nature would not equally apply to those which are charitable in character.

11. Their Lordships in the course of their judgment observed:

The first question is, whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the

due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district open to the public opinion of that district and having that sort of family interest in the maintenance of this religious worship which would insure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken.

12. The next ease cited was that of *Kuppa Gurukkal v. Dora-swami Gurukkal* I.L.R.(1882) Mad. 76. This also related to a religious trust. It was held in this case that an alienation of hereditary religious trusts or offices to a person not in the line of heirs was not legal, but the learned Judges considered it unnecessary to determine whether an alienation to a person standing in the line of heirs should be upheld. In the course of their judgment it was observed:

To hold so would tend to public mischief in inducing needy incumbents of hereditary religious offices who desired to sell them to give a dishonest recognition to qualifications which, in fact, were not" the qualifications demanded by the nature of the office.

13. The third case which is directly in point and which relates to a charitable endowment is that of *Alagappa Mudaliar v. Sivaramasundara*

Mudaliar I.L.R.(1895) Mad. 211 (214). The learned Subordinate Judge has quoted a passage from this judgment but has unfortunately

misunderstood the observations and was therefore unable to apply them Correctly to the facts of the present case. The passage reads as follows:

It is well settled that such offices cannot be alienated by the act of parties. The question then is whether the arrangement made in the present case

amounts to an alienation. If it was a mere arrangement for the more convenient management of the choultry, reserving to the plaintiff's brothers

their right of control, and, if necessary, of resumption of actual management, then it might be said that there would be no interference with the

supposed will of the founder and that the arrangement would be lawful. To that extent it seems clear that any coparcener jointly entitled to management may waive his rights.

14. The learned Subordinate Judge appears to have considered that the arrangement contained in Ex. F would be covered by the last two sentences but he apparently overlooked the important reservation made in them and expressed in the words "and, if necessary, of resumption of actual management". Is there anything like the reservation mentioned in this case? On the contrary the penultimate sentence in the sale deed, which has been already quoted, makes it clear that the power of resumption was not only not reserved but it was clearly stated on the other hand that the vendor would not have any claim of any kind in respect of duty or right of conducting the charities. For the same reason sufficient attention was not paid by the trial Court to the words "to that extent" in the last sentence of the judgment quoted above.

15. It may also be noted in passing that like the Privy Council case in *Rajah Varma Valia v. Ravi Varma Kunhi Kutty* (1876) L.R. 1 IndAp 76 :

1876 ILR 1 Mad. 235 (P.C.) the learned Judges in this case *Alagappa Mudaliar v. Sivaramasundara Mudaliar* I.L.R.(1895) Mad. 211 presumed

that in the absence of any other suggestion as to rule of succession the intention of the founder of the choultry must be taken to have been that the

office of management should be held in common by the family of the original holders. It is hardly necessary to discuss the other cases which were

cited by Mr. Duraiswami Aiyar but the decision in *Sundarambal Ammal and Kamalambal Ammal Vs. Yogavanagurukkal*, might be referred to with advantage.

16. Mr. Patanjali Sastri has relied on *SriMahant v. Govindacharlu* (1934) 68 M.L.J. 295 . This was a case of an alienation of office of an archaka

(pujari) which was held to be valid as it was made without any consideration to one in the line of heirs and was not considered to be opposed to

the interests of the institution. It was also observed in this case that the duties entrusted to an archaka were frequently carried out in temples by

proxy and an alienation of the office was for these reasons upheld. It may be interesting to note the gradual development of this branch of the law

and of the various views expressed by eminent judges at various times; but the

case has no application to the facts of the present case, where the office in dispute is first of all that of a trustee of a charitable endowment and not of an archaka and, what is more important, this has been found to have been alienated for consideration under Ex. F. Moreover the alienation was not in the line of heirs although it may have been to a member of the family, but it cannot be said that the alienation was not opposed to the interest of the institution or that there are any circumstances in this case which may rebut the presumption raised by their Lordships of the Privy Council in (1876) L.R. 4 I.A. 76 (Privy Council) and by the learned Judges in *Alagappa Mudaliar v. Sivaramasundara Mudaliar* (1834) 68 M.L.J. 295. to the effect that the intention of the founder of the trust must have been that the office of management should be held in common by the members of his family jointly. The other cases relied on by the learned Counsel for the respondents are these of *Narayana v. Ranga* (1891) 2 M.L.J. 19 : ILR 1891 Mad. 183. and *Ramanathan Chetti Vs. Murugappa Chetti*, . They have no application to this case as the first one relates to the office of a pujari while in the second case the parties had agreed to carry on the management of a religious institution by rotation and no question of alienation of an office for consideration was raised or considered. Moreover the members of the junior branch who had surrendered their office were not parties to the suit, which was confined to the disputes between the members of the senior branch inter se, and their Lordships of the Judicial Committee in confirming this judgment in 10 CWN 825 (Privy Council) clearly stated that this decision would not affect the rights of the members of the junior branch who were not before the Court. As for *Nirad Mohini Dassi v. Shibadas Pal Dewasin* I.L.R.(1909) Cal. 975 which was the case of a private idol, the alienation of the shebaitshaip to a closely connected member of the family was held to be valid under the Hindu law and it was held that the alienation was not effected for any personal gain and the alienee appeared to have more interest in the worship of the idol than any one else. As stated above, this decision was arrived at in the special circumstances of that case and does not fit in with the various Madras cases which have been cited above. Having regard to the idea of the public policy which militates against the alienation of the office of a trustee to an endowment either charitable or religious and to

the principle enunciated in *Alagappa Mudaliar v. Sivaramasundara Mudaliar* I.L.R. (1895) Mad. 211. with which we are in respectful agreement,

and which follows the Privy Council decision in (1876) L.R. 4 I.A. 76 (Privy Council) we must hold that Alagappa Mudaliar could not alienate his

office in favour of the original plaintiff, and the alienation conferred no right on him. It is hardly necessary to consider how Alagappa's position

would be affected if he were alive, since he had executed a sale deed himself; but it is clear that his sons could not be prejudiced by their father's

conduct in transferring the office which he could not legally alienate, and which could not, in any case be, of any validity after his death.

Consequently Alagappa's heirs should still be considered to be joint trustees with the original plaintiff and defendant 1.

17. The next point raised by the learned Counsel for the respondents was that since the original plaintiff had been functioning as a trustee de facto,

he was entitled to institute these suits regardless of whether he was a trustee de jure or not. This argument has been rendered possible on account

of some decided cases, which were, cited by him and to which I shall advert shortly.

18. The term "de facto" appears to have been rather loosely used but when used in connection with, a trustee or a guardian as distinguished from a

de jure trustee or guardian it is meant to convey a person who has been actually functioning in either of these capacities when he was not entitled

to do so legally. If this is all that is meant to convey, the expression is unhappy, as this idea would have been better expressed, at least so far as a

trustee is concerned, by the words "trustee de son tort", a term which is so well known and which brings out the idea of wrong so very clearly. A

person cannot legally confer any right on himself by acting in a wrongful manner although he may subject himself to certain liabilities. This was

pointed out by their Lordships of the Judicial Committee in *Mata Din v. Ahmed Ali* in the following words:

It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a "de facto" guardian. He may, by his de facto

guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

19. If on the other hand, the term "de facto" is employed to describe a person who is found to be acting as a trustee of an institution or as a

guardian of a person under disability and thus presumed to be a trustee or a guardian de jure unless found to be otherwise, it would not do, in my

opinion, that harm which it has now done. In other words, a legal presumption in favour of a person's legal title and the office may be raised if he is

found to be acting as such-as was done in *Niamat Ali v. Ali Raza* (1914) ILR 37 All. 86 but it must be remembered that it is rebuttable and would

shift the burden of proof on the party who denies his position. It would then be a rule of evidence merely and not one of substantive law and can be

defended on the principle underlying Section 110 of the Indian Evidence Act.

20. But unfortunately the cases have not rested there. It is hardly necessary to discuss *Guzzu Payidappa v. Venkataru Venkata Reddi* (1915) 31

I.C. 913. which was the case of a dormant partner and which was decided on an entirely different principle, but with great deference I am not

prepared to accede to the correctness of the decisions in (*Kaji*) *Mahomed Ibrahim Vs. Sundaram Chetti and Others*, and *Moideen Bibi Ammal* by

agent *Montana Sahib Vs. Rathnavelu Mudali*, which followed two Allahabad cases in *Benarsi v. Altaf Hussain* (1921) 63 I.C. 171 and *Muiz-ud-*

din v. Md. Ikhlak AIR 1924 All. 59.

21. I should like to examine the Allahabad cases first on which both the Madras decisions are based. Taking up *Benarsi v. Altaf Hussain* (1921)

63 I.C. 171 I find that one Altaf Hussain had filed a suit for an injunction against Benarsi restraining him from building on a piece of land which was

situated between an imambara and his premises on the ground that certain Muharram ceremonies were being performed by him as a muttavalli

every year. The suit was dismissed by the trial Court, on what grounds one cannot say, but was partially decreed in appeal. The matter was then

taken up to the High Court where Altaf Hussain's locus standi to institute the suit was challenged on the ground that muttavalli's rights were

inalienable, and a transfer of such rights to Altaf Hussain would not confer any rights on and consequently any title in him to file the suit. I cannot

say if this objection was raised in the trial and the lower appellate Courts or if it was raised for the first time before the High Court. It was found by

Stuart, J., who delivered the judgment of the Court that the previous muttavalli had transferred his rights to Altaf Hussain a few years before the

suit who had since then made considerable improvements in the imambara with

his own funds. It is hardly necessary for me to express any opinion

in this case on the question whether the learned Judge was right in disagreeing with the conclusion arrived at in *Wahid Ali v. Ashruff Hossai* I.L.R.

(1882) Cal. 732 but suffice it to say that in the absence of the deed of trust, under which the trust was created and where the founder of the trust

could confer an authority on the muttavalli to transfer his office, the learned Judge presumed the appointment to be a good one prima facie and held

that it could be challenged for sufficient reasons only and could not be questioned by a person who was alleged to have infringed rights of the

mosque or imambara. Then follow the words:

A person challenging the de facto muttavalli's position must adduce evidence to show that he has no title.

22. They only mean, in my opinion, that, under the circumstances of the case, the learned Judge was willing to raise a presumption that Altaf

Hussain who had been acting as a muttavalli under a deed of transfer by the prior incumbent of office must be taken to be a muttavalli de jure in the

absence of the deed of trust and that it was for Benarsi to rebut this presumption which he had failed to do. It is unnecessary to examine this case

any further as I find that the learned Judge decided the question of Altaf Hussain's rights to maintain the suit not only on the presumption raised by

him but on other considerations as well. It would thus follow that if analysed the case does not go any further than what was held in *Niamat Ali v.*

Alt Raza (1914) I.L.J. 37 All. 86.

23. The other Allahabad case is that of *Muiz-ud-din v. Md. Ikhlal* AIR 1924 All. 59. The question in that case was whether Muiz-ud-din was

entitled to obtain a refund of certain moneys found to be due to his late father Bashiruddin, who was described to be a de facto muttavalli of the

trust. In a suit which was filed against Bashiruddin for his removal, it was held by the High Court in appeal that he had acted as a de facto muttavalli

of the trust sufficiently long to be entitled to remain in possession of the trust property as such. The facts of this case are not known, but if the

learned Judges were deciding the case on a consideration of the question of limitation, it would be an entirely different matter. On the other hand, if

they were prepared to raise a presumption in favour of his being a de jure muttavalli, the case does not take us any further than what was decided

in Niamat Ali v. Ali Raza I.L.R.(1914) All. 86.

24. The other de. facto trustee mentioned in this case is Muiz-ud-din himself. When he tried to realise the balance of certain money by execution,

to which Bashiruddin was found to be entitled by virtue of the decree which was passed by the High Court in his favour, Muiz-ud-din's allegation

that he was appointed to be a muttavalli by his father was not accepted but in his capacity as a muttawalli de facto, he was held entitled to execute

the decree on two conditions which are to a certain extent conflicting. The first condition was that he must agree "to credit" the money realised by

him to the trust and "'account there for duly to the person or persons who may hereafter be declared lawfully entitled to the muttavalliship'" The

other condition was that he would not be entitled to withdraw the moneys "'if the opposite party takes steps within a reasonable period to get the

question of muttavalliship to the trust adjudicated in a proper Court.

25. If Muiz-ud-din had any legal rights as a de facto muttavalli, why and under what law were these conditions being imposed? If he was being

treated as a next friend of a minor would have been, whose interests had to be protected by the Court, he was not being treated as a muttavalli at

all but a stranger and the user of the term "de facto" was, with great deference, incorrect. This case is, therefore, no authority for the proposition

that a de facto muttavalli has any rights as such.

26. Let me now take up the Madras cases on this point. The first one is Kasi Chetty v. Srimathu D eivasikhamoney Nataraja (1913). There is no

discussion in that case on this point at all and is therefore of no value in arriving at a conclusion. Moreover the plaintiff's possession in this case was

found to be prior to that of the defendant's and the plaintiff was for that reason held entitled to eject the defendant. The second one in (Kaji)

Mahomed Ibrahim Vs. Sundaram Chetti and Others, was a case by a muttavalli for possession of a property which belonged to a mosque. This

was decreed in spite of the objection that a de facto trusteeship was not recognised under the Muhammadan law and the plaintiff was therefore not

entitled to sue. There is no discussion in that case on the point although both the Allahabad cases were cited and the decision was based on the

ground that no such objection was taken in them. They could hardly be any authority if this point was not taken or decided in them. I have gone

through them and already stated what the rationale of these decisions was. The 3rd Madras case which was cited was that in Moideen Bibi Ammal

by agent Montana Sahib Vs. Rathnavelu Mudali, . The same contention "that Muhammadan law does not contemplate a de facto trustee and that

such a person has no locus standi to sue" was raised in this case but repelled by the learned Judges on the ground that "'de facto muttavallis of

mosques are spoken of as if they were well known to the law"', in the Allahabad case cited above. The only work on Muhammadan law to which

any reference was made was that of Tyabji's, but the remark made by the learned author:

That a person not validly entitled to act as muttavalli, by taking charge of it and purporting to manage the property thereby becomes a trustee de

son tort and answerable as such,

27. does not seem to have been followed and does not certainly support the conclusion at which the learned Judges arrived.

28. The next case relied upon by the learned Counsel for the respondents was that of Appasami Pillai Vs. Ramu Tevar, . A study of the facts of

that case would however show that the case was finally decided by Ramesam, J., on the ground that Neelambal Achi's right of possession passed

on Kandaswami's death, which occurred before he could accept the trustee's office, to the plaintiff and not on Kandaswami's heirs as he, that is,

the plaintiff was found to be the reversioner to Neelambal's estate. The other remarks in the judgment are in the nature of obiter and have no

application to the facts of the present case. It has been admitted in the present plaint that the lease to the present defendants was granted by the

Taluk Board of Shermadevi in 1906 and they were recognised to be permanent tenants under a compromise which was arrived at between the

parties to O.S No. 11 of 1909 at the appellate stage. This would show that the tenants were in possession of the properties in dispute long before

the transfer of the trustee's office was effected in favour of the original plaintiff. There is no rule of law under which they can be debarred from

questioning the locus standi of the original plaintiff to maintain the suit for ejectment when he is said to have come into possession of that right long

after their occupation of the property in suit.

29. The only other case which was cited by Mr. Patanjali Sastri was a Calcutta

decision in *Hart Mohan Modak v. Rames-war Das* (1920) 64 I.C.

737. There is no discussion on this point in that case while it appears that the plaintiff had been recognised to be a shebait by the parties

concerned. The case was therefore decided on what appears to be an admission rather than on a settlement of the question whether he was

entitled to sue in the capacity of a de facto trustee.

30. An examination of these cases would show that there is no warrant for the conclusion that a de facto trustee, as such, has any locus standi to

maintain an action. After all his position is that of an intermeddler or a wrongdoer (unless on the facts of each case a presumption can be relied in

his favour of being a trustee de jure) and he cannot confer any rights on himself by committing a wrong, although, as their Lordships observed in

Mata Din v. Ahmed Ali (1912) 23 M.L.J. 6 : L.R. 39 IndAp 49 : ILR 34 All. 213 (P.C.) he may assume liability on account of this conduct.

31. We are concerned in this case with the position of what has been styled a trustee de facto. It may be that under the Hindu law, unlike the

Muhammadan law, the action of a guardian de facto has been held to entail certain liabilities on minors, if his action in alienating their properties is

found to have been for their benefit or necessity as held in *Hunooman-persaud Panday v. Mussumat Babooee Munraj Koonweree* (1856) 6

M.I.A. 393 *Nathuram v. Shoma Chhagan* I.L.R.(1809) 14 Bom. 562 *Vembu Iyer alias Ramanadha Iyer Vs. Srinivasa Iyengar and Others*, and

Vemulapalli Sitaramamma v. Maganti Appayya (1925) 50 M.L.J. 689 : ILR 49 Mad. But we are not concerned here with de facto guardians but

with what have been called trustees de facto. I have not come across any case, nor has one been cited at the bar which may lead me to the

conclusion that the position of such trustees under the Hindu law is any different from what they occupy under other systems of law.

32. I have therefore no hesitation in holding that a trustee de facto is really no other than what is known to law as a trustee de son tort and his

position does not improve, as remarked by their Lordships of the Judicial Committee, by describing him to be a trustee de facto. As a trustee

de son tort he cannot be held to confer a right on himself to maintain these suits, even if they are taken to have been instituted for the benefit of the

charities.

33. Moreover, having found that Alagappa's heirs still continue to be trustees of the Chattram, and that it was not legally permissible for the

original plaintiff and his heirs to file or continue, these actions without his (Alagappa's) heirs being parties to the suit either as plaintiffs or as

defendants, the question of de facto trusteeship assumes, in my opinion, secondary importance merely.

34. The general principle of law is that the office of a trustee, irrespective of the number of trustees, is a joint one and cotrustees form, as it were,

one trustee and must therefore execute the duties of their office jointly. It has been held in a number of cases that no suit in regard to trust

properties would be maintainable by one or some of the trustees only, if the remaining trustees are not before the Court either as plaintiffs or even

as defendants. See (1881) L.R. 8 I.A. 135 (Privy Council) Bechu Lal v. Oliullah I.L.R.(1885) Cal. 338 Ashtamurthi Nambudri v. Raman Menon

(1899) 9 M.L.J. 312 and Shanmugha Moopanar v. Subbayya Moopanar (1921) 42 M.L.J. 133.

35. Following these authorities it must be held that the suits were not maintainable by the original plaintiff or by his legal representatives without

impleading Alagappa or his heirs either as plaintiff or as defendants in the suits.

36. Having found that the present plaintiffs could not continue the suits in the absence of Alagappa's heirs, we have to decide the course which we

should follow in regard to them. The suits were pending in the trial Court for 14 years and the plaintiffs were adamant in their opposition to the

objection raised on account of non-joinder of the remaining trustees. Mr. Patanjali Sastri made a verbal application at the close of his arguments,

that his clients might be permitted to join Alagappa's heirs as parties to the suits now, and that the case remanded for a fresh trial after they had

been impleaded. He placed reliance on S.R.M.A.R. Ramanathan Chettiar Vs. Rajah Sir Annamalai Chettiar and Others, . The application was

vehemently opposed by the Counsel for the appellants.

37. Mr. Duraiswami Aiyar has first of all contended that even if we remand the suits at this stage, the orders passed by us would be infructuous, as

the suits would have to be dismissed u/s 22 of the Indian Limitation Act. He has placed reliance in this part of the case on Meyappa Chetty v.

Subra-manian Chetty (1916) A.C. 603 Seerangathuni Vs. Bava Vaithilinga

Mudaliar, Mohanavelu Mudaliar v. Annamalai Mudaliar (1922) 44

M.L.J. 249 and Sri Raja Sobhanadri Appa Rao v. Sri Raja Parthasarathi Appa Rao (1931) 62 M.L.J. 154. He has further urged that in view of

the plaintiff's conduct during the last 17 years, this is not a case in which we should exercise our discretion - even if it exists - in the plaintiff's

favour and take away an advantage which his clients have gained, on account of the plaintiff's persistence, by lapse of time. Having considered the

matter very carefully, it appears to us that the plaintiffs' abstinence from making Alagappa or his heirs parties to the suits was deliberate and they

were trying to fight shy of Alagappa or his heirs in this litigation. The request by their counsel at the far end of the cases is too belated to be

seriously noticed. It seems to be unnecessary for me to determine the question of limitation which might have had to be carefully considered if I

had been inclined to exercise my discretion in the plaintiffs' favour. But in view of their conduct and the prejudice which may be caused to the

appellants it appears to me that the exercise of discretion in their favour would neither be judicious nor judicial.

38. In these circumstances we are constrained to accept the appeals and dismiss these suits. The appellants will have their costs in both the courts.

Appeal No. 111 of 1935.

Venkatasubba Rao, J.

39. I agree with the judgment just delivered by my learned brother. The appeal raises several questions, but there is one point fatal to the plaintiff's

case with which alone it is necessary to deal. The suit has been brought by one Thirumalayappa Mudaliar, who claims to be the sole trustee of a

certain Annadhana Chattram or choultry - a charitable foundation. His case is that his family has enjoyed the right of trusteeship for, about two

centuries that he was himself possessed of a 5-12ths share of the right, that he acquired by transfer 6-12ths share of a co-sharer by name

Alagappa and that the first defendant Kalyani, a Hindu widow, was possessed of the remaining 1-12th share, which she lost by non-enjoyment and

to which he somehow became entitled. The plaintiff thus claims that the entire right passed to him, and on the strength of that alleged title, seeks to

recover possession of the properties in question said to belong to the charity. The first defendant, out of the fifteen defendants originally

impleaded, was. thus a formal party and of the remaining defendants the second and the third are the most important.

40. The facts that led to the suit may be briefly set forth. The Taluk Board of Shermadevi, alleging mismanagement of the trust, took possession of

the properties in the year 1905 and was in possession thereof till 1915, when owing to a certain order made by the Government, they were

restored to the plaintiff's family. The possession of the Taluk Board, according to the plaintiff, was that of a trespasser, and he further alleged that

defendants 2 and 3 obtained from that body the properties on lease and their possession was also in consequence wrongful. There was a litigation

between the Taluk Board and the aforesaid defendants 2 and 3, which, ended in a compromise recognizing in them occupancy rights. The plaintiff

impeached this compromise, declared that he was not bound by it and in 1916 sued defendants 2 and 3 for possession. In the suit he claimed the

properties as belonging to his family in private ownership, subject only to some sort of trust in favour of the choultry. Defendants 2 and 3, who

claimed permanent rights in the property and contended that they were not liable to be ejected, asserted that the plaintiff's claim was a fraudulent

one and that the properties exclusively belonged to the choultry. There was an issue framed as to whether the properties belonged to the plaintiff's

family or to the charity. No attempt was made by the plaintiff to prove the private ownership set up by him, but at the close of the case and just

before the delivery of the judgment, applied, that the choultry should be impleaded as a party. His application was granted, but his suit, on some

ground with which we are not concerned, was dismissed. An appeal was taken and the District Judge, Mr. Jackson holding that by the time the

charity was brought on the record the claim became statute barred, confirmed the lower Court's decision. It was while this appeal was pending

that the present suit was brought in 1921. From Mr. Jackson's judgment a second appeal was filed in the High Court, which in 1930, was

withdrawn by consent of parties, it being agreed that the matters in controversy were to be left at large. Such in brief are the antecedent facts of

this litigation.

41. Defendants 2 and 3 pleaded that they and their ancestors were in possession from time immemorial enjoying permanent occupancy rights; they

raise a further contention, a plea in limine, that the transfer by Alagappa on which the plaintiff relied, was inoperative and invalid and did not confer

on him the right he claimed. This contention, as I shall presently show, is well founded and ought to prevail. So far as the first defendant Kalyani is

concerned, she pleaded that the plaintiff does not possess the full right of trusteeship as claimed by him and that she is entitled to a sixth share

thereof. It may be mentioned that by a decree passed in a separate suit, her right as put forward here has been recognised and affirmed.

42. The question then that has to be considered is, whether the plaintiff has validly acquired Alagappa's share in the right in question. The lower

Court's decision is in his favour and the defendants have filed the present appeal. It has been laid down by the Judicial Committee that a trustee of

a Hindu temple has no power to transfer his right of management. In the case before the Board, the trusteeship vested in the karnavans of four

distinct tarwads and they transferred to a third party - the Rajah of Charakel - the property of the temple as well as their right of trusteeship. Their

Lordships hold that independently of custom, persons holding such a trust are incapable of transferring it and both principle and reason are strongly

opposed to such a power and particularly to such an exercise of it as had taken place in the case before them. They state in conclusion that under

what may be termed the common law of India, the trustees have no power to transfer their right and, dealing with the question of custom, they go

on to declare that in no circumstances will the law recognise a custom sanctioning not merely the transfer but the sale of a trusteeship (1876) L.R. 4

I.A. 76 (Privy Council) and Alagappa Mudaliar v. Sivaramasundara Mudaliar I.L.R. (1895) Mad. 211 (which, it is interesting to note, related to

this very family) is more directly in point. There, as here, the trust related to a charity and the assignment was in favour of a member of the family. It

was held by Muthuswami Aiyar and Shephard, JJ., that it did not operate as an effectual transfer of the trust. The view as expressed by the learned

Judges seems to be, that the transfer of a trusteeship is bad, whether or not for consideration; not does it make any difference in their opinion that

the alienee happens to be a member of the same family. This decision moreover introduces an important qualification - Is the arrangement intended

for the convenient management of the charity, the assignor reserving to himself his right of control and resumption, or, is it intended to divest him

once for all of his right of management? In the former case, the arrangement is good but in the latter, is not. This view of the law has been accepted

in several later decisions, of which it is sufficient to mention *Rajaram v. Ram Boy* (1912) 24 M.L.J. 75. That a transfer of trusteeship, if for

consideration, that is to say, for the personal or pecuniary benefit of the transferor is utterly bad, is not disputed by Mr. Patanjali Sastri, the

respondents" (the plaintiffs") learned Counsel. But he contends that a transfer for no consideration and in favour of the next heir or a member of the

same family is valid and ought to be recognised. On this point there has been a conflict of opinion in the various Courts, and even in the same Court

divergent views have been expressed. It is unnecessary to pursue this matter, as I am clearly satisfied that the transfer, if any, in the present case (I

use the words "if any" as will be seen, advisedly) is for the pecuniary benefit of the transferor.

43. This brings me to the question, what is the effect of Ex. F (dated 10th February, 1914), described as a deed of sale, on its proper

interpretation? Mr. Patanjali Sastri's contention may be put thus: At the date of the document the plaintiff's family assumed (though in the sequel

the assumption has turned out to be wrong) that it owned the property, burdened no doubt with some trust; the subject of the bargain therefore

was the property and not the trusteeship; the consideration of Rs. 1,300 mentioned in Ex. F must thus be related to the property. In the first place,

the document is not susceptible of this interpretation. It says:

As it would be very much convenient for the charities to be conducted in case my share also is added to yours, the above properties have been

settled to be sold to you for Rs. 1,300 subject to the charge of the above charities.

44. This shows that the parties regarded the two things, the owning of the property and the conducting of the charity, as inseparably connected.

The same idea occurs again:

As you too are responsible for conducting the charities out of the above properties, as you alone are to succeed to the two shares out of the twelve shares.

45. Here also the ownership of the property carries with it the duty of performing the charity. The matter does not stop there. The document

concludes thus:

Hereafter I shall have no claim of any kind in respect of the schedule mentioned properties or the duty or the right of conducting the charities.

46. It will be seen that the parties kept in mind both the aspects of the trusteeship, namely, the duty as well as the right. It is difficult in the face of

these recitals, to accept the contention that the object of the document was to deal solely with the property. Secondly, it is argued that the

consideration was fixed with reference to the property alone and that the trusteeship passed to the transferee as merely ancillary to it. There was, I

have no doubt, an entire contract for a single consideration and it is impossible to sever the contract as suggested. Each part of the contract was an

inducement to every other part of it and there is no warrant for dividing the bargain into two distinct parts see the observations of Jessel, M.R. at p.

18 and of Lush, L.J. at p. 26 in *Redgrave v. Hurd* (1881) 20 Ch. D.1. Thirdly, it is argued that the operative part of the document is that which

deals with the property and not the passage quoted above, which deals with ""duty and the right of conducting the charities"". Here I must observe

that Mr. Patanjali Sastri is put into a dilemma. If his contention is right, there has been no transfer at all of the office in question, in which case the

plaintiff is out of Court. Lastly, it remains to observe that on the learned Counsel's own showing the document is vitiated by a mutual mistake,

both the parties being under the mistaken impression, that the property belonged to the family and not to the charity. If this be so, the document

must be deemed to be of no effect and the right of trusteeship has not passed to the plaintiff.

47. In the result, as Mr. Duraiswami Aiyar rightly contends (1) either there has been a sale of the office, in which case the transaction is illegal and

cannot be given effect to, (2) or there has been no transfer of the trusteeship at all, on which hypothesis the plaintiff's claim to Alagappa's share

falls to the ground. Whichever is the correct view, Alagappa the cotrustee has not been represented in the suit; Misconduct on the part of a trustee

does not ipso facto result in his removal granting that Alagappa was guilty of misconduct in alienating or attempting to alienate his trusteeship. In any

event the office is a hereditary one and Alagappa having died shortly after the suit, leaving three adult sons, his right devolved upon them.

48. Co-trustees, as has been held, form as it were one collective trustee, whose office is joint and indivisible and whose powers and duties must be

exercised jointly *Rajaram v. Ram Boy* (1912) 24 M.L.J. 75, already cited, at p. 76 and *Shanmugha Moopnar v. Subbayya Moopnar* (1921) 42

M.L.J. 133. All co-owners must join in a suit to recover property unless the law otherwise provides. If some co-owners refuse to join, it is the

practice in India to allow them to be included in the array of defendants *Kanna Pisharody v. Narayanan Somayajipad* I.L.R.(1881) Mad. 234.

Co-trustees are subject to the above rule *Shanmugha Moopnar v. Subbayya Moopnar* (1921) 42 M.L.J. 133 already cited; *Bechu Lal v.*

Oliullah I.L.R.(1885) Cal. 338 and *Ashtamurthi Nambudri v. Raman Menon* (1899) 40 M.L.J. 532. Similarly in the case of co-executors a suit

cannot be held properly constituted unless all of them are on the record. An action having been brought by one executor only, the co-executor was

impleaded as defendant on objection being taken. It was held that the suit was time-barred u/s 22 of the Limitation Act, as the co-executor was

brought on the record after the period allowed by the statute see the judgment of Sir John Wallis in *Seerangathuni Vs. Bava Vaithilinga Mudaliar*, .

49. Mr. Patanjali Sastri at the close of his argument applied that he should now be permitted to bring on the record the sons of Alagappa. The suit

was filed nearly seventeen years ago and the objection as to non-joinder was taken at the earliest stage. It would not be proper exercise of

discretion to allow the defect to be cured at this distance of time. The observations of the Judicial Committee in (1881) L.R. 8 I.A. 135 (Privy

Council) apply with great force to the facts here. After holding that "the non-joinder of Bikuntanath is not an objection of form only", their

Lordships go on to state:

The appellants have not on any occasion sought the assistance of the Court as they might have done... to make him a party to the suit. It is not the

province of either the High Court or the District Judge to force that course upon them. The objection was clearly taken; and they, for motives of

their own, deliberately abstained from making him a party to the suit.

50. history of the previous suit filed by the plaintiff in 1916 seems to be repeating itself. On that occasion he put forward the false claim that the

properties belonged to the family and not to the trust. Mr. Jackson, the District

Judge, referring to the late addition of the choultry as plaintiff, remarked thus:

Of course the Court had no right to allow an entirely fresh plaintiff to be brought into the suit in this precipitate manner, but apart from the question of procedure the chatram which adopted the first plaintiff's plaint in toto had no locus standi. It was in terms suing in 1920 a trespasser who had come in in 1906.

51. Holding that by the time the chatram was brought on the record the action had become time-barred, the learned District Judge dismissed the suit. In the present plaint also defendants 2 and 3 are, as already stated, treated as trespassers. Granting that the suit was in time when it was filed, it has now been pending for over 17 years, and it does not appear just to deprive the defendants of the plea of limitation that is available to them.

On this ground, if on no other, the request made at this late stage must be refused.

52. Lastly, it was contended that where a de facto trustee brings a suit he is entitled to a decree. First, it must be observed that this case has been put forward for the first time at the hearing of the appeal. Secondly, the argument rests on a very slender foundation. The few Madras cases which seem to support this view such as *Moideen Bibi Ammal by agent Montana Sahib Vs. Rathnavelu Mudali*, and *(Kaji) Mahomed Ibrahim Vs.*

Sundaram Chetti and Others, purport to follow certain decisions which, with great respect, have been completely misunderstood. *Niamat Ali v. Alt*

Raza I.L.R.(1914) All.86 is one of such decisions. There a suit was brought u/s 92, C.P. Code and it was dismissed on the ground that no breach

of trust was alleged or proved. Referring to the defendant who succeeded *Karamat Ali*, the learned Judges observed:

Assuming that *Karamat Ali* was legally entitled to be the muttavalli (which office he undoubtedly de facto enjoyed), he was entitled to appoint his successor.

53. It is difficult to see how this countenances the view that a suit lies at the instance of a de facto trustee. In *Benarsi v. Altaf Hussain* (1921) 63

I.C. 171 it was held that a person challenging the de facto muttavalli's possession must adduce evidence to show that the latter has no title. It

decides no more than that a de facto trustee may be presumed to be also the de

jure trustee, - a presumption liable of course to be rebutted. In

Muiz-ud-din v. Mohammad Ikhlq AIR 1924 All. 59 no question of law whatever has been decided, as a glance at that case will show. In Abkan

Sahib v. Soran Bivi Saiba Ammal (1913) 28 M.L.J. 347 : ILR Mad. 260 it has been held that a de facto trustee or a trustee de son tort is entitled,

like a de jure trustee, to be reimbursed the moneys properly expended by him. How this decision supports the view taken in the two Madras cases

cited above, it is difficult to see. Nor does Hari Mohan Modak v. Rameswar Das (1920) 64 I.C. 737 avail the plaintiff. The judgment makes it

clear that the de facto manager was recognised as such by the parties concerned. Some reliance has been placed upon Narayana Rao v.

Dharmachar (1902) 13 M.L.J. 146 : ILR 1902 Mad. 514. But that case deals with what is known as possessory title. As against a wrongdoer,

prior possession of the plaintiff in an action of ejectment is sufficient title; that is all that has been decided. The two Madras cases to which I have

referred are thus, in my opinion, clearly wrong. The contention therefore that a de facto manager is entitled to a decree, assuming that it can now

be raised, must be overruled.

54. In the result, the lower Court's decree is reversed and the suit is dismissed with costs throughout.

55. These appeals Nos. 111 and 112 of 1935 having been posted for being spoken to this day, the Court made the following

ORDER

1. The costs will be paid by Medai Dalavai Ranganatha Mudaliar (respondent No. 1), Medai Dalavai Kumaraswami Mudaliar (respondent No.

2), and Chellammal, the widow of Medai Dalavai Shanmuga Kumaraswami Mudaliar, from the assets in their hands of Thirumalayappa Mudaliar.

Appeal

2. It follows from my judgment in the connected appeal that the lower Court's decree here is also reversed and the suit is dismissed with costs

throughout.