

(1921) 11 MAD CK 0011
In the Madras High Court

Venkatachalapathi Aiyar

APPELLANT

Vs

China Muna Chakrapani Aiyar

RESPONDENT

Date of Decision : 22-11-1921

Acts Referred:

Citation : AIR 1922 Mad 83 : 66 Ind. Cas. 844 : (1922) 15 LW 279 : (1922) 42 MLJ 258

Hon'ble Judges : Oldfield, J; Krishnan, J

Bench : Full Bench

Judgement

Oldfield, J.—I agree with the judgment which my learned brother is about to deliver and have nothing to add.

Krishnan, J.

2. The first question we have to decide in this Second Appeal is whether a trust has been created by the parties with reference to the Rs. 300 and

interest dealt with in Ex. A, The lower courts have held that no trust was created but the respondent's vakil has tried to support the decree of the

lower appellate court by arguing that in reality a trust was created.

3. The question has to be decided entirely on the wording of Ex. A, the agreement between the parties, for there is no other evidence bearing on it,

That document says in one portion of it "Rs. 300/- with balance of interest which has been allotted for Dwadasi charity out of the balance still due,

shall be allotted for that chanty and a dharmasasanam be executed, and again in another party "the sum of Rs. 300/ -with balance of interest

relating to the said charity shall not remain with both of us but we shall abide by the advice of mediators and conduct the charity"! It seems to me

that the lower courts are right in holding that the parties contemplated taking

the advice of mediators in settling the details of the trust they desired to create and embodying those terms in a dharmasasanam or formal deed of trust before the trust was to be taken as created. The language of Ex. A in saying "shall be allotted and a dharma " sasanam be executed" seems clearly to point to a trust to be created in the future by a proper deed. No doubt Ex. A uses the expression "which has been allotted" with reference to the Rs. 300--but that must be read with what follows and I think it only means "which we have agreed to allot". In my opinion Ex. A only evidences an agreement between the plaintiff and the defendant to so allot the money by a proper deed of trust to be executed thereafter and as no such deed has yet been executed the matter has not passed beyond the stage of agreement into the stage of a completed trust or dedication to charity. If the money had already been dedicated to charity it would not be open to the parties to revoke that dedication or resile from the arrangement. But I think in the present case there are no words in Ex. A to show that that position has been reached, for I consider that under it, it will still be open to the plaintiff and the defendant jointly to abandon their agreement if they so desire and to take the money themselves. Plaintiff or defendant perhaps could not by himself give up the arrangement against the wishes of the other but they could I think by mutual consent do so. There is no trust impressed on the money yet, nor have any rights been created in any of the intended beneficiaries, the Brahmins, who are to be fed on Dwadasi days, to insist on the trust being carried out. In fact it seems to me that the parties have not parted with the ownership of the money. They have only agreed to do so in the future,

4. It is true that the charity contemplated is a form of public charity and the Indian Trusts Act does not apply to it and consequently no formalities are required by law to create it. See *Manohar Ganesh Tambekar v. Lakshmiram Govindram* I.L.R.(1887) 12 Bom. 247, and *Bhuggobutly Prosonno Sen v. Gooroo Prosonno Sen* I.L.R (1897) Cal. 112. Nevertheless to create a trust with reference to a particular property it is necessary that language used should be clear enough to show a definite intention to create a trust by it and should amount to a declaration which is or can be construed to be imperative. See *Halsbury's Laws of England* Vol. 28. page 12, paragraph 17, It is further necessary that the right of the

author of the trust in the property should have been parted with for the benefit of the beneficiary. Vice Chancellor Bacon observes in *Warriner v.*

Rogers (1873) L.R. 16 Eq. 340, that ""The one thing necessary to give validity to a declaration of trust--the indispensable thing--I take to be, that

the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the

declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."" This

passage is quoted with approval by Sir G. Jessel, M.R. in *Richards v. Delbridge* (1874) L.R. 18 Eq 11 . Applying the above tests to the present

case I think it is clear no trust has been created.

5. It is further argued for the respondent that even though an executed or completed trust may not exist in the case there is nevertheless an

executory trust here because there is a contract to create a trust which is specifically enforceable between the parties. Defendant urges in answer

that there was really no consideration for the agreement embodied in Ex. A as the whole of the money dealt with in it in reality belonged to him, It

is not necessary to decide this point for as between parties the doctrine of executory trusts does not apply. In cases of contract that doctrine is

applicable only in cases like marriage settlements where there is a contract based on valuable consideration for the creation of a trust of which

specific performance can be ordered at the instance of the beneficiary. See *Underbill on Trusts* page 14. No authority has been cited to show that it

applies to cases of charitable trusts where the beneficiaries are purely volunteers as in the present case.

6. It was also argued that once there is a dedication to a charity the fact that the details of the trust are not settled by the dedicator will not affect

the validity of the dedication. In such cases the defect will be cured by the Court, in some cases and by the Crown in others, See *Tudor on*

charities and Mortmain, 4th Edition, Chapter VII. But the fundamental thing required to Support the contention is a completed dedication; a mere

intention to dedicate in future is insufficient as it has no legal effect. In the present case, as I hold that there was no gift or dedication to charity, the

argument becomes irrelevant.

7. From the above discussion it follows that the plaintiff was not entitled to any

declaration regarding any trust for no trust exists. It is then argued that Ex. A evidences a specific enforceable contract between plaintiff and defendant and that in this suit itself specific performance should be directed by the execution of a formal trust deed after the details for the conduct of the charity are settled by a punchayat as contemplated by Ex. A, or, that failing, by the Court itself. This is what the Lower Appellate Court has ordered but I think that course is not justifiable. There is no prayer in the plaint for any such relief and without an amendment of the plaint and a retrial of the suit, such relief cannot be given without prejudicing the defendant. To grant such an amendment will entirely alter the nature of the suit. In those circumstances I consider that it is not proper to allow an amendment of the plaint at this late stage of the case. The District Munsif had dismissed the plaintiff's suit on the very ground that his remedy was to sue for specific performance and yet plaintiff made no application for amendment till now. The plaintiff, I think, should be left to enforce his remedy, if any, in a separate suit if so advised.

8. In the absence of a trust the plaintiff's suit based solely on the existence of one must fail. I would therefore allow the Second Appeal and reverse the decree of the District Judge and restore that of the Munsif with costs here and in the lower appellate court.