# APPELLATE CIVIL.

*Before Mr. Justice Parker and Mr. Justice Shephard.*

SUPPAMMAL (PLAINTIFF), APPELLANT,

*v.*

THE COLLECTOR OF TANJORE AND OTHERS, (DEFENDANTS), RESPONDENTS.*

1889. March 8, 15.

*Charitable endowment—Trust property sold in execution—Rights of heirs of the creator of the trust against execution purchaser.*

A trust-deed of certain property executed by a member of a Hindu family provided that neither he nor his heirs should incumber or alienate it but that in case of necessity his heirs might maintain themselves out of the income while administering the trusts of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of personal decrees passed against the settlor and another member of his family. The widow of the latter, after the death of the settlor, sued to recover the land from the execution purchaser as heir to the settlor:

*Held*, the plaintiff was not entitled to recover the land. *Rupa Jagshet* v. *Krishnaji Govind* (I.L.R., 9 Bom., 169) distinguished.

APPEAL against the decree of Y. Ramasami Aiyangar, Subordinate Judge of Negapatam, in original suit No. 43 of 1885.

Suit by the plaintiff, who was the widow of one Subramanya Chetti, to recover from the execution purchasers certain land which had been sold in execution of decrees obtained against her late husband and one Ponnusami, who was a member of a Hindu family together with him. The land in question was the property comprised in the following instrument, filed as exhibit A:—

"Deed of charity, executed on 12th December 1861, corresponding to 29th Karthigai, Thunmathi year, of Svasti Sri Salivahana Era, 1784, by one Ponnusami Chettiar, son of Subramanya Chettiar, residing at Nagore, Negapatam Taluk.

"The garden, belonging to me by ancestral right, containing many trees, and worth Rs. 1,500, in Kottam, attached to the said Nagore, lies to the west of road, to the east of Thangachi Thiruvasal garden, to the south of lane leading to the said

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Thangachi Thiruvasal, to the north of Sivanthilinga Chettiar's garden, and is situated within these. For the chuttram, worth Rs. 5,000, built (on it), I have left permanently for the chuttram charities (the following) :— . . . . . Therefore, with the income of the above-mentioned three kinds of lands, the Brahmans who are allowed to reside in the said chuttram should be given food throughout the year, and Brahman travellers who come daily should be given food; giving meals in the woods and other kinds of giving meals should be conducted. Besides, I and, after me, my descendants, in order of seniority, should conduct the repairs of the said chuttram, and tanks, steps, and bridges, belonging to it, and the expenses for the salaries of agent and officers appointed for it. The said charity should be conducted as long as the sun and moon last. Neither I, nor my heirs, have any right to mortgage, hypothecate, sell, &c., the said properties. But, if it sometimes happens that lands can be got which yield greater income than the above-mentioned nunjai, punjai, &c., lands, I only shall have authority to use the present lands as I like, after I buy them (the late lands) and (leave) permanently for the said charity. If an opportunity sometimes happens when my heirs are to live upon the income of the said charity (they) can maintain themselves in addition to conducting the said charity. If any of my heirs do not conduct the said charity properly, and are careless, the Government which has charitable mind, has a duty to make them to conduct the charities properly and to be careful."

(Signed) PONNUSAMI CHETTIAR.
( ,, ) SUBRAMANYA CHETTIAR (son of said person's elder brother)..

Ponnusami, the executant of the above instrument, died before suit, and the plaintiff sued as his heir.

The plaint alleged that the charities at Nagore which had been instituted many years previously, were kept up in accordance with the above instrument until 1873, when the land in question was attached and sold as above. The plaint prayed "for a decree "adjudging that she may be put in possession of the said charity "properties on finding that according to the provisions of the "aforesaid deed of charity plaintiff alone is entitled to maintain "the charities."

In 1874, Ponnusami disclaimed the trust in a petition to the Sub-Collector of Negapatam.

In 1881, the Collector of Tanjore, as Agent of the Board of Revenue, acting under Regulation VII of 1817 (Madras) instituted a suit for the appointment of a proper trustee of the charities and for the delivery to such trustee of the charity lands;—Subramanya Chetti, the plaintiff's husband, was joined as a defendant in the suit, and on his death, which occurred during the suit, she was brought on the record as his representative. The suit was terminated by a decree in the terms of a compromise between the Collector and the execution purchasers who agreed to perform the charities.

The plaintiff now alleged that the decree did not affect her interests, as she was no party to the compromise.

The Subordinate Judge having dismissed the suit, the plaintiff preferred this appeal against his decree.

*Rama Rau* for appellant.

*Subramanya Ayyar* and *Ramachandra Rau Saheb* for respondents.

The further facts of the case and the arguments adduced on appeal appear sufficiently for the purpose of this report from the judgment of the Court (Parker and Shephard, JJ.).

SHEPHARD, J.—The suit is brought to recover property comprised in an instrument executed in 1861 by one Ponnusami (now deceased) a brother of the plaintiff's late husband. The defendants Nos. 2, 3 and 6 are in possession of this property in virtue of sales held under money decrees obtained against the late Ponnusami and his brother Subramanyan. By the instrument of 1861, Ponnusami declared that, with the income of the property, certain Brahmans should be supplied with food throughout the year, and certain other charities should be conducted. It was also provided that the said charity should be conducted for ever, and neither Ponnusami nor his heirs should have any right to mortgage, hypothecate or sell the said property. In case of necessity, his heirs might live on the income, maintaining themselves in addition to conducting the said charity. It is clear that neither Ponnusami nor the plaintiff, Subramanya Chetti's widow, could have any right to recover this property from the auction purchasers except, for the fact, that it has, by the instrument of 1861, been made the subject of a trust. The only question is whether this circum-

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stance gives the plaintiff as one of Ponnusami's heirs any better right than she would otherwise have had. The plaintiff's case is not based on any complaint that the trusts enjoined by the late Ponnusami have been disregarded; for although the defendants aver and have proved to the satisfaction of the Subordinate Judge that they purchased without any notice of the trust, as a matter of fact they have been since the date of the compromise made in the suit of 1881 and are holding the property as property charged with a charitable trust. The question is therefore not whether the property is still so charged in the defendants' hands, but whether the right of managing it and such right of enjoying the surplus profits as may have been reserved to Ponnusami and his heirs can be recovered by his heir. It is not disputed that Ponnusami, had he been alive, could not have maintained this suit; but it is contended that the plaintiff, though she claims in succession to him, does not claim under him and does not sue as his representative. She was no party, it is argued, to the decrees under which the property was sold, and not being a representative of the judgment-debtors, was not bound to sue to set aside those sales, because the sales did not affect her interest in the property. In support of the argument, our attention was called to the case of *Rupa Jagshet* v. *Krishnaji Govind*(1) where it was held that the plaintiff, although he had been sued as representative of his deceased father and brother, and in execution of the decree passed against him the property sued for had been sold, could nevertheless recover it on the ground that it was property held by himself and his brother on trust for a religious purpose. It was considered that the suit was "not one by a party to the suit in which the sale was made to "set aside the sale but one by the trustee of the endowment to "recover the property." I think the case may be distinguished from the present, because there the plaintiff himself had an actual interest in the property sold, being a co-trustee with his brother, and, as he was not in his own person joined as a party to the suit, that interest was not presented for sale and was not affected by the sale. Having regard to the decision of the Privy Council referred to in the argument (*Chowdry Wahed Ali* v. *Mussamut Jumaee*(2)), and the cases following it in this Court (*Arundadhi* v. *Natesha*(3)),

(1) I.L.R., 9 Bom., 169. (2) 11 B.L.R., 149.
(3) I.L.R., 5 Mad., 391.

none of which are mentioned in the judgment, I think the case is one which presents some difficulty; but, however, that may be, to my mind it is distinguishable by the circumstance I have mentioned. In the present case, at the time when the property was sold, all the persons necessary to be joined in the suit, in order to make the decree binding on the family, were joined as parties, and the plaintiff had then no interest which could entitle her to question the sale. The circumstance that the property had been made the subject of a trust gave certain rights to the persons entitled as beneficiaries, and to that extent, restricted the powers of the holder for the time being. Further than that, in my opinion, the trust makes no difference; the property remained partible and alienable, and the inheritance of it was governed by the ordinary rules (see Mayne's Hindu Law, 4th edition, §. 397, and cases cited). I can see no foundation for the proposition put forward on the plaintiff's behalf, viz., that the heirs taking under the disposition made by Ponnusami come in not merely as his heirs but by virtue of an independent title, or, in other words, that an heir to property burdened with a trust is in any better position than an heir to other property. Regarded as a mere heir of Ponnusami, the plaintiff is clearly not entitled to recover lands which since 1873 have been in the possession of purchasers who took in execution of decree against him and his brother. I have assumed that at the time of the sale there was a valid subsisting trust to which the lands were subject, and it was apparently on that assumption that the defendants agreed to the compromise by which the suit between them and the Collector was determined. It is, however, by no means clear, that there was any such trust. On the 5th issue, the Subordinate Judge finds that the charities mentioned in exhibit A were not in fact performed in the manner directed, and the conduct of the parties exhibited in the fact of mortgaging the property in 1871 goes to prove, as the Subordinate Judge observes, that they never intended to give effect to the provisions of the deed. This mortgage was outstanding at the date of the defendants' decree, and they were compelled to pay it off. It is true, as argued by the plaintiff's vakil, that neglect or breach of trust on the part of the trustees in acting in accordance with the direction of the founder could not have the effect of annulling a properly constituted trust. But in this case, beyond the fact that Ponnusami executed and had registered the instrument A, the evidence so

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far from indicating an intention to constitute a trust goes to show that he and his brother treated the property as their own, available in the ordinary way for the payment of their debts. In my opinion, however, even if the interest of the judgment-debtors was when sold to the defendants subject to the trust imposed by the instrument A, the plaintiff's suit must none the less be dismissed. The fact would still remain that such interest as the judgment-debtors had was saleable and was sold, and that the plaintiff, inasmuch as her claim is based on inheritance alone, cannot say that she possessed any independent interest which did not pass by the sale. For this reason, I would dismiss the appeal with costs.

PARKER, J.—The plaintiff's rights as trustee, if any, could only accrue on the death of her husband, and I agree that she could not succeed to greater rights than her husband possessed at his death. It is admitted that he could not have maintained this suit.

Independently of this, however, I am satisfied that exhibit A was never carried into effect. It was executed by Ponnusami alone and not by plaintiff's husband. Ponnusami disclaimed it in 1874, and there is no evidence that the income of these particular lands has ever been appropriated to the maintenance of the charities and chuttram at Nagore which were in existence long before the execution of exhibit A.

I do not think the trust was ever carried into effect by Ponnusami, and it may be doubted whether he really intended it should be.

I agree, therefore, in dismissing the appeal with costs.