

## APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Benson.

GOPU KOLANDAVELU CHETTY (FIRST DEFENDANT),

APPELLANT,

v.

, SAMI ROYAR (PLAINTIFF), RESPONDENT.\*

1905.  
January 31.  
February 1, 2.  
March 13.

*Hindu law—Charitable Trust—Trustee of, has no power to appoint a co-trustee in place of a deceased trustee—Civil Procedure Code, Act XIV of 1882, s. 13—Decision on a question of law not res judicata when the object-matter of the subsequent suit is different.*

The provisions of the Indian Trust Act do not apply to charitable trusts. In the absence of a power under the instrument creating a trust or by virtue of some statutory provision, a trustee, as such, has no power to appoint any person as trustee either in his own place or to act jointly with him.

A decision on a question of law in a previous suit is not *res judicata* in a subsequent suit between the same parties when the object-matter of the two suits are different.

*Quære*.—Whether such a decision can be *res judicata* against a party who could not have prosecuted an appeal against it.

*Parthasaradi v. Chinna Krishna*, (I.L.R., 5 Mad., 304), *Venku v. Mahalingu* (I.L.R., 11 Mad., 393), *Ghamantlal v. Eapubhai*, (I.L.R., 22 Bom., 669), *Vishnu v. Ramling*, (I.L.R., 29 Bom., 25 at p. 30), referred to and followed.

THIS suit was brought by the plaintiff (respondent) to restrain his co-trustee, the first defendant (appellant), from dealing with the trust properties without his, *i.e.*, the plaintiff's concurrence. The first defendant who was sole trustee had appointed the plaintiff a co-trustee with himself by a deed dated 22nd October 1895. Subsequently the plaintiff brought a suit (No. 181 of 1898) against the first defendant and another to set aside certain fraudulent alienations of trust property. The question, whether the plaintiff was validly constituted a trustee under the deed of 22nd October 1895, was raised and decided in plaintiff's favour and the alienation was set aside.

The further facts necessary for this report are set out in the judgment.

The lower Court passed a decree in favour of the plaintiff.

The first defendant preferred this appeal.

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\* Appeal No. 153 of 1902, presented against the decree of M.R.Ry. P. S. Gurusurti, Subordinate Judge of Kumbakonam, in Original Suit No. 71 of 1900.

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*V. Krishnaswami Ayyar* and *T. V. Gopalasami Mudaliar* for  
appellant.

*Sir V. Bhashyam Ayyangar* and *C. V. Ananta Krishna Ayyar*  
for respondent.

JUDGMENT.—The suit out of which this appeal arises was instituted by the respondent Sami Royar, as a trustee entitled to act jointly with the appellant Kolandavelu Chetty, in respect of charities and trusts created by the will of G. Appakutty Iyer. The main question for decision is whether, under the appointment relied on by Sami Royar, he was validly appointed as a trustee.

With reference to this question it was urged on his behalf by Sir Bhashyam Ayyangar that his appointment was really made by the daughters and daughters' sons of Appakutty Iyer, who were the heirs of the latter at the time. This contention is one suggested for the first time in this Court and is altogether unsupported by the record. Neither in this case, nor in the connected cases tried at the same time and to which Sami Royar is a party, was any averment made that the appointment was made by these heirs. The compromise in Original Suit No. 1 of 1897 (District Court, Tanjore) does not amount to an appointment of Sami Royar by the other plaintiffs in that suit. The plaint, as well as the compromise, proceeds on the assumption of an anterior appointment by Kolandavelu Chetty, and the matter is put beyond all doubt by the frame of the sixth issue in Original Suit No. 12 of 1900. We cannot therefore accept the respondent's contention and allow him to set up this new case. It was next urged that the question of the validity of the appointment is *res judicata* by the decision in Original Suit No. 181 of 1898 (District Munsif's Court, Kumbakonam), brought by the respondent against one Kannu Pillai, and the present appellant.

That suit was for the purpose of obtaining a declaration that the decree in Small Cause Suit No. 242 of 1896 (Subordinate Judge's Court, Kumbakonam) by Kannu Pillai was not capable of being executed by attachment of any of the property of Appakutti Iyer's estate referred to in his will. Kolandavelu Chetty was made a defendant as the other trustee, Sami Royar, obtained the declaration asked for. Mr. Krishnasami Iyer, on behalf of Kolandavelu Chetty, argued that the decree in favour of Sami Royar was in favour of the estate which Kolandavelu Chetty represented, that the latter was therefore not entitled to appeal against

such decree and as against him no plea of *res judicata* could be founded on the adjudication referred to.

It may be that this suggestion is not without force, but, in point of fact, Kolandavelu did prefer an appeal which was heard and disposed of on the merits. We prefer therefore not to dispose of the plea of *res judicata* with reference to this argument.

Mr. Krishnasami Ayyar's next objection was that though it was necessary for the determination of Sami Royar's suit to decide whether Sami Royar was validly appointed by Kolandavelu, yet that finding was on a question of law, and as the object-matter of the present suit is entirely different from that of Original Suit No. 181 of 1898, that finding is not conclusive in the present suit. That the object-matter is different there is no doubt, for the claim now is to restrain Kolandavelu from acting in the future management of the estate and the trusts otherwise than jointly with Sami Royar, while the object-matter in the previous suit was whether the debt due to Kannu Pillai under the Small Cause decree was liable to be realized out of the estate.

It is equally clear that the adjudication in Original Suit No. 181 was upon a question of law, viz., whether it was competent to Kolandavelu to appoint Sami Royar as his co-trustee. In our view it is quite decided that an adjudication upon a point of law, though binding upon the parties in any future suit *quoad* the same object-matter is not conclusive even between the same parties when the subject-matter of the second suit is different. This is the view taken in *Parthasaradi v. Chinna Krishna*(1), *Venku v. Mahalinga*(2), *Chamanlal v. Bapubhai*(3), *Vishnu v. Ramling*(4), and as we consider that view to be sound, we do not feel called upon to decide whether the view of the Calcutta High Court in *The Government of Bengal v. Senayat Ali*(5) is in reality different. We are therefore of opinion that the contention of the respondent as to *res judicata* is not sustainable.

The question for determination then, is whether the appointment of Sami Royar by Kolandavelu is valid. The facts are shortly as follows :—

Under the will of Appakutti Iyer two trustees were appointed, viz., G. Nataraja Chetty and another. The latter died many

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(1) I.L.R., 5 Mad., 304.

(2) I.L.R., 11 Mad., 393.

(3) I.L.R., 22 Bom., 669.

(4) I.L.R., 26 Bom., 25 at p. 30.

(5) I.L.R., 27 Calo., 317 at p. 318.

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years ago. On the death of Nataraja Chetty there was litigation as to who was entitled to succeed him as trustee and it was held by this Court on appeal that his son and heir, Kolandavelu, was so entitled. No one claiming as the heir of the other predeceased trustee came forward, and for a considerable period Kolandavelu was the sole trustee. In the latter part of 1895, Kolandavelu appointed Sami Royar as his co-trustee in the place of the second trustee named in the will. The will itself conferred no power on either of the trustees, or on any one else, to fill up vacancies in the office of trustee. Section 73 of the Indian Trusts Act does not extend to trusts such as that created by Appakutti, and it is settled law that, in the absence of a power under the instrument creating the trusts or by virtue of some statutory provision, a trustee as such has no power to appoint any person as trustee either in his own place or to act jointly along with him. It follows, therefore, that the appointment relied on by Sami Royar under exhibit I conferred on him no right to act as trustee, and the present suit brought by him as trustee is unsustainable.

We accordingly reverse the decree of the Subordinate Court and dismiss the suit with costs throughout.

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## APPELLATE CIVIL.

*Before Sir S. Subrahmaniam Ayyar, Officiating Chief Justice,  
and Mr. Justice Davies.*

1905.  
March 30, 31.

SOMU PILLAI (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL, MAYAVARAM (DEFENDANT),  
RESPONDENT.\*

*Contract Act IX of 1872, ss. 23, 65—An agreement tending to create a monopoly void as opposed to public policy—Madras District Municipalities Act IV of 1884, s. 191, cl. 2, and s. 282, cl. 2—Construction of statutes, observations on—Refund of money obtained under a void agreement.*

Agreements having for their object the creation of monopolies are void as opposed to public policy under the English Common Law and under section 23 of the Indian Contract Act.

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\* Second Appeal No. 507 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 821 of 1901, presented against the decree of M.R.Ry. A. Rajagopala Ayyar, District Munsif of Mayavaram, in Original Suit No. 263 of 1900.