

Sooniram Ramniranjandass - - - - - *Appellant*

v.

Alagu Nachiyar Koil (Temple) otherwise known as Alagiya
Nachi Amman Koil by its Trustees - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 5TH JULY, 1938

Present at the Hearing :

LORD ROMER.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

On the 1st April, 1933, an order of adjudication under the Presidency Towns Insolvency Act (III of 1909) (herein called "the Act"), was made by the High Court at Rangoon against a firm therein called the S.A.R.M. Chettyar Firm and described as carrying on business as bankers and money-lenders in Rangoon. This order was made at the instance of the appellants Sooniram Ramniranjandass as petitioning creditors. At the date of the adjudication order the insolvent firm consisted of three brothers, sons of one Ramaswami Chettyar, who had died some years before. The business was a Hindu joint family business: it had been known at one time as the S.A. Firm and had been carried on by Ramaswami's father and afterwards by Ramaswami as managing member (karta) of the family.

On the 19th December, 1933, the insolvents' schedule of affairs was filed, showing as creditor No. 85 in the list of unsecured creditors, the name of a Hindu temple situate at a place called O'Siruvayal in the Ramnad district of Madras, the place of origin of this Chetty family. The temple is called Alagiya Nachiar temple. The amount of the debt is stated as Rs.48,915-10-0; the "date when contracted" is entered as April, 1932; and the consideration is described as "deposit". In June of 1934 a proof of debt for the sum mentioned was tendered on behalf of one Annamalai as trustee of the temple, but in July, 1937, this was supplemented by another in which Annamalai claimed to prove on behalf of the deity as a worshipper representing the deity and all the worshippers. In this amended proof interest

to the date of adjudication is added to the sum appearing in the insolvents' books making the total debt Rs.51,488-12-3. The debt is described as "amount due on current account which amount was gifted to the said Alagu-nachiar Koil (temple) by the insolvent firm who retained custody of it as a custodian". In December, 1935, seven affidavits, all in the same form, were filed; by each of which the deponent claimed to be a trustee of the temple and explained that the temple was administered by seven trustees each representing a "karai". They alleged that the insolvent firm was possessed of trust funds belonging to the temple and consented that Annamalai described by them as a close relative of the insolvents should be regarded as a proper person to recover the trust funds for the temple.

By section 52 of the Act, the property of the insolvent divisible amongst his creditors does not comprise property held by the insolvent on trust for any other person. Upon this well-known principle a proceeding was begun on the 17th February, 1936, in the name of the "85th creditor Alagunachiar Koil" by a statement of claim to recover Rs.51,488-12-3 in full as trust money. The appellants as "adjudicating creditors" filed objections, whereupon the Official Assignee proceeded to act as a tribunal to decide the matter; and after hearing oral evidence in February, 1936, delivered a written judgment or order dated 12th May, 1936, holding that "the claimant is entitled to be paid fully and to have a charge on the assets of the insolvents for the sum so due". Against this, as a judicial order, the appellants purporting to act under section 86 of the Act, filed a memorandum of appeal and Braund J. as the judge exercising the insolvency jurisdiction of the Court, dealt with the matter on that footing. On 29th June, 1936, he allowed the appeal and declared that the temple had no right to take the sum in question out of the estate of the insolvents or to exclude it from the insolvents' assets in the hands of the Official Assignee. Accordingly he dismissed the application made to the Official Assignee and allowed the appellants certain costs of that application and of the appeal. From this order an appeal was taken to an Appellate Bench of the High Court. The learned Chief Justice and Dunkley J. having differed in opinion (7th December, 1936), the appeal was referred to Leach J. as third judge, who on 21st January, 1937, gave judgment agreeing with the Chief Justice in directing that the appeal be allowed and the decision of the Official Assignee restored. From this order the present appeal to His Majesty has been brought.

Whether the claim of the temple be regarded as a mere proof of debt or as a claim to property in the hands of the Official Assignee or to a charge thereon, their Lordships are unable to relate the procedure followed in the High Court to the provisions of the Act. The Official Assignee is the person in whom the insolvent's property vests as owner though only for the benefit of others. How a claim that certain property has not vested in him at all or a claim to have a charge upon property which has vested in him

can under the Act be dealt with by him as a tribunal, it is not possible to discover. The Official Assignee in such a matter is a party litigant. Even if the matter could be regarded as a mere question of admitting or rejecting a proof, when the Official Assignee acts under rule 25 of the second schedule, it seems more reasonable and more in accordance with a sound interpretation of section 86 and with English practice under statutory provisions couched in the same terms that the "appeal" from the "act or decision" of the Official Assignee to the Judge should be by motion and that the oral evidence necessary should be taken before the insolvency Judge himself. It is at least clear that the present case cannot be concluded by regarding the Official Assignee as a trial judge whose estimate of the witnesses' evidence must *prima facie* be accepted. Inadmissible evidence has come upon the record as though it were good evidence of custom and witnesses have been asked and have answered questions which are questions of law.

The admissible and relevant evidence lies in a very narrow compass. There are, first, the books of account kept by the insolvent firm. The books for the years prior to 1928 are not available: they are said to have been burnt. But the ledger for certain years between 1928 and 1933 contains an account in the name of the temple which purports to treat the temple as a depositor who is at credit for a sum which in 1928 had amounted with interest to Rs.36,670 and which had continued to increase by the addition of compound interest with frequent rests and at varying rates till in 1932 it reached the figure of Rs.48,915-10-0 above-mentioned. The entries make mention of the interest as at "*thavanai*" rates—that is, treating the matter as a deposit for a fixed term (apparently two months) at a certain rate of interest appropriate to each term. It is not possible to ascertain the date at which the first credit entry was made or the exact terms thereof or the amount for which the first credit was given but the suggestion made by the respondents was that these entries date probably from the time of Ramaswami's father. There are certain daybook entries to the same effect. The accounts do not show that any drawings had been made by the temple. No books of account kept by or on behalf of the temple have been produced.

In addition to the entries in the insolvents' books there is the oral evidence of a witness Subramoniam Chettyar, given before the Official Assignee. He was one of the claimants, being one of the seven persons who had filed affidavits claiming to be trustees of the temple. He said that each trustee managed the temple's affairs for one year in rotation. He deposed that he came from O'Siruvayal and had known the insolvent's father Ramaswami. He explained that seven "clans" worship this deity: that the eldest member of each clan acts as a trustee; that accounts of receipts and expenditure are kept, but no accounts to show donations to the temple. The main element in his evidence was that a statement had been made to him by

the insolvent's father Ramaswami over 20 years before " that there were monies in the name of Alagunachiar in the S.A.R.M. Firm Rangoon "; " that he had set apart this sum for the purpose of charity in his firm and that I could send for the expenses of the temple whenever I required ". The witness explained that Ramaswami, who was the eldest brother, the others being minors, managed the affairs of the S.A. family for five or six years and that he had died about 16 or 17 years ago (i.e., from 1936). The witness further said that twice after the conversation described by him, he had gone to Ramaswami and got money for the purposes of the temple. No accounts with reference to these monies were produced and no particulars whatsoever given. This evidence is highly suspicious particularly as it seems reasonably clear that the managers of the idol were in ignorance of the credit in the firm's books. If they had made any claim or obtained any money in recent years evidence to prove this would have been readily available, and according to Dunkley J. it was common ground that the managers were in entire ignorance of the credit. But, as that learned judge noticed, the evidence of Subramoniam is as harmless as it is unreliable.

The evidence of a clerk of the insolvents adds little or nothing, but two Chettyar business men were called apparently to explain the practice and intention of Chettyar firms in crediting amounts to charities and temples in their books. The effect of their evidence fairly taken appears to their Lordships to be that it is usual for a firm to credit something towards charity; that if particular sums are credited to a particular deity, that deity is intended to have certain rights as follows: that no money is separately invested or is intended at the time to be withdrawn from use in the firm's business; that interest is credited upon the sum due to the deity at the ordinary rate allowed to customers of the firm, which is lower than the rate obtained by the firm by the use of its money; that the managers of the deity, however, have no right to demand payment when they choose, but the money should be expended for the deity by the firm at the firm's discretion as occasion may arise—in other words the control rests with the firm. This evidence is of importance as an indication of the case made on behalf of the temple; and, as a credit in favour of a deity is not self-explanatory, their Lordships do not treat it as inadmissible. Whether it is correct is another matter: for the purpose of the only question now to be decided it may be taken as correct. The opinions of the witnesses as to the effect in law of such a transaction as they describe are, however, both inadmissible and useless.

Learned counsel for the appellants have not sought to contest the right of the trustees of the temple to rank for dividend as unsecured creditors in respect of the credits in question, but contest the decision of the Appellate Bench restoring the finding of the Official Assignee that these sums are payable in full out of the insolvents' assets. Their Lordships are not concerned, therefore, to examine any contention

to the effect that such entries as were made in the insolvents' books create no legal liability—a question which might well prove to be serious and even difficult. The sole question for determination is whether what is proved to have been done by the insolvent firm was sufficient to make them trustees of any fund for the benefit of the temple or to amount in Hindu law to an endowment for the deity. As by Hindu law an endowment may be effected without writing, without the appointment of a trustee and without vesting the property in anyone other than the deity, learned counsel for the respondents preferred to rest his case upon Hindu law. But it is not open to dispute that the respondents' right to payment in full cannot be made out unless there was either a trust or an endowment.

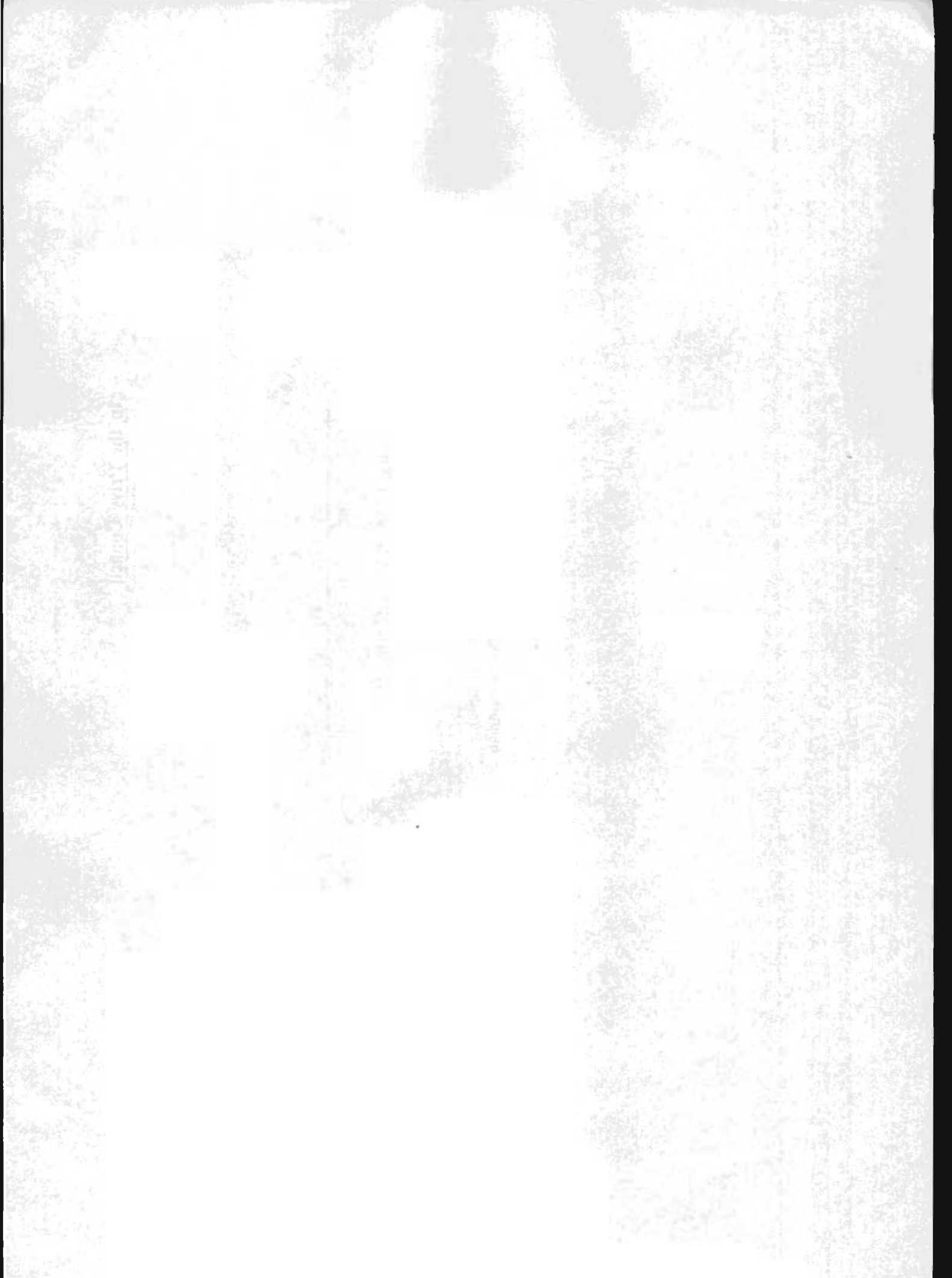
Their Lordships think it reasonably plain that in the present case there was no endowment of any property and no intention on the part of the insolvent firm to hold any property as trustees for the deity. In this view they are in agreement with Braund J. and Dunkley J. It may be as well to guard against the supposition that because the other party to the transaction was a deity the insolvents must have made themselves trustees. If, instead of Ramaswami's father entering in his books a credit to the temple by way of charity or by way of promise, the firm had owed to the trustees of the temple a like sum by way of rent and had been allowed to postpone payment on terms as to interest, it is clear that the firm would not have been trustees: to covenant to pay money to trustees does not make one a trustee. The *prima facie* meaning of the entries in the insolvent's books discloses an intention on the part of the firm to treat itself as debtors to the temple in a sum which should increase as time went on. To hold that they are trustees because they have consented to be debtors would not only be unjustified, but would be inconsistent with their intentions as manifested by their conduct in making no allocation of any assets, in using their whole funds in their business as before, and in computing interest at a rate and in a manner applicable to an ordinary customer. If the respondents' witnesses be right, the entries only make the insolvents debtors *sub modo* and on special terms less onerous than their obligations to an ordinary customer—terms which may or may not render their obligations to the temple unenforceable against them. This makes it all the more unreasonable that they should be held to have intended to assume the obligation of trustees. There is no evidence that at any time a particular sum of money was paid to the insolvent firm by themselves on behalf of the temple. The respondents' witnesses speak of Chettyar firms crediting money to a particular deity by way of charity, and in any case there could be no purpose in separating monies in order to mix them again—unless indeed the firm had been minded to create the appearance of a breach of trust.

The same reasons are equally forceful to disprove the suggestion that the entries effect an endowment of property for the deity. The first question to be asked on that suggestion is what property has been made debutter or charged

in favour of the idol? The second is, what proof is there of any such intention? As an interpretation of the conduct of the insolvent firm the theory of endowment breaks down as completely as does the theory that the firm intended to declare itself trustees for the temple.

It is thus unnecessary to consider whether in the circumstances of the case insuperable difficulties beset the respondents' attempt to trace trust monies in the hands of the insolvents so as to show that they are represented by assets in existence at the date of the insolvency. The respondents fail to show that the insolvents have created a trust fund or have acted as custodians or trustees of any such fund or of any property belonging to the temple.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the order appealed from set aside and the order of Braund J. dated 29th June, 1936, restored. The respondents will pay the appellants' costs throughout—including the costs of the proceedings before the Official Assignee.



In the Privy Council

SOONIRAM RAMNIRANJANDASS

2.

ALAGU NACHIYAR KOIL (Temple)
otherwise known as Alagiya Nachi Amman
Koil by its Trustees.

DELIVERED BY SIR GEORGE RANKIN

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