

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:17.02.2017

Pronounced on:22.02.2017

Coram

The Hon'ble Dr.Justice G.Jayachandran

Second Appeal No.1648 of 1997

1.Marakkal
2.Palaniammal
3.Rajendran
4.Devendran
5.Devaraj
6.Nagaraj
7.Ramakkal
8.Marakkal

..Appellants

/versus/

1.S.G.Kannappan(died)
2.Palaniammal
3.T.M.Maranaicker
4.Rasaiyan
5.Rathinal
6.Marammal
7.Subramaniam
8.Ponnusamy
9.Chinnasamy
10.Palaniswamy
11.Rangammal
12.Palanisamy
13.Mara Naicker

(Since respondents 2,11, and 12 remained
exparte in the lower appellate Court, notice
not necessary to respondents 2, 11 and 12

13th respondent given up in appeal)

14.Sampath

15.Ponmudi

16.Parthiban

17.Mani(unsound mind)

(Rep.by her brother and

guardian Sampath vide Court

order dated 17.02.2017 made

in C.M.P.No.17316 of 2003 in

S.A.No.1648 of 1997 by GJJ)

(RR14 to 17 brought on record as LRS

of the deceased R1 vide order of

Court dated 10.08.2011 made in

C.M.P.Nos17315 of 2003)

..Respondents

Prayer: Second Appeal is filed under Section 100 of the Civil Procedure code against the judgment and decree of the learned Sub Judge, Gobichettipalayam, dated 08.12.1995 in A.S.No.59 of 1990 and as modified the judgment and decree of the learned District Munsif of Gobichettipalayam dated 16.05.1989 in O.S.No.764 of 1983.

For Appellants :Mr.S.Sounthar

For Respondents :Mr.J.Hariharan for R4 and R5

Mr.J.Hariharan for

Mr.V.Nicholas for R6 to R10

R1 died, R2,11 and 12-NDW

R3-No appearance

J U D G M E N T

The appellants are the legal representatives of defendants 3 to 5 in the suit filed for declaration, partition and injunction. To declare

that the plaintiffs are entitled for 1/2 share in the 'A' schedule property; partition by metes and bounds in the 'A' schedule property and permanent injunction in respect of 'B' schedule property.

2. One Oor Ranga Naikkar had two wives. Through his first wife Marakkal he had a son by name Periya Ranga Naikkar. Through his second wife Palaniakkal, he had a son by name Chinna Nayakkar and daughter by name Palaniammal. During the life time of Oor Ranga Naikkar, the suit property bearing S.No.172, in Periya Koduvuri Village, Sathyamangalam Sub-Division, Coimbatore District, to an extent of 1.41 acres, in total extent of 2.49 acres was purchased by his second wife Palaniakkal on 24.06.1938.

3. The said property is now the subject matter of the second appeal. Smt. Palaniakkal is the first defendant in the suit. Her daughter Palaniammal is the second defendant. The case of the plaintiffs is that, the first defendant purchased 'A' schedule property out of her Sridhana and own income and enjoying it absolutely. On 12.09.1979 she sold the property to her daughter Palaniammal, the second defendant. A month later, on 12.10.1979, Palaniammal sold the property to the plaintiffs

S.G.Kannappan and T.Ranga Naikkar and the 7th defendants S.Rajaiyan jointly. The plaintiffs and the 7th defendant thus entitled for 1/3 share each in common. On 7.2.1980, out of his 1/3 share, the first plaintiff sold 1/6 share to the 2nd defendant and remaining 1/6 share to the 8th defendant. Later, he repurchased the 1/6 share sold to the second plaintiff. Thus, the plaintiffs are jointly in possession and enjoyment of 1/2 share in the 'A' schedule property.

4. Whereas, in respect of this suit property earlier the first defendant filed a suit in O.S.No.985/1979 against the 3rd and 4th defendants, which was later dismissed for default on 3.7.1981. Mara Naicker who is the sixth defendant in this suit, filed a suit for injunction against the 3rd, 5th defendants and Oor Ranga Naikkar, claiming himself as tenant under the 1st and 2nd defendants herein not to evict him without due process of law. That suit was contested by the parties at interlocutory stage but, later allowed to pass ex-parte decree 17.10.1981 since the learned counsels representing for the defendants reported 'no instruction'.

5. The contention of the respondents 3 to 5 in their written statement was that the suit property was purchased in the name of first defendant by Oor Ranga Naikkar from out of joint family income to avoid any future claim by his brother Chenna Naikkar with whom, he had no good relationship. The 1st defendant has no income of her own. She was only a name lender and it was a benami transaction. The first defendant was never been in possession and enjoyment of the property. The sale by the 1st defendant to the 2nd defendant on 12.09.1979 is not a valid transaction. Therefore, the subsequent transactions on 07.02.1980 and 07.11.1983 are void. Further, those transactions held pending litigations in O.S.No.985/79 and O.S.No.1008/1979, thus, hit by the principle of lis pendence.

6. The trial Court declared that the plaintiffs 1 and 2 jointly entitled for 1/2 share in the 'A' schedule property but, declined to grant injunction in respect of 'B' schedule property . Accordingly, preliminary decree was passed for partition.

7. Aggrieved by the decree of declaration and partition, the defendants preferred appeal. As against the dismissal of injunction

relief, no appeal filed by the plaintiffs. On appeal, the appellate Court modified the trial court judgment by fixing the shares of each sharers, by declaring in the 'A' schedule property, the first plaintiff and the eighth defendant are entitled for 1/6 share each; the second plaintiff and the seventh defendants are entitled for 2/6 share each. It also confirmed the judgment of the trial Court rejecting the injunction relief in respect of 'B' schedule property, though no appeal was filed against the dismissal of injunction relief. In the said circumstances, this Second Appeal is filed by the legal representatives of the defendants.

8. Both the Courts below rejected the version of the defendants regarding Ex.A-1. The Courts below held that, the averment that first defendant was only a name lender to Ex.A-1 is not proved. The conduct of the parties, recitals found in the documents exhibited as evidence and the pleadings in the earlier suit reveals that the suit property was dealt as the personal property of the first defendant and acted upon. After discussion on the law and the facts, the Courts below has held that the suits which were pending during the impugned transactions do not hit either by the principle of *res judicata* or *lis pendence*.

9. This Court, while admitting the Second Appeal has formulated ***the following Substantial Question of Law:-***

“(1)Whether the Courts below are correct in decreeing the suit when the suit is barred by res judicata?

(2)Whether the Courts below are correct in decreeing the suit when Exhibits A2, A3,A4 and A5 are affected by lis pendens because of the pendency of suit O.S.No.985 of 1979 and that the respondents 1 and 2 do not derive any title under Exhibits A3,A4 and A5?”

10. The learned counsel for the appellates contented that, the plaintiffs have not placed even a piece of document to show that the first defendant had her own source of income to purchase the suit property in the year 1938. The first defendant and her daughter second defendant remained absent. The plaintiffs, who are the purchasers of the property, can have no right to claim title over the suit property since, their vendor or vendors vendor had no right to alienate. The first

defendant was only a name lender for Oor Ranga Naikkar and the property was in fact purchased from the joint family exertion and enjoyed by the members of the joint family. Further, it was contented by the appellants that, the transactions pending litigation is hit by *lis pendenti* and *res judicata*.

11. Per contra, the learned counsel for the respondents/ plaintiffs submitted that, to the facts of the case neither *lis pendenti* or *res judicata* will apply since they were not aware of the pending litigation, when they purchased the property. Further, both the suits were disposed in collusive manner, which is clearly established through Exs.A-8, Ex.A-14 and Ex.A-15. O.S.No.985/79 was ultimately dismissed for default without any decision and O.S.No.1008/79 was allowed due to non representation of the defendants. Through these two suits nothing emanates to render the vesting of title in favour of the plaintiff void.

12. The learned counsel for the appellants emphasised that, the Courts below while holding Ex.A-1 is a valid document, failed to consider the fact that first defendant is the right person to plead that

the suit property was her property purchased through her own earnings. She did not deny that she was not a name lender to Ex.A- 1 by filing written statement or deposing before the Court. In a Hindu joint family, it has to be presumed the property acquired are joint family property even though it is purchased in the name of any individual member of the family, unless that individual member establishes that he had his or her own source of income to buy the property.

13. To this plea, this court is of the opinion that it is suffice to quote the following observation in ***C.K.Krishnan -vs- C.K. Shanmugam and others*** reported in ***1975 (11) MLJ 73*** for the plea of benami transaction raised by the appellants.

"A note of caution is always struck when Courts are obliged to deal with properties standing in the names of female members of a joint family. The presumption which usually arises when such a property stands in the name of a male member of the family, is not so easily available in cases where the properties stand in the name of a female member. In the joint family, if there is sufficient nucleus belonging to the said family and if the said apparatus of a nucleus is in a position to yield surplus income which would enable the members of the joint family to purchase properties in the name of one or the other of the members of the family, then the presumption is raised that such properties, though prima facie in the name of one of the members of the family, are virtually to be held to be the properties of the family, and not of the member concerned. No

doubt, if, in a given case, a challenge is made that the particular person in whose name the property stands is its owner, then the onus is heavily on him to establish : hat he has purchased the property from and out of his own acquisitions and without resort to, or without deriving any assistance from, the joint family nucleus or its income. But, on the other hand, if the property stands in the name of a female, no such prima facie presumption arises. If the challenge, however, by a member of the family is that the property standing in the name of a female member such as a member's wife or a sister of the family etc., should enure to the benefit of the family in general, then he has to necessarily bring home such hypothesis and data to the knowledge of the Court in an action initiated by him and establish, at least reasonably, that his contention is plausible and maintainable. (emphasis added)

14. Thus, in a case of property, which stands in the name of a female member of the family, the burden to prove that it is the joint family property is casted upon the person, who raise that plea. He cannot stop with bald assertion, he should adduce necessary evidence for scrutiny of the Court to ascertain whether the real title in the property is on such female member (or) she is only a name lender for the family. In this case, the burden to prove that first defendant was only a name lender for the joint family is on the plaintiff, which he has failed to establish.

15. Regarding the plea of *res judicata* and *lis pendenti*, it is established through documents that in the earlier suit O.S.985/79, the

suit was dismissed for default and no issue was heard and decided finally. Before a plea can be held to be barred by the principles of res judicata, it must be shown that the plea in question had not only be pleaded or ought and might have pleaded, it had been heard and finally decided by the Courts. In a suit dismissed for default, there is no scope for hearing and deciding the issue.

16. This issue has been settled by the Hon'ble Supreme Court way back in 1969 in ***Shivashankar Prasad Sah and others -vs- Baikunth Nath singh*** reported in [***AIR 1969 SC 973***] which reads as under:-

"Before a plea can be held to be barred by the principles of res judicata, it must be shown that the plea in question had not only been pleaded but it had been heard and finally decided by the court. A dismissal of a suit for default of the plaintiff, we think, would not operate as res judicata against a plaintiff in a subsequent suit on the same cause of action. If it was otherwise there was no need for the legislature to enact rule 9, Order 9, Civil Procedure Code which in specific term say that where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. The contention that the dismissal of a previous suit for default of the plaintiffs operates as res judicata in a subsequent suit in respect of the same claim was repelled by the Judicial Committee, of the Privy Council in Maharaja Radha Parshad Singh v. Lal Sahab Rai and Ors.(1). Therein the Judicial Committee observed thus :

"None of the questions, either of fact or

law, raised by the pleadings of the parties was heard or determined by the Judge of the Shahabad Court in 1881; and his decree dismissing the suit does not constitute res judicata within the meaning of the Civil Procedure Code. It must fall within one or other of the sections of chapter VII of the Code; in the present case it is immaterial to consider which, the severest penalty, attached to such dismissal in any case being that the plaintiff cannot bring another suit for the same relief."

From this decision it is clear that the Judicial Committee opined that before a plea can be held to be barred by res judicata that plea must have been heard and determined by the court. Only a decision by a court could be res judicata, whether it be statutory under [S. 11](#), Civil Procedure Code or constructive as a matter of public policy on which the entire doctrine rests."

17. Section 52 of the Transfer of Property Act, 1882 refers transfer of property pending suit. This section is the emancipation of the doctrine of lis pendens. This Section restricts transfer of immovable property by one of the litigating party detrimental to the interest of the other litigating party. The true scope of Section 52 of the Transfer of Property Act, 1882 is not to prevent the vesting of title on a transferee in a sale pendente lite but, only makes it subject to the right of the other parties, as decided in the suit. The spirit of this Section is not to wipe out a sale pendent lite altogether but, to subordinate it to the rights based on the decree in the suit. As per Ex.A-8, the suit, which

was pending transfer of the property under Exs.A-2 to A-5 dismissed for default. Since no right is decided in favour of the appellants in that suit, the transfers pendent lite are perfectly valid.

18. The trial Court after considering the entire gamut of the case had at length discussed each issues and had decreed the suit. The lower appellate Court after re-appreciation of the evidence independently, substantially agreed with the trial Court judgment, except fixing the shares to each of the claimants individually. This Court finds no point to interfere with the well considered judgments of the Courts below, in the light of the answer to the Substantial Questions of Law recorded above

19. In the result, ***the Second Appeal is dismissed.*** No order as to costs.

22.02.2017

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Index:Yes/No

Internet:Yes/No

To

The Subordiante Judge, Gobichettipalayam.

The District Munsif, Gobichettipalayam.

Dr.G.Jayachandran, J.

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Pre-delivery judgment made in
S.A.No.1648 of 1997

22.02.2017

<http://www.judis.nic.in>