

(1934) 03 MAD CK 0046
In the Madras High Court

Ayya Pillai

APPELLANT

Vs

Ayyadurai Goundan and Others

RESPONDENT

Date of Decision : 29-03-1934

Acts Referred:

Citation : AIR 1935 Mad 81 : (1934) 40 LW 823

Hon'ble Judges : Pandalai, J

Bench : Division Bench

Judgement

Pandalai, J.—The plaintiff, a minor, appeals from the decree of the learned Subordinate Judge of Vellore, reversing a decree of the District Munsif of Eani-pot, and dismissing his suit brought for recovery of possession of 2 acres 3 cents of wet land from the defendants who were it was alleged, in possession under a mortgage granted to them and their ancestors by the plaintiff's father in 1891, and, after the mortgage was paid off in 1910, under a lease for five years from that year. The plaintiff alleged that there had been a previous litigation, O.S. No. 201 of 1916, brought by a subsequent mortgagee under the plaintiff to recover the same property from the defendants, that in that suit the plaintiff was added as defendant ,4 and his mother appointed guardian-ad-litem, that in the Munsif's Court defendants 1 to 3 in that case represented by the present defendants repudiated the mortgage of 1891 and set up long adverse possession but the Munsif held against that plea, that in appeal however the then learned Subordinate Judge came to the opposite conclusion and held that it was not proved that the defendants were holding under the mortgage of 1891 and that it was proved that they had been in adverse possession for a long time and hence dismissed the suit, that the matter was taken up in second appeal (Second Appeal No. 1141 of 1918) where an issue was sent down as to the character of the defendants' possession, that on the same evidence the Subordinate Judge submitted a finding that the defendants were in adverse possession which the High Court accepted and dismissed the appeal and the suit, that in the course of these proceedings which lasted from April 1916 to March 1920 the plaintiffs' guardian-ad-litem took no steps to assert the plaintiff's title or to prove that the

defendants were in possession under the mortgage of 1891 but that all she did was to appear personally in Court when the issues were framed and to admit the then plaintiff's claim, that she took no trouble to engage a pleader or to adduce any evidence and in particular the documents now produced A, C (or C-1), K etc., which would have shown clearly the plaintiff's title and the nature of the defendant's possession, that for this reason the learned Subordinate Judge was misled into finding against the plaintiff and that therefore the guardian was grossly negligent and the decree in that litigation is not binding upon the plaintiff.

2. The plaintiff therefore prayed for a decree declaring his, title and that the decree in O.S. No. 201 of 1916 is not binding upon him and for possession of the properties and other reliefs. The defendants generally traversed these allegations and urged that the properties never belonged to the plaintiff, that their possession throughout was as absolute owners and adverse to the plaintiff and that decision in the previous litigation is binding upon the plaintiff and operates as *res judicata* against him. Of the issues framed, the first related to the title to the property whether it belongs to the plaintiff or to the defendants, the second is merely explanatory of the first and raised the question whether the suit properties are karnam inam, the fourth issue raised the question of the truth and validity of the mortgage of 1891 and the subsequent lease set up by the plaintiff, the fifth raised the question whether the decree in O.S. No. 201 of 1916 was *res judicata* and the sixth whether the plaintiff's guardian was guilty of laches and if so whether the plaintiff is not bound by the same for the reasons stated.

3. The District Munsif who delivered a carefully considered judgment found that the properties originally were inam granted for the service of karnam which belonged to the family of the plaintiff and that in 1884 the inam was enfranchised and the plaintiff's father given a title deed (Ex. A) entitling him to hold (the properties subject to a quit rent of t Rs. 19 mentioned therein in commutation both of the services and the reversionary interest possessed by the Government. No attempt was made in either of the two Courts to show that the title to the property is otherwise than as Ex. A shows, viz., that it was karnam inam land belonging to the family of the plaintiff but subsequently enfranchised by Government and raiyatwari patta granted under Ex. A. On the question of *res judicata* the Munsif held that v the decision in the former suit would be *res judicata* against the present plaintiff in the present litigation although these parties wore co-defendants in the former suit, but he held that this result was avoided by his view as to the conduct of that litigation by the then guardian-ad-litem. He found that the result of that litigation by preponderance of documentary indications and probabilities sic should have been in plaintiff's favour and as of that as the new materials were then of available and within reach of the plaintiff's former guardian, the indictment of 36 gross negligence should be sustained and the minor plaintiff should be held not it bound by the former adverse decision.

4. The Munsif in para 13 mentions *seriatim* the grounds for that opinion and lays

great stress upon the failure to produce Ex. A, the title-deed, Ex. L, extract from the inam register relating to this inam, Ex. C(1) a simple mortgage executed on the same date as the mortgage Ex. B by one of the mortgagees obviously to provide himself with funds for obtaining the disputed mortgage and Ex. K an unregistered lease for 5 years from 1910 under which the mortgagee-defendants after the mortgage was discharged held the property as lessees under the same plaintiff. On these grounds he held that the decision in the old suit is no bar to the plaintiff and gave him as decree. On appeal the learned Subordinate Judge of Vellore instead of considering the issues which had been framed by the District Munsif, following a habit which regret to find is too common among the lower Courts, laid down as the only points for determination i.e., (1) whether the plaintiff's guardian was guilty of such gross-negligence in the conduct of O.S. No. 201 of 1916 as to render the decree not binding upon him; and (2) is the present suit barred by res judicata? He, in fact, omitted to consider the preliminary question upon which alone the first at least of these points would arise, viz., whether on the evidence before the Court at present the plaintiff's case that the property belongs to his family and was mortgaged to the defendants in 1891 and was held by them under that mortgage and subsequently under a lease till 1915 was true. It is only if those facts were proved that any question of negligence of the guardian would arise at all. If they were not proved, the plaintiff's case would fail on that ground alone without the help of any previous determination; but only if his case were true on the facts as now established would there arise any further question whether that case cannot be heard because the question is res judicata by a previous decision which is binding upon the plaintiff as his guardian was not guilty of negligence. My first duty therefore is to consider whether the Munsif's determination on this part of the case which the Judge omitted to consider is correct. I have gone very carefully with the help of the learned Advocates on both sides into this question and I have not been referred to anything which shows that the indubitable documents produced by the plaintiff do not establish his case conclusively. The revenue registers so laic as 1922-23 the previous registers including the inam B register culminating in the title deed Ex. A all tell only one story against which the defendants have not a scrap of evidence except their oral evidence to show that they have any title to this property. That they have been long in possession is true enough on the plaintiff's case itself, because they were in possession from 1891 under the mortgage of that year. I have therefore no hesitation in coming to the conclusion that on the most indubitable proof the plaintiff has established that the property is his, was granted to his family by enfranchisement of an inam, that he is paying tax down to the time of the present litigation and that the defendants, unless they prove their title by adverse possession, have no right at all to keep this property. Then as to the question of how they came into possession, the only conclusion I can come to, is that they came into possession in 1891 under the mortgage Ex. B. It is easy enough to make vague and general statements of old possession but no court will believe such statements in the face of Government records and registered

documents. Therefore I think the Munsif was right and the learned Subordinate Judge has not shown that he was wrong on this part of the case, viz., that, if the case had to be decided on the merits at the present moment there cannot be any doubt or hesitation as to who should have this property.

4. Now I have, come to the two points which the learned Subordinate Judge thought barred the plaintiff of his rights. On the point of res judicata I think the learned Judge was right in thinking that, unless the plaintiff could get rid of the decision in the previous case in the way alleged by him, that decision would be res judicata as between him and those defendants, on the question of title and possession. These defendants were defendants 1 to 3 in O.S. No. 201 of 1916 and the plaintiff was the defendant 4. The appellant attempted to show that the conditions necessary to constitute res judicata between co-defendants did not exist. The point he attempted to make was that there must have been active contest between the co-defendants. As there was no contest between defendants 1 to 3 and defendant 4 in the old suit therefore it was said that that decision could not be res judicata. There were expressions like active contest and active controversy in the older decisions on this topic but the most recent pronouncements of the Privy Council, in *Mauni Bibi v. Tirlokinath* 1931 P.C. 114 and *Maung Sein Done v. Ma Pan Nyun* 1932 P.C. 161, require only three elements to constitute a decision res judicata between co-defendants. They are (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. Mark that the first element is not that there should be active contest between the co-defendants, but merely that there must be a conflict of interest between them, and this conflict may exist notwithstanding that one of the concerned defendants does not contest at all. In fact in the previous case concerned in the *Mauni Bibi v. Tirlokinath* 1931 P.C. 114 decision, one of the two parties, between whom that decision was held to be res judicata, did not appear at all. The point therefore taken by the appellant is no longer right though it may have been supportable on the language of similar decisions, for instance *Sankaramahalingam Chetti v. Muthulakshmi* 1918 Mad. 39, where the expression "active controversy" is used. The same three elements are held in the subsequent decision in *Maung Sein Dokne v. Ma Pan Nyun* 1932 P.C. 161 to be sufficient. In this case there was undoubtedly a conflict of interest between the present plaintiff (then defendant 4) who supported the then plaintiff's claim and the defendants who were defendants 1 to 3 then. It was also necessary to decide that conflict to give the plaintiff a decree and that conflict was decided against the present plaintiff. If therefore there were no other faults to be found with that decision, the plaintiff would be out of Court.

5. This leads to the really important point in the case whether in the conduct of that suit the plaintiff's then guardian (his mother) was guilty of such negligence or gross negligence as it is sometimes expressed as to release the plaintiff from the effect of that decision. What actually happened may be very briefly stated.

The then plaintiff claiming under a mortgage dated 2nd August 1915, from this plaintiff brought that suit for possession against the present defendants who were then defendants 1 to 3. The contention of the then plaintiff and the defendants 1 to 3 may be taken to be substantially the same as now. Defendant 4 was this plaintiff who appeared by his guardian ad litem, his mother. She did not appear by vakil but personally appeared at the time of framing the issues as the records of that case show and admitted the plaintiff's claim. For anything that we ROW know and in fact there is no evidence to the contrary, that is all she did in the whole litigation. She took no more part or interest either in the Munsif's Court in which the plaintiff won or in the appellate Court or second appellate Court where eventually he lost. In view of what I have already said about the unassailable character of the plaintiffs claim to the property and the nature of the defendant's possession of it, this conduct on the part of a guardian would alone be sufficient to examine her bona fides or diligence with great care. So much depended upon her diligence or the want of it, as her ward was really in the position of the plaintiff himself. The decision in that suit necessarily binds him by res judicata. The plaintiff in that case had only his mortgage money in jeopardy. The present plaintiff then defendant 4 stood to lose the whole property. When in such circumstances the guardian of an owner of property does nothing in a suit by the result of which he will be bound and simply goes to sleep from the beginning to the end of the litigation, it is difficult not to characterise that conduct as negligent. But it is asked what is it that she could have done? The answer is easy. The judgment of the appellate Court is based upon the idea that the mortgage under which the defendants are said to be holding the property, viz., Ex. B, was a suspicious transaction to which they did not consent which therefore must have been written and kept for some ulterior object not binding on the innocent Goundans in possession. On this ruling idea everything else was built. I cannot conceive that the Court, if it could be disabused of that dominant error, would have come to the conclusion, at which it arrived, viz., that defendants 1 to 3 were in adverse possession; for it is obvious that if a person takes a usufructuary mortgage he holds under the mortgagor and there can be no further question of adverse possession. A perusal of the first and second judgments of the learned Subordinate Judge on that occasion makes this clear that for some reason which must have been sufficient to his mind at that time he could not convince himself that the persons in possession (the defendants) were consenting, parties to the mortgage (Ex. B). On this the whole of the rest of the inferences, suspicions, etc., was founded. While the Judge's mind was thus in travail, the good lady (the plaintiff's mother) who never appeared in Court or even engaged a pleader for her kept in her hands the material documents which would have proved that the defendants must have taken a title from the owner and they are the documents mentioned the District Munsif in para. 14 of his judgment.

6. If the title deed, Ex. A, had been produced, it would at once show that the plaintiff's family was entitled to the property upon the most indubitable of titles,

viz., a government grant dated 1884. For the present the learned Subordinate Judge is to hazard a guess that he would have made a mistake and fallen into an error into which he did not fall and would probably not have fallen. Similarly the extract from the inam fair register which was then as available as now would at once have shown that all the defendants' talk of long adverse possession was unlikely to be true in the last degree. But the document which clinches the matter is Ex. C(1) (copy of which is Ex. C) which defendant 1 himself produced in this litigation and of which the copy Ex. C was available and in the hands of the then plaintiff in 1917 immediately after this decision of the Munsif, but long before the decision of the Subordinate Judge. That is a simple mortgage for Rs. 250 executed by defendant 1 himself to a stranger of some other property belonging to the defendants. An examination of these two documents (Exs. B and C) makes it for all human purposes conclusive that the defendants accepted the mortgage Ex. B and when they put forward the plea of adverse possession were really imposing upon the Court. Ex. C was registered on 9th June 1891, being presented at the office of the Sub-registrar at 5 p.m. by defendant 1, the executant. It was in the handwriting of Ayya Pillai, the plaintiff's grandfather, the mortgagor under Ex. B. It was numbered as 1051 and registered. Immediately afterwards, i.e., at 5-30 p. m. Ex. B was produced for registration before same Officer by Ayya Pillai, the mortgagor and was numbered as 1052 and registered. Thus it is plain that at the registration of those two documents both the mortgagor and the mortgagee under Ex. B were present.

7. The mortgagee was raising Rs. 250 out of the Rs. 300, for which he was taking the mortgage from Ayya Pillai. I am asked seriously by the respondents' learned Counsel to say what the learned Judge has said that the mortgage Ex. C may have been for some other purpose and that there is nothing in it to connect it with Ex. B. This is an ingenious argument which does not appeal to me. All that I am now concerned with is that the learned Subordinate Judge who decided the previous case ought to have had a chance of saying whether it would have appealed to him or not. In all humility I think that it would not have appealed to him any more than it does so. I think it humanly impossible to say that a Court with these two documents before it. (Exs. B and C) and being made aware of the facts which I have mentioned, would come to the conclusion that Ex. B was not accepted by the mortgagee, the present defendants 1 to 3. The copy (Ex. C) which is also now produced shows the date when it was obtained. Why neither the then [Plaintiff nor this plaintiff's guardian ad litem made any attempt to file it in Court has not been explained. There is still another matter. The document now marked Ex. K which is a lease given to the defendants after the mortgage (Ex. B) had been discharged in 1910 was actually produced in Court in the old litigation, but no one seems to have taken the trouble to get it exhibited or prove it. The present learned Subordinate Judge says that even if it were proved it would not have made any difference. I can only repeat what I have said about Ex. C that I cannot agree with this at all and in any case the former

learned Subordinate Judge never had a chance of saying that it produced no effect on his mind.

8. On the contrary if he had been satisfied, as now the Courts are satisfied, that it was a genuine document, the inevitable conclusion would be that the plea of adverse possession would be ruled out. Taking all this into consideration I think that the conduct of the plaintiff's mother as guardian in the old suit can only be described as gross dereliction of duty. It does not matter whether it was due to ignorance or anything else. It is no excuse to say that she thought that the then plaintiff was going to conduct the case. It cannot be permitted for a minor's guardian to take refuge under the plea that he entrusted his duty to some other party.

9. Several cases have been referred to, to show that such conduct as I have described is not enough to constitute negligence, gross enough to avoid the effect of a decree to which a minor is a party. In the first place the learned advocate for the respondents attempted to draw a distinction between negligence by not raising the necessary plea and negligence by not offering evidence to support the plea which is taken. According to him although negligence of the former character might avoid a decree against a minor, negligence of the latter character is not sufficient. There is no basis for this distinction at all. Negligence is negligence whether it consists of not going to the Court and raising a plea at all or whether it consists of abandoning a plea practically after raising without trying to support it by such evidence as is available to the guardian. And this is not mere matter of logic, but it has been expressly so held in *Brij Raj v. Ram Sarup* 1926 All. 36, where it was held that an omission to defend or to raise a particular plea or to call certain evidence might in the circumstances of a particular case amount to negligence or to a breach of duty which was owing by the guardian ad litem to the infant in that case. This case was approved and followed in the Pull Bench case of *Siraj Fatima v. Mahmud Ali* 1932 All. 293 where the authorities were exhaustively examined.

10. There being no such destination as contended for, the only question is whether on the facts of this case the conduct of the plaintiff's guardian was gross enough to avoid the effects of the decree against the minor. That is not a question of authority because it depends upon the facts of each case. The general principle, however, is well settled that the test is, as Mukerjee, J., put it in *Parameswari Pershad narayan Singh v. Sheo Dutt Rai* (1907) 6 C.L.J. 448, that it must be such, negligence as leads to the loss of a right, which must have been successfully asserted if the suit had been conducted or resisted with due care. To apply the test in each particular case raises a question of mixed law and fact per Dovados, J., in *Anand Rao v. Appa Rao* 1925 Mad 258. In the words employed by that learned Judge the negligence must be such as would be called gross negligence in law, i.e., such negligence as would imply that the person guilty of it neglected to do what was plainly his duty to do or did something which any man of ordinary prudence would not have done. Later in the same case he said that in

every case the Court has to see whether the facts are sufficient to make out gross negligence on the part of the guardian. As to particular applications of the rule to varying facts, they are not of course of much guidance as authority on account of the variation in the facts of each case. But it is useful to recall that putting forward a false defence known to be false easily comes within the rule : see Subbanna v. Narasamma 1915 Mad. 384.

11. Where a guardian ad litem absented himself at the hearing and the vakil was unable to explain why the witnesses summoned were not present and consequently a decree was passed against a minor, an application for adjournment being refused, that was held to come within the rule : Subbiah Pandaram v. Arunachala Pandaram 1925 Mad. 379. Failure to set up proper defences by a guardian to a suit against a minor comes within the rule : Vadapallai Joga Rao v. Kale Venkamma 1927 Mad. 497. We cannot exhaust the various circumstances in which a Court might hold that the guardian had failed in his duty to the minor so as to call into operation the rule now under consideration. I have no doubt that considering the evidence then available and considering that the plaintiff's guardian did nothing to bring it forward before the Court it is no answer to say now that even if it had been brought forward the Court might have fallen into an error. It is to be presumed that every Court will try its best to do what is right on consideration of all the materials placed before it and I myself have no doubt that if the materials now placed before the Munsif's Court had been placed before the Court in the old suit, the result would have been the same as what the District Munsif arrived at in this suit. I therefore think that the decree in O.S. No. 206 of 1916 is of no effect to bar the plaintiff of his just rights.

12. On this ground the decree of the learned Subordinate Judge is set aside and that of the District Munsif restored with costs here and in the Court below.