
(1976) 12 MAD CK 0010

In the Madras High Court

Case No : S.A. No. 801 of 1976 and A.S. No. 49 of 1974

Chandran Padayachi

APPELLANT

Vs

T.V. Venkatasubramanya Vadyar and Others

RESPONDENT

Date of Decision : 17-12-1976

Acts Referred:

Citation : AIR 1977 Mad 292 : (1977) ILR (Mad) 173 : (1977) 90 LW 207

Hon'ble Judges : Ramanujam, J

Bench : Single Bench

Judgement

1. The third defendant in O. S. No. 406 of 1971 on the file of the District Munsif, Valangiman at Kumbakonam, is the appellant herein.

2. One Kamakshiammal and her son, the first respondent herein, filed the suit for recovery of possession of the suit properties, along with mesne

profits against defendants 1 to 4. Their case is that the suit properties comprising 8 cents in R. S. 459/2 and 26 cents in R. S. 460/5 in

Thiruvisanallur originally belonged to the family of one Subbier, that as they were, adjacent and contiguous to his land, the first respondent

purchased the undivided half share of Narayanaswami Iyer, a member of Subbier's family under a sale deed dated 5-3-1959, that by another sale

deed he purchased 1/4th share therein along with other properties on 30-3-1959 and 22-5-1959 from two other sharers for his benefit benami in

the name of the first defendant on the representation of the first defendant that if the sale deed is taken on his name he will be able to recover

possession from the lessee one Sellur Natesa Padayachi and that on the same representation the first respondent also executed a sham and nominal

sale deed dated 30-3-1959 in respect of the half share purchased by him from

Narayanaswami Iyer under the earlier sale deed dated 5-3-1959

and that the first defendant was thus made the ostensible owner of the suit items. The plaintiff's further case is that to recover possession of the suit

property from Sellur Natesa Padayachi the second plaintiff filed a suit, O. S. No. 162 of 1959 on the file of the District Munsif. Valangiman, in the

name of the first defendant, for recovery of possession, but the said suit was, however, withdrawn with liberty to file a fresh suit. He later filed O.

S. 266 of 1961, which was resisted by the tenant Natesa but it was however decreed for possession. Against the said decree, the said Natesa

filed A. S. 96 of 1962 which was allowed. The first defendant in the meanwhile took possession of the properties from Natesa and gave it to the

plaintiffs. But since he later took forcible possession from the plaintiffs of the suit properties claiming to be the real owner of the properties, the first

respondent herein filed O. S. 388 of 1962 on the file of the same court for a declaration that the first defendant was only a benamidar for the

plaintiffs and also for recovery of possession of the suit items from the first defendant and the said suit was decreed on 4-4-1964, upholding the

plaintiffs' title and directing the first defendant to deliver possession of the suit properties. In the meanwhile the first defendant had preferred a

second appeal S. A. 1266 of 1963 against the decision in A. S. 98 of 1962 before this court which was, however, dismissed on 30-3-1969. In

the said second appeal, the plaintiffs wanted to implead themselves on record on the ground that there was collusion between the appellants and

the respondents therein but the same was not permitted. as against the decree in O. S. 388 of 1962 in favour of the first respondent the first

defendant preferred A. S. 64 of 1964 and then S. A. 876 of 1965 on the file of this court both of which were, however, dismissed. The plaintiffs

are, therefore, entitled to recover possession of the suit properties from defendants 3 and 4 who are the grandsons of Sellur Natesa.

3. The first defendant and his son the second defendants remained ex parte.

4. The suit was contested only by defendants 3 and 4 and their case was that they were not aware of any of the alleged benami transactions and

proceedings other than O. S. 266 of 1961, A. S. 98 of 1962 and S. A. 1266 of 1963. filed by the first defendant against Sellur Natesa, that there

was no collusion between the first defendant and Natesa Padayachi, as alleged

by the plaintiffs at any time and that they have been in possession and enjoyment of the suit properties for a long time and have acquired title to the suit properties by prescription. They also contended that the suit is barred by res judicata in view of the decision of this court in s. a. 1266 of 1963 to which the first defendant was a party, that even if the plaintiffs' case of benami is true they are bound by the said decision rendered against the benamidar and that, therefore, the plaintiffs cannot seek recovery of possession of the properties from them in the fact of the said decision.

5. The trial court accepted the case of the plaintiffs that the decision in S. A. 1266 of 1963 is not binding on them in view of the collusion between the first defendant and Sellur Natesa Padayachi, that the first defendant being only a benamidar the plaintiffs are entitled to recover possession from defendant 3 and 4, they being admittedly tenants in respect of the suit properties, that the suit is not barred by res judicata in view of the decision in S. A. 1266 of 1963, and that the defendants have not perfected their title by adverse possession. In this view, the trial court decreed the plaintiffs' suit. the lower appellate court also agreed with the view of the trial court and upheld the plaintiff's claim for recovery of possession. In this second appeal the said concurrent findings of the courts below have been challenged.

6. The learned counsel for the appellant contends that as the appellant is not added as party to that suit in O. S. 388 of 1962. filed by the plaintiffs against the first defendant and the subsequent proceedings, he is not bound by the judgments therein and, that, therefore, the first respondent cannot claim that he has got subsisting title as against him, after the decision in S. A. 1266 of 1973. However, it has been found by the courts below on the basis of the evidence let in that the second respondents had trespassed upon the suit property and had taken possession of the same from the appellant, and that the appellant was not in possession of the suit property after the disposal of O. S. 266 of 1961. On the basis of the said findings it is urged by the learned counsel for the first respondent that since Sellur Natesa or his sons were not in possession of the suit property, and it is only the second respondent who was in possession of the suit property at the time of filing of the suit O. S. 388 of 1962, the sons of Sellur Natesa were not impleaded as parties. Further, the second

respondent who was contesting defendant in O. S. 388 of 1962, did not raise the plea that the suit property is not in his possession but it is in the possession of Sellur Natesa. On the other hand, he claims in the written statement that the property is in his possession and he is entitled to the same. As has been pointed out by the lower appellate court, if the second defendant had claimed in O. S. 388 of 1962 that the property is not in his possession but it is in the possession of Sellur Natesa, there may be some force in the contention of the appellant that Sellur Natesa is a necessary party to O. S. 388 of 1962. But as the second respondent who was the defendant in O. S. 388 of 1962 had claimed that he was in possession of the suit property, the non-impleading of Sellur Natesa as a defendant in that suit cannot be said to be very material. It is the case of the first respondent that the second respondent filed the earlier suit O. S. 266 of 1961 on his behalf and at his instance and as the latter began to assert independent title in himself he had to file a suit O. S. 388 of 1962, for a declaration that the suit property is his and that the sale deeds in favour of the second respondent are only benami. after the filing of the suit in O. s. 388 of 1962, one cannot except the second respondent to conduct diligently the further proceedings arising out of O. S. 266 of 1961, that is A. S. 98 of 1962 and S. A. 1266 of 1963, outcome of these proceedings cannot in any event be for his benefit. Having regard to the filing of the suit O. S. 388 of 1962 by the first respondent against the second respondent, it is possible to assume that the second respondent colluded with the tenant Sellur Natesa. Having regard to the nature of the proceedings and the inter se dispute between the first and second respondents as regards the title to the property, the decision obtained by Sellur Natesa against the second respondent cannot bind the first respondent. Therefore, these decisions cannot be a bar to the first respondent claiming title to the property. The learned counsel for the appellant, however, relies on a decision in Kirtibashdas v. Gopaljee, AIR 1914 Cal 323, wherein it has been pointed out that so long as benami system is recognised, it is to be presumed, in the absence of any evidence to the contrary, that a suit instituted by a benamidar has been instituted with the full authority of the beneficial owner and that any decision made in such a suit is as such binding upon the real owner as if the suit had been brought by the real owner himself. Reliance

has also been placed on the decision in Abdul Rahman v. Mohendra Chandra, AIR 1920 Cal 425 and Kondi Savla Bachal Vs. Banachand

Cheniram Marwari, , wherein it has been held that the proceedings against the benamidar in its ultimate result is fully binding on the beneficial

owner. In Priyanath Chakravarty Vs. Kalicharan Chakravarty, it has been observed that a benamidar is a trustee for the real owner and the latter is

bound by the fraudulent conduct of the benamidar where third parties are not privy to the fraud, unless their title can be overthrown by showing

either that they had direct notice or something amounting to constructive notice of the real title or that circumstances existed which ought to have

put them on an enquiry which, if prosecuted, would have led to a discovery of it.

7. In this case, as already pointed out, as between respondents 1 and 2, it has been conclusively held by this court in S. A. No. 875 of

1965(Mad), that the second respondent is only a benamidar and the real owner of the property is the first respondent therein. The question is

whether the decision rendered in the earlier proceedings as between Sellur Natesa and the second respondent benamidar will bind the first

respondent, the real owner. Though, as pointed out in the above decisions relied on by the learned counsel for the appellant, normally a decision as

against a benamidar should bind the real owner as if the decision had been rendered against the real owner himself, that is not an absolute rule. If

there is any evidence to the contrary to indicate that the benamidar could not have been authorised by the real owner to conduct the above

proceedings, it has to be inferred that the benamidar had no right to represent the real owner in those proceedings and that the decision therein

cannot, therefore, bind the real owner. In this case, on 3-10-1962, when the first respondent filed a suit O. S. 388 of 1962, against the second

respondent seeking a declaration that the second respondent is only a benamidar and for recovery of possession from him of the suit property, any

authorisation given to the benamidar earlier should be deemed to have been withdrawn, and that thereafter the benamidar cannot claim to

respondent the real owner thereafter. Therefore, the earlier proceedings which originated from O. S. 266 of 1961 filed by the second respondent

on behalf of the first respondent only till the filing of the suit O. S. 388 of 1962. The subsequent conduct of these proceedings by the second

respondent can only be taken to be on his own behalf and for his personal benefit and not as agent or representative of the true owner, the first respondent. It is true, the first respondent could have intervened in A. S. No. 98 of 1962 and S. A. No. 1266 of 1963 on the ground that the second respondent could not properly represent the interest of the first respondent, the real owner. But it is seen that the first respondent, in fact, took steps to bring himself on record in A. S. 98 of 1962 and S. A. 1266 of 1966. That the first respondent wanted to come on record in the second appeal is clear from the judgment in the second appeal which refers to the petition filed by the first respondent to implead himself on record specially alleging collusion between the second respondent and Sellur Natesa and the dismissal of the same. That the first respondent took steps to file an application for impleading himself as a party in A. S. 98 of 1962, but that attempt was thwarted by his counsel K.S. Venkatarama Iyer who was also the counsel for the second respondent, is clear from Ex. A-18, a copy of the affidavit signed by the first respondent and said to have been handed over to the said counsel. In his deposition Ex. A-19 in the earlier suit O. S. 388 of 1962, the said counsel has not denied the receipt of the affidavit from the first respondent but he mere stated that he does not remember. Therefore, it is clear that the first respondent took steps to bring himself on record in the earlier proceedings initiated by the benamidar, the second respondent, but his request was turned down ultimately in S. A. 1266 of 1963. Therefore the mere fact that the first respondent was not in fact impleaded in the earlier proceedings cannot stop him from contending that the second respondent benamidar had no authority to conduct those proceedings. The refusal by the court to make the first respondent a party in the earlier proceedings cannot be treated as having the same effect as an order to the opposite effect. This has been pointed out in AIR 1927 108 (Privy Council) In that case a compromise was effected in a mortgage suit between the mortgagee and the insolvent mortgagor. Subsequent to the passing of the preliminary decree based on the said compromise the Receiver, who was administering the estate of the insolvent and in whom the enquiry of redemption had vested by operation of law, sought for impleading himself as a party and that was ordered. Thereafter when the mortgagee attempted to bring the mortgaged property to sale, the Receiver challenged the preliminary decree based

on the compromise. It was held by the Privy Council that though the right of the secured creditor over his security was not affected by the fact that

the mortgagor had been adjudicated insolvent, it does not mean that an action against the mortgagor could proceed in the absence of the receiver

in whom the equity of redemption has been vested by operation of law and therefore the decree based on the compromise between the insolvent

mortgagor and the mortgagee was a nullity and even if the Receiver has been made a party to the suit, the decree cannot bind him. In the course of

the said decision the Privy Council observed:--

The decree which is pleaded as constituting *res judicata*, on the face of it bears that it was pronounced in a suit to which the appellant was not a

party and therefore does not come within the rule as to *res judicata* in S. 11, C.P.C. which only applies to matters which were in issue in a former

suit between the same parties. The refusal to make the appellant a party to the suit cannot be treated as having the same effect as an order to the

opposite effect, although it is plain enough from the judgment that if he had been made a party the result would have been the same in both the

courts in which he was heard on his petitions..... In any case the appellant who had done his best to be made a party to the suit and had failed,

was quite entitled to proceed on the view that the decree against Amulya was not binding on him and to take action in his own name to vindicate

the equity of redemption as he has now done.

The above decision of the Privy Council clearly supports the case of the first respondent that as he had done his best to be made a party to the

earlier proceedings initiated by the benamidar, the second respondent but had failed, he is entitled to proceed on the basis that the decree in those

proceedings will not bind him and to take action in his own name to vindicate his rights. In an earlier decision in *Gurnarayan v. Sheolal Singh*, ILR

46 Cal 566 : AIR 1918 PC 140, the Privy Council had observed:--

So long, therefore, as a benami transaction does not contravene the provisions of the law the courts are bound to give it effect. As already

observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so

far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such

circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to

it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially

entitled is fully affected by the rules of res judicata. With this view their Lordships concur. It is open to the latter to apply to be joined in the action;

but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him. In case of a contest

between an alleged benamidar and an alleged real owner, other considerations arise with which their Lordships are not concerned in the present

case.

The last sentence in the above observations of the Privy Council clearly suggests that if there is a contest between the real owner and the

benamidar during the pendency of certain proceedings, the normal rule that the beneficial owner will be affected by the rule of res judicata may not

apply. As already pointed out, even before the disposal of A. S. 98 of 1962 by the lower appellate court on 19-3-1963 and of S. A. 1266 of

1963 by this court on 30-3-1967, disputes have arisen between the first respondent, the real owner and the benamidar the second respondent and

the dispute was the subject-matter of the suit O. S. 388 of 1962 filed on 3-10-1962. In fact S. A. 1266 of 1963 was disposed of on 30-3-1967

long after the second respondent was held to be a benamidar and not the real owner as claimed by him in O. S. 388 of 1962 on 4-4-1964.

Therefore, after the real owner and the benamidar have clearly falling out, the benamidar cannot claim to represent the true owner. Admittedly the

stand taken by the second respondent in O. S. 388 of 1962 was that he is not a benamidar but was the real owner of the property, and that in that

capacity he has taken possession of the property from Sellur Natesa. Thus in any event after 4-4-1964, the date of decision in O. S. 388 of 1962

the second respondent had no authority to represent the first respondent, the real owner in any proceeding. The decision in S. A. 1266 of 1963

cannot, therefore, be taken to bind the real owner, the first respondent. In Ragho Prasad Gupta Vs. Shri Krishna Poddar, , the court has

observed:--

..... It is now well settled that in any litigation with a third party, the benamidar

can sufficiently represent the real owner. The decision in any proceeding brought by or against the benamidar will bind the real owner though he is not joined as a party unless it is shown that the benamidar could not or did not in the fact represent the interest of the real owner in that proceeding.

The above observations indicate that though normally a decision in a proceeding against a benamidar will bind the real owner even though he is not joined as a party to the proceeding, it is open to the real owner to show that the benamidar could not and did not in fact represent the interests of the real owner in that proceeding so as to avoid the binding nature of the decision as against him. As already pointed out, in this case, after serious disputes have arisen between the benamidar, the second respondent and the real owner, the first respondent as a result of the latter filing a suit O.

S. 388 of 1962, the first respondent should be taken to have no power to represent the real owner.

8. The learned counsel for the appellant would, however, point out that the courts below have proceeded on the basis that there was collusion

between Sellur Natesa and the second respondent in the proceedings arising out of O. S. 266 of 1961, that there is no justification for proceeding

on that basis, that there is no evidence of collusion and that the evidence available when analysed taking into account the conduct of the second

respondent in resisting the suit O. S. 388 of 1962 filed by the real owner and at the same time taking proceedings against Sellur Natesa completely

belies the case of collusion between Sellur Natesa and the second respondent. Even assuming that there is no basis for assuming collusion between

Sellur Natesa and the second respondent, the first respondent can claim that the decision in the earlier proceedings arising out of O. S. 266 of

1961 filed by the benamidar, the second respondent cannot bind him by showing that the second respondent had ceased to have any authority to

represent him in these proceedings after the filing of O. S. 388 of 1962. Even assuming that there is no collusion between Sellur Natesa and the

second respondent in the conduct of the earlier proceedings initiated against Sellur Natesa, the second respondent had, in fact, ceased to have any

authority to represent the first respondent after filing the suit O. S. 388 of 1962 wherein the second respondent has set up an independent title to

the property in himself and denied his character as a benamidar. I am, therefore, of the view that the decisions in A. S. 98 of 1962 and S. A. 1266

of 1963 cannot bar the first respondent from claiming title to the suit property as against the appellant who is the son of Sellur Natesa.

9. The only other question that remains to be considered is whether the appellant has established his case that he had acquired title to the suit

property by adverse possession. It is true, in the earlier suit O. S. 266 of 1961 filed by the benamidar, Sellur Natesa was held to have perfected

title to the suit property by adverse possession. But as the said decision is held to be not binding on the first respondent, the first respondent can

disprove the defence case of adverse possession. On the question of possession, it is seen from Ex. A-23, certified copy of the cultivation

accounts from fasli 1364 to fasli 1373, that it is the first respondent who was in possession of the suit property. Thus, the first respondent has

proved possession within 12 years of filing of the present suit O. S. 406 of 1971. Though the appellant claimed that he has been enjoying the suit

property for 30 years and more before the filing of the suit, no scrap of paper has been produced to show that he has ever paid kist to the suit

property. Even otherwise, the first respondent having established his title to the suit property he is entitled to recover possession of the suit

property unless and until the appellant establishes that he has perfected title to the suit property by adverse possession. Even in the earlier

proceedings arising out of O. S. 266 of 1961, the finding that the plaintiffs have perfected title to the suit property by adverse possession is not

based on any evidence worth mentioning, for the said finding proceeds on the basis that since the second respondent as plaintiff has not been in

possession at any time within 12 years of suit, he has lost title to the suit property and the defendants have acquired adverse title. As regards the

oral evidence, the appellant has examined himself as D.W. 1 and he has admitted that to his knowledge he has not paid any kist to the suit property

nor patta has been transferred in his name at nay time. Though D. Ws. 2 to 4 have been examined to prove that the suit property was in the

possession of the appellant, both the courts below have not chosen to accept their evidence and sitting in second appeal this court cannot interfere

with the appreciation of the oral evidence by the courts below. I have to, therefore, accept the finding of fact given by the both courts below that

the appellant has not shown to have been in possession of the suit property adversely to the first respondent for the statutory period.

10. The result is the second appeal fails and is dismissed. There will however, be no order as to costs. No leave.

11. Appeal dismissed.