
(2009) 01 MAD CK 0298
In the Madras High Court
Case No : Second Appeal No. 293 of 2000

Devasena Ammal

APPELLANT

Vs

K. Rathnavelu Mudaliar and R. Parvathy Ammal

RESPONDENT

Date of Decision : 19-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 11
Transfer of Property Act, 1882 — Section 52

Citation : (2009) 2 LW 522

Hon'ble Judges : K. Mohan Ram, J

Bench : Single Bench

Advocate : V. Ragavachari for M/s. Nadana Sabapathy, for the Appellant; K. Rajendiran, for the Respondent

Final Decision : Dismissed

Judgement

K. Mohan Ram, J.—The unsuccessful defendant in O.S. No. 242 of 1992 on the file of the Additional District Munsif Court, Kanchipuram, is the appellant in the above second appeal. For the sake of convenience, the parties are referred to as per their ranking in the suit.

2. The case of the plaintiff, in-brief, is as follows:-

a. The father of the plaintiff, namely, Kuppusamy Mudaliar, executed Ex.A1 Settlement Deed, dated 25.6.1981, which covered the suit property also and ever since the settlement deed was executed, the plaintiff was in possession and enjoyment of the same by obtaining a separate patta. The suit property is a land measuring to an extent of 0.54 cents comprised in S. No. 99/1 in Karai Village, Kanchipuram Taluk. The plaintiff's sister, the second defendant, filed a suit in O.S. No. 787 of 1981 in the Court of Additional District Munsif, Kanchipuram, questioning the validity of the settlement deed Ex.A1. In the suit a compromise decree dated 19.3.1991 was passed. As per the compromise decree, the second defendant, who was the plaintiff in O.S. No. 787 of 1981 got one acre out of 2.16 acres in S. No. 155/1 and an extent of 0.50 cents out of 0.76 cents in S. No.

155/2. The plaintiff got under the compromise decree the suit property and other properties. The second defendant executed a sale deed in favour of the first defendant under Ex.B3, dated 26.8.1989 during the pendency of the suit and hence, the said sale is hit by the doctrine of lis pendens contained u/s 52 of the Transfer of Property Act. The plaintiff issued a notice Ex.A4 for which the first defendant alone sent a reply Ex.A5, while the second defendant did not send any reply. Thereafter, the plaintiff filed a suit for declaration of his title to the plaint schedule lands and for recovery of possession thereof from the defendants and for future mesne profits from the date of suit till delivery of possession.

3. The second defendant remained *exparte* and did not contest the suit. The first defendant contested the suit, *inter alia*, contending as follows:-

a. The settlement deed Ex.A1 executed in favour of the plaintiff had been cancelled by the settlor himself under Ex.B1 dated 4.8.1981 and under another registered settlement deed Ex.B2 Kuppusamy Mudaliar settled the suit property and other properties in favour of his daughter, the second defendant. In the deed of revocation Ex.B1 itself, the settlor had stated that while he was unconscious his thumb impression was taken in certain documents including the settlement deed in favour of the plaintiff and he was not a willing party to the settlement deed. Thereafter, Kuppusamy Mudaliar had executed a registered settlement deed on 9.8.1981 under Ex.B2 in favour of the second defendant and the same was immediately acted upon. The plaintiff is not in possession of the suit property. The first defendant had purchased the suit property for valuable consideration under Ex.B3 sale deed executed by the second defendant on 26.8.1989 and ever since the date of purchase, the first defendant is in possession and enjoyment by obtaining patta in her favour.

4. The material pleading which is relevant for deciding the substantial question of law that has been framed in the above second appeal is contained in paragraphs 8 and 9 of the written statement of the first defendant which reads as follows:-

"8. This defendant was not a party to O.S. No. 787 of 1981 and any decree in that suit is not binding on this defendant. This defendant was not aware of any such Court proceedings and any such suit and only from the copy of the plaint this defendant has come to know about that suit. 9. This defendant is a bonafide purchaser for valuable consideration and the sale deed in her favour is true and valid. The second defendant had proper title and possession to convey the land to the first defendant. The sale is not vitiated by the doctrine of *lis pendens*." On the aforesaid pleadings, the first defendant sought for dismissal of the suit. 6. On the aforesaid pleadings, the trial Court framed the following issues:-

a. Whether the sale deed executed by the second defendant in favour of the first defendant is true and is legally sustainable?

b. Whether the second defendant has any right over the suit property?

c. Whether the deed of revocation, dated 4.8.1981 is legally sustainable?

- d. Is it true that the first defendant purchased for a valuable consideration ?
- e. Whether the sale dated 26.8.1989 is hit by the doctrine of lis pendens?
- f. Whether the plaintiff is entitled for declaration and permanent injunction ?
- g. To what other reliefs?

6. During trial, the plaintiff was examined as P.W. 1 and Exs.A1 to A5 were marked on the side of the plaintiff. On the side of the first defendant, her manager one P.R. Ramanathan was examined as D.W. 1 and Exs.D1 to D5 were marked.

7. The trial Court on a consideration of the oral and documentary evidence available on record held that Ex.B1, dated 4.8.1981 executed by Kuppusamy Mudaliar revoking Ex.A1 registered settlement deed dated 25.6.1981 executed by the Kuppusamy Mudaliar in favour of his son, the plaintiff, is not valid and further held that Kuppusamy Mudaliar would not have validly executed Ex.B2 settlement deed in favour of the second defendant. It has been further held that Ex.A1 settlement deed is valid and granted a decree declaring the title of the plaintiff to the suit property. The trial Court further held that the sale deed executed by the second defendant in favour of the first defendant under Ex.B3 during the pendency of the suit in O.S. No. 787 of 1981 is hit by the doctrine of lis pendens contained u/s 52 of the Transfer of Property Act and accordingly, granted a decree declaring the title of the plaintiff to the suit property and for recovery of possession and the determination of mesne profits was relegated to separate proceedings under Order 20 Rule 11 C.P.C.

8. Being aggrieved by that the first defendant filed A.S. No. 19 of 1997 before the Subordinate Court, Kanchipuram. The lower appellate court on an independent consideration of the entire evidence on record and the findings and reasonings of the trial court confirmed the judgment and decree passed by the trial court and dismissed the appeal.

9. Being aggrieved by that the first defendant has filed the above second appeal. While admitting the above second appeal, the following substantial question of law has been framed:-

"When the second respondent (second defendant) has sold the property for valuable consideration to the appellant (first defendant) as early as 26.8.1989, will not the act of the second respondent amount to a fraud in entering into a compromise with the first respondent and giving of the suit property to the first respondent on 9.8.1991. Will not the principle that "a decree obtained by collusion in a suit which was honestly begun" exclude the principle of lis pendens u/s 52 of the Transfer of Property Act"

10. Heard both.

11. At the outset, the learned counsel for the plaintiff/first respondent submitted that the aforesaid substantial question of law does not arise for consideration in

the facts and circumstances of the case as the appellant had neither pleaded nor adduced any evidence to the effect that the compromise entered into between the second defendant and the plaintiff in O.S. No. 787 of 1981 on the file of the Additional District Munsif Court, Kanchipuram was vitiated by fraud or collusion.

12. Mr.V.Ragavachari, learned counsel appearing for the appellant submitted that in as much as the appellant in her written statement had stated that "the sale is not vitiated by the doctrine of lis pendens", it should be construed that the appellant had questioned the compromise entered between the second defendant and the plaintiff on the ground of fraud and collusion. The learned counsel further submitted that the pleadings in mofussil courts in our country are loosely drafted and a liberal construction has always to be given to such pleadings. The learned counsel further submitted that though the suit filed by the second defendant might have been filed bonafidely and it was contentious in the beginning but after transferring the property in favour of the first defendant since the second defendant had fraudulently entered into a compromise with the plaintiff to defeat the rights of the purchaser, namely, the appellant, it cannot be said that the termination of the suit was honestly brought out in one of the visual modes and therefore, contended that the doctrine of lis pendens will have no application.

13. The learned counsel further submitted that in the reply notice itself the appellant had questioned the validity of the settlement deed Ex.A1 and in the reply notice the appellant had clearly stated that she was not aware of the court proceedings which was pending between the plaintiff and the second defendant and since she was the bonafide purchaser for valuable consideration, she was immediately put in possession and she had also obtained patta and she is in possession of the property. The learned counsel further submitted that in the plaint the details of compromise arrived at between the plaintiff and the second defendant have not been set out and therefore, the first defendant had no opportunity to file a detailed written statement regarding the fraud committed by the plaintiff and the second defendant and regarding the collusion between them in arriving at a compromise.

14. The learned counsel though referred to a number of judgments, all of them are not being referred to except the following three judgments which have got direct bearing on the substantial question of law to be decided in the above second appeal.

a. Annamalai Chettiar v. Malayandi Appaya Naick and Others ((1906) 16 MLJ 372).

b. Annamalai and Others v. Chellakutti (AIR 1963 Madras 300 = (1963) 76 L.W. 215).

c. A. Palaniappa Mudaliar and others v. Sivanmalai Gounder and another (71 LW 391).

15. The learned counsel relied upon a Full Bench decision of this Court reported

in (1906) 16 M.L.J. 372 (Annamalai Chettiar v. Malayandi Appaya Naick and Others). The question that was referred to the Full Bench was whether the doctrine of lis pendens, as embodied in Section 52 of the Transfer of Property Act applies when the suit during the pendency of which the transfer takes place is subsequently compromised and a decree is given in pursuance of the compromise, or, in other words, was the case of Vythinadayyan v. Subramanya (1889) ILR 12 Mad. 439 rightly decided"

In the said decision, in paragraph 15 it has been laid as under:-

"The essence of the doctrine of lis pendens undoubtedly is that where a proceeding before a Court exercising contentious jurisdiction is honestly brought out to a termination in one of the modes which the law permits to be terminated by and a decision of the Court is obtained, such decision is binding upon all persons who claim title by virtue of a transfer pending the litigation. With reference to this underlying principle there is no conceivable reason for attaching greater efficiency to a decision arrived at after actual contest than to decisions arrived at otherwise."

In the same decision, in paragraph 9 it has been observed as under :-

"Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end."

In paragraph 13 of the very same decision, it has been laid down as under: -

"I think Section 52 of the Transfer of Property Act should be construed as applying to the case of a compromise decree in the absence, of course, of anything in the nature of fraud or collusion. This seems to be the natural construction of the section and it is in accordance with the principles on which the doctrine of lis pendens is based."

16. The learned counsel for the appellant relied upon a Division Bench of this Court reported in AIR 1963 Madras 300 = (1963) 1 MLJ 154 = (1963) 76 L.W. 215 (Annammal and Others v. Chellakutti). In that decision, the Division Bench has followed the legal principles laid down in the aforesaid Full Bench decision of this Court. The learned counsel for the appellant also relied upon a decision of the learned Single Judge of this Court reported in 71 L.W. 391 (A. Palaniappa Mudaliar and Others v. Sivanmalai Gounder and another). In that decision the learned Judge has referred to and relied upon the aforesaid Full Bench decision of this Court and other decisions. In that decision it is observed that the only suit now excluded from the Doctrine of Lis Pendens is a collusive suit.

17. The learned counsel also relied upon a decision of the Apex Court reported in 2008 (15) SCALE 158 (Bachhaj Nahar v. Nilima Mandal and Another). In that

decision, the Hon"ble Apex Court has referred to and relied upon the following passage from the decision of the Constitution Bench of the Apex Court in Bhagwati Prasad Vs. Shri Chandramaul,

"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, though indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case."

In the very same decision, the Apex Court has also referred to the decision of the Apex Court rendered in the case of Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, wherein the principle laid down in the judgment of the Constitution Bench was reiterated. In the said decision, it is observed as under: -

"It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issue by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

18. Only basing reliance on the aforesaid observation contained in paragraph 13 of the Full Bench Decision, the learned counsel for the appellant submitted that on the basis of the compromise decree passed in O.S. No. 787 of 1981 the doctrine of lis pendens cannot be invoked to invalidate the purchase made by the appellant from the second defendant as the compromise decree itself has been arrived at by fraud and collusion between the plaintiff and the second defendant.

19. In paragraphs 8 and 9 of the written statement, which have been extracted above, except the following sentence, namely, "the sale is not vitiated by the doctrine of lis pendens", the first defendant has nowhere stated in the written statement that the compromise is vitiated by fraud or the compromise was the result of any collusion between the plaintiff and the second defendant. Even in Ex.A5 reply notice dated 10.4.1991 sent to the legal notice issued by the plaintiff neither fraud nor collusion has been alleged. In the reply notice except stating that the appellant was a bonafide purchaser for valuable consideration and she was not aware of the court proceedings, no other allegations have been made questioning the genuineness of the compromise decree. This aspect has been

considered by both the Courts below.

20. It is also pertinent to point out that the first defendant/appellant has not entered the witness box. D.W.1 claiming himself to be the manager of the appellant got examined on the side of the appellant. In his evidence also, D.W.1 has not whispered anything regarding the alleged fraud in obtaining the compromise decree or alleged collusion between the plaintiff and the second defendant. In the course of cross examination of P.W.1 a suggestion has been put to P.W. 1 regarding collusion and the following answers have been elicited, namely, "compromise memo Apart from that no other suggestion has been put and no worthwhile answers have been elicited from PW. 1 which lends support to the contention that the compromise is vitiated by fraud or collusion. When there is total lack of pleadings and also there is absolutely no evidence, this Court wonders as to how the above substantial question of law arises for consideration in the above second appeal. As rightly contended by the learned counsel for the respondent the above substantial question of law in the light of the pleadings and evidence available on record does not arise for consideration in the above second appeal.

21. It is true that as contended by the learned counsel for the appellant that the pleadings in mofussil courts are loosely drafted and a liberal construction has always to be given to such pleadings but this is a case of no pleading at all and therefore, the contention of the learned counsel cannot be countenanced.

22. In 2008(15) SCALE 158 itself, the Apex Court in paragraphs 12 and 17 has also laid down as under:-

12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the very necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred, to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case.

17. In the absence of a claim by plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right. In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right."

(emphasis supplied)

23. As laid down by the Apex Court in the aforesaid decision that a case not specifically pleaded can be considered by the court where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. But in the case on hand, it has to be pointed out that the pleadings does not contain necessary averments to make out a particular case and no issue relating to fraud or collusion has been framed and the parties were not aware that such issue would arise for consideration in the suit and they have not led any evidence on those aspects.

24. Further, in the very same decision, the Apex Court has emphasised that only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. Since the case was not specifically considered by the court, as pointed out above, this is not one such exceptional case. Both the courts below have pointed out that there is total lack of pleadings and evidence in respect of the alleged fraud or collusion sought to be raised during the course of arguments.

25. It is also pertinent to point out that a suggestion has been put to P.W.1 suggesting that in the compromise memo signature was obtained by fraud and the said suggestion has been denied by P.W.1. Another suggestion has been put to P.W. 1, namely, "he was in collusion" and the said suggestion also has been denied by P.W.1. Both the aforesaid suggestions run counter to each other. If fraud is suggested in obtaining the compromise decree then the plea of collusion cannot stand along with the suggestion regarding fraud. If by playing a fraud upon the second defendant, the compromise decree was obtained then the collusion between the plaintiff and the second defendant does not arise at all. Similarly, if the collusion is accepted then the plea of fraud will not arise. Therefore, it has to be pointed out that without raising any plea in the written statement some suggestion has been put by the learned counsel during the course of cross examination of P.W.1 without understanding the difference between fraud and collusion. For the aforesaid reasons, I am unable to countenance the submissions made by the learned counsel for the appellant.

26. The contention of the learned counsel for the appellant that though the suit filed by the plaintiff was initially contentious because of the passing of collusive compromise decree the suit itself has become non-contentious and hence, the

doctrine of lis pendens is not applicable cannot be countenanced. It is difficult to see that how the compromise of the suit between the parties subsequent to the transfer can be held to render the suit non-contentious at the time of the transfer or, indeed, at any time. The very fact of the compromise shows that the suit was contentious. Moreover, if the compromise of a suit were, held to render it non-contentious, it would never be safe for any party to enter into a compromise, since by so doing he would jeopardise the fruits of the decree, which might be made of no effect by a transfer made behind his back by the other party. I find no reason why the law should be such as to involve consequences so completely at variance with the principles on which the doctrine of lis pendens is based.

27. In this context, it is pertinent to refer to the law laid down by the Hon'ble Three Judges Bench of the Apex Court in the decision reported in (2001) 3 SCC 179 = 2001-3-L.W. 308 (Santosh Hazari v. Purushottam Tiwari (deceased) by LRs.)

"In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.⁵ the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju⁶:

"[W]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law."

and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

In the very same decision, the Apex Court has further held as under:-

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding

precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case."

28. If the principles of the aforesaid decision of the Apex Court is applied to the facts of the case, then it has to be held that since the question of law that has been framed had already been decided by a Full Bench of this Court as early as 1906 itself and reported in (1906) 16 M.L.J.372 referred to above, the above substantial question of law cannot be considered to be a substantial question of law at all Further, to be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts.

29. As pointed out above, there is absolutely no pleading or evidence in this case and as such, no foundation whatsoever has been laid in the pleadings and therefore, the above substantial question of law, in the considered view of this court, does not arise for consideration, in the above second appeal. It has to be pointed out that both the Courts below have considered the pleadings and entire evidence on record thoroughly and their findings are based on the evidence available on record and correct principles have been applied to the facts of the case and as such the same do not call for any interference at the hands of this Court. It is pertinent to point out that both the Courts below have concurrently found that Kuppusamy Mudaliar after executing Ex.A1 settlement deed, dated 25.6.1981 in favour of is son, the plaintiff and having not reserved any right to revoke the settlement deed could not have executed Ex.B1, dated 4.8.1981 revoking Ex.A1 and therefore, Kuppusamy Mudaliar had no right to execute Ex.B2 settlement deed, dated 9.8.1991 in favour of his daughter, the second defendant and accordingly, upheld the Ex.A1 settlement deed and granted decree declaring the title of the plaintiff to the suit property. But while admitting the above second appeal being satisfied with the correctness of the findings recorded by the Courts below, the learned Judge of this Court has not chosen to frame any substantial question of law on the issue relating to Ex.A1 and the decree declaring the title of the plaintiff. The learned counsel for the appellant had also not raised any substantial question of law on the said issue. Therefore, the said finding regarding the title to the suit property has become final. Once the title to the suit property has become final, it goes without saying that the second defendant had no right to convey any title in respect of the suit property in favour of the first defendant and therefore, on that ground itself, the appellant cannot get any relief in the above second appeal and thus the above substantial question of law framed in the above second appeal has become academic. For the foregoing reasons, the substantial question of law is answered against the appellant and the above second appeal fails and the same is dismissed with costs throughout.