

(1968) 10 MAD CK 0022
In the Madras High Court
Case No : Second Appeal No. 1902 of 1964

Kamatchi Ammal	Vs	APPELLANT
Athigamudaya Pillai and Others		RESPONDENT

Date of Decision : 29-10-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9

Citation : AIR 1969 Mad 426 : (1969) 82 LW 113 : (1969) 1 MLJ 440

Hon'ble Judges : Alagiriswami, J

Bench : Single Bench

Advocate : R. Gopalaswami Iyengar, for the Appellant; N.K. Ramaswami, for the Respondent

Final Decision : Allowed

Judgement

Alagiriswami, J.—The plaintiff is the appellant. The suit property originally belonged to one Urkavalan Pillai, who settled it upon his wife,

Kunjarathammal, under a document, Ex. A-1, dated 19-8-1924. Kunjarathammal and Urkavalan Pillai executed a possessory mortgage, Ex. B-1,

on 7-6-1939 in favour of the first defendant. The suit out of which the second appeal arises was for redemption of this mortgage. Defendants 2 to

6 are the sons of Urkavalan Pillai's brother, Arumugham Pillai. D-7 is a daughter-in-law of his. The plaintiff is a successor-in-interest of a

purchaser from Urkavalan's wife under Ex. A-2. Defendants 2 to 7 contended that the properties were the joint family properties of Urkavalan

Pillai and their father, and that therefore Urkavalan Pillai had no right to settle them on his wife. They also claimed that they were in possession for

over the statutory period and perfected title by adverse possession. Both these points have been found against them.

2. There was an earlier suit, O.S. 211 of 1959, filed by Arumugha, for recovery of possession of the suit properties after declaring that the two alienations by Urkavalan's widow were void and against his reversionary interest. Arumugham Pillai died and that suit was allowed to abate. The question, therefore, arises also whether the earlier decision would bar defendants 2 to 7 from questioning the alienation by Kunjarathammal. The sale by Urkavalan's widow was in discharge of two earlier mortgages executed by herself and her husband, for Rs. 150 received by her for the funeral expenses of her husband and Rs. 150 received by her in cash. The settlement deed in her favour stated that she was to enjoy the property and not to alienate the property without reference to the settlor and that the settlor himself should not alienate the property without reference to the settlee. The next question that arises therefore is whether after the death of Urkavalan Pillai the terms of the settlement deed would still bind his widow or she would become a holder of a widow's estate entitled to alienate the estate for legal necessity. I do not think that, that question need be gone into in the view that I take of the effect of the earlier decision in O. S. 211 of 1959. Defendants 2 to 7 claimed only as the legal representatives of the plaintiff in O. S. 211 of 1959.

3. The Privy Council in *Brij Indar Singh v. Lala Kanshiram*, 33 MLJ 486 = AIR 1917 PC 156 had stated that Section 371 of the old Civil Procedure Code, corresponding to Order 22, Rule 9 only hurts the plaintiff. Then they pointed out that an order abating a suit may be said to be really tantamount to a judgment in favour of the defendant. This observation is relied upon on behalf of the appellant. But then this decision did not deal with a case of a plaintiff in an earlier suit being a defendant in a subsequent suit. In *Rahim Unnissa Begum v. Srinivasa Aiyangar*, 38 MLJ 266 AIR 1920 Mad 580 a Bench of this Court had to consider the effect on the right of parties in a subsequent suit, of the result of an earlier suit which had been allowed to abate. In considering that question the Bench referred to the dictum of the Privy Council above mentioned and then stated that so long as the plaintiff is unable to vacate the judgment and so long as the defendant continues in possession he can plead against the plaintiff and those claiming under him that the order of abatement is conclusive of rights to the property, and that the only course open to the legal

representative if he wants to escape the abatement order is to apply for setting aside the abatement and so long as it is unreversed it would be

binding on him. The discussion is only about the effect of the abatement of the earlier suit when the plaintiff in the earlier suit or his legal

representatives bring the subsequent suit.

But the Bench also referred to the decision in *Jayasing v. Gopal*, (1904) 6 Bom LR 638, wherein a Bench of the Bombay High Court held that

where the legal representatives of the plaintiff, on whose death the suit abated, got into possession of the property they were entitled to resist the

suit brought to oust them from possession, and that the previous order of abatement did not preclude them from setting up title. If this decision of

the Bombay High Court is correct, there is no doubt that in this case defendants 2 to 7 would, notwithstanding the abatement of the earlier suit

brought by the father, be entitled to set up their own title. What is urged on behalf of the respondents is that when the Bench of this Court often

referring to this decision, in the next sentence say that accepting this judgment as rightly laying down the law it does not affect the present one, the

Bench should be deemed to have accepted as correct the decision in (1904) 6 Bom LR 638. I do not think that this is correct. It only means that

even if the Bombay judgment is accepted to be correct it did not affect the case before the Bench. In any case the ratio of the decision of the

Bench was not the same as in (1904) 6 Bom LR 638, and therefore, there is no decision of this Court which is binding on me and which could

compel me to hold that where the previous suit has abated the plaintiff in that suit can in a subsequent suit against him plead that the decision in the

earlier suit would not bar his defence. The Lahore High Court in *Raju v. Ramchand*, AIR 1933 Lah 752 has taken a view contrary to the Bombay

view. The Lahore High Court does not refer to the decision in (1904) 6 Bom LR 638. They merely say that where the plaintiff cannot bring a fresh

suit to establish his title he cannot resist the claim of the plaintiff (in the fresh suit) in spite of the definite finding in the earlier suit.

It appears to me that the decision of the Lahore High Court is more in accordance with the principles embodied in Order 22, Rule 9. Surely if the

plaintiff whose suit has abated cannot again bring a fresh suit on the same cause of action, and the earlier decision should be deemed to be a

decision against him, he cannot get rid of the effect of the earlier decision just because he happens to be a defendant in a subsequent suit. Even in

the subsequent suit where he is a defendant it should be held that he would be barred from agitating the same questions which he could have

agitated in the earlier suit and which because of the provisions of Order 22, Rule 9 he is prohibited from agitating in a subsequent suit as a plaintiff.

The fact that he is merely a defendant in the subsequent suit does not seem to affect the Principle embodied in Order 22, Rule 9. I am therefore, of

opinion that the decision of the Lahore High Court is preferable to the decision of the Bombay High Court. Following the decision of the Lahore

High Court I hold that defendants 2 to 7 are barred from raising the questions which the father of defendants 2 to 6 had sought to raise in the

earlier suit in O. S. 211 of 1959. It follows, therefore, that the plaintiff is entitled to succeed in the suit.

4. The appeal is accordingly allowed and the suit will stand decreed. As the question at issue is rather a difficult one on which no authority of this

Court is found I will order both the parties to bear their own costs in this Court. Leave granted.