
(1968) 08 MAD CK 0041
In the Madras High Court

Kathoon Bivi Ammal and Another

APPELLANT

Vs

Arulappa Nadar and Another

RESPONDENT

Date of Decision : 23-08-1968

Acts Referred:

Contract Act, 1872 — Section 208

Citation : (1969) 1 MLJ 241

Hon'ble Judges : A. Alagiriswami, J

Bench : Division Bench

Judgement

A. Alagiriswami, J.—This appeal arises out of O.S. No. 42 of 1962. Defendants 2 and 1, who are husband and wife are the appellants. The first defendant filed O.S. No. 17 of 1962 against her step-daughter, Fareeda Beevi, her husband and the plaintiff in O.S. No. 42 of 1962 for a declaration that the two mortgage deeds executed by her step-daughter's husband, the third defendant in that suit, one in favour of her stepdaughter, the first defendant in that suit, and the other in favour of the second defendant in that suit, who as already mentioned is the plaintiff in O.S. No. 42 of 1962, were void and not binding on her. The third defendant in that suit was her power-of-attorney agent and in that capacity, he executed the mortgages in favour of the first and second defendants in that suit. On the ground that they had been executed by him after she had cancelled the power-of-attorney in favour of the third defendant that suit was decreed and there was no appeal, against it either by the first or by the second defendant. O.S. No. 42 of 1962 was filed by the second defendant in O.S. No. 17 of 1962 against the plaintiff in O.S. No. 17 of 1962 as the first defendant, her husband as the second defendant, a tenant under the first defendant as the third defendant and the son-in-law of defendants 1 and 2 as the fourth defendant, this son-in-law being the third defendant in O.S. No. 17 of 1962. O.S. No. 42 of 1962 was dismissed. As against that dismissal, the plaintiff in O.S. No. 42 of 1962 filed an appeal and that appeal was allowed and the suit decreed. Defendants 1 and 2 have, therefore, come upon appeal to this Court. The trial Court held that the first defendant had cancelled the power-of-attorney executed by her in favour of

the fourth defendant on 2nd September, 1958, and that, therefore, the mortgage executed by the fourth defendant in favour of the plaintiff was not valid. But it gave a decree against the fourth defendant for the sum due on the mortgage. The lower appellate Court also held that the power-of-attorney was validly cancelled though there seems to be some confusion in its mind with regard to this point as seen from its discussion in paragraphs 9 and 10 of its judgment. However, on the ground that u/s 208 of the Indian Contract Act, the termination of the authority of an agent does not take effect, so far as regards third persons, before it becomes known to them. The cancellation would not bind him and consequently the mortgage deed executed by the fourth defendant in favour of the plaintiff was valid. But it gave only a charge decree for the mortgage amount. The plaintiff has, therefore, filed a memorandum of cross-objections and wants a decree for possession of the mortgaged property to be granted in his favour. "

2. As both the Courts below have held that the power-of-attorney executed by the first defendant in favour of the fourth defendant has been validly cancelled by her even before the fourth defendant executed the mortgage in favour of the plaintiff, the only question that arises is whether u/s 208 of the Indian Contract Act, such cancellation will have the effect of making the mortgage executed by the fourth defendant void as against the first defendant. Section 208 of the Indian Contract Act is as follows :

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

3. Illustration (6) to this section is as follows:

(b) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay and afterwards by letter, revokes his authority to sell and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B, the money, with which B absconds. C's payment is good as against A.

This illustration is apposite to the facts of this case. In Mulla on Indian Contract Act, Students Edition, Eighth Edition, page 226, the case of Trueman v. Loder (1840) 2 A. & E. 589, is referred to. That was a case where A traded as B's agent with B's authority all parties with whom A made contracts in that business were held to have a right to hold B liable to them until B gives notice to the world that A's authority is. revoked; and it makes no difference if in a particular case the agent intended to keep the contract on his own account. It is argued on behalf of the appellant that it is very unreasonable to expect that the first defendant should inform the whole world that she had cancelled the power-of-attorney given to the fourth defendant, and that she cannot be expected to approach everybody with whom the fourth defendant was likely to enter into

contract and inform them of the cancellation. I do not think that such considerations have any relevance in the face of the clear words of the section. The policy of the law, apparently in the interests of trade and commerce, is that the agent's action should bind the principal, even though the principal might have cancelled the agent's authority unless the third persons with whom the agent enters into contracts knew of the termination of the agency. On this point, therefore, the conclusion of the lower appellate Court is correct, and it should be held that the mortgage executed by the fourth defendant in favour of the plaintiff is valid and binding on the first defendant.

4. One point, which was strenuously urged by the appellants in this Court was that this appeal is barred by *res judicata*. The argument is put thus : The first defendant in O.S.No 42 of 1962 obtained a decree in O.S. No. 17 of 1962 holding that the mortgage executed by the fourth defendant in favour of the plaintiff and Fareeda Beevi, who were the first and second defendants respectively in that suit (O.S. No. 17 of 1962) was void and not binding on the first defendant, who was the plaintiff in that suit. There was no appeal against that decree. It has, therefore, become final and operates as *res judicata* because the same question arises in this suit. On the other hand, it is urged on behalf of the contesting respondent that this question was not raised by the first defendant in his appeal before the lower appellate Court and that if she had raised that question he could at least have filed an appeal with a petition to excuse delay and that the appellants should, therefore, not be allowed to raise this question of *res judicata* in this Court. There is considerable force in this contention. But all the same I will discuss the question of *res judicata* that has been raised.

5. There is no doubt that the question that arises for determination in this suit is the same as in O.S. No. 17 of 1962. The present first defendant wanted a declaration that the mortgage executed by the present fourth defendant in favour of the present plaintiff was not binding on her. This suit, O.S. No. 42 of 1962, was for a declaration of the plaintiff's right in respect of that very *othi*. The following were the issues framed in O.S. No. 17 of 1962:

- (1) Whether the cancellation of the power given to the 3rd defendant by the plaintiff is true and valid?
- (2) Whether the suit documents executed by the 3rd defendant as agent of the plaintiff are null and void?
- (3) Whether they were executed by the third defendant *bona fide* for purposes binding on plaintiff?
- (4) To what relief, if any, is the plaintiff entitled?

The following were the issues framed in O.S. No. 42 of 1962:

- (1) Whether the 4th defendant was a power-of-attorney agent of the first defendant on the date of the suit mortgage bond? If not whether the said bond executed by him in favour of the plaintiff is void and unenforceable?

- (2) Whether the said bond is sham and nominal and not supported by consideration?
- (3) Whether the plaintiff is not entitled to delivery of possession of the suit properties?
- (4) Whether the plaintiff is entitled to claim damages?
- (5) Whether the amount of profits claimed by the plaintiff is excessive?

It would be noticed that issues 1 and 2 in O.S. No. 17 of 1962 and 1 and 2 in O.S. No. 42 of 1962 are in respect of the same question, though the wording of the issues is different in O.S. No. 42 of 1962 and the onus is thrown on the plaintiff. Both the suits were tried together by consent and all the evidence was recorded in common. Both these sets of issues were discussed together by the trial Court and its finding is found at the end of paragraph 21 of its judgment in the following terms:

I hold on issue 1 in O.S. No. 17 of 1962 that the cancellation of the power given to the 3rd defendant by the plaintiff is true and valid. On issue No. 2 in O.S. No. 17 of 1962, I hold that the suit documents executed by the 3rd defendant as agent of the plaintiff are null and void against the plaintiff. On issue 1 in O.S. No. 42 of 1962 I hold that the 4th defendant was not a power-of-attorney agent of the first defendant on the date of the suit othi bond and that the bond is void and unenforceable against the plaintiff. On issue No. 2 in O.S. No. 42 of 1962 I hold that the suit bond is supported by consideration and that the 4th defendant is liable to pay the othi amount to the plaintiff.

These two sets of issues are the crucial issues in the two suits, and the question that arises is the same in both the suits, that question being whether the power-of-attorney executed by the first defendant in favour of the fourth defendant, had been validly cancelled. Both the Courts have held that the suit mortgage bond is supported by consideration in the sense that the plaintiff has paid consideration towards it. I cannot, therefore, accept the contention on behalf of the appellants that issues in the two suits are different and the question that arises for decision is different in the two cases. Therefore, the decision of this Court in Panchanada Velan Vs. Vaithinatha Sastrial and Others, , would govern the facts of this case. There it was held that where cross-suits between the same parties on the same facts were tried together and judgment was given on the same day, but separate decrees were passed and an appeal was preferred against one of the decrees alone that the decree unappealed did not operate as a bar u/s 13 (present Section 11) of the CPC so as to preclude the appellate Court from dealing with the decree appealed against, and that the doctrine of res judicata has no application when the very object of the appeal, in substance if not in form is to get rid of the decision which is pleaded in bar. The Full Bench that decided the case followed the decision in Abdul Majid v. Jew Narain Mahto ILR (1889) Cal. 233, and by implication refused to follow the decision in Gururajamman v. Venkatakrishna Chetti ILR (1901) X Mad. 350. The following

discussion of this question is very apt to the facts of this case:

Technically, no doubt, the tenant's appeal ought to have been in both suits and the proper course for the District Judge to have taken would have been to require the appellant to amend his memorandum of appeal so as to make it an appeal in both suits; but the fact that the tenant only appealed in his own suit and did not prefer an appeal in the landlord's suit did not preclude the District Judge from deciding upon the merits the questions raised in the appeal which was before him. The subject-matter of litigation in the two suits was the same, the evidence was the same, and the two suits were tried together. The reasons for which the tenant's suit was dismissed were the reasons for which judgment was given in favour of the landlord in his suit.

We do not think that, either u/s 13 of the Civil Procedure Code, or on general principles, the doctrine of *res judicata* has any application to the facts of this case. The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the Appellate Court is asked to decide *res judicata*. The tenant's appeal in his suit if successful would have the effect of superseding the adjudication in the landlord's suit.

In *Pappammal alias Muthu Karuppayee Ammal Vs. Meenammal and Others*, , the Bench which made reference to the Full Bench, had to consider this question. They referred to the decision in *Panchanada Velan Vs. Vaithinatha Sastrial and Others*, , and pointed out that Full Bench had clearly indicated the principle to apply in the circumstances of the case that where the object of the appeal being in substance, if not in form, is to get rid of the very adjudication which is put forward as constituting *res judicata* that the adjudication should not be held to bar the appeal. The Bench also added the qualification that the decision must have been rendered at the same time and the suits must have been tried together but it was not material that they must be cross-suits. The Bench then referred to the decision in *Ramaswami Chetti v. Karuppan Chetti* (1915) 29 M.L.J. 551 which followed the Full Bench decision in *Panchanada Velan Vs. Vaithinatha Sastrial and Others*, , and held that that decision is not to be confined to cross suits only but that it is equally applicable to suits between the same parties in which a common question is raised and decided and an appeal is preferred in only one of the suits. Paragraph 1 of the head note in *Ramaswami Chetti v. Karuppan Chetti* (1915) 29 M.L.J. 551, is to the following effect.

Where the matter in issue in two suits was the same and suits were tried together on the same evidence and disposed of by the same Judge, and the judgment in the one case was based on and followed the judgment in the other, though separate decrees were drawn up, an appeal against one of these decrees is not barred by *res judicata* by reason of the fact that no appeal was filed against the other decree.

6. In the decision in *Lakshmi Ammal v. The Official Receiver, Tinnevely* (1934)

67 M.L.J. 364, Beasley, C.J. referred to the sentence in the Full Bench judgment to the following effect.

It would lead to startling results if we were to hold that an appellate tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts but in a case other than the case under appeal, had given a decision which had not been appealed against, at the same time as the decision in the case under appeal

and held that the doctrine of res judicata had no application when the very object of the appeal was to get rid of the decision pleaded in bar. In K.V. Narayanaswami Aiyar Vs. Sevadappa Goundar, , the decision in Lakshmi Ammal v. The Official Receiver, Tinnevely (1934) 67 M.L.J. 364, was followed. In M.C.A.R.C.S. Chockalinga Thevar Firm Vs. K.A. Sankarappa Naicker and Another, , it was held thus:

Where during the pendency of an appeal against the finding in a suit, the same issue had been raised and decided differently in another suit in the same Court later by a different judge and such later decision had been allowed to become final it will operate as res judicata in the appeal against the earlier decision.

But this decision cannot help the appellants because there were different decisions in different suits tried on different occasions by different Judges. In Mulla's Commentaries on the CPC at page 38 of Edition 11, the learned author says:

The preponderance of judicial decisions in different High Courts is in favour of the view that the judgment not appealed against does not become res judicata. This is on the ground that a decision given simultaneously cannot be said to be a decision in a former suit.

7. In Subbiah Udayar v. Karupiah Udayar ILR (1965) 1 Mad. 57, a Bench of this Court referred to the decision in Badri Narayan Singh v. Kamdeo Prasad Singh (1962) 1 S.C.J. 63 : (1962) 1 M.L.J (S.C.) 39 : (1962) 1 A.W.R. (S.C.) 39 : (1962) 3 S.C.R. 759, relied upon by the appellants in this case and pointed out that that case related to two appeals arising out of one proceeding before an Election Tribunal the subject-matter of the appeals being different and separate decrees were drawn, and that there was one further appeal against the order in one appeal only, and remarked Subbiah Udayar's case ILR (1965) 1 Mad. 57:

It was held that the finding in the unappealed decree would operate as res judicata. The Supreme Court in that very decision has recognised that when there is a single suit, the question of res judicata does not arise merely because there are two decrees based on the same judgment.

The Bench referred to an earlier decision of the Supreme Court in Narhari and Others Vs. Shankar and Others, , where it was pointed out that the question of res judicata arises only when there are two suits and that even when there are two suits, it has been held that a decision given simultaneously cannot be a

decision in the former suit, that when there is only one suit, the question of res judicata does not arise at all and as that in case, both the decrees were in the same case and based on the same judgment and the matter decided concerned the entire suit there was no question of the application of the principle of res judicata. The Bench held as follows:

Where there is only one the question of res judicata does not arise at all. Both the decrees in the instant case are based on the same judgment and matter decided concerns the entire claim. The subject-matter in dispute between the parties in substance can be regarded as forming one only. By virtue of the peculiar procedure obtaining in regard to applications filed u/s 42 of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) it has been the practice for such claimant to compensation money to file his own application.

In such a case, the applications are consolidated for the purpose of hearing and a common judgment given. Both the applications in the instant case must be regarded therefore, as comprising a single controversy and that they should be regarded as constituting a single proceeding as the subject-matter is the same. There is no question of the application of the principle of res judicata to such a case.

8. The above decision and the discussion therein would show that the decision relied upon by the appellants in *Badri Narayan Singh v. Kamdeo Prasad Singh* (1962) 1 S.C.J. 63 : (1962) 1 M.L.J. (S.C.) 39 : (1962) 1 A.W.R. (S.C.) 39 : (1962) 3 S.C.R. 759, has no application to the facts of this case. Another case relied upon by the appellants is in *Sheodan Singh Vs. Smt. Daryao Kunwar*, . It was there held as follows:

Where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal Court will be res judicata and the appeal Court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits and if that is so, the decision of the appeal Court will be res judicata.

That really does not apply to the facts of this case, as would be seen from paragraph 19 of that decision at page 1338. Their Lordships referred to the case in AIR 1947 248 (Nagpur) . In that case two suits were consolidated by consent of the parties and there were certain common issues. Appeal was taken from the decision in one suit and not from the decision in the other, and it was urged in the High Court that the decision in the other suit had become final. The High Court applied the principle that res judicata could not apply in the same proceeding in which the decision was given and added that by a parity of reasoning it could not apply to suits which were consolidated. They pointed out that the view taken in *Panchandavelan v. Vaithinatha Sastri* I.L.R (1906) Mad.

M.L.J. 63, is similar to the one case in AIR 1947 248 (Nagpur) and that they need not express an opinion as to their correctness. The authority of the decision in Panchandavelan v. Vaithinatha Sastrial (1906) I.L.R 29 Mad. M.L.J. 63, which has been consistently followed in this Court has not been shaken by either of the two decisions relied upon by the appellants. It follows, therefore, that in this case, the appeal is not barred by res judicata. The two suits were tried together by consent, the issues raised a common question, the evidence was the same, the decision in one suit followed the decision in the other suit, the effect of the appeal in one suit was in substance to get rid of the common decision and therefore, the fact that an appeal was filed only against the decree in one suit, but not against the decree in the other suit does not mean that the decree in the suit not appealed against became res judicata. . . .

9. The second appeal fails and is, therefore, dismissed. The decree passed by the lower appellate Court is a charge decree and may be executed.

10. I do not think there is any justification in this case for allowing the cross-objections. The lower appellate Court has apparently taken the equities of the case into consideration. After all the suit was decreed against the first defendant on purely technical considerations. It is rather hard on her that notwithstanding the cancellation by her of the power-of-attorney given in favour of her son-in-law the fourth defendant she should be made to pay the plaintiff because of the fraud played by the fourth defendant. The memorandums of cross-objections is also dismissed. There will be no order as to costs.

11. No leave.