

(1922) 12 MAD CK 0070
In the Madras High Court

Koonamvelli Unnara (dead) and Another	APPELLANT
Vs	
Koyiparambath Perinkitayil Kunhi Raman and Others	RESPONDENT

Date of Decision : 11-12-1922

Acts Referred:

Citation : AIR 1923 Mad 514 : (1923) 17 LW 322 : (1923) 44 MLJ 443

Hon'ble Judges : Wallace, J

Bench : Division Bench

Judgement

Wallace, J.—The Substantive points for decision in this appeal are two both questions of res judicata. The plaintiffs (contesting respondents) are the junior members of a Marumakattayam tarwad in Malabar and they bring this suit to eject among others the appellant from the plaint property on the ground that the plaint property is the property of a Devaswom which is itself the property of their tarwad. The appellant claims under the third defendant, who was the son of one Sankaran, and claims that the plaint property was the property of Sankaran, that Sankaran followed Makkathayam law and that the third defendant therefore succeeded to the property after his father's death and passed it on to him. On this point, the plaintiffs claim that Sankaran followed Marumakkathayam Law, and therefore his successor in title to the property was not the third defendant but their own tarwad, of which, according to them, Sankaran was the Karnavan when he died. One of the main points for decision by the lower Courts therefore was whether Sankaran's property descended to his son or to the plaintiffs' tarwad in other words, whether Sankaran followed the Makhathayam or Marumakkhathayam Law. This very question was raised and decided in a previous suit, O.S. No. 433 of 1898 on the file of the District Munsif of Payyoli to which the third defendant and the then Karnavan of the plaintiffs' tarwad were parties and it was then decided that Sankaran followed Makkhathayam Law, and that the Karnavan of the tarwad was not his heir. This finding was upheld on appeal by the District Court of North Malabar and is a final decision binding on the parties and their successors in title. The plaintiffs contend that this decision is not res judicata against them, but we are of opinion that that contention

cannot prevail and that the lower Courts have erred in holding that it is not.

2. The plaintiffs' contention, which has been upheld by the lower appellate Court, is that O.S. No. 433 of 1898 was dealing with a case of self-acquisition of Sankaran and that in such case it was not necessary for the Court to record a general finding that Sankaran followed Makkathayam Law, and that therefore the finding, being unnecessary for the decision of that case, does not constitute *res judicata*. It was argued further that, even if it did not appear on the face of the record in that suit that the Court was dealing with a case of self-acquisition, it will still be open to the plaintiffs in this suit to adduce evidence to prove that it was so. To the latter proposition we must demur. A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide, no more and no less. If there is any ambiguity as to what it decided, which cannot be cleared up without further evidence, then it will not be clear finding and therefore not a case of *res judicata* at all.

3. A consequential contention by the plaintiffs that Sankaran followed Makkathayam as regards his self-acquisition and Marumakkathayam as regards his tarwad property appears to us to be a pure speculation and contrary to the decision in O.S. No. 433 of 18.98. Taking the judgment in that suit as it stands, we can find nothing in it to indicate that the Judge was dealing with any case of self-acquisition, but much to the contrary effect. The subject matter of the suit was an amount due to Sankaran on the redemption of a kanom which had been paid into Court pending the decision as to who was his legal representative, and the issue to be decided definitely was who was his, legal representative entitled to the money. The karnavan sued on the ground that Sankaran followed Marumakkathayam and the third defendant pleaded that Sankaran followed Makkathayam. The issue was perfectly clear, and the finding equally clear, that Sankaran followed Makkathayam. There is no suggestion anywhere that it was a case of intestacy in the matter of self-acquired property. The lower appellate Court has assumed without giving any reasons that the suit related to self-acquisition. It was obviously strongly influenced to that assumption by its conclusions that the property in the suit before it belonged to the plaintiffs' tarwad and not to Sankaran's sons. We must dissent from its assumption and hold that the question whether Sankaran followed Marumakkathayam or Makkathayam is *res judicata*, in a decision binding on the plaintiffs and their tarwad.

4. Apart from the judgment in that suit, there are three strong indications that the plaintiffs' tarwad had never dreamt that that judgment applied only to Sankaran's self-acquisition until the appeal in the lower appellate Court. The first is the grounds of appeal to the District Court against the decision in O.S. No. 433 of 1898 vide Ex. II which show clearly that the general point as to the law governing Sankaran's property was directly raised.

5. As to the second, in order to make this clear it is necessary to refer to a further litigation covering the very property now in this suit. In O.S. No. 195 of

1902 on the file of the District Munsif of Quilandy, the third defendant sued as heir of Sankaran a lessee under Sankaran for the recovery of the present property, and the suit was resisted by the present first defendant, (now karnavan of plaintiffs" tarwad, but not then karnavan), on the ground that he held the property as manager of the Perinkitayil Bhagavathi Devaswom which owned it. According to the plaintiffs in the present suit the Devaswom belongs to the plaintiffs" tarwad. So the issue in that suit again raised the question whether the successor to Sankaran's rights was his son or the plaintiffs" tarwad. It was there again held that Sankaran followed Makkathayam and not Marumakkathayam and that his son was his successor in title.

6. When the third defendant took out execution proceedings and attempted to get delivery through the Court the then karnavan of the plaintiff's tarwad obstructed the delivery and claimed the property for the tarwad. This matter was decided by the District Munsif in M.P. No. 936 of 1903, and by his order in that he decided against the tarwad, and ordered the obstruction to be removed on the ground that the tarwad's claim had already been negated, and the third defendant got delivery of the property on 2nd May, 1903. It is significant that even in these proceedings there was no suggestion that the previous suit, O.S. No. 433 of 1898, which was referred to and relied on by the third defendant throughout in O.S. No. 195 of 1902, related to Sankaran's self-acquisition. Some attempt to save the property for the tarwad was made in the execution proceedings, but even there, so far as appears from the order, the contention in the reply petition by the Karnavan-which has not been produced before us,--was merely that the previous suit referred only to some property of Sankaran, apparently not that it referred to self-acquired property. So that even so much nearer the date of the Judgment in the 1898 suit as 1903, the karnavan did not plead that the 1898 suit was concerned with a case of self-acquisition. It is important to note that although in the suit, O.S. No. 195 of 1902, the same claim as is now put forward namely, that the suit property belonged to the Devaswom, was advanced, still it was there never sought to distinguish the nature of the third defendant's title to kanom money in O.S. No. 433 of 1898 from that of his claim to the alleged Devaswom property in O.S. No. 195 at 1902. It is very unlikely that if such a distinction could, with any plausibility, have been then made, it would not have been then made.

7. The third point of significance is that the tarwad set down under this decision in the execution proceedings for 11 years and then brought the present suit, and that the present suit is one not by the karnavan but by the junior members of the tarwad, while the karnavan is made the first defendant, although he throughout his written statement, fully supports the plaintiffs with a merely nominal plea, as an excuse for making him defendant, that the plaintiffs are not entitled to possession of the property as against their karnavan. With the question whether such a suit for ejectment by the junior members of the tarwad only will lie at all we are not here concerned. But, apart from that, it is obvious that the position of the karnavan as a defendant instead of as a plaintiff in the

suit was dictated by the strong consciousness of the plaintiffs that the karnavan was already bound by the decision in O.S. No. 433 of 1898, if not also by that in the execution proceedings, and that the present suit is filed in a sort of desperate hope that the court might not hold this matter res-judicata against the junior members: and that the idea that it might be contended that the property in O.S. No. 433 was self-acquisition had not then occurred to the plaintiffs" tarwad.

8. It is therefore evidence that there is not even any real probability that the property in O.S. No. 433 was self-acquisition, and that the plaintiffs were aware of that. We hold however, for reasons already given, that the question of inheritance of the property of Sankaran, whether self-acquired or family, was directly and substantially in issue between the predecessors in title of the present litigants and was once for all decided between the third defendant and the predecessor in title of the plaintiffs in O.S. No. 433 of 1898, and that that finding is binding on the plaintiffs, and we would uphold the, decision of the Court of first instance on this point. As remarked by that Court, this is enough to dispose of the suit, but we will deal with the other part of the appellant's argument, namely, that the decision in Execution Proceedings in M.P. No. 936 of 1903, already noted is also res-judicata and had the force of a decree which not being set aside by appeal or otherwise still binds the plaintiffs.

9. The proceedings on the claim petition in 1903 fell under Sections 328 and 331 of the previous Civil Procedure Code. u/s 331 when such a claim of a third party was put in, the claim had to be registered as a suit, the result being that the order passed therein would have the force of a decree. We are satisfied that in this Miscellaneous Petition, the District Munsif did not follow the procedure laid down in Section 331. He disposed of the matter merely on the petitions and on his decision in the suit itself. The appellant contends that, notwithstanding the defect in procedure, the order directing removal of the karnavan's obstruction is nevertheless a decree, and relies on *Gopala v. Fernandez* ILR 16 Mad. 127 and *Fanindro Deb Raikut v. Rani Jugodishwari Debi* ILR 14 Cal. 234. These cases do not seem to be in point. They were cases where the court had refused altogether to act u/s 331 and the rulings were to the effect that such refusal was tantamount to rejecting a plaint. No doubt when the procedure u/s 331 has been properly followed the decision will have the force of a decree vide *Muttammal v. Chinnana Goundan* ILR 4 M. 220 , but we are satisfied that in this case the order has not been based upon the proper procedure and that where it is sought to give the formality and the legal effect of a decree to such an order in order that it may be used as res judicata, there ought to have been a formal array of parties, framing of issues and trial as laid down in Section 331, and we hold, as it was held in *Vishnu v. Ramachandra* (1909) 9 Bom. L.R. 936 that if the petition has been wrongly treated as a merely interlocutory application in the suit, it cannot be placed on the same footing as a suit itself. We therefore hold that the order in the miscellaneous petition is no bar to the present suit and is not res-judicata against the plaintiffs.

10. We will note very briefly one other point raised before us on behalf of the karnavan, 1st defendant. When the appeal from the original court first came up to the District Court, the latter remanded the case for findings on three points. On the first two of these the original court on remand held that the plaint property was not the exclusive property of Sankaran, but belonged to the Devaswom and was trust property owned by the plaintiffs' tarwad. In these findings, the lower appellate Court concurred. It is contended that here we have a concurrent finding of fact binding upon this court. But these concurrent findings of fact are not based on the consideration of any title in the plaintiffs' tarwad separate from their pleaded title to succeed to Sankaran. It may be that the plaint property was originally Devaswom property and that Sankaran succeeded to it as Oralan from his maternal uncle and not from his father. But the question whether plaintiffs are the heirs of Sankaran has, as we have held, been finally decided against them in O.S. No. 433 of 1898, and plaintiffs are not now suing on any other footing than their right to succeed to Sankaran, and if the lower courts have erred, as they have, in law in holding that the plaintiffs succeeded Sankaran, the concurrent finding of fact is also wrong in law. The plaintiffs, who are the junior members of a tarwad, are not suing on the footing of trustees or Oralans to recover trust property. They sue, under title from Sankaran, to eject the 4th defendant from property which he holds through the son of Sankaran, and their title to succeed to Sankaran has been finally negatived, by a decision which lays down in effect that Sankaran was not the karnavan of any Marumakhatayam tarwad, and therefore that his oralanship could not descend by Marumakhatayam law to them or their tarwad.

11. We are therefore of opinion that the lower appellate court has erred in law in its decision. Its decision is therefore reversed and the plaintiffs' suit dismissed with costs throughout to the fourth defendant.