
(1948) 02 MAD CK 0029
In the Madras High Court

Nallai Chakravarthulu Andalamma

APPELLANT

Vs

P. Natesam Pillai and Another

RESPONDENT

Date of Decision : 19-02-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63

Citation : (1948) 61 LW 487 : (1948) 2 MLJ 85

Hon'ble Judges : P.V. Rajamannar, O.C.J.

Bench : Division Bench

Judgement

P.V. Rajamannar, Officiating C.J.

1. This is an appeal against the judgment of Chandra-sekhara Aiyar, J., in Second Appeal No. 1233 of 1945. The first respondent before us filed a suit in the Court of the District Munsiff of Ellore to set aside an order passed in E. A. No. 445 of 1941 upholding the claim of the appellant to the suit property which had been attached by the 1st respondent in execution of a decree obtained by him in O.S. No. 469 of 1928 against the husband of the appellant. The appellant based her claim on a sale deed, dated 24th August, 1928 (Ex. D-2) executed in her favour by her husband, the judgment-debtor. The first respondent alleged that the sale in favour of the appellant was a sham and nominal transaction not supported by consideration and executed to screen the property from the reach of creditors. The District Munsiff of Ellore who tried the suit held that the sale deed in favour of the appellant was not supported by consideration but that the appellant was in possession and enjoyment of the property in her own right ever since the execution of the sale deed and she had acquired title to the property by adverse possession. He therefore dismissed the suit. On appeal the learned Subordinate Judge of Ellore concurred with the District Munsiff in holding that the sale was not supported by consideration. He further held that the sale was a sham and fictitious transaction not intended to transfer any property to the appellant. Having regard to that finding he thought it was unnecessary to go into the question of adverse possession because if the transaction was sham and

fictitious, the possession of the appellant would in no sense be adverse to her ostensible vendor, viz., her husband. He allowed the appeal and decreed the suit.

2. There was a second appeal by the present appellant which came on for hearing before Chandrasekhara Aiyar, J. The learned Judge was evidently inclined to agree with the finding of fact arrived at by the learned Subordinate Judge that the sale in favour of the appellant was sham, collusive and nominal and did not pass any property to the appellant. In fact it does not seem to have been pressed before him that the finding was wrong. Two points were however argued before him. One was that it was incumbent on the learned Subordinate Judge to go into the question of adverse possession set up by the second defendant. The learned Judge rightly rejected this contention on the ground that as the finding of the lower appellate Court was that the sale was a sham transaction, and the so-called possession of the second defendant was really possession not on her own account but possession of the husband. There was therefore no question of adverse possession or acquisition of title by prescription. The other question raised before the learned Judge was that the suit was barred by limitation as Article 120 applied to the case and as the suit had been filed more than six years from the date of the knowledge obtained by the plaintiff about the sham and nominal character of the sale deed. The learned Judge discussed the question of the applicability of the third column of Article 120 to the facts of the case and he held that it was only when the alienee put forward a case on the basis of the transaction that a cause of action arose in the creditor's favour. That was the date when the right to sue accrued and therefore the suit was in time. With respect to the learned Judge, in our opinion no question of the applicability of Article 120 arises in this case. The suit was what it purported to be, a suit to set aside an order passed on a claim petition. It was a suit under Order 21, Rule 63 of the CPC and was well within time having been instituted within a year from the order on the claim petition. It may be that in a suit under Order 21, Rule 63, in determining the question whether the property in suit belongs to the judgment-debtor, the Court may have to go into the question whether the title of the judgment-debtor is subsisting or has been extinguished by any of the provisions of the Limitation Act. Such a contingency would not arise in a case of this kind where the finding is that the transaction on which the appellant relied was sham and nominal and it was not necessary to set it aside. The title of the judgment-debtor was not therefore extinguished by lapse of time. The only Article applicable to the case was Article 11(1) and as we have already mentioned the suit was in time according to that Article.

3. The learned advocate for the appellant attempted to attack the finding of fact arrived at by the learned Subordinate Judge on the nature of the transaction. The finding is one of fact and we cannot say that there is no legal evidence to support that finding. It was therefore binding in second appeal on the learned Judge who heard it and it is binding on us.

4. The appeal therefore fails and is dismissed with costs of the first respondent.