

(1970) 07 MAD CK 0024
In the Madras High Court

Rahima Bivi alias Safia Bi

APPELLANT

Vs

Sirajunnissa Bi, Azizunnissa Bi

RESPONDENT

Date of Decision : 30-07-1970

Acts Referred:

Citation : (1971) 84 LW 480 : (1971) 2 MLJ 243

Judgement

1. The plaintiff is the appellant. She had executed a sale deed in favour of the first defendant on 19th October, 1953. He sold it to the second defendant on and May, 1954, and the second defendant sold it to the third defendant on 9th July, 1965. The third defendant usufructually mortgaged the property to one Subbhan Sahib, who assigned it to one Rahimunnissa Bi, who transferred it to one Zackriya Sahib who in turn transferred it to the fourth defendant. The suit was for possession on the ground that the plaintiff executed the document believing it to be a usufructuary mortgage deed, but it had been fraudulently written as a sale deed. The trial Court decreed the suit but the learned Subordinate Judge of Tiruppathur allowed the appeal by the sixth defendant, who had subsequently been added as a vendee of the suit property and dismissed the suit.

2. The first point that arose was whether the plaintiff had made out her case that she had executed the document believing it to be a usufructuary mortgage deed. It was the plaintiff that got the document Exhibit A-1 registered before the Sub-Registrar. She says in her evidence that the document was read out at the Sub-Registrar's office and she was also told that that was an usufructuary mortgage and she was not told that it was a sale deed. It is obvious that if it was read out she could not have formed the

impression that it was usufructuary mortgage. Her elder son Yusuf Sheriff was present and her second son was also present and none of them objected to the recitals in this document. Unless the allegation that the Sub-Registrar was also a party to the fraud is made out, the plaintiff cannot succeed in establishing that she was made to execute a sale deed under the impression that it was only a usufructuary mortgage. Further in Exhibit B-6 a notice issued by a lawyer on behalf of the plaintiff it is stated that the plaintiff executed a nominal sale deed in favour of the third defendant with regard to the suit house in or about 1956, but that it did not take effect. It is stated in that notice that at the instigation of third defendant's husband she was made to execute a sale deed in favour of Basha. This Exhibit B-6 is in 1962, but the sale deed in favour of the third defendant is in 1955. If it was true that the plaintiff who had executed the document in favour of the first defendant intended it to be a mortgage, it should have been stated in Exhibit B-6 that the plaintiff had executed a usufructuary mortgage. That is why the plaintiff was anxious to deny that she authorised the issue of notice Exhibit B-6. There is then B-i a printed pamphlet issued by the plaintiff and her son where it is stated that the plaintiff, her son, P.W. 2 and the third defendant are entitled to the suit property. Thus, the conclusion of the lower appellate Court that Exhibit B-1 was not executed by the plaintiff under the impression that it was a usufructuary mortgage deed is amply supported by evidence. In the circumstances the decision of the Privy Council in *Giresh Chunder Lahoree v. Mussumat Bhuggobutty Debia and Mussumat Ram Soandree Debiel* (1869) 13 M.I.A. 419 and that of the Supreme Court in *Mst. Kharbuja Kuer Vs. Jangbahadur Rai*, are wholly beside the point.

3. The only other point of importance that arises in this case is whether because the first defendant was not impleaded as a respondent by the sixth defendant in the appeal filed by her before the learned Subordinate Judge of Tiruppathur, she cannot get any relief. For this contention on behalf of the plaintiff reliance is placed upon a decision in AIR 1927 252 (Privy Council) In that case a deed of transfer was executed by K.P. and firm in favour of the first defendant in 1911. The plaintiff purchased for Rs. 580, lands which he stated in his evidence, were worth Rs. 3,00,000. But the lands in the suit were valued at Rs. 40,000 and the remainder for which he had

not instituted suits were worth Rs. 2,60,000. The plaintiff filed two suits. In the first suit he alleged that the sale to the first defendant was invalid and inoperative in law, that the sale by the first defendant to the second defendant, the E.N.M.K. firm, was benami for the transferors, that the sale by the second defendant to Nadesan Chetty, represented by the third and fourth defendants, was also benami for the (K.P. firm) transferors, that the sales by Nadesan to defendant five to eleven, the defendants, in possession, were fraudulent and collusive with a view to defeat the plaintiff's claim. The second suit was in similar terms and challenged the transfers made to the first defendant and by the first defendant to the second defendant Singaram Chetty, the defendant in possession. Both the suits were dismissed and the plaintiff filed appeals to the High Court at Rangoon but did not make the defendants 1 and 2 in the first suit or the defendant 1 in the second suit parties to the appeals. The learned Judges of the Rangoon High Court held that the finding that the sale to the first defendant was good carried with it a finding that it was also good as between the plaintiff and the purchasers from the first defendant. Dealing with this aspect of the question, their Lordships of the Privy Council observed:

As regards this question, their Lordships agree with the learned Judges of the High Court that the plaintiff cannot be allowed in these appeals to question the validity of the sale to the first defendant or to set up in the first suit the benami character of the purchase by the E.N.M.K. firm from the first defendant so long as the findings in favour of the first defendant and the E.N.M.K. firm and the subsequent purchaser in the first suit and the purchaser from the first defendant in the second suit might stand on a different footing, where is there any evidence worthy of the name to show that they were made benami for the K.P. firm because the first defendant and the E.N.M.K. firm would not be necessary parties as regards these issues ; but this contention was not raised either in the Court below or before their Lordships and may, therefore, be disregarded.

4. It is obvious from the facts that the suits dealt not with the whole of the property sold to the first defendant but only with a part. Therefore, if the finding of the trial Court in both the suits that the transfer to the first defendant was valid stood as it would have to stand because he was not made

a party in the appeal filed to the High Court, there would be a conflict of opinion if it should be held on appeal by the High Court that the transfer to the first defendant was not valid. The High Court cannot so hold in his absence. This is because as between the first defendant and the plaintiff the decision of the trial Court would be resjudicata. And the plaintiff could not succeed unless the transfer to the first defendant was not set aside. It cannot be done without the first defendant being made a party in the appeal and merely by a part of the subject-matter being questioned on appeal to the High Court. It would be noticed that their Lordships of the Privy Council stated that if there were evidence to show that the purchase from E.N.M.K. firm and the subsequent purchases in the first suit and the purchases from the first defendant in the second suit might stand on a different footing, if there was evidence to show that they were made benami for the K.P. firm because they would not be necessary parties as regards those issues. In that case the real parties would have been the transferors and as between them and the plaintiff there can be no res judicata. In the present case after the first defendant had parted with his interest in the property he was no longer interested in the suit or in its result. The plea therefore that the decree of the trial Court had becomes final is without substance. In cases where the party who had not been impleaded in the appeal had a substantial interest in a portion of the properties concerned in the suit or in a portion of the properties which was originally purchased, there cannot be two contradictory decrees, one upholding the validity of the transfer in favour of the original transferee and another setting it aside. It is on that ground that the failure to implead in the first appeal a party who had succeeded in the trial Court but who had not been impleaded in the lower appellate Court could not be adversely affected by a decision against his interest in the appellate Court and, therefore, no relief could be given to him. Such a consideration does not arise here. The first defendant had no interest in the property and he got no relief by the decree in the trial Court. On the other hand the only person interested was the sixth defendant. By the first defendant not being impleaded as a party no interest of his was affected. I am, therefore, of opinion that the failure to implead the first defendant in the appeal before the lower appellate Court does not bar the sixth defendant from getting any relief in the lower appellate Court, or in this Court. The sixth defendant

was not asking for any relief against the first defendant. Where there is no conflict of interest between contesting defendants, the fact that one of them had not been added as a party would not affect the successful defendants right. In the circumstances, therefore, I am of opinion that, the judgment of the learned Single Judge in Chunnilal v. Jenwardas AIR 1953 M.B. 164, has failed to appreciate the real point decided by the Privy Council.

5. The second appeal is, therefore, dismissed with costs. No leave.