

(1935) 10 MAD CK 0080
In the Madras High Court

S.M. Muthuranga Chetti

APPELLANT

Vs

Lakshmipathi Naidu by next friend Ramachandra Naidu and
Others

RESPONDENT

Date of Decision : 18-10-1935

Acts Referred:

Citation : AIR 1936 Mad 488 : (1936) 43 LW 677 : (1936) 70 MLJ 627

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The seventh defendant is the appellant. The suit out of which -this second appeal arises was instituted by the plaintiffs for a partition of the suit properties after setting aside some alienations. The plaintiffs' right to the partition of the B Schedule properties is not in question in this second appeal. The alienation which is in question relates to properties covered by Ex. E, a mortgage executed by the plaintiffs' grandfather in favour of the seventh defendant. The relationship between the parties is shown in the genealogical tree printed page 8 of the pleadings.

Ethirajulu Naidu | _____
_____ | | | Rajamannar Thambu Duraiswami Sarangapani
Naidu (first Naidu Naidu (fourth defendant) defendant) (second (third
defendant) defendant) | | | _____
_____ | | | Lakshmipathi Ramakrishna Radakrishna
Audikesavalu (first (second (third plaintiff) (fourth plaintiff), plaintiff) plaintiff)

2. The plaintiffs are minors. Their grandfather Ethirajulu Naidu, who executed the suit document Ex. E, died in 1926. The first, second, third and fourth defendants are his sons. The fourth defendant was a minor at the time of the execution of the document. The first three defendants attested the document. The document was attested on behalf of the fourth defendant by Ethirajulu himself. The first three plaintiffs are the sons of the first defendant the elder son of Ethirajulu and the fourth plaintiff is the son of the third defendant. The seventh defendant

brought a suit on Ex. E against the four defendants the sons of Ethirajulu, Ethirajulu having died in the meantime, and obtained a decree. The decree had not been executed. In the present suit the minors question the validity of the document and the binding nature of the transaction. The case of the plaintiffs is clearly set forth in paragraph 12 of the plaint. The gist of it is that the debt was not incurred for any family trade, that it was incurred for discharging the debts of Thambu Naidu the second defendant and that it was not for any necessary purpose. This case was met by the contesting defendants in paragraph 13 of the written statement. They stated therein:

The mortgage bond referred to in paragraph 12 of the plaint was executed by Ethirajulu Naidu for discharging antecedent debt incurred in the course of the family trade and for necessary family purposes. It is a perfectly valid and bona fide transaction fully supported by consideration binding upon all the members of the family. As a matter of fact all the defendants 1 to 4 have attested the deed in token of their acknowledgement of the validity of the mortgage bond and their liability thereunder.

3. They concluded the paragraph by saying that the present suit is barred by res judicata as a result of the decision in O.S. No. 25 of 1927.

4. On the above material allegations issues Nos. 3 and 4 were framed for decision. Issue 3:

Are the mortgages and decrees obtained on them not valid and not binding on plaintiffs? Were they got fraudulently?

5. Issue 4:

Are the plaintiffs debarred by res judicata from contesting the decree in O.S. No. 25 of 1927 of sub-Court, Chingleput?

6. On issue 4 the District Munsif held that the suit was not barred by res judicata. He found issue 3 in favour of the seventh defendant, his finding being that money was received by Ethirajulu under Ex. E and that it was used for payment off antecedent debts of the family. His conclusion after examining the evidence is stated in paragraph 12 of his judgment. In the result the alienation was not set aside by the District Munsif. The matter was taken on appeal by the plaintiffs. In the appellate Court the learned Subordinate Judge recorded findings on both the points in favour of the plaintiffs and set aside the decision of the District Munsif.

7. Mr. Krishnaswamy Iyer on behalf of the appellant has raised two contentions, (1) that the lower Court should have held that the plaintiffs' suit is barred by res judicata by force of the decision in O.S. No. 25 of 1927; and (2) that the finding of the lower appellate Court on the binding nature of the mortgage should not be accepted, as that finding has been given on a new case for the first time raised in the appellate Court, a case not raised either in the pleadings or in the grounds of appeal by the respondents. I shall now proceed to discuss these points separately.

8. Point No. 1: - This relates to the decision in O.S. No. 25 of 1927. The argument that the decision is *res judicata* is based upon a series of decisions, namely, *Lingangowda v. Basangowda* (1927) 52 M.L.J. 472 : 54 I.A. 122 : ILR 51 Bom. 450 (P.C.) *Mata Prasad v. Nageshar Sahai* (1925) 50 M.L.J. 18 : 52 I.A. 398 : ILR 47 All. 883 (P.C.) *Sheo Shankar Ram v. Jaddo Kunwar* (1914) 41 I.A. 216 : ILR 36 All. 383 (P.C.) *Madhusudan Pandurang v. Bhagwan Atmaram I.L.R.* (1928) 53 Bom. 444 and *Raniakrishna v. Vinayak Narayan I.L.R.*(1910) 34 Bom. 354. All these cases are distinguishable. No doubt, in all these cases, the suits were brought by the minors, but in the first three cases *Lingangowda v. Basangowda* (1927) 52 M.L.J. 472 : 54 I.A. 122 : ILR 51 Bom. 450 (P.C.) *Mata Prasad v. Nageshar Sahai* (1925) 50 M.L.J. 18 : 52 I.A. 398 : ILR 47 All. 883 (P.C.) and *Sheo Shankar Ram v. Jaddo Kunwar* (1914) 41 I.A. 216 : ILR 36 All. 383 (P.C.) the question at issue was not whether the alienation made by the father was valid or not. The previous decision in those cases sought to be construed as constituting *res judicata* was conducted by the father against third parties and no question of any alienation arose in the subsequent suit. It was held that the decisions would constitute *res judicata* because the interests of the family were sufficiently represented by the father in the previous suit. This line of decisions cannot apply to the present case where what is questioned in the subsequent suit is an alienation by the father himself. If it is to be held that the decision in a suit brought against the father is *res judicata* in a subsequent suit, then it must be held that the minors have No. right to institute a suit at all questioning the alienation made by the father. But that clearly is not the law. The two last mentioned cases quoted may perhaps at first sight appear to be in favour of the contention raised by the appellant. But on examination it will be found that these cases are also inapplicable. In *Madhusudan Pandurang v. Bhagwan Atmaram I.L.R.*(1928) 53 Bom. 544 the learned Judge pointed out that the question whether the previous decision is not binding on the minor sons is hardly a question of *res judicata*. The only question was whether that decision would be binding. The principle of the decision appears at page 452. In the last paragraph it is pointed out that the debt in the case is an antecedent debt. The learned Judge says:

The mortgage in the present case being to discharge an antecedent debt, will bind the estate.

9. If the transaction was entered into for the purpose of discharging an antecedent debt, the decision would be binding and no question of *res judicata* does arise because under the Hindu law the transaction to pay off an antecedent debt is binding on the sons. The decision therefore is not an authority in support of the plea that the previous decision in this case should be construed to be *res judicata*. In *Ramkrishna v. Vinayak Narayan I.L.R.*(1910) 34 Bom. 354 the facts show that the properties were sold and were purchased in execution of the decree in the previous suit. This circumstance distinguishes the case from one in which the property had not been so sold. *Kunjan Chetti v. Sidda Pillai I.L.R.* (1898) 22 Mad. 461 another decision cited, is also not a case where the

alienation of the father was called into question by the minor sons. For these reasons I agree with the lower courts that the previous decision in O.S. No. 25 of 1927 is not *res judicata* in the present case.

10. The next point relates to the finding recorded by the lower court on the question whether the mortgage debt can be said to be binding on the plaintiffs. The learned Judge has come to the conclusion that the District Munsif threw the burden wrongly on the plaintiffs. Strictly speaking, as a matter of law his view is right but it is not necessary to discuss this question further because it is agreed that having regard to the fact that both the parties have given evidence in the case, the question of onus of proof does not arise at all. The only question is what should be the finding on the evidence adduced by the parties. The learned judge's finding is given in paragraph 3(b) of his judgment at page 6. After adverting mainly to the evidence given by the fifth defendant in a previous litigation filed as evidence in this case, he says.

It may be that after Ex. E was executed with intent to raise Rs. 4,000 to pay off grocery trade debt, fifth defendant pressed Ayalu for money and in order to oblige Ayalu Ethiraju had undertaken to pay to the fifth defendant Rs. 4,750 on Ayalu's behalf and that for that Rs. 4,000 in it he requested the fifth defendant to accept the mortgage in Ex. E. If the amount in Ex. E had been used by Ethiraja for such a purpose, it would certainly not bind the plaintiff's share in the mortgaged properties in Ex. E.

11. This shows that in his opinion that money raised under Ex. E was used for a purpose totally different from the purpose mentioned in the plaint. This is not the case of any of the parties. That the money was used for the purpose of paying off the liability of Ayalu was never raised in the plaint. I have already quoted paragraph 12 wherein the reasons for calling into question the alienation are mentioned by the plaintiffs. Of course the case raised in the lower court's judgment was not raised in the previous suit at all. The matter becomes very clear when we examine the grounds of appeal put in by the plaintiffs in the lower appellate court. There also it is not stated that the money raised under Ex. E was used for the purpose for which the learned judge says it must have been used. In these circumstances, it is surprising that the learned Judge allowed the question to be raised and persuaded himself to set aside the finding of the District Munsif holding that the money was used for meeting the liability of Ayalu. It is contended with a great deal of force by the learned advocate for the appellant that the finding is perverse. A finding not based upon the cases of the respective parties certainly cannot be accepted in Second Appeal.

12. The only question is what should be done in the circumstances, whether I should find for myself on the evidence whether the transaction is binding on the plaintiffs or whether the case should be remitted to the lower court for a fresh finding. All the materials necessary to arrive at a finding are not before me and so the proper course would be to send the case to the lower court to submit a revised finding on issue 3. The finding of the lower court on that issue is set

aside. The revised finding is to be submitted on the evidence on record within six weeks after receipt of this Order 10 days for objections.

13. The memorandum of objection is not pressed and is dismissed. No costs. The respondents will have to pay the court-fee on the memorandum of objections.

14. In pursuance of the above order of the High Court, the Subordinate Judge of Chingleput submitted the following revised

15. Finding: - find that the transaction of mortgage Ex. E was executed by the manager of the family with the assent of all his adult sons at the time and Rs. 4,000 taken from mortgagee to discharge antecedent debts. The transaction was absolutely fair and above board.

16. On the issue remitted, my finding of fact is that the mortgage, Ex. E, and the decree (Ex. K) obtained on it are valid and bind the plaintiffs and they were obtained fairly and no taint of fraud attaches to them.

17. The Court delivered the following

JUDGMENT

18. The finding is accepted. The result is that the lower court's decree is set aside with respect of the 5/16th share of the property covered by Ex. E, claimed by the 7th defendant in the second appeal. In other respects the lower court's decree will stand. The second appeal is allowed with costs. The contesting respondents will pay the costs.