
(1950) 02 MAD CK 0034
In the Madras High Court
Case No : Second Appeal No. 2661 of 1947

Valliammai Ammal

APPELLANT

Vs

E.L. Shankara Ayyar and Others

RESPONDENT

Date of Decision : 22-02-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 1, Order 32 Rule 3, 11

Citation : AIR 1950 Mad 562

Hon'ble Judges : Raghava Rao, J

Bench : Single Bench

Advocate : K. Bhashyam, K. Venkateswaran and T.M. Ramaswami Iyer, for the Appellant; K.S. Sankara Iyer and V. Sundaresan, for the Respondent

Final Decision : Dismissed

Judgement

Raghava Rao, J.—This second appeal arises out of a suit by one Valliammai Ammal, a daughter of one Palaniappa to recover properties specified in the three schedules attached to the plaint. Palaniappa died as far back as 7th November 1894, leaving him surviving three widows, Chinnathayi, Muthammal and Avudayammal and also a daughter by a predeceased wife, by name Subbammal, two daughters of Muthammal whose names it is unnecessary to mention and the present plaintiff, the daughter of Avudayammal. Palaniappa died possessed of a fairly large estate and quarrels ensued between his two widows, Muthammal and Avudayammal, Chinnathayi having left Palaniappa during his lifetime a long time back. In settlement of the quarrels between the two widows, there came into existence the agreement, Ex. D-4, dated 13th March 1895, which divided the assets and liabilities of the deceased Palaniappa in more or less equal moieties. Thereupon Chinnathayi began to intervene with her claim with the result that Avudayammal had to file O. S. No. 60 of 1895 in order to get EX. D-4 affirmed as against Chinnathayi. The result of the litigation was that the right to the estate was affirmed in favour of the two widows, Muthammal and Avudayammal, to the exclusion of Chinnathayi but in a life estate to be held by each of them in respect

of the particular moiety allotted to them under the agreement, Ex. D-4. Meanwhile there was a suit instituted by one Vallikannu Ammal a stranger to the family, O. S. No. 50 of 1896 on the file of the Sub-Court, Tirunelveli, against the two widows of Palaniappa, Muthammal and Avudayammal, for recovery, of a certain sum of money alleged to be due under a promissory note said to have been executed by Palaniappa during his lifetime on 10th October 1893. Muthammal therein pleaded that the promissory note was not true, while Avudayammal accepted it, with the result that the Court exonerated Muthammal from the action, and the plaintiff in that suit was content to take a decree against Avudayammal and the property in her hands for the amount due under the promissory note. There was then an othi executed by Avudayammal in favour of one Othuvar for raising a sum of Rs. 1,800 for part satisfaction of the decree, while with reference to the balance of the decree amount it happened that the decree-holder assigned the decree to a third party who accordingly executed it and brought the property in the hands of Avudayammal to sale in 1902. The auction was on 9th September 1902, and Exs. D-8, D-8 (a) and D-8 (b) are the sale certificates issued to the predecessor-in-interest of defendants 1 to 3 and 11 in connection with that auction which related to the properties in Schedule 1 to the present plaint. It may be mentioned here that the properties were brought to sale as subject to three mortgages (1) for Rs. 10,000 by Avudayammal to one Kailasam, (2) for Rs. 3200 by Avudayammal to Kailasam and (3) for Rs. 900 by Palaniappa to one Ramaswami; so far with reference to the properties in Schedule 1.

2. The properties in Schedule 2 are in the possession of defendant 3 by virtue of a sale by Muthammal for Rs. 2775 under EX. D-17 dated 14th July 1899. The sale was effected for the discharge of an oti of Palaniappa outstanding in a sum of Rs. 2800 (Ex. D-18 dated 26th March 1890) and a sum of Rs. 475 further, which was the balance due on a mortgage by Muthammal to one Kasinatha Pillai for Rs. 1000 under EX. D-19 dated 18th February 1898. The properties in Schedule 3 are also in the possession of defendant 3 by reason of an auction sale in execution of a decree in S. C. No. 344 of 1897 on the file of the Sub-Court, Tirunelveli.

3. With reference to the properties in Schedule 1 it is to be further stated that in the year 1903 within a few months of the actual issue of the sale certificates, EXS. P-8, D-8 (a) and D-8 (b) Subbammal, the daughter of a predeceased wife of Palaniappa brought the suit O. P. No. 4 of 1903 for a declaration that the court-action sale was not binding upon the reversion. She impleaded in that suit the two widows, Muthammal and Avudayammal, the other daughters of Palaniappa--her step sisters--and the decree-holders who had brought the properties to sale. The mortgagees subject to whose mortgages the auction sale had taken place were not however impleaded in that suit. Subbammal failed in that suit, and there was an appeal which, like the suit, was also dismissed by the High Court. The question which arises in connection with the properties in Schedule 1 is one of res judicata on account of the decision of this Court in appeal in the suit of

Subbammal. The decision of this Court is reported in Subbammal v. Avudayammal, 30 Mad. 3, and it is also exhibited in the present case as Ex D-7 (b). It was observed in that judgment that

"The plaintiff having had the opportunity of proving that the debt for which the decree was obtained was, in fact, not due or was, for any reason, not payable out of the estate the only point for consideration is whether the mortgage and sale relied on by defendants 6 and 7 (the mortgagee and auction purchaser respectively) was prejudicial to the plaintiff's reversionary interests."

The learned Judges (Subramania Ayyar and Benson JJ.) proceed to observe further :

"No attempt has been made to show this. The evidence shows that defendant 6 (mortgager) did in fact pay the Rs. 1800 on account of the decree passed in favour of defendant 8 (decree-holder) on the note. It cannot be suggested that the terms of the mortgage are not reasonable, nor does it appear that the Court sale for the remainder of the debt under which defendant 7 (auction purchaser) claims is detrimental to the estate. The decree no doubt was not the result of an actual contest, but it is perfectly clear that there was no collusion or fraud in obtaining it.

Defendant 1 as representing the estate was certainly not bound to raise any defence in the case when satisfied that the debt was really due. Defendant 8 (decree-holder) in contending herself with a decree against the assets in the hands of defendant 1 followed a course which in our opinion was justified, for under the agreement Ex. II (Ex. D. 4 in the present case) already referred to the bulk of the estate of Palaniappa had been left with defendant 3's consent in the hands of defendant 1 and the obligation to discharge this debt among others was part of their agreement. As regards the passage relied upon from Sri Gajapati Radhamani v. Pusapati Alakajeswari, 16 Mad. 1 : 19 I. A. 181 that depended upon the special circumstances of that case. The case of Kalyana Sundaram Pillai v. Subba Mooppanar, 14 M. L. J. 139 is a distinct authority against the contention that an alienation by one of two co-widows is ipso facto invalid with reference to the interest of the other co-widow or of other persons interested in the reversion."

4. It is clear from this judgment that unless its finality can be effectively got over in some manner recognised by law by the present plaintiff as the actual reversioner represented in the former litigation by the presumptive reversioner the then plaintiff, the plaintiff now must be out of Court. The way in which Mr. Bashyam puts the point for the appellant here is that the former suit was one by the presumptive reversioner who was a minor represented by her next friend, and that in that litigation all the materials which would have gone to show that there were relations of ill-will and hostility between the two widows, Muthammal and Avudayammal, so that proceedings taken against one of them only would not bind the reversion were not placed before the Court, and that consequently

the proceedings were vitiated by gross negligence on the part of the next friend of the then plaintiff. Mr. Bhashyam has drawn my attention to a decision of this Court reported in *Velumalai v. Natesachari*, I. L. R. (1945) Mad. 35 : A. I. R. 1944 Mad. 310 and a ruling of the Privy Council reported in *Gauri Nath v. Mt. Gaya Kuar*, (1928) 55 M. L. J. 339 : A. I. R. 1928 P. C. 251 as showing that an alienation effected by one of two co-widows, although for necessity, is not binding upon the reversion unless consented to by the other widow. But then the difficulty in the present case is two fold. Firstly I am not satisfied that the principle of these rulings which relate to alienations between one of the co-widows and a purchase from her necessarily applies to a case in which as in the present the validity of a court auction sale in favour of a bona fide stranger purchaser is in question, held as the result of a decree obtained as against one only out of two co-widows. To such a case, it rather seems to me that the material question may well be whether the estate was not in the matter of the decree and the execution proceedings taken thereunder sufficiently represented in law by one only of the co-widows. But what is even more important, there is no proof here that there were really conclusive materials which, had they been placed before the Court, would have necessarily entailed a decree in favour of the plaintiff in the former suit. The decision in *Subbaratnam Chettiar v. Gunavanthalal*, AIR 1937 Mad. 472 : 169 I. C. 694 to which my attention has been drawn by the learned counsel for the appellant cannot be of much assistance to him. What Varadachariar J. delivering the judgment of the Court in that case ruled was that if the matter not brought to the notice of the Court on the former occasion was such that had it been brought to the notice of the Court no decree could possibly have been passed as against the minor, no doubt gross negligence could be postulated, not otherwise. As the learned Judge puts it, the plea which the guardian of the next friend in the former litigation omitted to take must be a plea "clearly available", i.e., available so as to involve conclusively a result contrary to the one which the Court actually reached on the materials before it on the former occasion. That" is not the position as I have stated, in the present case. Moreover, I very much doubt whether the principle of gross negligence can at all be pressed into service by the learned counsel for the appellant in the case of an attack of a decree against the presumptive reversioner by the actual and in the circumstances here. The plaintiff in the former suit was suing in the capacity of a reversioner to the estate of Palaniappa for a declaration that the court auction sale of certain of the properties of that estate was not binding upon the reversion. The reversioner being a minor was no doubt represented by a next friend at the time. The decree of dismissal of that suit was never challenged by the then plaintiff later on in a separate suit through another next friend during the minority of that plaintiff; nor does it appear that there were any proceedings after the attainment of majority of that plaintiff for the avoidance of that decree. A decree which is vitiated by gross negligence can at best be only voidable and is not necessarily void as decided by me in S. A. No. 49 of 1947. The true principle in fact applicable to decrees to which presumptive reversioners are parties, when the question of their binding character as against

actual reversioners comes up for consideration, is the one embodied in Explan. 6 to Section 11, Civil P. C., as was pointed out by a Bench of this Court consisting of myself and Horwill J. in a case reported in Nagamma Shedthi Vs. Korathu Hengsu and Others, . It is not so much a question of negligence or gross negligence that arises for consideration in a case of this description as a case of bona fides or want of bona fides in the conduct of the litigation to use the language of Explan. 6 to Section Limitation Act, Civil P. C. Gross negligence as a head of attack against decrees is available only in the case of minors against whom decrees have been passed, but not in the case of persons who may be representing other people's interests in the previous litigation such as presumptive reversioners, prior trustees, previous yejamans or kartas etc. For all the reasons that I have indicated I am not satisfied that the decree in the former litigation which dismissed the suit of Subbammal the presumptive reversioner is not a conclusive bar to the present action. My attention has also been drawn in this connexion by Mr. Ramaswami Aiyar to para 18 of the judgment of the trial Court in the present case which deals exhaustively with the plea of res judicata. It is pointed out by the learned Judge in that paragraph of his judgment that

"except for stating that no evidence was at all called to prove the case put forward in the former litigation no details of the allegation have been given in the present suit."

The learned Judge observes further :

"Even the statement that no evidence at all was called to prove the case put forward therein does not appear to be correct when we notice from the judgment of the High Court (Ex. D-7b) that documents had been produced for the comparison of signature. The nature and availability of other evidence ere not shown and it is also not made out that the same had been wilfully suppressed and so from the mere fact that no other evidence had been adduced, it cannot be said that the result of that suit cannot bind the present plaintiff. There being no evidence here of the suppression of any valuable and available evidence, and there being no case that any available plea bearing on a question of fact or law had not been raised the case of negligence on the part of the next friend of the plaintiff in the earlier suit cannot be upheld. In fact, even in the present suit, the plaintiff on whom the burden lies (see Section 199 of Mullah's Hindu Law, 9th Edn.) has not shown that the debt in O. S. No. 50 of 1896 was false and so there is really no substance either in this plea of negligence or in the other pleas of fraud and collusion. The next friend of the plaintiff in the earlier suit (O. S. No. 4 of 1908) had fought it out with great fervour and taken up the matter in appeal to the High Court and in both the Courts very eminent counsel appeared for her--the person who appeared for her here was one Mr. D. S. Rangachariar who it is not disputed was one of the leaders of the local bar and the person who appeared for her in the High Court was Sri G. Sankaran Nair who afterwards became a Judge of the High Court--and so it would seem that there could not have been any fraud, negligence or collusion in relation thereto."

I fully agree with this reasoning and conclusion of the learned Subordinate Judge, and although the District Judge on appeal has not addressed himself to this aspect of the case in any detail whatsoever, I have no hesitation in holding that the concurrent finding of both the Courts below on this question is perfectly right.

5. It is argued by Mr. Bhashyam that at any rate so far as the mortgages subject to which the sale took place are concerned, they were mere bogus transactions, and that the sale held subject to such mortgages must be regarded as not binding on the reversioner. It does not appear that any attack was levelled against these mortgages in the former litigation as bearing upon the validity of the court sale which undoubtedly, together with the mortgage in favour of Othuvur, was the matter for consideration before the High Court as well as the original Court of trial. Nor is the issue raised in the present case sufficiently clear to show that the question of the validity of these mortgages was sought to be agitated in the present action as an independent matter. No materials have been placed before the Court in the present case which would justify the conclusion that these transactions were fictitious, and that on account of the mention of these transactions in the execution sale proceedings as true ones the estate sustained a loss as a result of the court sale held subject to these mortgages.

6. This disposes of the objections levelled in the argument of the learned counsel for the appellant to the judgments and decrees of the Courts below concerning the, properties in Schedule 1 to the plaint. The attack against the alienations of the properties in Schedules 2 and 3 has even much less of substance about it than the one in regard to the properties in Schedule 1. One point of law that has been raised in connexion with the attack concerning the properties in Schedule 2 is that a Hindu widow cannot for the discharge of an othi of the husband outstanding over the estate make any alienation of any part of the estate but must leave the othi outstanding till the reversion opens. It is said that there is no urgency or necessity for the discharge of the othi, because there is no personal covenant to pay on the part of Palaniappa, the executant of the othi. It is pointed out by the learned counsel for the respondents that it is not right to say that there is no personal covenant in the othi deed, because in fact there is one. There is therefore no substance in the point; but even if it were the fact that there was no personal covenant, I should still very much doubt whether that would make it incompetent for the widow to make an alienation of the estate for the discharge of a debt contracted by the husband. I very much doubt whether considerations of urgency need enter into a situation of this kind, because the payment up of the debts of the husband by the widow is an act of piety which she would certainly be entitled to do for the sake of the salvation of her husband's soul. It is said by Mr. Bhashyam that the alienation of the properties in Schedule 2 is only by one widow Muthammal, and that on that ground, even assuming that there was necessity, the alienation would be invalid. True, the alienations of the properties in Schedules 2 and 3 to the plaint do not come within the case of *res judicata* which touches the properties in Schedule 1 and

which I have already dealt with; but then the question already discussed --viz: whether the relations between the widows were hostile would also bear upon the question of the validity of these alienations. I am not satisfied that the appeal is at all well-founded with reference to the properties in Schedule 2.

7. Then as regards the properties in Schedule 3, as I have already stated, the title of the respondents rests upon an auction sale more than half a century old, and at this distance of time it is not reasonable to expect any clear evidence of necessity in support of the alienation. Mr. Bhashyam has drawn my attention to a recent judgment of a Full Bench of this Court reported in Marla Subrahmanyam Vs. Chelikani China Soorayya, which deals with the degree of presumption of necessity to be made in the case of an ancient alienation. The principles laid down by that decision are of course indisputable. The only question is whether in the circumstances of this case the conclusion of fact reached by the Courts below in favour of the existence of necessity is to be disturbed merely on the ground that proof of necessity is not forthcoming in all that strictness, which might be insisted upon in respect of comparatively more recent transactions. My attention has been drawn by learned counsel for the respondents to Ex. D-22 (a) which contains recitals of the necessity which had resulted in the small cause decree that gave rise to the execution sale under which defendant 3 claims. In all the circumstances I am not satisfied that there is any substance in the attack of the appellant against the decree of the lower Court with reference to these properties in the schedule either.

8. In the result, the second appeal fails and is dismissed with costs, two sets.

9. No leave.