

(1936) 11 MAD CK 0081
In the Madras High Court

Venkatachariar

APPELLANT

Vs

South Indian Bank and Another

RESPONDENT

Date of Decision : 24-11-1936

Acts Referred:

Citation : AIR 1937 Mad 651 : (1937) 45 LW 495 : (1937) 1 MLJ 575

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—The main question in this second appeal is whether the lower Court ought to have raised an issue whether the defendant is precluded from impeaching the title of the plaintiff to the suit property by reason of the decision in O.S. No. 24 of 1921 on the file of the Sub-Court of Tinnevely. The facts necessary for its disposal may be shortly stated. The plaintiff is the father and the second defendant is his son. The first defendant is a creditor of the second defendant. In execution of a decree obtained against the latter in O.S. No. 640 of 1920 on the file of the District Munsiff's Court of Tenkasi he attached the suit property on 12th April, 1922. The plaintiff filed the present suit, O.S. No. 12 of 1923 for a declaration that the suit property is his self-acquired property, that the second defendant has no right therein, that the first defendant is not entitled to attach the same as the property of the second defendant and for an injunction restraining him from bringing the said property to sale. Before the attachment by the first defendant the plaintiff had instituted a suit O.S. No. 24 of 1921 on the file of the Sub-Court, Tinnevely, against the second defendant and others for a declaration that the property described in the plaint thereto is his self-acquisition, that the second defendant has no manner of right thereto and that the several alienations made by him of some of the properties in the said suit are not binding on him. On the 20th March, 1923, the plaintiff obtained a decree in his favour in the said O.S. No. 24 of 1921. It is alleged that the suit property formed the subject-matter of the said suit and decision thereon. Before the present suit was taken up for trial, the plaintiff sought to amend the plaint and raise an issue that by reason of the judgment in the said suit, the first

defendant is precluded from contesting his claim by the operation of the rule of res judicata. The judgment was marked as Ex. F in the case but the learned District Munsiff refused to raise an issue on the ground that the first defendant was not a party thereto. On appeal, though Ex. F was relied upon at the hearing the questions relating to res judicata and the correctness of the order of the District Munsiff were not raised but after the hearing was closed an application was put in to raise the same and when the application was taken up the appellant's vakil absented himself and the application was dismissed. The learned Subordinate Judge refused to act on Ex. F on the ground that is inadmissible because the first defendant was not a party to it. On behalf of the appellant Mr. Ramaswami Aiyangar urges that the lower Courts should have raised the issue, but it is contended in answer that having regard to the conduct of the plaintiff he should not be permitted to raise the question in second appeal, that Ex. F did not relate to the suit property and that it was the result of collusion between father and son.

2. Before considering the question whether the plaintiff should be given an opportunity to raise this issue, it is necessary to decide whether assuming the facts were as alleged by the plaintiff and the judgment in the prior suit was honestly obtained, it would be res judicata between the plaintiff and the first defendant. There is no doubt that the issue in both the suits is identical, namely, whether the suit properties are the self-acquisition of the plaintiff and the second defendant has any interest therein. There can also be no doubt that the decision in the prior suit is res judicata between the plaintiff and the second defendant. The question therefore is, what is the position of the first defendant? Does he claim through the second defendant or to put the matter in another way, did the second defendant in the former suit represent the interest of the first defendant? If so, he is barred, otherwise not. By virtue of the attachment there is no transfer of the interest of the second defendant to the first defendant and the ownership in the property continued in the second defendant. The effect of the attachment is thus stated by Rankin, C.J., in *Najimunnessa Bibi v. Nacharuddin Sardar* ILR (1923) 51 Cal. 548:

Until attachment a judgment-creditor cannot litigate in his debtor's place (the italics are mine) to assert his debtor's rights ; while the attachment lasts, no new interest can be created to defeat it; and, although in this country, owing partly to the rule as to rateable distribution, attachment does not amount to a specific charge in favour of the decree-holder or by itself give him, in strictness a title thereto it is nevertheless the basis of all the judgment-creditor's right to assert his debtor's interest in the particular property in question.

3. Therefore so far as O.S. No. 24 of 1921 is concerned, the second defendant did represent all interests in the property in the litigation and so far as the present suit is concerned the first defendant must be deemed to claim under the second defendant litigating under the same title, vide *U Tha Lu v. Devanarain* AIR 1934 Rang. 206. The first defendant himself has no right or title to the property.

He has to rely on the title of the second defendant and stand or fall with him. In 1 CWN 639 (Privy Council) the Privy Council held that an attachment by a judgment-creditor of a property alleged to be the judgment-debtor's is of no avail when there has been a subsequent adjudication in a suit between a third party and the judgment-debtor negating the latter's right and a transfer in pursuance of the attachment subsequent to the adjudication is inoperative as against the party in whose favour the adjudication has been made. The reason of the rule is that what the judgment-creditor can attach and sell is only the right, title and interest of the judgment-debtor and if it is found he has none, the attachment operates on nothing and the execution sale confers nothing. Vide also *Parvati v. Kisansing* ILR (1882) 6 Bom. 567. In my opinion the rule of law applicable in cases of *jus tertii* may well be applied here, viz., "whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or in pais". Vide *Secretary of State for India v. Syed Ahmad Badsha* (1920) 41 M.L.J. 223 : ILR 44 Mad. 778 at 801. Thus if the second defendant is barred, the first defendant who is setting up his title is equally barred, I am therefore of opinion that the first defendant would be precluded from asserting the title of the second defendant by reason of the decision in O.S. No. 24 of 1921 on the file of the sub-Court, Tinnevely. I think the lower Court ought to have raised the issue. In view of the contentions raised by Mr. Muthiah Mudaliar, before finally deciding this second appeal it is necessary to raise the following issues and have findings on them:

(1) Whether the prior suit (O.S. No. 24 of 1921) on the file of the Sub-Court, Tinnevely) related to the suit property and there was an adjudication regarding thereto.

(2) Whether the judgment in that suit was the result of collusion between the plaintiff and the present second defendant.

4. I therefore direct the lower appellate Court to submit the findings on the said issues within two months from the date of the receipt of this order after taking evidence adduced by both parties who are given leave to tender the necessary evidence. Time for objections, 10 days. Having regard to the conduct of the plaintiff I direct the plaintiff to pay the costs of the first defendant incurred up to date including the hearing of the second appeal, viz., cost incurred in the District Munsiff's Court, costs incurred before the Sub-Judge after remand by the High Court and the costs of hearing of this appeal. Costs of further enquiry in the lower Court and further hearing in this second appeal will abide the result.

FINDING.

* * * * * JUDGMENT

5. I accept the finding that the judgment in the prior suit O.S. No. 24 of 1921 was not obtained by fraud or collusion by the present second defendant. I therefore reverse the decree of the learned Subordinate Judge and restore the decree of the District Munsiff. I direct the respondent to pay the appellant rupees

eighty-five (Rs. 85) for his costs of this appeal.

6. Leave to appeal is granted.