Muthaya Shetti Vs. Kanthappa Shetti

Muthaya Shetti Vs. Kanthappa Shetti

SooperKanoon Citation : sooperkanoon.com/776905

Court : Chennai

Decided On : Dec-17-1915

Reported in : (1918)34MLJ431

Appellant : Muthaya Shetti

Respondent : Kanthappa Shetti

Judgement :

Seshagiri Aiyar, J.

1. The predecessors in title of the plaintiff executed Exhibit A to one Shankaranaranappayya in 1872. Shankaranaranappayya sold the property comprised thereunder to Venkappayya under Exhibit 1 in 1879. Venkappayya's widow sold it in 1897 to Puttappayya and Puttappayya's sons sold the same in 1912 to the defendant The present suit is brought by the plaintiff to redeem the mortgage of 1872. The answer of the defendant is that the suit is barred by Article 134 of the Limitation Act as more than twelve years have elapsed since the date of the transfer by the original mortgagee. Both the Courts have come to the conclusion that the suit is barred by limitation. The judgment of the District Judge is so meagre that we were obliged to hear this case as a first appeal. Mr. Sitarama Row contended before us that under Article 134 the burden of proving that the transferee from the mortgagee had acquired an absolute right in the property lay on the defendant.

2. Before considering this question, I shall dispose of a preliminary point suggested by Mr. Ananthakrishna Aiyar for the respondent, namely, that Exhibit A is an absolute conveyance with an option to repurchase, and that consequently his client is the absolute owner of the property. In answer to this suggestion, the learned vakil for the appellant pointed out that the construction of Exhibit A is res judicata by virtue of a decision of the District Court of South Kanara in the year 1886. That decision was given under the following circumstances. A member of the plaintiff's family sued his brothers for partition, and claimed a share in the property in dispute alleging that the alienation of it was not for necessary purposes. The District Munsif held that the plaintiff was entitled to recover a third share of the property on paying a third of the mortgage amount. There was an appeal by the alleged mortgagee, the 9th defendant in that case. His contention was that the transaction was not a mortgage but an absolute sale with an option to repurchase, Mr. Best, the District Judge, held that it was a mortgage and not a sale. He further held that it was not open to the plaintiff to sue for the redemption of a portion of the property by offering to pay only a portion of the mortgage debt, and that moreover as the suit was not one for redemption, it should be dismissed qua this property.

3. The question is whether this conclusion of the then District Judge of South Kanara is res judicata. Mr. Ananthakrishna Aiyar strenuously argued that as the suit was dismissed and as the mortgagee could not have appealed against the decision of the District Judge although the finding on the construction of Exhibit A was against him, the matter is not res judicata. Upon the question whether a bare finding upon an issue when the final conclusion is in favour of the party against whom the decision on the issue is given, gives a right of appeal to the party, there have been differences of opinion. In Yusuf Sahib v. Durgi : (1913)25MLJ379 it was apparently held that an appeal lies under the circumstances. In Ranganatham Chetty v. Lakshmiammal : (1913)25MLJ379 the same view was taken. Both these cases follow Krishna Chandra Goldar v. Mohesh Chandra Saha 9 C.W.N. 584. In Venkata Suryanarayana v. Sivasankaranarayana (1914) 17 M.L.T. 85 the question was left open. There is a decision of Ayling and Spencer, JJ. in Secretary of State v. Saminatha Kownden I.L.R. (1911) Mad. 25 which is inconsistent with Yusuf Sahib v. Durgi I.L.R. (1907) Mad. 447 and Ranganatham Chetty v. Lakshmiammal

: (1913)25MLJ379 . See also Brij Behari Lal v. Shivanath Prasad 20 C.W.N. 1354. Having regard to the language of Sections 96 and 100 of the Code of Civil Procedure which gives a right of appeal only against decrees, it seems doubtful whether the two earlier Madras decisions are correct. If the decision in this case depended solely upon that question, I would have felt bound to refer the matter to a Full Bench; but I think that this case can be disposed of upon other grounds. I agree with Mr. Sitarama Row that the fact that a party against whom an issue is decided has no right of appeal does not affect the rule of res judicata. There is nothing in the language of Section 11 to suggest such a test. The language of explanation 2 to that section implies that the competence of a Court for purpose of res judicata is not affected by the fact that its decision is not appealable. It is true that this explanation was introduced to put an end to a controversy which existed as to whether when a decree is not appealable to the same tribunal the Court which decided the earlier claim can be held to have been competent to adjudicate upon the subsequent claim litigated in a superior Court. None-the-less, the wide language of the explanation shows that the legislature did not intend that the test of res judicata should depend on the right of appeal. I therefore overrule the first contention, Mr. Ananatha Krishna Aiyar then argued that the decision on Exhibit A was not necessary for the conclusion which was come to in the suit, and that consequently the matter is not res judicata. The cases on this point may be grouped under four heads : the first class of cases relates to the decision on issues which are altogether unnecessary for the disposal of the case. For instance, decisions on the character of the defendant's holding where the suit is dismissed on the ground that there has been no notice to quit or that there had been no exchange of pattas and Muchilikas : D. Narasamma v. D Kannaya (1881) 4 Mad. 134 and Muthukumarappa v. Arumuga I.L.R. (1888) Mad. 145 represent this class of cases. In these cases as the pronouncement upon the tenure of the defendant was not necessary for the disposal of the case, the decision upon that issue was held not to be res judicata. It is to this class of cases the observation of Sir E. Collier in Rajah Run Bahadur Singh v. Mussumut Lachoo Koer that 'as the decree was not based upon it, but in spite of it' there can be no res judicata, applies. See also Nundo Lall Bhuttacharjee v. Bidhoo Mookhy Debee I.L.R. (1836) Cal. 17 Thakur Magundeo v. Thakur Mahadeo Singh I.L.R. (1891) Cal. 647 and

Shib Charan Lal v. Raghu Nath (1895) 17 All 174. The second class deals with cases where although the decision of an issue is unnecessary for the disposal of the case, still for some reason the Court embodies that decision in the decree itself. Then the matter becomes res judicata not on the ground that there has been a decision on the issue, but because there is a decree of the Court which is binding upon the parties : Kaveri Ammal v. Sastri Ramier I.L.R. (1905) Mad. 104 and. Mota Holiappa v. Vithal Gopal I.L.R. (1916) Bom. 662. The third class relates to judgments which decide more than one issue; but it is doubtful from those judgments on which of these issues the final conclusion was based. In such a case the decision on both the issues will be res judicata. See Peary Mohan Mukerjee v. Ambica Churn Bandopadhya (1897) 24 Cal. 900 and the recent decision of the learned Chief Justice and Justice Phillips in Appeal No. 62 of 19 13 Secretary of State for India v. Maharaja of Vencatagiri 31 M.L.J. 97. Now I come to the fourth class. In the fourth class, the decision upon the issue is necessary, but unfortunately, the party against whom that decision is given could not appeal against it as the final decree is in his favour. In such a case it seems to me that the decision on the issue would be res judicata. The proper procedure where the defendant is affected by a decision on an issue which he has not the opportunity of contesting in appeal may be as suggested by Petheram C.J., in Jamaitunnissa v. Latifunissa I.L.R. (1885) All. 606. that is to say, he can ask the court which has given an adverse decision on a material issue to embody it in the decree so that he may have a right of appeal against such a decision. But if he neglects the opportunity and the decision itself is necessary for the disposal of the case, there seems to be no escape from the bar of res judicata. On the whole I have come to the conclusion that the decision of Mr. Best in 1886 which was absolutely necessary for the decision of the case and which has stood unchallenged for thirty years is binding on the parties, and that Exhibit A should be construed as a mortgage by conditional sale and not as a sale with an option to repurchase.

4. This conclusion throws me back upon the question whether the suit is barred by limitation. Article 134 has given rise to conflicting decisions. I do not propose to examine them at any length in the present case. In Radanath Doss v. Gisborne (1871) 14 M.I.A 1 at a time when the corresponding Article of the Act of 1859 contained the words ' in good faith ' Lord Cairns delivering the judgment of the

Judicial Committee held that the burden of proving that the purchaser acquired an absolute interest in the property lay upon such purchaser. In the Acts of 1877 and 1908, in addition to the other changes, the words ' in good faith ' were omitted. It is unnecessary to canvass the reasons which led the legislature to omit these words. In Radanath Doss v. Gisborne (1871) 14 M.I.A 1 the Judicial Committee pointed out that it must be shown that the purchaser honestly believed that he was acquiring an absolute right to the property. This deduction was made not because of the existence of the words ' in good faith '' but because of the use of the expression ' purchaser'. I do not think that the changes introduced by the Act of 1877 and of 1908 have absolved the Court from the necessity of coming to a conclusion upon this question If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as the absolute owner of the property. After all, Article 134 is only a branch of the law of prescription, and the question to be determined would be what it is that the purchaser prescribed for. The fact that he knew that his vendor had only a mortgage right would not be conclusive on this question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it? In Pandu v. Vithu I.L.R. (1894) 19 Bom. 140 that is the test that was suggested; Kannuswami Thanjirayan v. Muthuswami Pilial (1917) M.W.N. 5 to which Mr. Ananthakrishna Aiyar drew our attention quotes that case with approval. I do not think that Subbaiya Pandaram v. Mahamad Musthapa Maracayar (1916) 32 M.L.J. 85 decides anything to the contrary. Singaram Chettiar v. Kalyanasundaram Pillai (1914) 1 L.W. 687 is in favour of this view. See also Baluswamy Iyer v. Venkitaswamy Naicken (1916) 32 M.L.J. 24 The language of the article is not opposed to this proposition. In the present case this question has not been considered by either of the Courts below. I express no opinion on the question of the burden of proof, bearing in mind the observations of Lord Parker of Waddington that the Courts in this country are too prone to base their decisions on the abstract theory as to onus. But seeing that the plaintiff seeks to disturb a possession which has been with the defendant for a considerable period, prima facie, he must be called upon to prove his case. There must be a finding on the following issue:

Did the executant of Exhibit I intend to transfer an absolute interest in the property and was it the intention of the parties that there should be an absolute transfer of title to the property

5. Finding on the evidence on the record within a month from the date of the re-opening of the Court. Seven days for objections.

Bakewell, J.

6. I agree that the document which forms the root of the respondent's title must as between the parties be held to be a mortgage, and I propose to deal only with the question of limitation. It is I think clear from the wording of Article 148 of the Limitation Act, 1908, that it deals with suits in which the cause of action arises upon the contract of mortgage, and the article applies to a transferee of the mortgagee's interest under that contract : Article 134 therefore provides for cases where the transfer of mortgaged property by the mortgagee gives rise to a cause of action apart from the mortgage contract. The condition of good faith on the part of the transferee which was contained in Section 5 of Act XIV of 1859 has been eliminated from Article 134 but otherwise the article substantially corresponds with that section read with Clause 12 of S. I.

7. In Radanath Doss v. Gisborne (1871) l4 M.I.A. 1 their Lordships of the Privy Council in discussing Section 5 of the Act of 1859 considered separately each of the three conditions prescribed thereby, and defined ' purchaser ' as meaning ' some person who purchases that which de facto is a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title.' They held that the pleadings did not allege, and that there was no evidence of, any negotiation for such a purchase and 'no evidence of any allegation on the part of the vendor which would lead Messrs. Gisborne, and Company (the transferrees) to believe that this was an absolute title which they held to the property in question. The only evidence that they were purchasers at all is the production of the purchase deed, ' which their Lordships held contained 'no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property of the Maheeanwan Estate was a property which the

vendor claimed to hold by what we should call in this country a fee simple title.' The word 'transfer' includes a purchase (see Transfer of Property Act, Section 5) and the transaction in the present case is alleged to be a purchase, and I think that their Lordships' observations apply to Article 134.

8. It follows that a transferee who claims the benefit of the article must adduce evidence that he intended to purchase an absolute title, which will be in the first place the deed of transfer but may also consist of the contract of sale and the negotiations which preceded it. An important preliminary to a sale of immoveable property, which seems however to be frequently neglected is a careful investigation of the vendor's title, and I think that their Lordships had this in mind when in the passage first quoted they refer to a representation made to the purchaser and to his full belief that he was acquiring an absolute title. Evidence as to the documents of title produced by the vendor, and the steps taken by the purchaser to ascertain the former's title to the property will be important as showing the interest intended to be transferred. If, for instance, it should appear that the purchaser refrained from calling for and examining the title deeds and from examining the register of assurances, or from enquiry as to who was in possession of the property, or otherwise abstained from means available to him of ascertaining the title or that he in fact inspected the mortgage document under which the vendor claimed the property, there would be evidence upon which the Court might hold that the parties did not intend to transfer an absolute property but such interest only as was vested in the transferor, or possibly that the mortgagee intended to commit a fraud upon the mortgagor and that the transferee was accessory thereto or did not act in good faith. (See Section 18 of the Limitation Act). If, on the other hand, the title adduced by the vendor and the deed of transfer to the puchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention.

9. This view appears to me to be supported by the decisions of this Court reported in Kannuswami Thanjirayan v. Muthusami Pillai (1917) M.W.N. 5 and Baluswamy Iyer v. Venkitaswamy Naiken (1916) 32 M.L.J. 24 and Subbaiya Pandaram v. Mahomed Musthapa Maracayar (1916) 32 M.L.J. 85.

10. The Lower Appellate Court has dealt with the case in a very summary manner and I would remand it to that Court for a finding on the issue framed by my learned brother.

[In compliance with the order contained in the above judgment, the District Judge of South Kanara submitted a finding to the effect, that the executant of Exhibit I, intended to transfer an absolute interest, and that the intention of the parties was that there should be an absolute transfer of title of the property.]