**Perumal Vs. Gurunathan and Others**

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**SooperKanoon Citation** : sooperkanoon.com/780599

**Court** : Chennai

**Decided On :** Feb-27-1996

**Reported in** : AIR1996Mad415

**Judge** : Raju, J.

**Acts** : Code of Civil Procedure (CPC), 1908 - Sections 100 - Order 41, Rule 33

**Appeal No.** : S.A. No. 458 of 1983

**Appellant** : Perumal

**Respondent** : Gurunathan and Others

**Advocate for Def.** : T.R. Rajagopalan, Sr. Counsel for;P. Jagadeesan, Adv.

**Advocate for Pet/Ap.** : D. Shivakumaran for;P. Somasundaram, Adv.

**Judgement** :

1. The second defendant in O. S. No. 116 of 1977 on the file of the District Munsif of Sankari at Salam, who was the 4th respondent also in A. S. No. 13 of 1981 on the file of the Subordinate Judge, Salem, is the appellant in the above second appeal.

2. The plaintiffs have filed the suit for a declaration that the plaintiffs as owners are absolutely entitled to be in possession of the properties and for restraining the defendants, their men and servants by a permanent injunction from interfering with

the possession and enjoyment of the suit properties by the plaintiffs.

3. The case of the plaintiffs was that the suit properties belong to the plaintiffs absolutely as ancestral properties; that the first plaintiff had three sons, viz, the second defendant and plaintiffs 2 and 3, that the third defendant is the wife of the second defendant, that the suit properties along with another extent of eight cents in the same survey number are in possession and enjoyment of the plaintiffs and the second defendant for more than hundred years, that in 1960 the plaintiffs and the second defend ant borrowed a sum of Rs. 1,000/- from the first defendant, who insisted for the execution of a document in the form of a sale deed to vouchsafe the loan transaction, that the plaintiffs and the second defendant executed a document on 31-3-1960 styling it as a sale deed in favour of the first defendant without passing any title to him and with no intention to pass such title by virtue of the said document. It is the further claim of the plaintiffs that the amount borrowed was paid even prior to 1964 and that the first defendant has no right, interest or title in the suit properties and he was never in possession of the same. It is also claimed that after discharge of the loan, misunderstanding arose between the plaintiffs and the second defendant and the second defendant was willing to take away the share of the properties, viz., an extent of 8 cents in S.No. 664/1 with tiled building and Kalam, which were constructed in 1963 and that there was a family arrangement between the plaintiffs and the second defendant under a document,, dated 14-9-1964 under which the second defendant was given his share of the ancestral properties and that the remaining properties, viz., the suit properties fell to the share of the plaintiffs and the plaintiffs are in possession and enjoyment of the same. According to the plaintiffs, they have been paying the kist for the suit properties all along in spite of the document, dated 31-3-1960 executed in favour of the first defendant, that though the first defendant was made a party to the document, dated I4-3-I964, which is only a family arrangement, styled as a sale deed with the object of getting release of the rights of defendants 2 and 3 in favour of the plaintiffs and that therefore the defendants have no manner of right, interest or possession in or of the suit properties. The plaintiffs also reiterated that the second defendant was allotted for has share the properties mentioned in the document, dated 14-9-1964 and he had to pay Rs. 2,000/- for equalisation of the share of the plaintiffs and the third defendant, the wife of the second defendant

has paid by selling her jewels and that the transaction covered by a document, dated 14-9-1964 is not an outright sale and it is only a family arrangement. Since the first defendant and defendants 2 and 3 have joined together and started disputing the title of the plaintiffs, the suit came to be filed. .

4. The defendants contested the claim. So far as the first defendant is concerned his claim was that the documents in question, viz., Exs. A-t and B-3 were really sale deeds and that the document Ex. A-l was a sale in favour of the first defendant and pursuant to the same, the first defendant has been in continuous possession and enjoyment of the properties, and that, therefore, the plea that the documents Exs. A-l and B-3 constituted merely a family arrangement and release of rights cannot be countenanced. The second defendant appears to have adopted the written statement of the first defendant.

5. The third defendant was set ex parte.

6. On the above claims and counterclaims, oral and documentary evidence was adduced by both parties and the trial Court held that Ex. A-l was merely a sham and nominal document, that the possession was not handed over pursuant to the said deed and that it was permissible for the plaintiffs to prove the surrounding circumstances attendant upon the execution of Ex. A-l and that Ex. A-l was really a loan transaction. Similarly taking into account the circumstances surrounding the execution of Ex. B-3, it was construed to be a family arrangement and combination of release by defendants 2 and 3 in favour of the plaintiffs. The trial Judge also found the possession to be continuously with the plaintiffs only. Hence the suit was decreed granting declaration as prayed for. Aggrieved, the first defendant alone filed the appeal, before the first appellate Court. The second defendant does not appear to have filed any written statement of his own staking claim to the properties; but it is seen from the written statement filed by the first defendant that the counsel for the second defendant has made an endorsement that he adopts the written statement filed by the first defendant. As noticed earlier, the second defendant has not chosen to file any appeal also before the first Appellate Court. During the pendency of the appeal before the lower appellate Court, the first defendant Kanda-samy Pandaram died and his legal representatives were brought

on record. The lower appellate Court also concerned with the findings of the learned trial Judge and dismissed the appeal. As a matter of fact, the lower appellate Court has adverted to certain earlier proceedings in O. S. No. 752 of 1962 wherein the first defendant appears to have himself taken the stand that he was not the owner of the property and having regard to such stand taken and the continuous possession and enjoyment of the property also found substantiated to be with the plaintiffs, the appeal came to be rejected. The appellants in A. S. No. 13 of 1981, originally A. S. No. 179 of 1980 on the file of the District Court, Salem, have not chosen to file any appeal and they appear to have reconcited themselves to the fate of the result of the judgments of the Courts below. While that be the position, the second defendant, who has not projected any independent claim of his own and who has not chosen to file any appeal, before the First Appellate Court has filed this second appeal.

7. Mr. T. R. Rajagopalan, learned senior counsel raised a preliminary objection to the maintainability of the appeal at the instance of the second defendant contending that he having not projected any claim in himself and not having also filed any appeal before the fust appellate Court against the judgment of the trial Court, has no right to present the above second appeal. The learned counsel in support thereof relied upon the decision in Jamnadas v. Narayanlal, AIR 1970 SC 1221 and the decision in Nirmala v. Balai Chand, : [1965]3SCR550 . Per contra, Mr. Siva-kumar, learned counsel for the appellant has placed reliance upon the decisions in P. Narasimham v. P. V. Narasimham, : AIR 1973 AP162 and Braja Behari v. Chitta Ranjan, AIR 1968 Ass 19.

8. The decision in Nirmala's case (supra) is one arising out of the suit filed by 'A' against two deities represented by 'B' and 'N', his wife claiming a declaration that 'N' was benamidar in respect of the properties purchased in her name and later dedicated upon two deities and that by the deed of endowment, there was no absolute dedication in favour of the two deities. In the written statement filed in the suit, 'B' denied the claim made by 'A' and contended that the dedication in favour of the deities was absolute. It was ultimately held by the trial Court that the endowment was partial and that the beneficial interest remained vested in 'A', the plaintiff. The case of the deities that there was an absolute dedication was

rejected. The decree was not challenged by 'B' on behalf of the two deities. But 'N' appealed and contended that there was an absolute dedication in favour of the deities. Since 'N' did not represent the deities, she could not raise such a claim, unless she got formally appointed as guardian of the deities. The trial Court's decree was confirmed by the High Court, subject to certain modifications. In the appeal to the Supreme Court by 'A', the deities were also impleaded as party respondents, but the deities had not taken part in the proceedings, as they had not been parties in the High Court. The decree against the two deities had thus become final, no appeal having been preferred in the High Court by the deities. In that context, their Lordships of the Supreme Court held by majority that it was not open to 'N' to challenge the decree in so far as it was against the deities, that in the suit concerned before them, one of the decrees shall stand apart from the other since there were two sets of defendants and in substance, two decrees, though related, were passed and when the decree of the Court of first instance was allowed to become final by not appealing, it would not be open to another party to the litigation, whose rights are otherwise not affected by the decree, to invoke the powers of the appellate Court. In Jamnadas's case, AIR 1970 SC 1221 (supra), the Apex Court was concerned with a case, where there was a challenge to the decree of the trial Court, which was not appealed by one defendant, and it was held by their Lordships that inasmuch as the appellant did not appeal against the judgment of the trial Court and even in the appeal filed in forma pauperis leave was refused and thereafter, he did not pay any court-fee and pursue the appeal which came to be, for that reason, dismissed, such a person cannot be permitted later to challenge the decree as void.

9. In Braja Behari's case, AIR 1968 Ass 19 (supra), it was held that where all defendants have a common ground against plaintiff and the plaintiff makes a common ground of attack against the defendants, the mere fact that only some defendants appealed to the lower appellate Court, would not make any difference, so long as the other defendants also continued to be parties to the proceedings having equal rights to question the ultimate decision that was made, and that the preliminary objection that they have not having preferred an appeal to first appellate Court and, therefore, they have no right to come to the High Court and prefer appeal jointly with the other defendants, cannot be accepted. In P.

Karasimham's case, : AIR 1973 AP162 (supra), the Court was concerned with a case where the suit was decreed against all the defendants on a common ground that a debt contracted by one of the defendants as karta was for a legal necessity and in appeal by one of the defendants, the common finding was reversed by the High Court, the other defendants were competent to file Letters Patent Appeal though they had not appealed against the trial Court's decree, since the suit was decreed against all the defendants on a common ground, it was open to any one of them to file an appeal. It is interesting to notice that to come to such a conclusion, the learned Judges of a Division Bench of Andhra Pradesh High Court has chosen to express their dissent from the decision of this Court in Poomalai Ammal v. Subbammal, : AIR1953 Mad566 and distinguished the decisions in Arulayi v. Antoni-muthu Nadan : AIR1945 Mad47 and Mohammad Khaleef v. Les Tanneries, AIR 1926 PC 34. Paragraph 19 of the judgment which contains an extract of the judgment of this Court in Poomalai Animal's case (supra), is as follows:

'.....A memorandum of cross-objections has been filed by the first defendant who did not file an appeal against the judgment of the trial Court decreeing the suit against her. For the first time she has filed a memorandum of cross-objections herein which, in effect, is only an appeal against the decree of the trial Court invoking Order 41, Rule 33, C.P.C. I do not think that provision is meant to be exercised in favour of a party who did not choose to file an appeal against the judgment of the trial Court and allowed it to become final. Therefore, Order 41, Rule 33, C.P.C. does not avail him.....'

In paragraph 20 after the extract referred to supra, it is stated that the Division Bench of Andhra Pradesh High Court was unable to take that view. I am pointing out this aspect to show that apart from the fact that I am bound by the judgment of this Court, with which the Andhra Pradesh High Court expressed dissent, the ratio of the decisions of the Supreme Court would directly run counter to the view taken by the Andhra Pradesh High Court.

10. As far as the decision of Assam and Nagaland High Court, AIR 1968 Ass 19, Braja Behari's case (supra) is concerned, it may be noticed that that was a

peculiar case in which some of the defendants, though they were not appellants before the first appellate Court, joined with the other appealing defendants and filed the second appeal along with the defendants, who were fighting before the first appellate Court also, unlike the present case.

11. I have carefully considered the submissions of the learned counsel appearing on either side on this issue. There is no comparison of this case with the cases relied upon by the learned counsel for the appellant. As pointed out earlier, those decisions not only were rendered on the peculiar facts and circumstances of the case, but also to meet the contingencies visualised under Order 41, Rule 33, CPC, enabling the appellate Court concerned to adjust the rights of the parties and even alter the portion of the decree not appealed against, in giving effective relief in the appeal. On the other hand, so far as the second defendant -- appellant before this Court is concerned, as pointed out earlier, he did not project any claim of his own and he only adopted the written statement filed by the first defendant as per which the first defendant was claiming rights even against the interest of the second defendant contending that the plaintiffs as well as the second defendant have joined together and executed a sale deed in favour of the first defendant and that the said deed was a real one. As far as the document Ex. B-3 is concerned, the claim of the first defendant was that the third defendant, wife of the second defendant had no rights. It is such a person who has adopted the written statement of the first defendant with such contentions, has chosen now to file this appeal. That apart, the rights claimed by the first defendant himself is distinct and separate from the rights of the second defendant or third defendant and there is no identity of claims or any common or joint decree or claim in this case. The second defendant who suffered a decree before the trial Court, as also the third defendant by their omission to file any appeal before the first appellate Court must be considered to have abandoned their right to file an appeal against the decree in so far as it went against them before the trial Court and cannot, therefore, be allowed to file an appeal in this Court by way of second appeal under the pretext of challenging the judgment and decree of the first appellate Court before which also the present appellant was not an appellant, by merely taking advantage of the fact that he was one of the respondents. Permitting such an appeal at the instance of the second defendant will amount to permitting appeal directly to be allowed to be

filed against the judgment and decree of the trial Court by a person who has not chosen to challenge the judgment of the trial Court before the first appellate Court. It is all the more so and there could be no such permission having regard to the fact that the parties who have filed the first appeal, as noticed earlier, have reconciled to their fate and allowed the matter to become final and have not chosen to further pursue the matter by filing any second appeal. For all the reasons stated above, I do not find any merit whatsoever in the plea on behalf of the learned counsel for the appellant in his attempt to justify the filing of this second appeal at the instance of the second defendant. The second appeal is, therefore, liable to be and is rejected in this ground alone.

12. Even that apart, I find on going through the judgment of the Courts below that the character of the document has been construed in a particular manner and particularly having regard to the overwhelming oral and documentary evidence on record, the Courts below have come to the conclusion that Ex. A-l was a sham and nominal document and that possession always continued, as claimed by the plaintiffs, of the suit property with them. That being a pure question of fact, it is not for this Court to interfere with the concurrent finding of fact recorded in this regard. The learned counsel for the appellant tried to point out that a registered document cannot be avoided without any specific declaration therefor having been made, in a suit filed for injunction protecting the possession of the plaintiffs. This submission proceeds upon a mistaken impression about the nature of the relief sought for and ultimately granted. On verification of the original plaint presented in the trial Court, having regard to the nature of the decree passed, it is seen that though initially the suit was for possessory rights only, later the relief has been sought for a declaration that the plaintiffs are the absolute owners entitled to be in possession and for an injunction and the valuation was duly permitted to be amended and revised court-fee also paid pursuant to a separate order passed by the trial Court in I.A. No. 2055 of 1978, dated 21-2-1979. In that view of the matter, the decree passed cannot be said to be irregular or invalid.

13. For alt the reasons stated above, the second appeal fails and shall stand dismissed. There will be no order as to costs.

14. Appeal dismissed.