

Perumal Naidu Vs. Krishnaswami Naidu

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Court : Chennai

Decided On : Jan-29-1968

Reported in : AIR1969Mad90

Judge : Ismail, J.

Acts : Oaths Act, 1873 - Sections 12; [Constitution of India](#) - Article 14

Appeal No. : Second App. No. 48 of 1968

Appellant : Perumal Naidu

Respondent : Krishnaswami Naidu

Advocate for Pet/Ap. : R. Alagan, Adv.

Disposition : Appeal dismissed

Judgement :

Ismail, J.

1. The appellant and the respondent are brothers. The respondent instituted a suit for redemption of an othi dated 1-11-1941, executed by him in favour of the appellant over his undivided half share in the property and for partition and separate possession of his half share. In the written statement filed by him, the appellant contended that the name of the respondent was included in the sale

deed in respect of the suit property 'benami for namesake' and that the othi executed by the respondent arising out of the benami purchase 'did not in any way affect the position' and hence the respondent was not entitled to any relief.

2. The learned District Munsif framed necessary issues and the suit was adjourned from time to time for trial and when the suit came up for trial on 30-1-1967, both parties filed a joint memo stating that if the respondent took special oath putting out camphor and wearing an arali garland in front of Adisolaxi Pulukandi Koil stating that the respondent had a share in the suit property and had paid consideration, the suit might be decreed. This memo was signed by the respondent and the appellant and their advocates. On this, the learned District Munsif appointed a commissioner to administer the oath and posted the case for return of the warrant to 4-2-1967. On 3-2-1967 the respondent made an endorsement on the warrant that he was prepared to come for taking the oath. But on that date the appellant made an endorsement on the warrant saying that for some reason ha did not agree to the oath. Thereupon the Commissioner returned the warrant on 4-2-1967. On the return of the warrant, the learned District Munsif posted the case to 6-2-1967. On 6-2-1967 he recorded what happened before the issue of the warrant and stated that since the appellant, the challenger had resiled from his agreement without assigning any reason to satisfy the court, the appellant was again given an opportunity to carry out his part of the agreement and light the camphor before the temple at 12 noon on 7-2-1967. He further observed that the appellant again refused to fulfil his part of the agreement. Consequently the learned District Munsif directed the Commissioner to administer the oath after lighting the camphor and giving an opportunity to the appellant to perform his part of the agreement. In pursuance of this direction, the Commissioner executed the warrant and the respondent took the oath as per the joint memo on 7-2-1967. On 8-2-1967 the learned District Munsif, after referring to the above facts, decreed the suit of the respondent.

3. The appellant herein preferred A. S. No. 43 of 1967 on the file of the Court of the learned District Judge, Ramanathapuram, at Madurai and the learned District Judge on 23-12-1967 dismissed the said appeal. I must point out that the only contention urged before the learned District Judge was that the learned District

Munsif erred in straightway decreeing the suit without giving an opportunity to the appellant to explain the circumstances under which he resiled. Along with the memorandum of appeal, an affidavit was also filed by the appellant stating that the members of his family were opposed to the decision of the suit on the basis of the path, and that was the reason for his resiling from the agreement. The learned District Judge after considering the materials placed before him came to the conclusion that the learned District Munsif had given every possible opportunity to the appellant and the reasons adduced in the affidavit filed before him were not sufficient to justify the appellant resiling from the agreement. Hence the present second appeal.

4. Mr. Alasar, learned Counsel for the appellant, contended that Section 12 of the Indian Oaths Act 1873, is unconstitutional as being opposed to Article 14 of the Constitution. That section states-

'If the party or witness refuses to make the oath or solemn affirmation referred to in Section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it and that he refused It, together with any reason which he may assign for his refusal'.

Mr. Alagar himself conceded that Section 12 does not deal with the case of a challenger but only with the case of the person who agreed to take an oath and that even if Section 12 is held to be unconstitutional, that will not help the appellant. Apart from this I am of the view that no question of unconstitutionality arises with reference to Section 12. The position of a person who agreed to take an oath is essentially and basically different from the position of s person who agreed to abide by the taking of such an oath. In the case of the former resiling from his agreement, from the very nature of the case, the Court cannot compel him to take the oath, if he was unwilling to take. That is not the case with reference to a challenger. Therefore even this basic difference in the position between the two parties is sufficient to justify the resiling of the two parties from their agreement being treated differently.

5. The next ground urged by Mr. Ala-gar is that if this position is allowed to prevail, it will merely result in there being a contract which cannot be mutually enforced. I do not think that the principle of mutuality available in relation to specific performance of contracts can be applied to cases of the nature in question. The essential thing is here is an understanding arrived at between the two parties in the presence of the Court: and when one of the parties, namely, the challenger goes back on the understanding without proper reasons, all that the Court does is to allow the other side namely the proposer to take the oath which he agreed to take and to decide the dispute on the basis of such oath 'being taken. I do not think any question of mutuality arises under such circumstances. Therefore, in my view, there are no merits in the second appeal and the same is dismissed.

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