

Krishnan Vs. Punidham and ors.

Krishnan Vs. Punidham and ors.

SooperKanoon Citation : sooperkanoon.com/827677

Court : Chennai

Decided On : Aug-19-1996

Reported in : (1997)1MLJ242

Appellant : Krishnan

Respondent : Punidham and ors.

Judgement :

Raju, J.

1. The above Second Appeal has been filed by the plaintiff in O.S. No. 147 of 1977 on the file of the Court of the Additional Subordinate Judge, Pondicherry, who succeeded before the learned trial Judge, but lost partly before the first appellate Judge.

2. The plaintiff has filed the suit O.S. No. 147 of 1977 for a declaration of his title to the suit property and for permanent injunction. The case of the plaintiff before the trial court was that the suit property originally belonged to one Manicka Mudaliar, who was in possession and enjoyment of the same from 1922, that after his death, his two sons Muthusamy and Deivasigamani inherited the property, that in the year 1963, the plaintiff purchased half Khani of land to the west of the suit property, that the plaintiff entered into a sale agreement on 6.12.1965 with the second defendant and father of defendants 3 and 4 for the purchase of the suit property and that a notarial sale deed was executed on 13.1.1966 in pursuance of

the sale agreement after receiving the balance of sale consideration remaining unpaid after deducting the advance earlier paid at the time of agreement of sale. The plaintiff claims that he continued to remain in possession and enjoyment of the suit property as the full and absolute owner and made improvements to the suit property. While so, the first defendant appears to have filed the suit in O.S. No. 123 of 1971 for partition and obtained a preliminary decree and when the advocate Commissioner came to deliver the property, the plaintiff obstructed the execution of the preliminary decree and while filing an application and obtaining stay of further proceedings, has filed the present suit for the reliefs mentioned supra.

3. The first defendant filed a written statement contending that the properties are joint family properties and one Muthusamy and Deivasigamani sold one item of undivided properties to the plaintiff, that (he sale was, therefore, null and void to the extent of 2/3rd share belonging to other co. sharers, that the first defendant filed the suit in O.S. No. 127 of 1971 for partition and delivery of the share purchased and that the sale in favour of the plaintiff, if at all, is valid only in so far as the 1/3rd share of the vendors of the plaintiff is concerned.

4. On the above claims and counter claims, oral and documentary evidence came to be adduced by the plaintiff and the defendants were content with adducing oral evidence. On a consideration of the materials on record, the learned trial Judge by his judgment and decree dated 30.4.1580 decreed the suit mainly on the ground that the notarial sale deed must be prima facie considered to be genuine and valid and that the plaintiff was entitled to the benefits of Article 2265 of the French Civil Code providing for a short limitation period. Aggrieved the first defendant filed A.S. No. 19 of 1982 on the file of the Principal District Judge, Pondicherry. It is seen from the judgment of the first appellate Court that earlier the first defendant filed LA. No. 1299 of 1980 for condonation of delay in filing the appeal and the same was dismissed for default and another application in L.A. No. 699 of 1981 for restoration of the said application also came to be dismissed and therefore, the present appeal could not be maintained or entertained validly and properly. In the light of the above, the plaintiff took an objection to the maintainability of the appeal and also contended that the findings of the learned trial Judge on the merits of the

claims made in the suit are fully justified and do not warrant any interference. The learned first appellate Judge has overruled the objection taken regarding the maintainability of the appeal and also chose to reverse the judgment and decree of the trial court sustaining (he decree in favour of the plaintiff only to the extent of 1/3rd share of the suit property and dismissing the claim in the suit in other respects. The learned first appellate Judge was also of the view that the plaintiff cannot take advantage of Article 2265 of the French Civil Code for invoking the benefit of short period of limitation, Hence, the above second appeal.

5. Mr. V.S. Ramakrishnan, learned Counsel appearing for the appellant - plaintiff while elaborating the substantial questions of law formulated for consideration in the appeal. Contended that the first appellate court committed an error in entertaining the appeal and the same should have been dismissed when once the earlier application for condonation of delay of 156 days in filing the appeal came to be dismissed for default and was not also restored subsequently and that the learned first appellate Judge also committed an error in coming to the conclusion that the plaintiff was not entitled to invoke prescriptive title to the suit property under Article 2265 of the French Civil Code. The learned Counsel also relied upon the decisions in *Vidyacharan v. Khubchand* : [1964]6SCR129 and *Mudigowda v. Ramchandra* : [1969]3SCR245 in support of his claim.

6. Per contra, Mr. Hameed Mohideen, learned Counsel appearing for the first defendant while adopting the reasons assigned by the learned first appellate Judge, contended that in the teeth of the admission made by the learned Counsel that the French Civil Code applied and the limitation will not run against the defendants till the judgment was invited, it is not given to the plaintiff to challenge the decision of the learned first appellate Judge in this second appeal and that at any rate, the earlier, application for condonation having been dismissed for default and not on any merits of the rights of the parties or claims made in the appeal, nothing precluded the first defendant from filing the appeal as long as such filing of appeal was well within the time of limitation. As for the merits of the claim, the learned Counsel contended that the conclusions of the learned first appellate Judge are well merited and do not call for interference. The learned Counsel also relied upon the decision in *Surajdeo v. Partap Rai* A.I.R. 1925 Pat. 514 in support

of his submissions based on the maintainability of the appeal.

7. I have carefully considered the submissions of the learned Counsel appearing on either side. As regards the first contention on behalf of the appellant about the error in entertaining of the appeal in the teeth of the dismissal of the earlier application filed for condonation of delay on the ground of default and its non-restoration, I am of the view that the learned Principal District Judge was right in his conclusion that the appeal was maintainable and the contentions to the contrary raised before this Court cannot be countenanced. As rightly pointed out by the learned Counsel for the first respondent, the counsel for the plaintiff himself admitted that the limitation would start running against the first defendant to file an appeal only from the date of notification, of the judgment and it was an undisputed fact that the judgment was not notified to the first respondent. What was really contended before the first appellate Judge was that in the teeth of the dismissal of the application for condonation of delay and the dismissal of the restoration application, there is no scope for filing an appeal once again on the same matter. There is in my view no legal basis for such a claim, at any rate in this case. As against the reliance placed the learned Counsel for the appellant on the decision in Vidhyacharan's case : [1964]6SCR129 , wherein it was held that the Limitation Act and the Civil Procedure Code are to be read together because both the statutes relating to procedure and they are in pari materia and, therefore, to be taken and construed together as one system as explanatory of each other, the learned Counsel for the first respondent placed strong reliance upon the decision in Surajdeo's case, A.I.R. 1923 Pat. 514 wherein the learned Judges of the Division Bench of the Patna High Court, while applying the principles laid down by the Privy Council in the decision in Abdul Majid v. Jawahir Lal (1914) 36 All. 350 held that the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as adopting or confirming the decision appealed from and that it merely recognised authoritatively that the appellants had not complied with the condition under which the appeal was open to them and therefore, they were in the same position as if they had not appealed at all. It was also held therein that there is nothing in law to prevent the entertainment of a fresh appeal on the dismissal for default of a previously filed appeal provided the later appeal was otherwise in order and was

filed within the period of limitation stipulated therefor.

8. The learned first appellate Judge, on the facts of this case and in the light of the concession made, was obliged to decide only about the maintainability in the light of the earlier application for condonation of delay having been dismissed. It is not the case of the appellant that the appeal would be barred by limitation if the period of limitation is to be computed or calculated by applying the principle that the limitation would commence running against the judgment-debtor only when the judgment was notified to him and in French law notification of the judgment was an essential formality to have the limitation to run against a party to file an appeal. It is in this context, the learned first appellate judge came to the conclusion that the first defendant appellant before the first appellate court was entitled to take advantage of the absence of notification of the judgment, at any stage. As far as the dismissal of the application filed earlier for condonation of delay of 156 days in filing the appeal is concerned, it is seen that the same was dismissed for default and the restoration application was also dismissed and therefore, such dismissal could not operate as a decision on merits preventing filing of a fresh appeal if such filing of appeal is otherwise within the period of limitation. The mere fact that the first defendant on an earlier occasion proceeded under misconception of law governing admission of appeal and the period of limitation, is no ground to deny him the right of appeal, if the appeal would be otherwise in time when the correct provisions of law governing the period of limitation were applied. In view of the above, I do not find any infirmity whatsoever the decision of the learned first appellate Judge in preventing the objection to the maintainability of the appeal in holding that the appeal was maintainable in law.

9. As far the other contentions based on merits of the claim and the applicability of Article 2265 of the French Civil Code, I find that the learned first appellate Judge has extracted the very Article, which stipulated that the person acquiring a property bona fide and through a title which on the face of it conveys title acquires ownership in 10 years as against the normal period of 30 years and adverting to the peculiar facts of the present case has recorded a factual finding that the sale deed Ex. A-2 itself disclosed that the plaintiff was not bona fide purchaser and that the vendors have not disclosed to him any valid title and it is only knowing very

well the draw backs in the title that he did not require from the vendors any other document to justify the title and instead agreed to bear himself all the consequences, which would result from the failure of the production of the title deeds by the vendors. From the said factual position, the learned first appellate Judge came to the conclusion that such a declaration would clearly show that he was aware that his vendors were not in a position to establish their title and the plaintiff having taken deliberate risk in respect of the same is not entitled to have the benefit of short prescription of I title under Article 2265 of the French Civil Code. In spite of the above it is only in view of the admission made by the first defendant, the title to 1/3rd share of the plaintiff in the suit property was sustained and the suit ordered to be decreed only in respect of the said 1/3rd share. The said finding of the learned first appellate Judge proceeded on a proper and vital appreciation of the conduct of the plaintiff in not having purchased the property bona fide and the same does not suffer from any infirmity whatsoever warranting interference by this Court in this second appeal. The first appellate Judge as a Court of first appeal and as a final Court on finding of fact is entitled to take a different view by re-appreciating the very evidence adduced before the trial Court and which was appreciated in a different manner or the preliminary stage by the trial Judge. Unless the findings of the learned first Appellate Judge are shown to be not based on any evidence whatsoever or patently illegal, there is hardly any scope for this Court to interfere with the same in exercise of second appellate jurisdiction. On the facts of the present case, no such infirmity or patent irregularity is shown to vitiate the findings of the learned first appellate Judge in this regard. In view of the same, I do not see any merit in the above second appeal. The second appeal, therefore fails and shall stand dismissed. There will be no order as to costs.