Privy Council Appeal No. 6 of 1931

Talluri Venkata Seshayya and others - - - - - *Appellants*

v.

Thadikonda Kotiswara Rao and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 20TH NOVEMBER, 1936

Present at the Hearing:

LORD BLANESBURGH.
LORD THANKERTON.
SIR SHADI LAL.

[*Delivered by* LORD THANKERTON.]

This is a consolidated appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 30th November, 1927, whereby a judgment and decree of the Subordinate Judge of Masulipatam, dated the 5th February, 1925, was set aside and the appellants' suit was dismissed.

The present suit was instituted on the 21st August, 1923, by the present appellants, along with a fifth plaintiff who died during the trial, as representing the interested public, under Order I, Rule 8, of the Code of Civil Procedure, with the requisite permission of the Subordinate Judge of Masulipatam. The plaintiffs seek a declaration that five temples of the village of Vellatur, Guntur District, are public temples and that certain inam lands, situated in Kowthavaram village, form the endowment of these temples, and they seek to have set aside: (*a*) a permanent lease in respect of these lands executed on the 6th December, 1888, by the then managers of the temples, (*b*) a mortgage deed on the security of these lands, dated the 3rd November, 1900, and (*c*) the Court Sale effected in execution of the decree obtained on the basis of the said mortgage in O.S. No. 29 of 1911, on the file of the District Court of Kistna; they further seek restoration of possession of these lands to the first defendant, who is the present hereditary Dhamakartha of the temples. The other defendants are the persons who are in possession of the temple lands, claiming under the permanent lessee, and the members of an undivided family, who purchased the right to the annual rent reserved under the permanent lease.

Three main questions were argued before their Lordships, namely, (1) whether the suit is barred by limitation, (2) whether the suit is maintainable under Order I,

Rule 8, of the Code of Civil Procedure, and (3) whether the suit is barred by *res judicata*. The appellants' failure on any one of these questions will involve the dismissal of the appeal. In the view that is taken by their Lordships, the suit is barred by *res judicata*, and it becomes unnecessary to deal with, or express any opinion upon, either of the other two questions, or the particular facts out of which they arise.

The five temples in suit were built early in last century by one Thadikonda Seshayya, a native of Vellatur and the grandfather of the first respondent's adoptive father, who had amassed wealth in Hyderabad and had returned to his native place. The temples were built for the deities of Siddhi Ganapati Swami, Rajeswara Swami, Bhimeswara Swami, Adi Seshachala Swami and Kameswara Maharani, and Thadikonda Seshayya conducted the festivals and the other affairs of the deities during his lifetime; he left a will, dated the 26th August, 1826, shortly before his death, directing his widow, Adilakshmamma, to make a permanent endowment for the temples to the extent of Rs.70,200 out of his self-acquired properties. The widow purchased two sets of properties in the villages of Kowtharam and Peddapulivarru for the temples, conducted the affairs of the temples out of the lands so purchased, and afterwards made a formal gift of the lands to the idols. Another set of properties in the village of Vellatur was endowed to the same temples by the Zamindar of Narasaraopet.

Seshayya's two sons, Siddhi Ganapati Doss and Nagabhushana Gajanana Doss, conducted the festivals and other affairs until the death of Ganapati in 1857. The latter's widow claimed the Dharmakartaship, but the Collector decided in favour of Gajanana. In 1859 the Inam Commissioner granted an Inam title deed in respect of the Devadayam Inam situated in the village of Kowtharam. In 1867 Gajanana started borrowing money on the security of the Devadayam lands, which culminated in a usufructuary mortgage for Rs.8,000, dated the 15th January, 1887, under which the lands of Kowtharam were handed over to the mortgagee. In order to discharge this mortgage, Gajanana and his adopted son Seshayya, granted the permanent lease of Kowtharam lands, dated the 6th December, 1888, which is in suit, and the mortgagee, Gopalkrishnamma, on the same day executed the counterpart of the lease.

On the 18th January, 1891, two persons, interested in the temples and in the performance of the service and worship thereof, who had obtained the leave of the Court under section 18 of the Religious Endowments Act (XX of 1863), filed a suit, O.S. No. 4 of 1891 on the file of the District Court of Kistna, against Gajanana, his adopted son Seshayya and Gopalakrishna, the permanent lessee, claiming that the five suit temples at Vellatur were public temples and praying for the removal of the first two defendants from the office of Dhamarkarta. The main defence was that the temples and lands were private property to which the Act XX of 1863 did not apply. Gajanana died before the suit

was heard. In a judgment dated the 5th February, 1892, the District Judge of Kistna dismissed the suit, holding that the temples were private and that the lands were a private foundation, and that Act XX of 1863 did not apply. An appeal by the plaintiffs to the High Court of Madras was dismissed by a judgment dated the 3rd August, 1893.

The respondents' plea of *res judicata* rests upon these judgments, but, before dealing with them, it will be convenient to refer to the subsequent history of the temples and the Kowtharam lands in suit.

On the 3rd November, 1900, Seshayya mortgaged for Rs.4,000 his rights in the Kowtharam lands, subject to the permanent lease, and the Vellatur lands to Vadlamannati Srinivasa Dikshit. Seshayya died about 1905 leaving a will by which he appointed executors and gave them directions for the management of the temples and the properties. He was survived by his widow, Subbama, who brought a suit on the 22nd October, 1908 (O.S. No. 65 of 1908 in the District Court of Guntur) against the executors of her husband's will, Srinivasa, the mortgagee, and others, claiming the Vellatur lands on the ground that she had succeeded Seshayya as Dhamarkarta and that the mortgage of 1900 and other alienations by Seshayya were not valid. This suit, which did not relate to the Kowtharam lands, was subsequently renumbered as O.S. No. 84 of 1910, and, on the 14th February, 1913, the Subordinate Judge of Guntur decided in favour of Subbama, holding that the Vellatur lands were public endowments to the temples and the mortgage of 1900, so far as relating to the Vellatur lands, was not binding on Subbama as hereditary manager of the temples.

Meantime, Srinivasa had brought a suit on his mortgage in the District Court of Kistna (O.S. No. 29 of 1911) against Subbama and the executors of Seshayya, in which Subbama contended that the mortgage was not binding on the properties. The Court granted a mortgage decree on the 31st July, 1912.

Appeals were taken in the Guntur suit of 1910 and the Kistna suit of 1911 to the High Court of Madras, and judgment in both the appeals was delivered on the 23rd March, 1913. The High Court held that the mortgage of 1900 was binding on Kowtharam lands but not on Vellatur lands, and that the Kowtharam lands were liable to be sold. The decree of the Kistna Court was modified by dismissing the mortgagee's suit so far as Vellatur lands were concerned. On the 15th April, 1919, Srinivasa purchased the mortgaged properties at Kowtharam in execution of his mortgage decree. The appellants seek cancellation of this sale in the present suit.

Shortly after the decision of the High Court of Madras, Subbama adopted the first respondent, and the validity of the adoption, although raised in the suit, is no longer challenged by the appellants, in view of the concurrent findings of the Courts below.

It is unnecessary to refer to certain other suits which were brought during the intervening period before the present suit was brought in 1923. It is now necessary to return to the suit of 1891.

Mr. Dunne, on behalf of the appellants, conceded that, subject to the question of *bona fides*, the present appellants must be deemed to be claiming under the plaintiffs in the 1891 suit within the meaning of Explanation VI of section 11 of the Civil Procedure Code, as they were both claiming as representing the public interest in the temples and the Kowtharam lands. He further conceded that the matter in issue in the two suits was substantially the same. But the appellants maintain that the 1891 suit was not a *bona fide* litigation, that it was brought by the plaintiffs in collusion with the defendants, and that there was gross negligence in the plaintiffs' conduct of the suit; and that, accordingly, it could not form *res judicata* against the present plaintiffs.

The appellants' contention is founded on the non-production of a deed of gift of 1838 and of some of the documents connected with the inam enquiry, and also on the fact that, on their appeal to the High Court, the plaintiffs did not place their own oral and documentary evidence before the High Court, but only the defendants' evidence.

The learned Subordinate Judge held that the plaintiffs in the suit of 1891 had been guilty of gross negligence in the conduct of the proceedings before the Courts and that therefore the decision in such a suit could not bind the present plaintiffs or the worshippers at large. This decision was reversed by the High Court, who held that the plaintiffs in the 1891 suit were not guilty of fraud or collusion, or even of gross negligence. In both Courts the principles relating to negligent conduct of a former litigation by a guardian in the name of a minor were accepted as applicable to the case of parties litigating on behalf of a public interest, as in the present case. The cases illustrative of this principle, which are referred to in the judgments, are *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*, (1894) I.L.R. 22 Cal. 8, *Punnayyh* v. *Viranna*, (1921) I.L.R. 45 Mad. 425, *Karri Bapanna* v. *Yerramma*, (1923) 45 Mad. L.J. 324, and *Ananda Rao* v. *Appa Rao*, (1924) 47 Mad. L.J. 700. Their Lordships are not concerned to discuss the validity of these decisions, or the elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in *Karri Bapanna's* case (*supra*) that the principle of section 44 of the Indian Evidence Act can be extended to cases of gross negligence.

The provisions of section 11 of the Civil Procedure Code are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of section 44 of the Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts.

Under section 11, explanation VI, of the Civil Procedure Code, the plaintiffs in the present suit are deemed to be claiming under the plaintiffs in the 1891 suit, and again the statute defines a condition as necessary to the applicability of the section, namely, that the plaintiffs of 1891 litigated *bona fide*.

In the opinion of their Lordships, no case of fraud apart from collusion being suggested, the appellants are bound to establish either that the 1891 decrees were obtained by collusion between the parties, or that the litigation by the 1891 plaintiffs was not *bona fide*.

At the hearing before their Lordships, the appellants based their case entirely on inferences to be drawn (*a*) from failure to produce to the Courts in the 1891 suit certain documents, and (*b*) from the omission to lay the plaintiffs' evidence before the High Court. The appellants' oral evidence in the present suit tending to show collusion in the 1891 suit was not accepted by the Subordinate Judge, and was not referred to before their Lordships. The Subordinate Judge's finding of gross negligence is very far from a finding of intentional suppression of the documents, which would amount to want of *bona fides* or collusion, or of such intentional suppression of the plaintiffs' evidence before the High Court. In their Lordships' opinion, there is no evidence in this suit which establishes either want of *bona fides* or collusion on the part of the plaintiffs in the 1891 suit, and, accordingly, the appellants have failed to show that the decisions in the 1891 suit are not binding on them as *res judicata*. It follows, on this ground alone, that the appeal must fail.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs, and that the judgment and decree of the High Court dated the 30th November, 1927, should be affirmed.

(30124 -3A) WL 8136—2 180 12/36 P. St G. 338

In the Privy Council

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DELIVERED BY LORD THANKERTON.

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS
Pocock Street, S.E.1.

1936