

Puliyeri Kandiyil Panangadan Ambu Kurup Vs. Paloli Edathil Kunnummall and anr.

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Court : Chennai

Decided On : Sep-02-1890

Reported in : (1896)6MLJ29

Appellant : Puliyeri Kandiyil Panangadan Ambu Kurup

Respondent : Paloli Edathil Kunnummall and anr.

Judgement :

Best, J.

1. The question is whether the plaintiff's present suit is barred under Section 43 of the Code of Civil Procedure by reason of her omission to sue for possession of the land in her, former suit, ' in which the present appellant was also included as a defendant.

2. The former suit (No. 508 of 1884, Tellicherry District Munsif's file) was for setting aside the summary order dismissing the plaintiff's claim to the land which had been attached in execution of a decree and subsequently sold. The statement in the plaint in that suit that the cause of action arose 'on and after the 4th December 1883,' (see para. 5 of Exhibit C) shows that it was in fact a suit brought under section 283 of the Code of Oivil Procedure--'to establish the right' of plaintiff to the property. It has been held that where a previous suit for a declaration of title and confirmation of possession of property has been dismissed on the ground that plaintiff was. [29] not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the same property is not barred under section 43, Civil Procedure Code--see Nanoo Singh Monda v. Ananda Singh Monda I. L. R (1885) C. 291. The present plaintiff's case is stronger than were those of the plaintiff's in the case referred to above for the present plaintiff's suit was not dismissed ; but she obtained a decree setting aside the sale of the property. The decree thus obtained by her was merely declaratory (Of. Dildar Fatima v. Narain Das I. L. R (1889) A. 365) and such a decree is not sufficient to bar a subsequent suit for possession of the property.' Moreover the Subordinate Judge has found that though the present appellant was in possession of the property at the date of the bringing of the former suit, plaintiff was not aware of the fact; and such being the. case, the authorities quoted by him are sufficient to justify his finding that this suit for possession is not barred.

3. The statement in paragraph. 2 of the Memorandum of Appeal that the lower Appellate Court has not considered exhibits II, III, IV, V and VII, is incorrect. This appeal fails and must be dismissed with costs.

Muthusawmy Iyer, J.

4. I am of the same opinion. The only question of law that arises for decision upon the facts found is whether section 43 of the Code of Civil Procedure bars the present suit. The ground of claim in original suit No. 508 of 1884 was the order that rejected the claim in petition No. 1488 of 1883, and under section 283 the plaintiff was entitled to 'institute a suit to establish the right claimed by him and thereby to prevent the order from acquiring the force of a decree in a regular suit. The ground of the present suit was the wrongful withholding of possession from the plaintiff after his title had been declared in the previous suit. The grounds of action not being identical, section 43 is not applicable.

5. It is argued, however, for the appellant that the setting aside the sale and the recovery of possession are remedies consequent upon the declaration that the summary order is invalid. But it must be observed that section 283 gives a special right to sue for a declaration of title by reason of the special attribute with which the order on the claim petition is invested, unless it is invalidated. The right is one which the plaintiff is at liberty to exercise without reference to the Court sale and the transfer of possession under such sale that may or may not at once follow the order, and it [301 is indeed conceded by the appellant's pleader that if there had been no prayer in the previous suit for setting aside the Court sale, the present suit would be maintainable. After the claimant's title has been declared, he must no doubt sue but once, both to set aside the sale and recover possession, but until such declaration is made, the sale and transfer of possession are in the nature of successive wrongful acts originating from the invalid order rather than of remedies which he is bound to claim in the declaratory suit which is specially allowed on a stamp of Rs. 10. It is found further that whilst instituting the former suit the plaintiff was not aware of the transfer of possession under the Court sale which was sought to be set aside. In a case like this in which several wrongful acts consequent on the same order may occur on different dates, no laches could be imputed to the plaintiff for omitting to unite them all in one suit unless he was aware of their occurrence. The cause of action in such cases must be 'ascertained from the facts within his knowledge and averred in the plaint. I would also dismiss this second appeal with costs.