
(1936) 08 MAD CK 0029
In the Madras High Court

Alagirisami Naik and Others

APPELLANT

Vs

Sikandar Rowther and Others

RESPONDENT

Date of Decision : 25-08-1936

Acts Referred:

Citation : AIR 1936 Mad 960 : (1936) 44 LW 563 : (1936) 71 MLJ 614

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—This is a suit for redemption tiled by the grandson of the mortgagor. He stated in his plaint that defendants 8 and 9, the sons of the mortgagor, were also entitled to redeem but that they had refused to join the plaintiff in filing the suit because they themselves claimed no interest in the property. The trial Court found that the plaintiff's father had divided from the mortgagor even before the mortgage and that the only persons who had any right to redeem were defendants 8 and 9. That suit was dismissed. In appeal a part of the plaintiff's claim was allowed and a decree was given for some property in favour of defendants 8 and 9. In second appeal it was ordered that the appeal should be re-heard. The Subordinate Judge who heard the appeal a second time dismissed the suit on the ground that the plaintiff had failed to show any cause of action. In second appeal it is now urged that the Subordinate Judge acted wrongly in not passing a decree in favour of defendants 8 and 9, because they were parties to the suit and could have been transformed as plaintiffs under Order 1, Rule 10 and because even without that a decree could have been passed in their favour.

2. If there had been some doubt as to who should file a suit, then upon a proper

application the Court could have added some other persons, say defendants 8 and 9, as plaintiffs; but no such request was made by defendants 8 and 9. The plaintiffs in their plaint put forward a case which was adverse to defendants 8 and 9, claiming the sole right to redeem in themselves, while the defendants 8 and 9 remained ex parte. By remaining ex parte they acquiesced in the plaintiff's allegations and I do not therefore see how it was possible for the trial Court to have passed a decree in their favour. As the plaintiff had failed to show a cause of action and defendants 8 and 9 had not asked for any relief, the only course that was left open to the Court was to dismiss the suit. Order 1, Rule 10 refers to bona fide mistakes in the name of the plaintiff; but one cannot say here that there was any bona fide mistake. *Hughes v. Pump House Hotel Co.* (1902) 2 K.B. 485 was quoted by the learned Counsel on behalf of the appellant. The Court agreed in that case that it was very doubtful, from an interpretation of the leading case on the subject, which of two persons was entitled to sue. Unfortunately, the wrong person figured as the plaintiff but when the mistake was pointed out the other person was allowed to be substituted for the plaintiff. A similar case in India is *Krishna Boi v. The Collector and Government Agent, Tanjore* I.L.R (1907) 30 Mad. 419, where a Collector was managing an estate in Tanjore and as such he filed a suit for trespass. It was found that notwithstanding the fact that he was the manager, the proper plaintiffs were the concubines of the late Rajah of Tanjore. Upon an application substitution was allowed. In the Privy Council case *Bhupendranarayan Singha v. Rajeswarprasad Bhakat* (1931) 61 M.L.J. 632 : L.R. 58 IndAp 228 : ILR 59 Cal. 80 the plaintiff, claiming to be the owner of an impartible estate, sued for compensation. His three brothers were arrayed as defendants and supported their brother's claim. Their Lordships held that it was unnecessary to go into the question of the impartibility of the estate as the three defendants supported the plaintiff in his claim and that the suit should therefore be decreed for the whole amount claimed. It is clear that these cases have no resemblance at all to the case under consideration, where the defendants have themselves asked for no relief, nor has there been any application by defendants 8 and 9 to be substituted for the plaintiff. In *Debi Dayal Sahoo v. Bhan Pertap Singh* I.L.R (1903) 31 Cal. 433 three widows claimed

certain property, the first plaintiff being the principal claimant and the second and third plaintiffs reversioners who stated that they had transferred their rights to the first plaintiff. It was found on the facts that the first plaintiff had no right to sue but that the second and third plaintiffs were entitled to the property. Nevertheless, no decree was passed in favour of the second and third plaintiffs because on the pleadings they had not put forward any claim which was found in their favour. I therefore find that the suit was rightly dismissed and that a decree was rightly refused to defendants 8 and 9.

3. Even if the law had been otherwise, I would not have passed a decree in favour of defendants 8 and 9 without being properly satisfied that they were really parties to some of the proceedings that bear their name. They were ex parte in the trial Court, they were ex parte in this Court in second appeal and in the appeal from an order arising out of the suit they were also ex parte. From the vakalat filed on their behalf in this Court I find that their names appear but no other indication that they have joined the plaintiff. I therefore feel very doubtful whether at any time defendants 8 and 9 have taken any part in the proceedings in connection with this dispute. However, this is a point that does not now arise in view of my finding on the main point discussed. The second appeal is dismissed with costs. (No leave.)