
(1925) 03 MAD CK 0011
In the Madras High Court

(Banjoisi) Narasamma

APPELLANT

Vs

Banjoisi Sarasamman and Another

RESPONDENT

Date of Decision : 24-03-1925

Acts Referred:

Citation : AIR 1926 Mad 353 : (1926) 23 LW 157

Hon'ble Judges : Phillips, J

Bench : Division Bench

Judgement

Phillips, J.—S.A. No. 1067 of 1922 The plaintiff and Defendants 1 and 2 are sisters, and plaintiff brings this suit to recover her one-third

share in the suit house which has been found to belong originally to plaintiff's father. In 1918 the first defendant, who appears to have been in

possession of the suit house, brought a suit u/s 9 of the Specific Belief Act against her sister, the 2nd defendant. In executing the decree she

obtained obstruction was caused and she came into Court with an application under Order 21, Rule 97, Civil Procedure Code, in which the

plaintiff and her alleged tenant were counter-petitioners. An enquiry was held and finally an order was passed in E.A. No. 599 of 1918 which runs

as follows:

The obstructor did not intervene in that suit. Now she has been evidently set up by her defeated sister. Remove obstruction and deliver.

2. The obstructor can only refer to the plaintiff, the second counter-petitioner and by the use of the word "" obstructor "" the District Munsif must be

deemed to have found that she was the person who caused obstruction ; otherwise the word would be meaningless. It would appear, therefore,

from his order that he held that the plaintiff caused obstruction and he passed an

order which would appear to be under Order 21, Rule 98. As the plaintiff has failed to bring her suit within one year from the date of that order the lower appellate Court has dismissed it as barred by limitation.

3. In appeal it is urged that the order directing removal of obstruction was not passed under Order 21, Rule 98, because the plaintiff did not actually obstruct but obstructed through her tenant who was the first counter-petitioner in the application. There is no evidence to support the contention. I think, in the face of the order defining the plaintiff as the obstructor, it is unnecessary to consider that question here.

4. It was then contended that the order could not have been passed under Order 21, Rule 98, because the decree passed u/s 9 of the Specific

Belief Act is not a decree for possession within the meaning of E. 97. Reliance is placed upon an old case, *Gobind Chunder Bagdee v. Gobind*

Ghose Mundul 7 W.R. 171, but that case was not one under the Specific Belief Act nor under the present Civil Procedure Code. I can see

nothing in B. 97 which prevents its being applicable to a decree for possession under the Specific Belief Act. That decree for possession

undoubtedly declared the plaintiff's possessory right. It did not purport to decide that title but it confirmed the lesser right in the plaintiff and it was

a conclusive determination of that right. I see no reason why Order 21 should not be applied in this case ; consequently it must be held that, the

order of the District Munsif was passed under E. 98 and, therefore, the plaintiff's present suit is barred by limitation.

5. There are observations in *Mancharam v. Fakirchand* [1901] 25 Bom. 478 and in *Santi Lal v. Raj Narain* AIR 1924 All. 804 which go to show

that the person obstructing under Order 21, Rule 97 must be physically present on the spot. In neither of the cases was this observation necessary

for the determination of the suit, and in one case there was a conflict of opinion. Beading Order 21, Rules 97 and 98 etc., we find no reference to

the present obstructor, but only reference to the person obstructing or resisting execution. With all respect, therefore, if these two cases intended to

lay down that Order 21, Rule 97 is inapplicable to a case in which the obstructor was not actually present, I think it goes too far but, in view of the

finding in this case that the plaintiff did obstruct, it is not really necessary to determine the question.

6. The plaintiff's appeal (S.A. No. 1067 of 1922), therefore, fails and is dismissed with costs of the first defendant.

7. S.A. No. 543 of 1922--The first defendant also filed an appeal against the portion of the decree which declares that the 2nd defendant is

entitled to one-third share in the suit property. Ordinarily in partition suits it is the practice to declare the shares of all the parties to the suit and to

give a decree accordingly. This is to avoid multiplicity of litigation and that is the reason why all the sharers have to be made parties in such suits but

I do not think that it is laid down anywhere that in all circumstances must a decree be given in favour of all the cosharers. *Ashidbai v. Abdulla* AIR

1924 All. 804 is a clear authority to the contrary ; but reliance is placed on a decision of this Court in S.A. No. 1493 of 1920. The point was not

really considered in that case but the suit was remanded for fresh disposal on the ground that the parties to the suit were entitled to obtain their

shares although they were not members of a Joint Hindu family. The question whether the circumstances must justify a refusal of such reliefs to the

defendant was not considered at all. In the present case the plaintiff's claim to one-third share has been dismissed, and apparently there are now

only two other sharers entitled to the property ; and it is not clear what their respective shares are. The 2nd defendant in filing a written statement

only claimed one-third share on the assumption that one-third of the property would be allotted to the plaintiff. That not having been done, the right

of the other two sharers may be altered. I think, therefore, that there should be no decision of this question in this suit because the question has not-

been put in issue and there has been no determination of the share of the two-remaining sisters. I would, therefore, allow the appeal and set aside

that portion of the decree leaving the 2nd defendant to establish her right in a fresh suit if so desired.

8. In the circumstances I make no order as to costs in this appeal (S.A. No. 543 of 1922.)