

(1942) 11 MAD CK 0047
In the Madras High Court

C.S. Ananthanarayana Iyer

APPELLANT

Vs

Sivaramakrishna Iyer and Another

RESPONDENT

Date of Decision : 03-11-1942

Acts Referred:

Citation : AIR 1943 Mad 370 : (1943) 56 LW 44 : (1943) 1 MLJ 100

Hon'ble Judges : Krishnaswami Ayyangar, J

Bench : Division Bench

Judgement

Krishnaswami Ayyangar, J.—The appellant as plaintiff instituted the suit out of which this appeal has arisen for partition and recovery of an one-fourth share in a piece of wet land bearing survey No. 18-A in the village of Avadaiyaparai, Erode Taluk. He purchased this share from one Sundaram Ayyar under a sale deed dated 5th November, 1937. Sundaram Ayyar is the youngest of four brothers who are all sons of one Anantharamalinga Ayyar now deceased. The three elder brothers executed a mortgage in favour of the first respondent on 10th June, 1911, to secure the repayment of a loan of Rs. 1,500 advanced to them. The suit property was one of the items comprised in the mortgage. Six years later there was a partition in the family of the mortgagors and the arrangements then made are embodied in a partition deed dated 24th July, 1917. By that deed the properties of the family were divided among the several members of the family, namely, the father and the four brothers. The suit property amongst others fell to the share of the father, and he was given the right to enjoy them during his lifetime. Afterwards his wife was to enjoy them and after her death they were directed to be taken by the four sons in equal shares. There was also a list of family debts appended to the deed of partition which the sons undertook to discharge and among them was the mortgage debt due to the first respondent.

2. In 1928, the first respondent instituted O.S. No. 208 of 1928 in the Court of the Subordinate Judge of Coimbatore to enforce the mortgage impleading the mortgagors alone as defendants. In due course preliminary and final decrees

were passed and the entire mortgaged properties inclusive of the land now in suit were finally brought to sale in execution and purchased by the decree-holder himself. The decree-holder--now first respondent--also obtained possession through Court on 21st April, 1934. As already indicated, Sundaram Ayyar, the vendor of the appellant, had not been made a party to the suit so as to bind his interests in the suit property. On 5th November, 1937, Sundaram Ayyar sold his one-fourth share in two items of properties, of which one was the property now in suit. On the strength of this sale deed the appellant instituted the suit out of which the present appeal arises for obtaining the reliefs mentioned. The District Munsiff who tried the suit in the first instance dismissed the suit holding that the appellant had no right to sue for partition and that his only remedy was to bring a suit for redemption of the property, which he held was liable to contribute a proportionate part of the mortgage debt. On appeal to the District Judge of Coimbatore, that decision was affirmed. Hence this second appeal.

3. On behalf of the appellant it was contended that the mortgage of the 10th June, 1911, executed in favour of the first respondent did not bind the interest either of the father Anantaramalinga Iyer or of his son Sundaram Ayyar as neither of them was a party to it and as by that time a division in status had been established among the members of the family. But it is clear that in the partition deed this debt was treated as a binding liability of the family which the sons including Sundaram Ayyar undertook to discharge. It is not therefore open to the appellant to plead that the debt did not bind Sundaram Ayyar.

4. The only question which arises for consideration on these facts is whether the appellant should be given an unconditional decree for Sundaram Ayyar's share of the suit property without being obliged at the same time to pay a proportionate part of the mortgage debt. We are clearly of opinion that the answer should be in the negative. We have here a case of an owner of an one-fourth share suing for a partition and recovery of that share against the owner of the remaining three-fourths who was also a mortgagee of the suit property as well as of certain other properties. In such a suit it is the duty of the Court to adjust the rights and liabilities inter se between the parties and to determine the shares on such adjustment. To ignore the liability of one of the parties to the other or others and proceed merely to effect a division without regard to it, is to ignore the very character of the suit and the nature of the relief which the Court is bound to grant. It is conceded that such a course is not permissible in a suit for partition among the members of a joint Hindu family; but it is argued that a similar suit between co-owners stands on a different footing. We are unable to accept this distinction as sound in principle and we are not surprised that no authority has been cited in support of it.

5. It is next argued that even if in law the liability of Sundaram Ayyar to pay a proportionate part of the mortgage debt can be taken into account, still the liability can no longer be recognised as the debt has long since been barred by limitation. It is, however, to be observed that the prevailing view of this Court is

that even if a mortgage is barred by limitation it is still available to the mortgagee as a shield to defend his possession. (Vide Pingali Venkataramana Reddi by his authorised agent Brahmanda Narasimha Rau Vs. Kotigari M. Rangiah Chetti and Others, , A.R.M. Karuppan Chettiar and Another Vs. Venkata Perumal and Others, and L. P. A. No. 24 of 1940.) Limitation does not extinguish the liability but only bars the remedy. That the mortgage in favour of the first respondent did not confer upon him a right to possession is immaterial where, as here, the suit is one for partition calling for the adjustment of mutual rights and liabilities. The decision of the Privy Council in Bijai Saran Sahi v. Rudra Bageswari Prasad Bahadur Sahi (1929) 58 M.L.J. 440 which related to a simple suit for possession by an owner of the equity of redemption against a mortgagee who had no right to possession has no bearing in the present connection.

6. In the light of the foregoing discussion, the only decree that the appellant is entitled to, is a decree for partition and recovery of an one-fourth share in the suit property conditional on his paying into Court within 6 weeks the amount representing the pro rata liability of that share to contribute towards the mortgage debt, to be determined by the Court, at the time of the passing of the preliminary decree. A preliminary decree in these terms shall be substituted for the decree of the District Munsiff. The appellant has substantially failed and he must pay the costs of the first respondent in all the three courts. The parties agree that the mesne profits if any payable to the appellant shall go in discharge of the interest due by him.