

(1909) 10 MAD CK 0042
In the Madras High Court

Duri Bhagavanulu

APPELLANT

Vs

Tadpatri Veeravadambu and Others

RESPONDENT

Date of Decision : 27-10-1909

Acts Referred:

Citation : (1910) ILR (Mad) 246 : 4 Ind. Cas. 392

Hon'ble Judges : Ralph Benson, O.C.J.; Krishnaswamy Iyer, J

Bench : Division Bench

Judgement

1. Defendants Nos. 1, 2 and 3 acquired amongst themselves 4 virthis, 13 visams and one pie of land in the Agraharam of Sangavalsa. In 1876

there was an award of arbitrators on a submission made by them dividing the common properties. That document is Exhibit-H. The plaintiff

purchased half a visam of land from the 1st defendant on the 28th March, 1897, out of the lands that had fallen to the 1st defendant in the division

made by the award.

2. The District Munsif gave the plaintiff a decree for his half visam by directing a division of the entire property of the three brothers. The District

Judge has dismissed the suit. The first question to be decided is whether the plaintiff was entitled to the division and this turns on the right

understanding of the provision contained in Exhibit--H. Exhibit--H says: Time is fixed for the partition of the said paddy fields up to the end of the

year Sarvajith (1887-1888). So it is settled that each should enjoy the lands allotted for his share until then, and that, at the end of the said term,

they should again divide the said lands so that the profits and losses are equal and then enjoy.

3. Time is fixed for the partition of the said Palungrah Tope and Mango Tope

lands up to the end of the year Sarvajith (1887-88). So it is settled that, until then, each, should enjoy the lands allotted to his share according to the above arrangement, and that at the end of the said term the profits and losses should be made equal and the said lands divided by the parties equally.

4. What is the effect of the foregoing clauses? The arbitrators do not make a final division of the properties. They direct enjoyment separately of the plots specifically assigned to each of the sharers and instead of making a final partition direct a future division to be made in the year Sarvajith.

It is clear that subject to the separate enjoyment of the shares allotted to each the parties are entitled jointly or as tenants-in-common to all the

properties temporarily divided until the division to be made after Sarvajith. Every part of the property comprised in this allotment is subject to the

common ownership to be finally terminated by partition after Sarvajith. The plaintiff as the purchaser of an undefined half visam or of the definite

plots amounting in extent to a half visam must be entitled to claim a partition after Sarvajith as the second and third defendants would,

notwithstanding the alienation of a portion of the lands by the first defendant be entitled to claim a partition against the 1st defendant. It is

impossible to construe Exhibit--H as a contract entered into by defendants Nos. 1 to 3. See Krishna Panda v. Balaram Panda 19 M.k 290;

Sornavalli Ammal v. Muthyya Sastrigal 23 M.k 593 and Bhujahari Saha Banikya v. Behary Lal Bisak 4 C.L. 162. Their joint tenancy or tenancy-

in-common which existed before the award Exhibit--H is not finally put an end to, but continues to remain till the end of Sarvajith though subject to

separate enjoyment of special allotments till then. No objection was taken in the written statement of the contesting defendants and no issue was

framed as to whether the plaintiff as a mere purchaser of a portion of the property allotted to the 1st defendant under the award was entitled to

claim a partition under the terms of the award. And the District Judge in paragraph 8 of his judgment distinctly concedes ""that as purchaser from

the 1st defendant the respondent-plaintiff stands in his shoes and if the first defendant can now claim re-partition from his brothers, respondent can

claim re-division.

5. We may usefully add the remarks of Free-man in his book on Co Tenancy at p.

279 in support of the District Judge. "If, however, there remain any States wherein the Courts really intend to assert that a conveyance by one co-tenant of part of the common property is void, in any other sense than that such conveyance will not operate to diminish or impair the rights of the non-assenting co-tenants, such Courts are falling into minority, as the more recent decisions tend strongly towards the recognition of such conveyance as a valid transfer of all the grantor's interest in the property therein described entitling the grantor to certain rights that the co-tenants of the grantor cannot wantonly disregard;" Section 204. The District Judge, however, comes to the conclusion that the first defendant must be deemed to have elected to forego the privilege he possessed, of claiming a fresh division at the end of Sarvajith by his failure to preserve his share intact. Some portion of the land which had fallen to the share of the 1st defendant was sold for arrears of Kattavadi under a decree obtained by the zamindar against defendants Nos. 1 to 3 and other sharers. Assuming for the sake of argument that the 1st defendant was responsible for the sale of a portion of his property because he could have avoided it by payment, the property sold must be held to have been impressed with the liability to re-partition at the end of Sarvajith in the same manner that the half visam purchased by the plaintiff in private sale was itself liable to re-partition if the second and third defendants chose to insist upon it.

6. It cannot be, therefore, said that the 1st defendant lost his right to re-partition by the sale of a portion for arrears of rent. The District Judge himself points out that if the property when sold had been the joint property of the three brothers they could have no complaint that it was not kept available for re-partition. All that can be said is that the properties divided by the award in Sangavalsa being liable to re-partition the plaintiff is not entitled any more than the 1st defendant was to claim a re-partition of a portion of the properties divided omitting those that were sold for arrears of rent and have come into the hands of the 1st defendant's wife, the 4th defendant, as transferee of the purchaser in auction.

7. We may refer by way of analogy to suits by purchasers from one of several coparceners in a Hindu family of his share in a portion of the family property where the whole family property is required to be partitioned for the purpose of assigning the plaintiffs their share; See Mayne's Hindu

Law, Section 494. We must, therefore, hold that the plaintiff was entitled to maintain this suit for the recovery of his half visam by a re-partition.

8. It remains, however, to consider whether in the above view the suit was rightly conceived without the 4th defendant having been impleaded as a party in the first instance. The remarks already made are sufficient to show that no re-partition could be made without the lands in the possession of the 4th defendant being brought, into hotchpot.

9. At the time the fourth defendant was added as a party, more than 12 years, had elapsed from the end of Sarvajith and the suit would, as against her, be barred by limitation. And as she was a necessary party, the whole suit was liable to be dismissed. See *Imam-ud-din v. Liladhar* 14 A.p

524 and *Kalidas Kevaldas v. Nathu Bhagvan* 7 B.k 217. If relief could be given to the plaintiff against defendants Nos. 1 to 3 without joining the

4th defendant and including the lands bought by her the claim might be dismissed as against her merely. See *Ram Kinker Biswas v. Akhil Chandra*

Chauduri 2 M.L.T. 137 That being impossible the whole suit fails. We would on this ground support the decree of the District Judge and dismiss

the second appeal, but without costs.