

(1961) 11 AP CK 0015

In the Andhra Pradesh High Court

Case No : Letters Patent Appeal No. 130 of 1960

Fatimunissa Begum Saheba and Others

APPELLANT

Vs

Shaik Abu Baker Saheb and Others

RESPONDENT

Date of Decision : 08-11-1961

Acts Referred:

Citation : AIR 1963 AP 119

Hon'ble Judges : P. Chandra Reddy, C.J.;Jaganmohan Reddy, J

Bench : Division Bench

Advocate : A. Gangadhara Rao and P. Babul Reddy, for the Appellant; K. Krishnamurthy and R. Venugopala Reddy, for the Respondent

Final Decision : Allowed

Judgement

P. Chandra Reddy, C. J.

1. This is an appeal by the defendants under clause 15 of the Letters Patent against the judgment of Srinivasachari J. in A. S. No. 362/1956 reversing that of the Subordinate Judge, Nellore, and remitting the case to the trial court for fresh disposal.

2. Briefly stated, the facts giving rise to this appeal are these. The 1st respondent brought a suit for partition and separate possession of his 1/2 share in an item of property described in the schedule annexed to the plaint and for past and future mesne profits under the following circumstances. The 1st defendant was indebted to him in a sum of Rs. 1313-7-0 under a promissory note dated 21-1-1949. He obtained a decree on the foot of this promissory note in the District Munsiff's Court, Nellore and, in execution of that decree, he brought to sale 1/2 share of the Judgment debtor in the plaint schedule property and himself purchased the same on 3-3-1952, we understand, subject to the mortgage created in his favour on 2-4-1949 for a sum of Rs. 4,000/-. This was confirmed on 5-4-1953. Having obtained a sale certificate, he applied for delivery of possession of that 1/2 share. Defendants 6 to 8, who purchased the whole of

that property from the 5th defendant, obstructed delivery of possession, whereupon the plaintiff filed I.A. No. 334 of 1952 for removal of obstruction. The obstruction was removed and the plaintiff took possession of the property through court on 2-5-1953. The unsuccessful defendants carried the matter in revision to the High Court of Madras (C. R. P. No. 804 of 1953) challenging that order. The revision petition was accepted by the High Court.

In the course of the judgment, it was observed by Krishnaswami Nayudu J., who disposed of the Civil Revision petition, that the proper course for the purchaser of an undivided share was to institute a suit for partition; but in the circumstances of the case where there was already a preliminary decree passed in a suit brought for partition in O.S. No. 120 of 1947 on the file of the Sub Court, Nellore, it was open to the plaintiff to apply to be made a party in the final decree proceedings and work out his rights thereunder. It may be mentioned here that O.S. No. 120 of 1947 referred to by Krishnaswami Nayudu J. was brought by the present 1st defendant for partition and separate possession of his share in the Court of the Subordinate Judge, Nellore, in 1947. A preliminary decree was made declaring his 1/2 share in the plaint schedule property. This was affirmed on appeal by the High Court of Madras on 4-2-1953. Final decree proceedings were not started till the year 1954. The plaintiff, notwithstanding the observations of Krishnaswami Nayudu J., did not choose to get himself impleaded as one of the parties in the final decree proceedings. Instead, he laid the present action.

3. The suit was resisted by the defendants on various pleas but the one relevant for the purpose of this enquiry is that a suit for partial partition was not maintainable, the only remedy of such a purchaser at a Court auction being to ask for a general partition of the family properties. This defence prevailed with the Subordinate Judge with the result that he dismissed the suit in limine. The aggrieved plaintiff filed an appeal against the decree of the trial Court.

4. Pending this appeal, final decree was passed in O. S. No. 120 of 1947 on the file of the Sub Court, Nellore allotting item 9 which was the subject-matter of the appeal to the 5th defendant in the present suit, who was the 2nd defendant in O. S. No. 120/47 and who had alienated the whole of the item in favour of defendants 6 to 8 even before the institution of O. S. No. 120 of 1947. Another item of the property of the family was allotted to the share of the 1st defendant. It is pertinent to remark here that the 1st defendant on the 20th of April 1949 settled all his properties on his wife and children, defendants 2 to 4 in this litigation. Because of these complications, the 1st respondent filed a petition for permission to amend the plaint by adding a prayer for recovery of an extent of property equal to that purchased by him in the court auction out of the share allotted to the 1st defendant. This petition was opposed by the 1st defendant on two grounds: (i) that such an amendment would be introducing a new case and (ii) that the plaintiff, who purchased the undivided 1/2 share in a specific item of property, would not be entitled to substitution of some other property.

Srinivasachari J., overruled both these objections, accepted the amendment, allowed the appeal and sent back the case to the trial court for investigating afresh into the matter and giving permission to the defendants to file additional written statements. It is this judgment of our learned brother that is brought under appeal by some of the respondents in the first appeal.

5. The view of our learned brother is impugned mainly on the ground that the doctrine of substituted security does not apply to a purchaser at a court auction, that since what was purchased in the court auction in the instant case was an undivided share in a specific item, he could only sue for general partition and request allotment of the property purchased or as much of it as possible, to the share of the judgment-debtor without prejudice to the rights of the other members of the family and that, if such allotment was not possible in the general partition, he cannot ask for substitution of some other property for the property sold as there was no warranty of title in a court auction. This contention is founded on the judgment of Venkata Subbayya v. Srirangam 1956 Andh WR 251 : AIR 1956 AP 88. We have to give effect to this submission as the matter is concluded by the authority of 1956 Andh WR 251 B. Venkata Subbayya and Another Vs. N. Srirangam and Others .

We are told that this decision was not cited before our learned brother. The only ruling to which his attention was drawn was Sabapathi Pillay v. Thandavaroya Odayar ILR Mad 309 : AIR 1920 Mad 316. The learned Judge distinguished that case on the ground that its ratio decidendi was that the theory of substituted security could not be extended to persons who are strangers to each other and that it would apply only to cases where there was relationship of promisor and promisee.

We do not think that that is the real basis of the ruling. The reason of the rule was that there was no contractual nexus between the Court auction purchaser and the judgment-debtor, that the auction purchaser was bound by the principle of Caveat emptor, that he took the risk of the property corresponding to the description given and that if that failed he could have no remedy against the judgment-debtor because there was no kind of representation by him which has led to that result. However, it is unnecessary for us to pursue that, having regard to 1956 Andh WE 251 B. Venkata Subbayya and Another Vs. N. Srirangam and Others by which we are bound. It follows that the remedy of substitution of property of an equivalent value out of the share of the judgment-debtor would not avail the court auction purchaser. We are here unconcerned with the question as to whether the court auction purchaser could pursue any other remedy or what his rights are under his mortgage. In this view of the matter, it is not necessary for us to consider the point whether the learned Judge was justified in allowing the amendment.

6. Learned Counsel for the respondents sought to sustain the judgment under appeal by arguing that the plaintiff was entitled to a 1/2 share in item 9 as this was specifically assigned to him in the preliminary decree in O. S. No. 120 of

1947. That being so, it is needless for him to invoke the principle of substituted security. By reason of the auction purchase, he has acquired the interest of the judgment-debtor in that item of property. The clause in the preliminary decree, which is the foundation of this argument runs, as follows :

"that the plaintiff's right to his half share in respect of items 1 to 6 and 8 to II of the plaint A schedule properties (attached hereto) be and hereby is declared".

The point presented on the strength of this clause is that under the preliminary decree 1/2 share in item 9 fell to his share and that the right of the auction purchaser who stood in the shoes of his judgment-debtor accruing under this preliminary decree could not be defeated by allotting another item of property. We are not impressed with this argument. The preliminary decree in a partition action merely declares the rights of the parties in the properties the subject-matter of that suit. The clause under examination has not gone further than declaring the right of the plaintiff in the properties set out in schedule A attached to that decree. The division of the properties and specifying the several portions of the properties assigned to the several parties as their respective shares are the functions of the final decree.

7. That apart, the contention of the 1st respondent is opposed to clause 7 of that very preliminary decree which runs as follows :

"that as far as possible the items in possession of the alienees from defendants 1 to 4 who are in possession be allotted to the shares of the defendants 1 to 3."

It may be stated here that the 2nd defendant therein is the present 5th defendant and, as already said, he had alienated the whole of the suit property even before the partition action in favour of defendants 6 to 8. If really under Clause (i) this item of property was given to the plaintiff therein (the present 1st defendant) clause 8 would be unmeaning. The two clauses read together would clearly indicate that the preliminary decree simply declared the right of the plaintiff therein to a 1 / 2 share in the properties enumerated in schedule A and the court which passed the decree did not purport to allot any specified item of property to any of the parties. We have therefore, to reject this submission of the respondents.

8. In the result, the decree under appeal is set aside and that of the trial court restored except as to costs. In the circumstances of the case, we direct the parties to bear their own costs throughout.