

(1912) 08 MAD CK 0023
In the Madras High Court

G. Narayanasawmi Naidu Garu	Vs	APPELLANT
Tirumalasetti Subbaya and Another		RESPONDENT

Date of Decision : 28-08-1912

Acts Referred:

Citation : 16 Ind. Cas. 698

Hon'ble Judges : Sundara Aiyar, J;Sadasiva Aiyar, J

Bench : Division Bench

Judgement

Sundara Aiyar, J.—In this case, the Receiver of Nidavole Estate seeks to recover possession of a holding in the occupation of defendants

Nos. 1 and 2. The land was held by one Rangam till his death in 1897 or in 1898. It descended on his death to his two sons, Sobhandhari (now

dead) and the first defendant. The second defendant is the son of Sobhandhari. After Rangam's death, Sobhandhari executed a muchilika in favour

of the Estate acknowledging that it was kammatham land in which he had no occupancy right. Subsequently, the Receiver, treating the holding as

belonging to Sobhandhari alone, instituted a suit against him to compel him to accept a patta. There was a decree in favour of the Estate and as

Sobhandhari failed to accept a patta and executed a muchilika, an order, u/s 10 of the Rent Recovery Act, VIII of 1865, was passed against him.

There is some dispute as to whether the Estate actually obtained delivery of possession in pursuance of the Collector's order. It appears clear,

however, that the present defendants Nos. 1 and 2 were not actually dispossessed; and the plaintiff admits the Estate was not able to cultivate the

land. The question fought out between the Estate and defendants Nos. 1 and 2 in the lower Courts was whether the land was ordinary jeroyti land

in which Rangam the ryot in possession had occupancy, right or the kammatham land of the Estate. Both Courts have found that the plaintiff failed

to prove that it was kammatham land. We see no legal objection to this finding and must therefore, accept it.

2. A question of law has been raised and argued in this Court. It is contended that the Estate, having obtained a decree against Sobhandhari and

ejected him from possession so far as it could, it is entitled to recover his share. It was at first argued that the share, which the plaintiff would be

entitled to recover, was one half, but on its being pointed out that there was nothing to show that Sobhandhari represented his son, the 2nd

defendant, who was joint owner with him of the land, in the ejectment proceedings and that the -patta was tendered to Sobhandhari as if he was

solely entitled to the land, the claim has been pressed with respect to the one fourth share which Sobhandhari would admittedly have in the land.

The argument is that the plaintiff is in the same position as if Sobhandhari had conveyed his one fourth share to the estate or his share had been

seized by means of attachment. Assuming this position to be correct for a moment, a suit to recover the one-fourth share purchased by the plaintiff,

without instituting a suit for general partition of the properties belonging to the defendant's family, would not ordinarily be maintainable. This

reposition may be taken to be fairly well settled. There may be exceptional circumstances in which a prayer for general partition may not be

insisted on by the Courts: but no exceptional circumstances were pointed out in this case, for the obvious reason that the suit was framed for

recovering the whole land on the ground that it was kammatham property and there was no prayer to recover Sobhandhari's share, There may be

equities as between Sobhandhari and the defendants which would make it inequitable to award the plaintiff Sobhandhari's one-fourth share. A

decree in ejectment for one-fourth of the land cannot, therefore, be given.

3. It is then argued that the plaintiff may be given a decree for joint possession. It is, no doubt, open to the Court, where such a course is regarded

as proper, to give a decree for joint enjoyment to a plaintiff who is entitled to seek for partition; but the passing of such a decree is discretionary

with the Court. I am strongly disinclined to give an alienee, from one member of a joint Hindu family, joint possession alone with the other members

of the property which he obtains by the alienation. The plaintiff did not ask for joint possession in the plaint in this suit. I do not think he is entitled to

a decree for joint possession. He must be left to his remedy in a suit for a partition.

4. Thus far I have assumed that the effect of the order in ejectment and the proceedings in execution of that order would be to entitle the plaintiff to

Sobhandhari's one-fourth share. But I am strongly inclined to hold that they had no such effect. The holding was a joint one in the occupation of

Sobhandhari and the other members of his family. The patta ought to have been tendered to all the occupants. If the plaintiff had done so, he would

not, according to the present finding of the Courts, have been entitled to the decree which he obtained against Sobhandhari alone. It was in

consequence of Sobhandhari's admission of the kammatham right of the Estate apparently that he was directed to accept the patta then tendered.

His admission in the muchilika could, of course, not have affected the other members of the family if they had been made parties to the patta suit.

The plaintiff could not, by adopting what has been found to be illegal procedure, obtain an advantage which he would not otherwise be entitled to.

I find it difficult to see on what ground the ejectment proceedings could possibly affect the rights of the present defendants, either as to their shares

in the property or as to their right of survivorship to the share of Sobhandhari on his death which took place subsequent to the ejectment

proceedings. In Freeman on Co-Tenancy, Section 168, the learned author refers to a case in the Supreme Court of, California very similar to the

present one. A judgment had been rendered against some of a number of co-tenants which in effect for ever precluded them from asserting their

title. Then the remaining co-tenants instituted an action in ejectment against the plaintiff in the former suit to recover possession of the entire land.

His title was found. The question was argued whether, having regard to the previous judgment against his co-tenants, he was entitled to recover

anything more than his own share. The Court held that he was. Dealing with the argument that the defendant in this second suit became entitled, by

his judgment, to the rights of the co tenants against, whom he obtained his decree, the Court observed as follows:

Is the defendant a co-tenant with the plaintiff?. If so, he must have acquired that status by means of the judgment in the former action, in which it

was adjudged, as between him and Woods, Hastings and Kaskell, he had the better right to the possession. But he did not thereby become vested with their title, or succeed to their interest in the property. The judgment added nothing to his former title, but left it as it was before; and the point decided was that his was better than the title of his adversaries. I do not comprehend, how all this can have the effect to convert the defendant into a tenant-in-common with the plaintiffs grantors, who were not parties to the action, and were unaffected by the judgment. It may be said that there is a distinction between that case and the present one inasmuch as the object of an order u/s 10 of the Rent Recovery Act is to put an end to the tenancy between the land-holder and the ryot but the principle that the other co-tenants cannot be affected by the judgment is equally applicable to this case. I am strongly of opinion that if the defendants' right of Survivorship is taken to be destroyed, that would in effect be holding that their right was affected by a judgment to which they were not parties. The case cited for the appellant Sundar Lal v. Chhitar Mal 29 A.P 215 : 4 A.L.J. 17 : (1907)A.W.N. 25 is really not in point. There the father of a Hindu family instituted a suit for redemption which was dismissed. Then his sons instituted a suit for redemption and the question was whether the suit was maintainable. The Court held that, so far as the father's share in the property was concerned, the second suit could not be sustained. Now, any person interested in the equity of redemption is entitled to maintain a suit for redemption. The father's suit, therefore, was properly laid and the decree against him was rightly held to bar any suit for redemption so far as his share was concerned. But a landlord is not entitled to tender a patta to one only of several ryots jointly holding land under him or to take proceedings in ejectment against one only of several joint holders. A decree in proceedings, so improperly instituted and conducted, cannot bind those who were not parties to them.

5. Ram Narain v. Bisheshar Prasad 10 A.P 411 : (1888) A.W.N. 149 was cited for the respondent but in that case the only question argued was one of res judicata. It is, therefore, not in point. I am of opinion that the plaintiff's suit must fail also on the ground that he did not obtain any right to the share of Sobhandhari by the proceedings taken against him in ejectment. The result is that the second appeal is dismissed with costs.

Sadasiva Aiyar, J.

6. I agree in holding that the plaintiff could not, in any event, claim more than one-fourth share which belonged to the deceased Sobhandhrai. I am, however, of opinion that, when a tenant is ejected, he loses his rights in the holding, whether his interests cover only a part of the holding or the entirety of the holding, especially when the order of ejectment has been carried out by a process in execution in which the Court officer has necessarily to take the property into his custody and put it in the possession of the decree-holder. If a mere attachment of the interests of a joint tenant could sever the joint tenancy, I think the act of a Court officer in taking possession of a joint tenant's interests and handing over such possession to the decree-holder must also sever the joint tenancy. I am of opinion that the Courts should lean against the continuance of joint tenancies and against claims of survivorship. The ancient Hindu Law knew, according to the learned writer, Mr. J.C. Ghose, no such principle as joint tenancy and no principle of survivorship, which principles were introduced by the Mitakshara, the writer of which commentary gave an anomalous right by birth to sons in the ancestral properties of their father. Equity also does not favour joint tenancies and rights of survivorship. If a joint tenant can, by alienating his share, put an end to the tenancy, I do not see any adequate reason why he should not, by allowing the landlord to eject him so far as his interest is concerned, also put an end to the joint tenancy. As regards the case in para. 168 of Freeman on Co-Tenancy, with due respect to the Court which decided it, I do not feel myself impressed by the ingenious argument advanced therein. If a joint tenancy and the right of survivorship could be destroyed by proceedings in "fine and recovery" as stated in paragraph 33 of the same book, I do not see why a consent decree by which the co-tenant allows his landlord to get an order for ejectment against him should not also put an end to the co-tenancy. Even a judgment declaring the title of a third person in the holding as against a co-tenant has, in my opinion, the same effect as the transfer of any title which might have existed in the latter in favour of the decree-holder and must, therefore, sever the tenancy. I think the case of *Sunder Lal v. Chitter Mal* 29 A.P 215 : 4 A.L.J. 17 : (1907) A.W.N. 25 clearly lays down that if the right of the one co-tenant is extinguished in favour of a third

person and cannot be set up by reason of a decision of a Court of Justice as against that third person, that event severs the joint tenancy and the other co tenants cannot claim to recover the share of the co-tenant, whose right has been destroyed either by setting up a right of survivorship or by alleging that the co-tenancy itself has not been destroyed, or by alleging that the judgment, which extinguished the rights of their co-tenant, did not make the person in whose favour such right was extinguished a tenant-in-common along with them. However, on the other grounds mentioned by my learned brother in his judgment, I hold that this is not a fit case for giving a decree for joint possession to the plaintiff along with defendants Nos. 1 and 2. I, therefore, agree in dismissing the second appeal with costs.