

(1918) 10 MAD CK 0037
In the Madras High Court

Iyathurai Aiyer and Another

APPELLANT

Vs

Kuppamuthu Padayachi

RESPONDENT

Date of Decision : 11-10-1918

Acts Referred:

Citation : 49 Ind. Cas. 416 : (1919) 19 LW 120

Hon'ble Judges : Seshagiri Aiyar, J; Napier, J

Bench : Division Bench

Judgement

1. Plaintiff, the father, and his son gave a usufructuary mortgage of certain properties. Subsequently there was a division between father and son. The father redeemed the whole of the properties and leased them to the present defendant, who in Court-sale purchased the son's share since his lease. The suit was to recover possession based on the lease.

2. The District Munsif decreed the suit. The Subordinate Judge, we think very properly, directed a partition of the property between the plaintiff and the defendant. The real question before us is whether the plaintiff is entitled to anything more than interest from the defendants on the moiety which he paid to the mortgagee. Mr. Purushothama Aiyar relies on *Asansab Ratuthan v. Vamana Rau* 1 Ind. Dec. 427 and *Nainappa Chetti v. Chidambaram Chetti* 7 Ind. Dec. 369 for the proposition that a party redeeming the whole property is entitled to stand in the shoes of the mortgagee. But Section 95 of the Transfer of Property Act is clear that the person redeeming is not entitled to the rights of the mortgagee, but only to a charge for the excess sum he paid. As regards *Asansab Ravuthan v. Vamana Rau* 1 Ind. Dec. 427, it is enough to say that that decision was passed before the Transfer of Property Act. As regards *Nainappa Chetti v. Chidambaram Chetti* 7 Ind. Dec. 369, it was a case of simple mortgage. Consequently the question whether the person redeeming could obtain higher rights than that of a charge holder was not necessary for consideration in that case. In the face of the language of Section 95 of the Transfer of Property Act we are unable to give effect to the appellant's contention.

3. Another point has been raised regarding the plaintiff's rights to mesne profits since the expiry of the lease in 1912 and before possession was surrendered to him under the decree of the Court. Defendant contends that he was in possession only of the moiety purchased by him. The Subordinate Judge has not dealt with the question. We must ask him to submit a finding whether the defendant was in possession of the moiety now decreed to the plaintiff and if so, what is the amount of mesne profits payable to him in respect of that half from July 1912 to the date he took possession.

4. No fresh evidence will be admitted. The finding will be submitted in six weeks and seven days are allowed for filing objections.

5. In compliance with the order contained in the above judgment, the Subordinate Judge of Negapatam submitted the following

FINDING

I have been directed by the High Court to submit my finding on the following issue: "whether the defendant was in possession of the moiety now decreed to the plaintiff, and if so, what is the amount of mesne profits payable to him in respect of that half from July 1912 to the date he took possession."

2. The plaintiff leased the whole of the suit lands to the defendant in 1910 and under " that lease the defendant enjoyed them for two years 1910-1911 and 1911-1912. The defendant acquired ownership of one-half of them belonging to the plaintiff's son, Sambasiva Aiyar, on the 2nd January 1912 (vide Exhibit 111). The accounts between them" as regards the rent payable for the said two-years were completely settled on 1st September 1912, on which date the plaintiff granted the receipt, Exhibit D, to the defendant in evidence of the settlement and the payment of Rs. 58-13-4 in pursuance of the same. The question for determination under this issue is whether the defendant cultivated the whole of the lands consisting of the plaintiff's share and the plaintiff's son's share acquired by him through Exhibit III from 1912 onwards, as he was doing in the two years preceding that year under the lease granted to him by the plaintiff or whether he cultivated only his share.

3. The defendant's case is that he refused to cultivate the plaintiff's share in 1912 and asked him to make his own arrangement for its cultivation and that he (defendant) has been cultivating and enjoying his half share only ever since. The plaintiff's case, on the" other hand, as presented in the argument before me seems to be that as there was no partition by metes and bounds of the two shares he was not in a position to take possession of his half share, that the defendant, as one originally let into possession of the whole lands as his lessee, should have delivered possession of the whole extent to the plaintiff, if he did not want to cultivate the plaintiff's share and should have sought his remedy for possession of his share by calling upon the plaintiff to come to a partition, that a mere expression of unwillingness on his part to cultivate the plaintiff's share did not amount to placing the plaintiff in possession of that share after the

termination of the lease and that, therefore, the defendant is bound to pay mesne profits for the plaintiff's share till he was given actual possession of the same through Court, I think that the aspect from which the plaintiff's Pleader wants me to look at the defendant's conduct is too technical and that the correct way of looking at it will be to find out whether, as a matter of fact, the defendant has been enjoying his half share only in the suit lands or enjoying the whole. The very fact that the plaintiff's suit for possession of both the shares has failed shows that the said argument is unsound.

4. As it has been found that there was no partition of the two shares, the defendant must be deemed not to have been, no doubt, in a position to state to the plaintiff in 1912 what specific portions belonged to him and what to the plaintiff and to confine his cultivation to specific portions as constituting his share. But the evidence shows that he, as a matter of fact, began to cultivate from 1912 onwards specified portions only in them, as constituting his share. It must be noted in this connection that, according to the defendant, there was a partition by metes and bounds of the two shares between him and the plaintiff, in which the portions cultivated by him fell to his share. This renders the defendant's case that he was enjoying specified portions as constituting his half share intelligible, and probable, though his case that there was a partition to which the plaintiff was a party and in which he got the said portions for his share with the plaintiff's consent has not been accepted by the Courts. Though his case of partition has not been acted it might well be that his confounds his enjoyment to specified portions as constituting his share at least to support the case set up by him.

5. The evidence also clearly shows that the defendant would not have enjoyed the whole. On 28th September 1912 the plaintiff sent a notice to the defendant demanding payment of his share of the kuruva crop then standing on the suit lands (vide Exhibit H, dated 28th September 1912). The defendant swears that he gave a reply to it stating that he did not cultivate the plaintiff's share and the postal acknowledgment. Exhibit I, dated 2nd October 1912, supports his evidence that he sent a reply. The plaintiff stated in his chief examination that he did not receive any reply for Exhibit H, but admitted in his cross-examination that the signature in Exhibit I was his. I think that the fair inference to be drawn is that the defendant did send a reply notice to the effect that he did not cultivate the plaintiff's share. It is also noteworthy that in Exhibit D, by the date of which also kuruva produce must have been raised on the suit lands, not a word was mentioned about the defendant having trespassed upon the plaintiff's share and cultivated that also. According to the plaintiff, there was an actual trespass of his share in July 1912 and not a mere holding over by the defendant after the expiration of the original lease granted to him by the plaintiff (as was the case in 1911) and kuruva cultivation of his share by the defendant without his consent. Under these circumstances one would expect some mention in Exhibit D of such unauthorised cultivation. But on the other hand, Exhibit D is couched in such terms that it leaves the impression in the mind of the reader that there was

a complete adjustment of accounts between the plaintiff and the defendant as lessor and lessee and that nothing more remained to be done as between them with regard to the suit lands. No reservation of the plaintiff's rights to proceed against the defendant for the trespass was made therein.

6. Even the witness for the plaintiff, plaintiff's witness No. 2, states that the defendant told plaintiff that he did not want to cultivate (he plaintiff's share and that plaintiff might make his own arrangement for its cultivation. He "further states that on the date of Exhibit D, the plaintiff stated to the defendant, after granting that receipt, that nothing was due from the defendant to him. Defendant's witness So. 2, the Kurnam, states that in Vyasi, i.e., May, June 1912 the defendant told the plaintiff to lease his share to somebody else, but that the plaintiff went away saying * * * * (do as you will). Defendant's witness No. 3 also supports the defendant on this point. The evidence of the defendant's witnesses is to the effect that after the defendant gave out that he would not cultivate the plaintiff's share, he has been cultivating his share only And that the plaintiff's man, a Parayafo, cultivated the plaintiff's share. There is no evidence on the plaintiff's side except the plaintiff's own word to counter-balance this.;

7. It is also to be noted that though the District Munsif has found against the theory of partition set up by the defendant. he was of the view that the defendant began to enjoy only specified portions of the suit lands as constituting his share some time after the symbolical delivery of his half share obtained by him through Exhibit G, though without the plaintiff's consent (vide paragraph 14 of his judgment). I find on this issue that the defendant has not enjoyed the plaintiff's share at any time after July 1912 and that, therefore, he is not liable to pay mesne profits for that share during the period mentioned in this issue, i. e., from July 1912 to the date when the plaintiff got delivery of his share through Court.

8. The actual date on which the plaintiff got delivery of his share is not ascertainable from the record and I am, therefore, unable to arrive at a finding as to the quantum of mesne profits payable by the defendant to the plaintiff, in the event of my finding that he is not liable to pay any mesne profits not being accepted by the High Court.

6. This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

7. We accept the finding and dismiss the second appeal; we make no order as to costs in this Court.