
(1918) 02 MAD CK 0027
In the Madras High Court

Kizhekke Manjambrath Avulla

APPELLANT

Vs

C.K.P. Kanna Kurup and Others

RESPONDENT

Date of Decision : 12-02-1918

Acts Referred:

Citation : 47 Ind. Cas. 595 : (1918) 8 LW 152

Hon'ble Judges : Phillips, J;Bakewell, J

Bench : Division Bench

Judgement

Bakewell, J.—The question argued before us is, whether the plaintiff is debarred from bringing his suit by reason of the omission of some of the co-owners of the property in his previous suit for redemption in contra-vention of the provisions of Order XXXIV, Rule 1.

2. The plaint states expressly that the previous suit was against the 1st defendant in his personal capacity and this also appears from the order dismissing the 4th defendant from that suit; there is, accordingly, no question of the members of the 1st defendant's Tarwad other than the 4th defendant being bound by the previous decree.

3. The plaint does not allege that the plaintiff was ignorant of the claims of those persons to the Kanom right, and I think that there was sufficient evidence to support the finding of the learned Subordinate Judge that he had notice of that claim when he brought the previous suit.

4. It is obvious that if a mortgagor were at liberty to bring separate suits for redemption against several co-mortgagees under the same mortgage, in which separate accounts would have to be taken, there would be an unnecessary multiplicity of proceedings and great confusion might arise: see Nilakant (sic) v. Suresh Chandra Mullick 423 I.A. 171 : 4 Sar. P.C.J. 685, and such a course is in contravention of Order II, Rule 2.

5. The plaintiff's claim is against all the co-owners that they shall jointly deliverup possession of the mortgaged property and is based on the Kanom

deed, and I think that this constitutes the whole of the claim" which he was entitled to make in the previous suit within the meaning of Order II, Rule 2, and that this rule prohibits another suit against the other co-owners.

For these reasons I would dismiss this appeal with costs.

Phillip, J.

The finding of the Subordinate Judge must be accepted that plaintiff had knowledge of the fact that the 1st defendant's Tarwad had a Kanom right in the property in respect of which 1st defendant the Karnavan executed the Marupat, Exhibit B. The case, however, appears to be somewhat similar to the case of Govinda v. Mana Vikraman 5 Ind. Dec. 200. It is contended that, in that case, the first suit was for rent while the second suit was on the mortgage, but the second suit also included a claim for the rent decreed in the first suit, and it was held that the claim was neither *res judicata* nor barred u/s 43 of the CPC corresponding to Order II, Rule 2 of the present Code. That case is, however, distinguishable from the present case, on the ground that in the second suit the basis for the claim for rent was the mortgage, whereas in the first case the claim was based on a lease. In the present case, the second suit is based on the same cause of action as the first. In the first suit plaintiff, knowing that the Tarwad had a right in the Kanom, sued the Karnavan alone in his personal capacity, and omitted to sue in respect of his claim against the Tarwad. I, therefore, agree that the present suit is barred under Order II, Rule 2.