

(1936) 11 MAD CK 0059
In the Madras High Court

Krishnan Nair

APPELLANT

Vs

Kambi

RESPONDENT

Date of Decision : 26-11-1936

Acts Referred:

Citation : AIR 1937 Mad 544

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This is a suit in ejectment and for recovery of arrears of rent. It was instituted originally by one Achutha Nair as manager of his tarwad. The subject matter of the suit related to four Items of property. It was alleged that items 1 to 3 were leased to the defendant's father in Chingom (1908-1909) 1084 with a munpattom of Rs. 40 under a lease deed executed by him in favour of Kunji Amma, the then senior female member of the tarwad on behalf of the tarwad, as the senior male member Govinda Menon was then employed elsewhere. Item 4 was alleged to have been leased orally in 1086 also to the defendant's father by one Gopalan Nair who was then managing the tarwad on behalf of the said Govinda Menon. Kunji Amma died before suit. As the defendant who is in possession of the property after the death of his father refused to surrender possession or pay rent from 1104 to the plaintiff, this suit was instituted. The said Achuthan Nair died pending suit and the next senior male member Krishnan Nair was added as plaintiff 2 in the suit. The main defence is that the leases were granted by Kunji Amma who was the senior-most female member, that there is a custom in the tarwad under which the right of management vested in the senior-most female member, that after the death of Kunji Amma the right of management vested in Nanu Amma who is the senior most female member alive, that he has attorned to her and paid and has been paying rent to her and claimed to hold under her and therefore was not bound to surrender possession. The findings of both the Courts are that both the leases were given by Kunji Amma but in regard to the custom and the right to the management of the tarwad properties both the Courts differed.

2. The learned District Munsif found that there was no custom which entitles the senior-most female member of the tarwad to manage the property in preference to the senior-most male and gave a decree to the plaintiff as prayed for. The learned Subordinate Judge took a different view. He was of opinion that the custom has been made out. His reasoning is based on the fact that for a period of nearly 40 years Kunji Amma, the senior-most female member was allowed to manage the tarwad and such management was acquiesced in by the male members and that Nanu Amma was after her the manager in whom the tarwad property vested and the plaintiff had no title to maintain the suit, but he however found that if the plaintiff was the person entitled to the management of the tarwad properties he was entitled to possession of properties items 1 to 3. This finding of the learned Subordinate Judge as to custom is attacked in second appeal and it seems to me that the finding is unsatisfactory. The suit tarwad formed a branch of a main tarwad from which it separated by a deed of partition, Ex. D, in or about 12th July 1877. The said deed of partition distinctly provides that Govinda Menon, the senior-most male member, should be manager of the branch to which Kunji Amma belonged. But for some reason or other Kunji Amma was allowed to manage the tarwad. There is no other instance given of a female member managing the tarwad. Strong and cogent evidence must be given to establish a custom entitling the senior-most female member to manage in preference to the senior-most male. It would be unsafe to infer a custom from the single instance of a senior-most female having been allowed to manage the property for a considerable length of time. The elements which would be required to establish a valid custom cannot be said to have been established in this case. But I think it is unnecessary to rest my decision on this ground as the case can be satisfactorily disposed of on another ground.

3. It has been brought to my notice by Mr. Govinda Menon, who appears for plaintiff 2 (appellant), in this case that, since the filing of the present appeal, in two litigations to which Nanu Amma and the present plaintiff 2 were arrayed as plaintiff and defendant it was finally decided that the right of management vests only in the senior-most male member and that there was no custom established to entitle the senior-most female to manage in preference to the senior-most male and that plaintiff 2 was the rightful manager of the tarwad. Mr. Govinda Menon has made an application for the documents in support thereof being received in evidence. They are judgments in A. Section Nos. 68 and 69 of 1934 on the file of the Sub-Court at Ottappalam. Mr. Kutti Krishna Menon has objected to the reception of the said documents on the ground that in second appeal they cannot be admitted relying on the decision in Secy. of State v. Manjeshwar Krishnaya (1908) 31 Mad 415. It seems to me that the said decision is distinguishable and this case is governed by the ruling in Gaddam Paramasivudu v. Mulakala Subbanna AIR 1919 Mad 17 where under similar circumstances a judgment was admitted in second appeal. In Secy. of State v. Manjeshwar Krishnaya (1908) 31 Mad 415 the case related to a question of fact and further the documents were available in the trial Court unlike in this case where the

judgments sought to be admitted were pronounced after the filing of the appeal in this Court. I must therefore take notice of the fact that there has been such an adjudication and mould the decision accordingly. Therefore following the said decision in *Gaddam Paramasivudu v. Mulakala Subbanna* AIR 1919 Mad 17, I allow the said documents to be filed. It seems to me that the said documents conclude the issue as to the title of Nanu Amma set up by the defendant. If Nanu Amma had been a party to this litigation there can be no question that the said judgments will operate as *res judicata* between her and plaintiff 2 and the fact that the said judgments were delivered since the filing of this appeal is immaterial. The principle applicable is thus stated by Mahmood, J. in *Balkishen v. Kishan Lal* (1889) 11 All 148:

The doctrine so far as it relates to prohibiting the retrial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue.... So far as the justification of this view from the provisions of the CPC is concerned, I may say that the rule contained in Section 13 is not limited to the Courts of first instance, that it applies equally to the procedure of the first and second appellate Courts by reason of Sections 582 and 587 respectively, and, indeed even to miscellaneous proceedings by reason of the general provisions of Section 647 of the Code.

4. This principle was accepted and applied in *Gaddam Paramasivudu v. Mulakala Subbanna* AIR 1919 Mad 17 in second appeal and recently by Varadachariar, J. in *Rangachariar and Others Vs. J. Rengasawmy Ayyangar and Others*, in a civil revision petition. The question is, will the defendant, not being a party to the said judgments, be bound by them? The view of Dr. Bigelow is that a lessee would be bound by a judgment against his lessor in the absence of any fraud or collusion on his part. He explains the principle thus:

To make a man privy to an action he must have acquired an interest in the subject matter of the action either by inheritance, succession or purchase from a party subsequent to the action or he must hold the property subordinately.... The ease of privity by subordination may be illustrated... by the common law illustration feoffee and feoffee. That is Coke's illustration. A more familiar one to lawyers of the present time is afforded by the relation of landlord and, tenant. A lawful judgment which deprives the landlord of the estate deprives the tenant of necessity of his subordinate right.

5. In *Seshappaya v. Venkataramana Uppadaya* (1910) 33 Mad 459, Miller and Sankaran Nair, JJ. point out that there is no English authority in support of this view. They refer to the view of Hukumchand according to which

a tenant of the defendant in ejectment, who acquired his lease before the commencement of a suit is not estopped as to his term by a judgment in the suit against his lessor.

6. But the learned Judges leave the question open as they were of opinion that Dr. Bigelow's principle would not apply to the case of a permanent heritable

tenure. In such a case they thought that as the tenancy cannot be determined by notice nor will it be terminated by efflux of time, the interest of the lessee is not subordinate to that of the lessor. Where therefore there is no question of any outstanding term or where the term of lease has expired or where the tenancy is determinable at will and the lessee is bound to surrender possession when called upon to do so by the lessor or anyone who succeeds to him, there is no reason why the principle enunciated by Dr. Bigelow should not be applied. In this case the finding is, as already stated, the defendant was bound to surrender possession to plaintiff if he was the rightful manager. It seems to me therefore that the defendant is concluded by the judgment against Nanu Amma. Even if it be held that the defendant cannot be said to be claiming strictly under Nanu Amma, since he has chosen to rely on the title of Nanu Amma, and made it a part of his defence it would be open to the plaintiff to repudiate the said title. In a suit in ejectment where the defendant relies on title of a third party having no other title to rely on, it is open to the plaintiff to rely upon whatever would displace the title of the said third party and defeat the claim. In *The Secretary of State for India in Council Vs. Syed Ahmad Badsha Sahib Bahadur*, Kumaraswamy Sastri, J. explained the principle applicable to a case of this description thus:

In all cases of *jus tertii* the person who sets up the rights of a third party is bound to prove that the third party has or had the rights alleged and it is always open to the other party to displace the title of the person so set up by showing that he was a party to the litigation which has negated that title. Whatever would estop or bar the persons whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or in pais.

7. Thus whatever would estop by record, deed or in pais Nanu Amma would estop equally the defendant. Mr. Kutti Krishna Menon relied strongly on the said decision in *The Secretary of State for India in Council Vs. Syed Ahmad Badsha Sahib Bahadur*, itself as negating this view. But in *The Secretary of State for India in Council Vs. Syed Ahmad Badsha Sahib Bahadur*, the case was not viewed by the learned Judges therein as a case of a defendant setting up a *jus tertii*. The Secretary of State in that case was denying the title of the plaintiff and not making the title of the rival claimant to the office in question in that case as part of his title. The plea of the defendant in this case must therefore be negated. Since the defendant has paid the rent bona fide to Nanu Amma, he will not be liable for any arrears of rent nor for any rent paid subsequently up to date. I reverse the decree of the lower Court and pass a decree directing delivery of possession of the suit properties to the plaintiff. In the circumstances of this case, I direct each party to bear his own costs throughout. Leave refused.