

(1912) 12 MAD CK 0037
In the Madras High Court

Kurucha Gangu Naidu

APPELLANT

Vs

Kovvuri Basava Reddy and Others
Lingam Kristna
Bhupati Deo Garu Vs Kovvuri Basava Reddy Garu and Others

RESPONDENT

Date of Decision : 12-12-1912

Acts Referred:

Citation : 18 Ind. Cas. 691

Hon'ble Judges : Arnold White, C.J;Oldfield, J

Bench : Division Bench

Judgement

1. These are appeals against a decree permitting the plaintiffs to redeem a half share of a village, Sirijam, in Vizagapatam District, on payment to the 1st defendant of Rs. 12,500. In Appeal Suit No. 233 of 1909, the 1st defendant contends that the suit should have been dismissed, because he not only holds the mortgage, but has also acquired the equity of redemption of the whole village by purchase from its real owner, the members of another branch of the plaintiff's family. In Appeal No. 193 of 1909, the 3rd defendant in the alternative attacks the plaintiffs' title, as having originated in a sale effected in fraud of creditors, and relies on his own purchase of the equity of redemption at a Court-sale, as entitling him not the plaintiffs to redeem.

2. We can deal with Appeal No. 233 of 1909 shortly, because we concur in the lower Court's treatment of the evidence relating to this part of the case. It is argued that the village belonged originally to two brothers, Venkatakristna Raju and Venkatapathi Raju, as their joint family property. After the death of Venkatakristna, Venkatapathi in his personal capacity and as representing the sons of Venkatakristna, with two other members of the family, who died later without issue, executed the suit mortgage of the whole village to the 1st defendant's father in 1877. Afterwards, it is argued, that there was a partition between the two branches of the family. The plaintiffs allege a purchase by the 1st plaintiff from the sons of Venkatapati and the latter's title to half the village in virtue of a partition made shortly after Venkatapathi's death by a panchayet at

the instance of his and Venkatakrishna's widows as guardians of their minor sons. The 1st defendant, who has purchased from the sons of Venkatakrishna, relies on evidence of a partition by Venkatapathi on his death bed, at which the whole village was included, in the share of his vendors. The plaintiffs also contend that it is unnecessary for them to establish this case on facts, since the divided status of the family at the date of their purchase being admitted, it follows that from the data of the division they acquired, in the absence of proof of a partition of the family property by metes and bounds, the status of tenants in common with the other co-parceners in respect of it and are, therefore, entitled to redeem their unascertained share of the suit village and to ascertainment and possession thereof.

3. This view of the plaintiff's rights is in accordance with *Appovier v. Rama Subba Aiyan* 11 M.I.A. 75 and we accept it. It is, therefore, necessary to decide only whether the 1st defendant's evidence supports the partition, including the apportionment of the whole village to the sons of Venkatakrishna which he alleges. The witnesses are not of such credit as justifies any affirmative conclusion from their statement on a matter of this nature in the absence of independent corroboration by documents or otherwise. Adopting the major part of the lower Court's treatment of this part of the case, we accept its finding on issues Nos. 1, 2 and 3, in the plaintiff's favour and dismiss the Appeal No. 233 of 1909.

4. In the 3rd defendant's appeal, the first contention is that Exhibit G, the plaintiff's conveyance from the sons of Venkatapathi, is invalid against him, because it offends against Section 53, Transfer of Property Act. It is admitted here that the lower Court is mistaken in its reference to the kintali lands as available towards the satisfaction of the decree, in the execution of which the 3rd defendant shortly afterwards acquired his title to the suit village. But so far as appears, he was the only unsecured creditor of the estate, and regard being had to the circumstances of the conveyance, the consideration for it was not, in our opinion, so inadequate as to raise a presumption against its good faith. That presumption has not been justified on other grounds. This objection to the plaintiff's title has, therefore, not been sustained.

5. The remaining argument relied on involves reference to the details of the 3rd defendant's case. One Kannamma, had obtained a decree, Exhibit VI, in 1833 against Venkatapathi Raju and the sons of Venkatakrishna for future maintenance to be Paid in instalments. The property charged under it, the kintali lands above referred to, was exhausted and there is evidence that the instalments were being recovered, as they fell due, after successive attachments of the judgment debtors' other assets, that is, their interest in the suit village. Such an attachment was pending, when on (he 24th November 1905, 3rd defendant obtained a transfer of the decree, Exhibits II and II A, so far as it enjoined payment of Rs. 552 14 0 for which execution was already in progress, and Rs. 90 which had since become due. On the 24th February 1906, he applied u/s 235 of

the Code, then in force, by Exhibit XLIV, for recognition of his transfer and recovery by attachment and sale. This application was dismissed for failure to pay Process fees, after the recognition claimed had been accorded. The 3rd defendant, however, obtained an attachment for the whole of his claim by Exhibit XLV and after two abortive attempts, brought the whole of the village to sale, purchasing it himself on the 17th June 1907. The plaintiffs claim is based on their purchase of half the village by Exhibit G on the 16th March 1906, that is, before the 3rd defendant obtained his attachments. The question is, whether Exhibit G is void u/s 276, Civil Procedure Code, because the attachment of the property by the 3rd defendant's transferor had not been abandoned and was still in force. It should be noted that the 3rd defendant's right to rely on his transferor's attachment is recognised in *Hafiz Suleman v. Sheikh Abdullah* (1894) A.W.N. 13 and *Kishen Lall v. Charat Singh* (1900) A.W.N. 214 and is not seriously disputed.

6. To deal first with the 3rd defendant's intention, as disclosed by the circumstances, the two decisions cited impose on him the burden of proof of his intention to rely on the attachment made by his transferor. To discharge it, there is first the reference to that attachment in his transfer, Exhibit II, to show that its existence was present to his mind. Next on the 3rd October 1905, the transferor was induced to consent to an adjournment of the sale then pending in order that the judgment-debtors might raise money by a private sale; and it is unlikely that the 3rd defendant did not know of this and would not have seen the danger of leaving the property unprotected by an attachment shortly after. The principle that the 3rd defendant's intention must be presumed to have followed his obvious interest is applicable. The lower Court found motives for his abandoning the existing attachment in (1) the inclusion of the additional amount of Rs. 90 in the new attachment and (2) anxiety to evade the consequence of an order obtained by the plaintiff for the sale of the property subject to his mortgage, Exhibit IV. We return to the former. The latter was not substantial. For, the existence of the mortgage had been admitted by the 3rd defendant's transferor in connection with the claim petition, Exhibit U, and although the 3rd defendant did not, in fact, refer to it in his own execution petitions, he was and must have known that he would be bound by that admission. Stress has been laid on the fact that the 3rd defendant did in terms apply for an attachment in Exhibit XLIV, in order to the recovery not only of the Rs. 90, payable for the two last instalments, but also of the Rs. 553-14-0 in respect of which, attachment was already pending. But the immediate purpose of Exhibit XLIV was clearly to obtain recognition as transferee and when it had been obtained, the third defendant did not trouble to pay the necessary fees in order to obtain the substantive order in execution, for which Section 232 obliged him to apply. This failure rather supports the view that he actually desired no fresh attachment and intended to rely on that made already by his transferor. Exhibit XLV, under which he, in fact, obtained an attachment, was subsequent to the plaintiff's purchase and cannot justify inference to any abandonment of the original attachment before it. No argument from the procedure followed by the 3rd defendant's transferor in

obtaining successive fresh attachments is sustainable, since the 3rd defendant was not concerned in those proceedings and they, therefore, support no conclusion as to his subsequent intention. In these circumstances, we hold the 3rd defendant's intention to maintain the original attachment established.

7. Cases have been referred to by the lower Court and here to show that an abandonment was the necessary legal implication of the 3rd defendant's conduct. But each is, in our opinion, distinguishable in some particular respect. In *Puddomonee Dossee v. Roy Muthooranath Chowdhry* 12 B.L.R. 411 *Musammat Matonginy Dassee v. Chowdhry Janmunjoy Mullick* 25 W.R. 513 and *Kishen Lall v. Charat Singh* (1900) A.W.N. 214 the original decree-holder's attachment had been terminated by a striking off order in (so far as appears) unqualified terms. In the present case, the disposal of Exhibit XLI, "sale postponed for one month. Struck off," negatives the view that proceedings were closed. In these cases, moreover, the interval between the striking off order and the fresh attachment was long and in the two first mentioned, there are references to the Court's compelling the transferee to attach again--two further points of difference from the present case. As regards the latter, it is to be observed that the Court's exercise of such compulsion, not the propriety of that exercise, is the material fact, the transferee being entitled only to get the order in question set aside by an appeal, not to disregard it and dispute its correctness, when necessity arises, vide the second case cited and *Gobinda Chandra Pal v. Dwarka Nath Pal* 33 C.k 666. In *Gunga Gotti Pal v. Ram Sunder Dutt* 8 C.L.R. 157 the striking off order ran "let the execution case be, for the present, struck off." The qualification thus expressed is indefinite, and the interval in this case also was long. In *Hafiz Suleman v. Sheik Abdullah* (1894) A.W.N. 13 the defendant did not plead Section 276 and apparently did not attempt to prove that the original attachment was subsisting at the time of his opponent's consequence. The most these cases authorize, is a presumption in favour of the abandonment of the first attachment on the application for a second; and that presumption is, we hold, rebutted by the 3rd defendant's conduct and the circumstances of the case.

8. Reference has then been made to the fact that the property had been attached by the original decree-holder for the recovery of Rs. 553-14 0 only and that the 3rd defendant in Exhibit XLIV and afterwards applied for recovery by attachment of that sum and of a further Rs. 90. Now the introduction of this further Rs. 90 cannot support any direct, objection to the Court sale, at which the 3rd defendant's purchase was made. It had not been relied on in that way in the lower Court or here. It is argued, however, that it is important with reference to the question of abandonment, because it debars the 3rd defendant from treating his prayer in Exhibit XLIV for recovery of Rs. 55314-0 by attachment as immaterial or merely formal. He could not, it is said, have taken proceedings for the recovery of the two sums concurrently except by means of one attachment for the total; and his action in order to obtain such an attachment therefore involved his abandonment (as useless) of the attachment which already existed. But firstly, this argument does not entail that such abandonment was

contemplated except as conditional on or effective from the date of his actually obtaining the attachment for the larger sum, that is, until after the sale to the plaintiffs. And next, this conception of execution for the recovery of distinct sums becoming payable to the same decree-holder on different dates as involving distinct attachments seems to us unsound. No authority, which supports it, has been adduced. For in *Tej Narain Chatterjee v. Ram Tunoo Moojoomdar* 12 W.R. 870 the only case cited relating to an instalment decree, such as that now under consideration, the second application was made after the decree-holder had been satisfied in respect of an amount claimed in an earlier one. The principle that execution cannot issue for part of a decree is referred to in that judgment. But we have been shown no reason for and no advantage in extending it to include a prohibition against an application asking, as the third defendant might have asked in Exhibit XLIV, for an order in execution directing the recovery of the Rs. 90 in addition to the Rs. 553-14-0 by means of existing attachment. Such an order, whatever its exact wording, could have been published in accordance with law and could have been followed by an order for a sale at which both amounts due could have been realized conveniently together. We do not think it material that no explicit provision is made or form prescribed for such an order in the Code, since the reference in Section 235(j) to "such other methods of execution as the nature of the relief sought may require" indicates that the provision explicitly made is not exhaustive, and since there is no separate reference to instalment decrees. On the other hand, if the plaintiff's construction of the principle above referred to were adopted, the execution by attachment of decrees for instalments recoverable at short intervals would be rendered impossible, since a fresh execution for the total amount due would have to be obtained on the occurrence of each default, in each case, before a sale could be held on the preceding application. The plaintiff's contention being supported by neither authority nor convenience, we reject it and decide that the 3rd defendant was under no obligation to apply for recovery of the Rs. 553-14-0 by attachment in consequence of his application in respect of the Rs. 90

9. Appeal No. 233 of 1909 (appeal of the 1st defendant) is accordingly dismissed with costs to be paid by the 1st defendant. No order is made as to costs in the Court below. Both the memo. of objections are dismissed with costs. The plaintiff will pay costs in their memo. of objections to the 3rd defendant and the 2nd defendant will pay the costs in his memo. of objections to the 1st defendant. Appeal No. 198 of 1909 is allowed, and the suit is dismissed. The plaintiffs will pay the third defendant's costs here and in the lower Court. No order as to the costs of the other defendants in either Court.