

(1918) 03 MAD CK 0002
In the Madras High Court

M. Kuppaswamy Chetty and Others

APPELLANT

Vs

Kusala Ramiah and Others

RESPONDENT

Date of Decision : 18-03-1918

Acts Referred:

Citation : 49 Ind. Cas. 89 : (1918) 8 LW 551

Hon'ble Judges : John Wallis, C.J.; Spencer, J

Bench : Division Bench

Judgement

John Wallis, C.J.—This is an appeal from the judgment of Mr. Justice Coutts Trotter in a suit brought by the purchaser, from the Official

Assignee, of the right, title and interest of the insolvent, one Rathnavelu Chetty (1st defendant), in the suit ""properties. The insolvent was

adjudicated in October 1903 and in the course of 1104 there was some correspondence between the Official Assignee and the insolvent's

brother, Kuppaswamy Chetty, the 3rd defendant in this case. "The then Official Assignee did not press his claim to the property but subsequently

in 1910 his successor, Mr. Branson, took a different view and sold the property by public auction to the plaintiff. Now in the appeal which was

argued before us, (he right of the plaintiff to stand in the shoes of the insolvent, Rathnavelu Chetty, by virtue of his purchase from the Official

Assignee has not been contested. Three points were taken, two of which do not appear to have been pressed before the learned Judge.

2. The facts as regards this case are that in 1896 and 1897, two Muchilikas, one Exhibit A and the second a more formal one, Exhibit B, were

entered into by the members of the 1st defendant's family referring their disputes to an arbitration and empowering the arbitrators to divide all the.

properties among the members of the family. The arbitrators divided the Immovable properties, allotting two shares to the 3rd defendant,

Kuppnswamy Chetty, and one share to each of the other brothers and reserving certain other properties for the maintenance of the female

members, and all the" members of the family in Exhibit C signified their assent to this. The first objection raised by Mr. K. Srinivasa Ayyangar was,

that as the partition was never completed according to the Muchilikas, -This was not a final partition even of these items of Immovable property.

We think there is really no foundation for that contention, for, as was pointed out, it has been held frequently that the parties to an arbitration of this

kind are quite at liberty, if they like, to accept a partial partition and that a partition is binding on them.

3. The next objection taken by Mr. K. Srinivasa Ayyangar was that the suit was res judicata in. the 3rd defendant's favour. As I have said, the full

partition contemplated by the Muchilikas was never carried out, and the 1st defendant, who appears from the evidence to have been a man of

unbalanced mind--a conclusion which is also supported by the interpretation of the ""learned Vakil for the respondent in this case--was induced to

question the partition and instituted a suit, Original Suit No. 30 of 1900, the plaint in which is Exhibit E, really for a fresh partition. He was allowed

to withdraw that suit with liberty to bring a fresh suit and he brought a fresh suit, Civil Suit No. 6 of 1901. If the plaint in that case be carefully

examined it will be found that he did not sue, as the present plaintiff claiming under him sues, to recover these specific items of property. What he

alleged against 2nd defendant in that suit and the 3rd defendant in this was that that defendant denied his (the plaintiff's) right to a partition of the

suit properties as joint family property (see paragraph No. 10), and not that he was denying the plaintiff's right to these specific properties which

the present 3rd defendant had specifically admitted in his written statement in "the previous case; and what he asked for was a fresh partition. He

also asked ""should this Honourable Court hold that there is still a legally subsisting reference, then effect may be given to the Muchilika dated 8th

January 1897 and one or more arbitrates appointed by this Honourable Court and a decree passed in terms of the award that may be made."" It

really comes to this, that he asked for a fresh award by fresh arbitrators but did not ask in that suit for the possession of these specific items of

Immovable properties. Therefore the subject-matter of the suit was not the same and it cannot be said that the question in this suit is *res judicata* as

that suit was dismissed for default without leave to bring a fresh suit. That disposes of (two of the objections Urged by Mr. K. Srinivasa Ayyangar

and leaves us to deal with the main question in the case, whether the suit was barred by limitation on the date when it was instituted.

4. For the purpose of deciding this question of limitation the learned Judge found upon the correspondence and the evidence that the 3rd defendant

was not entitled to rely on his possession as adverse to the plaintiff before 22nd October 1904, the date of the letter Exhibit T. Mr. C, P.

Ramaswanii Ayyar, who argued the case for the re-respondent also relied upon the fact that the 3rd defendant was appointed Receiver of the suit

properties in the suit of 1900 and that, therefore, time never ran in his favour" at all I think that that argument is a sound one, and I propose to deal

with it in the first place.

5. Now, if we examine the written statement in the suit of 1900, Exhibits F and F 1, we find that the present 3rd defendant, whilst disputing the

plaintiff's right to a partition as a member of the joint family, did not dispute his right to the properties which had been awarded under the

Muohilikas. On the other hand he expressly alleged that the plaintiff was in possession of these properties. Paragraph No. 13 says that the

Immovable property that fell to the share of each member was actually taken possession of by him and was separately enjoyed by him, from that

time forward," and paragraph No. 17 says that "the plaintiff had been himself issuing bills for the rent due from his properties and recovering the

dues," though the rents had been collected through the family bill collector and had been deposited with the 3rd defendant. Paragraph No. 25 says

that "the plaintiff has after January 1900 ceased to issue bills or draw money from this defendant with the sister object of making it appear that

there was no division or separate enjoyment." In his evidence in this case the present 3rd defendant said that his brother Rathnavelu Chetty had

never done anything else to disclaim his possession. The mere fact that he ceased to issue was not sufficient to put him out of possession. In the same

written statement we have this heading in the schedule: immovable properties that fell to the share and are in the possession of M. Rathnavelu

Chetty (the plaintiff)."" In the affidavit for the appointment of a Receiver which was put in that suit (Exhibit; A) the present 3rd defendant says: I

crave leave that my written statement may be treated as part and parcel of this my affidavit,"" and thereby reiterates the statement that the properties

were in the possession of the insolvent. And in paragraph No. 7 he says that ""the allegation in paragraph No. 8 of the plaintiff's affidavit is, to say

the least, incorrect for, as I have stated in my written statement, I am not in possession of all the family properties but the plaintiff and 3rd defend

ant and others are also in possession of the family properties and enjoy the rents and profits. The plaintiff herein, who has been receiving the rents

and profits from his share of the family properties, has deliberately not received them from February this year with the object of making it appear

that there was no division."" In the face of these statements of the present 3rd defendant in his written statement and in his affidavit coupled with his

oral evidence it is absolutely impossible, in my opinion, to hold that he was in possession adversely to the insolvent at the date- of the suit or at the

date when he was appointed Receiver. If he was in possession at all at the time he was appointed Receiver his possession was that of his brother,

the present insolvent. The possession of the Receiver in one sense is said to be the possession of the Court, but as observed in Kerr on Receivers,

the possession of the Receiver is the possession of all the parties to the suit according to their titles. Now, it is not contested that at the time the

Receiver was appointed, the person who was entitled to the suit properties was the insolvent and further as I have already held, he was in

possession when the Receiver was appointed. The possession of the Court through the Receiver was, there-fore, the possession of the insolvent.

The Receiver, the 3rd defendant in this case has never yet been discharged; and even if he had been discharged; that would make no difference.

He would still hold the property on behalf of the rightful owner as observed in the Note in Kerr on Receivers, at page 151 See 6th Edition, page

179.--Ed of the 4th Edition citing Horlock v. Smith (1842) 11 L.J.Ch. 157. The contention that the 3rd defendant, who got himself appointed

Receiver on the footing that the suit property was in the rightful possession and ownership of the insolvent, could after-wards," during the

Receivership, turn round and set up an adverse title is in my opinion absolutely untenable and really obnoxious to the forcible observations con-

tamed in the judgment of Lord Macnaghten in *Corea v. Appuhamy* (1912) A.C. 23. This ground is quite sufficient to dispose of the suit. But we

also agree with the conclusion at which the learned Judge has arrived upon the correspondence that assuming Article 142 of the Limitation Act to

be applicable, ;the insolvent was not dispossessed nor did he discontinue to be in possession within 12 years of the institution of the suit. What

amounts to dis-continuance of possession is explained by Mr. Justice Fry in *Bains v. Buxton* (1880) 14 Ch.D. 537 : 43 L.T. 88. In my view the

difference between dis-possession and the discontinuance of possession might be expressed in this way; the one is where a person comes in and

drives out the others from possession; the other case is where the person in possession goes out and is followed into possession by other person.

As I have already pointed out, with reference to this case there is no satisfactory evidence that the insolvent ever went out of possession. All that is

shown is and what is stated in his written statement and in his affidavit is that during the Receivership the 3rd defendant was in possession.

Assuming that by ceasing to issue bills the insolvent went out--the 3rd defendant admits that he did nothing else--assuming that this amounts to

going out of possession, to make it discontinuance of possession it would be necessary to show that the 3rd defendant came into possession. On

the evidence I agree with the learned Judge that he never purported to take possession of the property until the date of the letter Exhibit T. We

have seen in the written statement in the first suit and in the affidavit for the appointment of a Receiver that he stated that the insolvent was in

possession, which apparently was the truth. In the written statement in the second suit, which is Exhibit K, while he set up that all the properties

were the self-acquisitions of himself and his father, he did not deny that the insolvent had acquired a title to the items that are now sued for by virtue

of the Muchilikas. In paragraph No. 18 he merely said that the plaintiff was not entitled to insist on the completion of the arbitration. On the

contrary, in paragraph No. 11 there is the allegation that ""the plaintiff,"" i.e., the insolvent, himself took possession of the properties that fell to his

share.

6. The next thing was the insolvency of the present 1st defendant in October 1913. Following what is unfortunately not at all an uncommon

practice with insolvents, he returned his Immovable property as nil in his schedule with a view to prevent his creditors from getting at it: The matter, however, engaged the attention of Mr. Read, who recently had succeeded to the office of the Official Assignee, in the latter part of 1914 and he wrote Exhibit O to the present 3rd defendant, Kuppnswamy Chetty, asking for an inspection of the award and received the answer Exhibit O, in which the 3rd defendant told him that he had not got the award with him, but referred to the fact that the properties were then divided. Then in Exhibit Q the Official Assignee wrote--and this is important for the understanding of the answer--I understand that the Immovable properties of the family were divided in 1897 : that, since then, the following properties have been in the sepa rate enjoyment of the insolvent,"" and he proceeded to set out the properties in suit now. There is no denial either of the properties having fallen to the insolvent's share"" or of their being in his enjoyment. In the answer Exhibit R, which the 3rd ""defendant wrote on the 12th October 1904, he merely says that the title-deeds are in his possession and that not a single title-deed of the said properties stands in the name of the insolvent. As regards the collections of rents, dues, etc., of such of the properties that yield income they are being collected by me under the circumstances mentioned in paragraphs Nos. 17 and 25 of my written statements filed in Civil Suit No. 30 of 1900 and under the Receivership in the above suit on the 19th July 1900 as also to the facts stated in paragraph No. 15 of the written statement filed by me in Civil Suit No. 6 of 1901."" As I have already stated, in my opinion, having regard to the fact that he got possession under the Receivership, what he now said was of absolutely no consequence. Further he acknowledges that he was in possession under the Receivership and a reference to paragraph No. 17 of his written statement in the first statement does, not show that he. claimed in any way at that time to be in possession on his own behalf. Similarly with regard to paragraph No. 25. As I have already pointed out, paragraph No. 25 does not amount to an allegation even of discontinuance of possession on the part of the insolvent, and then paragraph No. 15 of the written statement in the second suit merely say?, ""the 1st plaintiff having thus put an end to the arbitration is not entitled to ask for the completion of it."" But he in no way questioned the insolvent's title to or his possession of the properties now" in suit. It was not until the Official

Assignee wrote Exhibit S asking for the delivery of the properties that the 3rd defendant purported, in his letter dated the 22nd October 1904, to set up an adverse claim and claimed to be in possession on his own account.. I have already said that a Receiver is not competent to take up such an attitude and even if he was competent to do so, this suit was filed within 12 years of that time and so I agree with the learned Judge that up to that time his possession must be held to be on behalf of the insolvent. The conclusion is supported by a good deal of oral evidence in the case, The insolvent's own evidence is that for a long time the 3rd defendant was supporting him by grants of Rs. 30 or 40 a month, and there are some receipts which were taken by the 3rd defendant in respect of these properties and in which the insolvent's name is entered: and there must have been other receipts taken during this time, which the 3rd defendant has not produced and which, if produced, would probably show that he was in possession on behalf of the insolvent. At first he was no doubt merely assisting his brother in the endeavour to defeat the Official Assignee and his creditors and to keep the properties out of their reach. At a later stage he appears to have conceived the design of claiming to have held the property on his own account and has raised that plea in the present suit. For the reasons I have already given that plea has entirely failed and I agree in the conclusions of the learned Judge and dismiss the appeal with costs.