

(1934) 08 MAD CK 0048
In the Madras High Court

Medavarapu Narasayya

APPELLANT

Vs

Medavarapu Veerayya and Others

RESPONDENT

Date of Decision : 09-08-1934

Acts Referred:

Evidence Act, 1872 — Section 109
Registration Act, 1908 — Section 21

Citation : AIR 1935 Mad 268 : (1934) 40 LW 810

Hon'ble Judges : Walsh, J

Bench : Division Bench

Judgement

Walsh, J.—The plaintiff is the appellant in this second appeal. He sued to recover portions of three survey fields Nos. 203, 266 and 294 in Petunee-dipalem hamlet of Anumunilanna from the defendants. Defendants 1 to 3 as will be seen from the genealogical table set out in para. 3 of the lower appellate Court's judgment, are descendants of one Medavarapu Appayya (defendant 1 being the latter's son and defendants 2 and 3 grandsons). The plaintiff's case was that under the sale deed Ex. A dated 2nd July 1912 from one Ragamma he bought this property, which was subject to a registered lease, Ex. B, dated 3rd June 1907 for 10 years executed in favour of this Appayya by Ragamma. Ex. A recites this lease deed as subsisting. The lessee on the termination of the lease in 1917 refused to deliver possession and hence this suit. The defence was a total denial of Ragamma's title and also of the alleged tenancy under Ex. B. The trial Court found that the defendants were estopped from denying. M. Appayya's tenancy under Ex. B, and that consequently it was not necessary to go into the more complicated question of Ragamma's title and decreed the suit. On appeal with the consent of both the parties and in order that there-might be a final adjudication in case the plaintiff failed in the matter of estoppel, a finding was called for on issue 3 which runs as follows:

Who had been in possession of the suit lands and how long and under what title prior to the death of defendant I's husband?

2. It is admitted that "husband" is a clerical error for "father." In reply to this the learned District Munsif after a careful consideration of the documents came to the conclusion that they established Ragamma's title; but he did not deal with the title by adverse possession since he had already held the tenancy to be subsisting. The lower appellate Court found that there was no estoppel as regards tenancy and that Ragamma had no title and dismissed the suit; and against this decree this second appeal has been filed.

3. Some matters in connexion with this property may be mentioned in their chronological order. The land in question is admittedly a part of an inam granted to one J. Tammeyya. Ex. E, is a copy of the title deed and it is in the plaintiff's possession. The extent of the inam therein mentioned is 10 acres 20 cents. Here we may turn to the genealogical tree set out in para. 3. It may perhaps be noted that it is only reconstructed on the materials available in the evidence and it cannot be taken that the seniority of any brothers or sisters mentioned there is necessarily the order in which they appear there. The contention of the plaintiff is that Tamayya of the inam deed is the propositus Zeopalli man" of the genealogical tree. (There is a slight error when in para. 4 of the lower appellate Court's judgment it is said that the plaintiff's contention was that the inamdār was Rangamma's father Thammayya). On the other hand the contention for the defendants was that the inamdār of the title deed was Thammayya, son of Venkataohalam, and they also disputed that the propositus Zeo-palli man had any third son Venkayya as alleged by the plaintiff. That naturally led to the question whether certain sales by the three sons of Venkataohalam or their representatives were of 1/9th of the inam according to the plaintiff's case or of 1/3 according to the defendants' case. It may be mentioned here that it is a necessary implication of the defendant's case on this point that Thammayya in the inam deed stood not only for himself, but for his two brothers Thimmayya and Veerayya. For reasons which I shall give presently I do not consider it necessary to go into the very complicated question of who the inamdār under Ex. P really was. Taking the principal events which have happened in the order of chronology, in 1895 under Ex. 1, Veerayya, son of Venkataohalam, gifted to M. Venkayya, son of A. ppayya the property which he says therein he got on partition from "Thimmayya's daughter-in-law." This document being long antecedent to any dispute in the case, although it is not at all clear how on the defendants' case Veerayya could get in partition from this person, nevertheless shows that he gifted all that he got in partition. Under it he gifted the following:

We Survey No. 203 A.C. 0 44 697 links Dry. Survey No. 266, A.C. 0 24 444 Link Dry Survey No. 294 A.C. 3 0 592 Link

4. At this point I may remark as, I had to do in another appeal, that if the registration officers had done the clear duty cast on them by Section 21, Registration Act, it is probable that a great many of the difficulties of this litigation might have been avoided. Everything in this case points to what so often happens, i.e., an unscrupulous karnam taking advantage of the confusion

or mistakes in the accounts to foment litigation. Thenomos an admittedly nominal sale under Ex. 5 by Ragavamma on 26th March 1909 in favour of the Karnam's mother in an attempt by Ragavamma to recover possession of the property. Perhaps on account of the Karnam's death she failed to do so; she then proceeded to execute usufructuary mortgage deed to certain persons, and subsequently executed this,, a sale deed Ex. A, to the plaintiff. Turning to the registration of certain of these deed : no doubt, on its face, Ex. 1 would be registrable because there is nothing to show that the full extent of the survey fields mentioned there is not being gifted. But it is perfectly certain from the evidence as to what is the present extent of the survey fields, i.e., No. 203, 3.22, No. 266 1.76, and No. 294, 21.61 (for whatever the original extent of the fields might have been, which is unfortunately not ascertainable, the evidence shows that it has diminished not increased, in the resurvey of 1911) that the contents given in Ex. 1 are not whole survey numbers. It is the duty under the rules of the Registration Department in such a case as this to verify the Survey Numbers and see that the extents given are correct. Whatever excuse there may be for the registration of Ex. 1, several of the other documents should clearly on their face have been refused registration. Per instance, Ex. 2 the sale deed by Venkayya, great grandson of Venkataohalam merely describes the lands sold, so far as the present lands are concerned, as, "I Inam wet 44 cents in the eastern portion of Survey No. 203" and "Inam dry 24 cents in the eastern portion of Survey No. 266" and our share of Inam dry 3 acres situate in the southern portion of Survey No. 294."

5. Although the document does not set forth the vendor's title, there is no doubt that it means by our share of Inam dry 3 acres" to convey an ascertained piece of land and that it is not a sale of an unascertained piece of land and that it is not a sale of an undivided unascertained share. These descriptions are obviously quite sufficient to identify the property sold. Even more disastrous has been the neglect to observe this section in the registration of Exhibits 11 and 12. Exs. 10 and 11, is a sale deed dated 20th August 1915 by the same Venkayya who had already sold this property under Ex. 11 in favour of the same vendee, M. Appayya; and Exhibit 12 is a similar sale deed dated 20th August 1915 by a daughter of Veerayya who had already sold his share under Ex. 1.

6. The plaintiff's case was that the vendee was dishonestly getting up sale deeds for the property from persons who had no interest in it and it is in fact admitted by the defendants that these persons were reselling properties which they had sold long ago. But the explanation given is that this was done as a piece of greater precaution owing to the difference in measurement at re-survey. Each of them now sells 8 86-1/3 acres which is 1/3 of the present survey extent; but so far as the lands sold are concerned, there is again a total want of details by which they can be located in the survey fields. If these documents had been refused registration until the parties complied with Section 21. of the Act, it would probably have been brought to light at the time as to whether they were merely nominal documents intended to correct the extent or what their real

nature was and what exactly the property sold was. Although as I said I am not going into this complicated question, I cannot help observing that this is an instance in which lack of care in the registration of documents has played into the hands of persons seeking to foment litigation from mistakes in the records. I may at once state why I do not propose to go into this matter which was sent back for a finding to the trial Court and it is this: if the tenancy of M. Appayya is not made out, then there is no question but that the plaintiff has not been in possession of the property for over 12 years before suit. Admittedly neither he nor his vendor Ragamma has collected any rent since the rent which he collected under the decree in S.C.S. No. G87 of 1913. In a notice issued to defendant 1 Veerayya Ex. E in 1921 he treats him as a trespasser. The suit was not instituted until 28th January 1925.

7. Proceeding with the chronological incidents, in so far as the plaintiff and his vendor Ragamma are concerned, there is admittedly no evidence that Ragamma ever collected rent from Appayya. In fact we have the plaintiff's distinct statement that she did not. We have then the registered cowle Ex. B dated 3rd June 1907 by which the land professes to have been leased to this M. Appayya for 10 years on a yearly rental of Rs. 5. Then in 1909 Ragamma sold the land as stated above to the karnam's mother and this document is now admitted to be nominal. In this sale deed the lease to Appayya is not mentioned. Then in spite of the sale she usufructually mortgaged the land to some person who brought a criminal case against M. Appayya for trespass. This was C.C. No. 437 of 1912 on the file of the Stationary Sub-Magistrate of Yernagudem. In that case the accused relied on this lease deed Ex. B to show that the possession was with him under Ragamma and not with the usufructuary mortgagees and he was acquitted. Then the plaintiff filed S.C.S. No. 687 of 1913 on the file of the District Munsif's Court, Kovvur, for recovery of the land. That suit was first decreed ex parte, then it was restored and on contest decreed in plaintiff's favour. The judgment is filed as Ex. C. Issue 1 was whether the lease relied on by the plaintiff is true. On this it is said in the judgment that the defendants' written statement was that Ragamma brought into existence the original of Ex. A (here Ex. B) the lease deed, but that as D.W. 1 he admitted that he had the original lease deed, with him; and that it was therefore clear that with eyes open he took the lease from Ragamma of her share. The view of the present trial Court was that this conduct constituted an estoppel by which the defendants were now precluded from denying Ragamma's title at the time the lease was granted and it is not their case that there has been loss of title by the lessor after they were put in possession. There is also the question whether Section 109, Evidence Act, is not applicable. It runs:

When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand or have ceased to stand to each other in these relationships, respectively, is on the person who affirms it.

7. It is argued before me that this burden in the present case, owing to the decision in the second civil suit rests on the defendants and that there is no evidence at all adduced to discharge it. It is not disputed that the relationship between landlord and tenant applies equally to a tenant holding over. If authority for this is needed *Vasudev Daji v. Babaji Ranu* (1871) 8 BHCR 175 might be quoted. But it is strenuously argued for the respondent that the question whether M. Appayya accepted Ex. B or not is a question of fact and that this Court is not entitled to go into a question of fact no matter however wrong the decision of the lower appellate Court may have been. Before dealing with this point it may be useful to look at the plaint and the written statement. There is no doubt that the plaint rests the case on a cowle which is specifically mentioned in para. 1. It also mentions S.C.S. No. 687 of 1913 in which a decree was obtained and the rent realised. For the respondent it is pointed out that the valuation is on the market value of the property and not on the rent. Even assuming that excess valuation has been given that will not in my opinion show that the suit is not laid on the cowle. When we turn to the written statement, para. 6, which deals with this cowle, (apart from the position taken up that the decision in S.C.S. No. 687 of 1913 is not binding on the defendants on the ground that they were not parties to that suit) the written statement seems to hesitate between the theory that the cowle Ex. B was one executed behind the back of M. Appayya to which he was not a contesting party, and that it was a collusive and nominal transaction between Rag-amma and Appayya. For instance it says that

though Ragammahad no possession or enjoyment of the suit land, she however thought of sotting up her title to the said land by somehow fabricating some records in support of her right, that with that object she executed the plaint cowle nominally in favour of defendant Is father without even obtaining a kadapa from the latter, that on the strength of that kadapa and after the lapse of some time she instituted S.C.S. No. 687 of 1913 in this Court... and that decision is not binding on these defendants.

8. Here apart from the obvious error in speaking of a kadapa instead of a cowle the plea appears to be that M. Appayya did not consent to this lease. Then, further-on, it is said:

Even otherwise, the said cowle is not valid. It was not executed with the object of enforcing it. Neither these defendants nor their father were ever allowed possession of the suit land by virtue of that cowle.

9. That rather points to the defence of a nominal document got up for some purpose by Ragamma with M. Appayya as a consenting party. The issue framed on the point is issue 2. It runs:

Is the muehilika executed by defendant I's father fraudulent and not valid on binding on defendants and are the proceedings in Section G. Section No. 687 of 1913 a sham and not intended to be binding on defendant I's father as alleged in the statement?

10. I confess I am unable to understand how this issue came to be framed in this form because the assertion in para. 6 was that defendant I's father did not execute a kadapa corresponding to the cowle. The lower appellate Court has found as one of the reasons for disbelieving the tenancy that it was unusual to evidence a tenancy by a cowle without a kabuliyat by the tenant. Assuming however that in issue 2 the words "mu-chlika executed defendant I's father" should be a "cowle executed by Ragamma," the issue as it stands appeals to deal solely with a sham transaction entered into between Ragamma and Appayya not intended to be binding, and there is no issue as to whether Appayya did not know or consent to the cowle; looking at the proceedings in the Small Cause Court and the criminal case already quoted one can easily understand that the defendants might have felt much difficulty in that line of defence. On the other hand, when we come to the trial Court's judgment we find in para. 8

that Ragamma did as a matter of fact execute such a lease deed cannot be seriously disputed. The only question is whether defendant I's father accepted it. The suggestion on behalf of defendant's is that Ragamma executed Ex. B behind the back of defendant I's father and quite unknown to him simply with a view to create evidence of title in her favour.

11. If that was the only contention, issue 2 which does not suggest collusion should have been in another form and there should have been an issue on what the Court says here is the only question." But although the learned District Munsif states in this paragraph that this is the only question, he proceeds in para. 11 to deal with the matter of collusion. He says

Defendant 1 and late Appayya were living together as members of an undivided family and without any quarrel till 19AI. There can therefore be no room for any suggestion of collusion etc.

12. I think it is clear both from the written statement already referred to, from the issue and from this quotation from the judgment that the defendants did rely on collusion at least as an alternate defence; and as I read issue 2 it was the main case and the only case raised in the issues. The trial Court's judgment in this respect is very unsatisfactory. The matter assumes considerable importance in second appeal because the basis of the argument for the respondents is that the lower appellate Court has found as a matter of fact that defendant I's father did not accept Ex. B and that this being a finding of fact I cannot interfere. It may be noted that the suit was instituted after the death of both Ragamma and Appayya. So neither of these persons could give evidence. The lower appellate Court says:

The ground on which the lower Court found that he must have executed the cowle is that it was filed as evidence in the criminal case filed against him in 1912 by one Somayya,

13. Here again the matter is somewhat inaccurately put. The cowle is a document which a landlord executes and Ex. B was executed by Ragamma. As I

said, the lower appellate Court relies on the fact that Appayya did not execute a counter-part, and therefore the question was not the consent of Appayya as proved by the execution of any counter-part whether he knew of the cowle. If I agreed that this was the really correct way of putting the question in appeal, I think looking at the issues which have been framed I should be obliged to send the case back because there is no specific issue at all, as I pointed out, as to whether Appayya knew about or consented to the cowle. Moreover the lower appellate Court has nowhere discussed how Ex. E being executed behind Appayya's back is consistent with his producing it in the rent suit, a most important matter. The suggestion in issue 2 is clearly that it was a nominal transaction between him and Ragamma and that is the only issue. However I believe that this is not the correct way of putting the question which has arisen in appeal and that the real questions are: (1) is there an estoppel against the defendants owing to the civil or criminal suits and (2) if there is no estoppel whether the Small Cause suit (687. of 1913) by its result does not cast the burden of proving that the defendants did not stand to the plaintiff in the relationship of tenants on them and whether they have discharged it? It has not been contended at any stage of the proceedings and is not contended now that the judgment in the Small Cause Suit constituted *resjudicata* as to the relationship of landlord and tenant for the purpose of the present suit. In arguing that it is only a question of fact which is in issue the learned advocate for the respondents relied strongly on a recent decision of the Privy Council in *Secy. Of State v. The Ramaswaram Devasthanam* 1934 P.C. 112. I may claim to be well acquainted with the facts of that suit as it was an appellate judgment of my own which was reversed by the High Court and restored by the Privy Council. In that case the Privy Council held, that the questions were purely of fact, though the findings as regards the facts were based on documents exhibited in evidence. The quotation relied on in that judgment by the respondent is one from *wail Mohammad v. Mohammad Baksh* 1930 PC 91.

Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials, have to be construed for the purpose of deciding the question.

14. In my opinion the case in *Secy. Of State v. The Ramaswaram Devasthanam* 1934 PC 112 is not parallel to the present case. There the questions at issue were purely questions of fact. Here the question, as I see it, is

was a certain legal position created as between the parties as the result of certain transactions?

and that appears to me to be a matter; of law. A closely parallel case is *Rungo Lal v. Abdool Guffoor* (1879) 4 Cal 314, This is described as a special appeal and I am not aware of what the precise significance of that term is in the Calcutta High Court. But it was an appeal against an appellate decree and that suit was one brought for rent of a sum below Rs. 100. An objection raised there that the

appeal would not lie as no question before the lower Court was determined relating to any title to land as between parties having a conflicting claim and the only point determined was that there was no relationship of landlord and tenant existing between the parties, was overruled. It is not however with the effect of the lower appellate Court's decision in that case that we are concerned. But I note in passing that this was apparently what we should call a second appeal, and no suggestion was made that their Lordships could not go in second appeal into the question as to whether the parties were landlord and tenant as it would be an interference with a finding of fact. That is the first point on which this case helps the present appellant's contention. But more important than that is the following. The plaintiff relied on the fact that in 1863 he had instituted a suit for rent which had been decreed. As against this the defendants sought to set up the fact that three years afterwards, when he brought another suit for rent of the same lands against the predecessors in title of the defendants and these defendants set up by way of defence that they relinquished "the lands and then subpoenaed the plaintiff to appear as a witness at the trial which he did not do, he withdrew the suit and it was argued that this terminated the relationship of landlord and tenant established in the previous suit. Their Lordships held that the withdrawal of the suit amounted to no more than this: that the plaintiff gave up his claim for the particular rents for which the suit was brought and that it in no wise put an end to the relationship of landlord and tenant, which was established by the decree of 1863. In another place their Lordships observe:

There is not the least doubt that in point of law that decree did establish the relationship of landlord and tenant in respect of the lands in question between the plaintiff and the defendants in that suit, and the relationship having once been established we take it to be clear that it continues as between the parties to that suit and their representatives in title until it is proved to have ceased.

15. The learned advocate for the defendants seeks to get over this case which is very parallel by suggesting that the suit in 1863 was a regular and not a small cause suit. He points out that under Schedule 2, para. 8, Small Cause Courts Act 9 of 1887 there must be a special notification to empower rent suits to be tried by Small Cause Courts and that there is such a notification in Madras but not in Bengal. I have no evidence to show whether there is such a notification in Bengal, but seeing that the Small Cause Courts Act was only passed in 1887 and the suit was in 1863 it appears to me that any reference to that Act is irrelevant. It may however be conceded, that as there was no Small Cause Courts Act in force in 1863 the decision in a rent suit in Bengal would have been one in a regular suit and hence its finding is *res judicata*. But the important point to be noticed is that the plea of *res judicata* was never raised by any of the parties in *Rungo Lal v. Abdool Guffor* (1879) 4 Cal 314. That word is not mentioned and it is Section 109, Evidence Act that is relied on. It has to be noted also that in that case no rent appears to have been paid from the time of the suit, and hence the question so far as Section 109 is concerned seems to be precisely similar to the present case, namely whether the words "have been acting as such" would cover

a case where what is proved is a single instance of such action established by means of a decree. Here the evidence is unchallenged that there was not only a decree but that the plaintiff collected rent under it. So that it appears to me that on the authority of *Rungo Lal v. Abdool Guffor* (1879) 4 Cal 314 this is sufficient to bring about the relationship u/s 109 and to throw the onus of proving that the tenancy terminated on the defendants. As I said before it is not the defendants' case that the tenancy created under Ex. B terminated. Their case is that it never existed.

16. I agree that the only importance about the criminal case is the fact that defendant I's father produced the cowle Ex. B in that case. The fact that he used it in his argument to oppose the complainants in the case is not to my mind of much importance for it was sufficient for him to show in that case that the complainant could not be in usufructuary possession from Ragamma seeing that he himself was in possession under a lease deed from her. Even if the findings in that criminal judgment about the possession of the property are admissible, they are of little importance because the only matter which the criminal Courts had to determine was whether the accused had trespassed on the land in the possession of the complainants in that case, and as the complainants could not prove their possession it followed that the accused had to be acquitted. The judgment in the civil suit is a matter of more difficulty. It is contended for the respondents that that judgment Ex. C is only admissible u/s 13, Evidence Act, as an instance where a right was recognized and that Section 43 shows that it is irrelevant as it does not fall under Sections 40, 41 or 42. It is argued on the other side for the appellant that a statement in that judgment, which I have quoted above, that the defendant as his first witness admitted that he had the original lease with him is relevant as an admission u/s 21 and also is admissible u/s 35, Evidence Act. As against its admissibility u/s 21, it is argued that it is only secondary evidence of such admission and no proof has been shown that primary evidence is not available. In this matter I am inclined to agree with the respondent. In the case of an admission it is very important to have the precise words of the admission. As regards its admissibility u/s 35, Evidence Act, the question is more difficult and no ruling exactly in point has been cited. It is argued for the appellant that an inference can be drawn from *Seethapati Rao Dora v. Venkanna Dora* 1922 Mad 71, that such a recital in a judgment between the parties is admissible u/s 35. The decision in that case however was only the converse that a recital in a judgment not between the parties of a relevant fact is not admissible u/s 35, Evidence Act. I do not think that the reference in that case to the Privy Council case, *Ram Prakash Das v. Anand Das* 1916 PC 256 supports the appellant's contention at all. It is remarked:

It is unnecessary in this reference to consider whether, if admissions made by parties to a suit or their predecessors in title are relevant and the originals containing the admissions are not forthcoming, secondary evidence of such admissions can be given by reference to extracts from judgments.

17. Here, for the admissibility, the prerequisite is said to be that the originals are not forthcoming. I therefore agree with the contention that this remark in Ex. C is not admissible in the present case. Nor are the reasonings either in this judgment or in the criminal case admissible: vide *Gobinda Narayan Singh v. Sham Lal Singh* 1931 PC 89. This however is a minor matter. After careful consideration I hold that the question in this appeal whether the relationship of landlord and tenant existed between the defendants and the plaintiff is one of law and not of fact. In that ; connection, I might perhaps also quote, *Satgar Prasad v. Raj Kishore Lal* 1919 PC 60 , where their" Lordships of the Privy Council say:

It is with reluctance that their Lordships differ from the concurrent opinions of the two Courts below on this point; but it is one in reality of legal inference from documents and. not of finding of fact.

18. That case concerned the legal relationship of parties. It is no doubt pointed out to me that their Lordships-of the Privy Council are not bound by Section 110, Civil P. C. In spite of this it is well known that they make it a rule not. to differ from the concurrent findings of two Courts below on a point of fact.. Here they expressly say that the legal relationship of parties is not a question.) of fact but of law. As I consider that-the matter can be raised as question of law, I hold that the first Court was-right in considering that there was an, estoppel u/s 115, Evidence Act, which says the defendant cannot attack, his landlord's title at the time. he was put in possession : vide (1885), *Earlton v. Bowcock* (1885) 51 LT 659. Even u/s 109 the onus of: proving that the relationship of landlord and tenant which subsisted had terminated lay on the defendants and1, they have adduced no evidence to that, effect. In fact it is not their case. No-doubt the notice Ex. E is strongly relied on for them as showing that the plaintiff treated them as trespassers. It is pointed out that there is no mention-therein of the lease. If the defendants" case had been an admission of the original tenancy, and it had been further-contended that it had ceased, Ex. E-might have been a valuable piece of evidence. That however is not their case and if it had been they would have had" to state when and how the tenancy terminated. No doubt both the Courts-have found that the purchase by the plaintiff was speculative. It has been pointed out to me that, with regard to the price, Rs. 70 might not have been an. inadequate sum to pay when there was a ten years" lease of the land with five years more to run on a rent of Rs. 5 only, with what was probably a troublesome-tenant in possession. The speculative character of the sale is however really immaterial because I do not propose to discuss the complicated question of plaintiff's title apart from the tenancy since plaintiff has not shown possession otherwise than as landlord with defendants as his tenants within the prescribed period of 12 years.

19. In the result the appeal is allowed with costs in this and the lower appellate Court and the decree of the trial Court restored.