

(1949) 02 MAD CK 0036
In the Madras High Court

Mulugu Nagamma

APPELLANT

Vs

Mudigonda Aghorapathi Sastri and Others

RESPONDENT

Date of Decision : 03-02-1949

Acts Referred:

Citation : (1949) 62 LW 249 : (1949) 1 MLJ 456

Hon'ble Judges : Panchapakesa Ayyar, J;Panchapakesa Aiyar, J

Bench : Division Bench

Judgement

Panchapakesa Ayyar, J.—This is an appeal against the judgment and decree of the Subordinate Judge of Tenali in O.S. No. 16 of 1946.

The facts were briefly these. The deceased father of the defendants sold eight items of property to the plaintiff's son on 14th August, 1916, for a

sum of Rs. 3,000. The vendee got possession of the properties and enjoyed them. On 6th November, 1924. he executed a will in favour of his

mother, the plaintiff, and died soon afterwards. Thereafter, the plaintiff enjoyed the properties. She sold item 8 and a portion of item 7 to strangers.

At the time of the sale by the father of the defendants to the plaintiff's son, he had only one son, namely, the first defendant; the other defendants

are sons subsequently born to him. The first defendant filed O.S. No. 42 of 1935, asking for a partition of his one-seventh share of all the family

properties, including these eight items, impleading his father and the other defendants and also the plaintiff in O.S. No. 16 of 1946 and other

alienees. The Court gave a preliminary decree for partition on 3rd August, 1937, in favour of the defendants, holding that the sale deed dated 14th

August, 1916, was fully supported by consideration but was binding on the sons only to the extent of the proved antecedent debts, namely, Rs.

585 and that the sale was not binding on their half share to the remaining extent. As regards the 8th item, it dismissed the suit as abated. The

alienated portion of item 7 had not been included in the suit. The Court directed the sons, the defendants in this suit, to pay a moiety of the binding

portion of the consideration, namely, Rs. 292-8-0. It awarded mesne profits to the sons only from the date of the deposit of the binding portion of

the consideration. The quantum of the mesne profits was left over to be decided subsequently. This decree was confirmed in appeal on 21st

December, 1938, in A.S. No. 377 of 1947. The defendants in this suit deposited the amount due from them under the decree in the partition suit,

on 21st December, 1939, and thereby became entitled on that date to the recovery of possession of items 1 to 7; but, actually, they recovered

possession of items 2 to 7 only on 21st April, 1944, and of item 1 on 6th July, 1944. They had filed a petition in 1941 (I.A. No. 269 of 1941) for

a final decree in the partition suit, O.S. No. 42 of 1935.

2. The plaintiff brought the present suit for recovering Rs. 11,281-6-8 as damages, since she was dispossessed of items 1 to 7 (a half share of the

properties sold on 14th August, 1916) in 1944, owing to the vendor's failure to keep up the express and implied covenants of title and quiet

enjoyment. By the time she brought the suit, the vendor was dead, and the defendants were sued as they were said to be-bound, under the theory

of pious obligation, to discharge the debt covered by the damages claimed.

3. The defendants contested the suit on various grounds, like limitation, excessive damages claimed, misjoinder of parties, etc. Their contest will be

clear from the issues. The learned Subordinate Judge framed the following issues:

(1) Whether the alleged covenant, for quiet enjoyment pleaded in para 3(c) of the plaint is true, valid and binding upon defendants ?

(2) Whether such a covenant is implied under law?

(3) Whether the suit claim is a " debt" enforceable against sons under Hindu Law ?

(4) Whether the suit claim is extinguished after the death of Virabhadrasastri (father of the. defendants)?

(5) Whether the suit is barred by time ?

(6) What is the market value of the properties at the time when the plaintiff was dispossessed?

(7) To what compensation or damages, if any, is the plaintiff entitled ?

(8) Whether the suit is bad for misjoinder of parties ?

(9) To what relief?

After discussing the evidence before him, the learned Subordinate Judge found issues 1 to 4 and 8 in favour of the plaintiff; but, on issue 5, he

found that the suit was barred by limitation as the amount due by the defendants under the decree in the partition suit had been deposited on 21st

December, 1939, and the possession by the plaintiff of items 1 to 7 had become thereafter wrongful possession, and, so, the plaintiff must be

deemed to have become dispossessed of those items on 21st December, 1939, and, as the suit was brought only on 21st April, 1946, that is, more

than six years from that date, it was barred by limitation. He relied on the ruling in *Kamalanand Singh v. Jarao Kumari* (1912) 17 I.C. 238. In that

view, he did not give any findings on issues 6 and 7 and dismissed the suit with the costs of the defendants. The plaintiff has preferred this appeal.

4. The learned Counsel for the plaintiff-appellant urged that the finding of the lower Court on issue 5 was erroneous, and that limitation would run

only from the date of actual physical dispossession, that is, when the physical enjoyment of the lands by the plaintiff was disturbed, and not from

the date of the defendants depositing the amount required of them and being thereby entitled to recover possession. We agree. The ruling in

Kamalanand Singh v. Jarao Kumari (1912) 17 I.C. 238 has no bearing on the facts in this case. It was not a ruling regarding limitation at all. It

simply held that when a landholder had by his action made it impossible for the sub-landholder to collect the rents, he could not claim to recover

those rents simply because he did not actually dispossess the under-tenure-holders physically. The general rule of law is, in our opinion, that

dispossession should mean physical dispossession and not merely a right to dispossess. The right of the plaintiff to bring a suit for damages was not

affected by limitation so long as he remained in possession of the items, and time began to run against him only from the date of actual

dispossession even though his right to remain in possession may have been lost by a decree against him, as here. The ruling in *Avdesh Kumar v.*

Zakul Hasnain ILR 1944 All. 612, will also support this view. "" Wrongful possession "", is irrelevant for this purpose as it will entitle a person, if he

goes on holding on to the lands for more than the prescribed period, to acquire title by prescription. That itself shows that it will not amount to

dispossession "" but is clearly a species of "" possession "" and cannot, therefore, amount to a termination of his possession. The fact that mesne

profits were directed to be paid to the defendants by the plaintiff from the date of deposit of Rs. 292-6-0 by them will make no difference and,

indeed, will only show that the plaintiff was still in possession and was not dispossessed.

5. In this view, we set aside the dismissal of the suit by the lower Court and remand the suit to the lower Court for fresh disposal on issues 6 and 7,

after allowing both sides to let in any further oral and documentary evidence they like, and to adduce all arguments they like with regard to the

basis on which damages should be awarded to the plaintiff for breach of these covenants. In the circumstances, the costs in this appeal will abide

and be provided for when the suit is disposed of afresh.

6. The Court-fee paid on the memorandum of appeal will be refunded to the plaintiff-appellant.