

(1952) 11 KAR CK 0009
In the Karnataka High Court
Case No : Appeal No. 184 of 1949-50

Nagappa Gowda and Others

APPELLANT

Vs

Doddamane Gurupadappa and Another

RESPONDENT

Date of Decision : 06-11-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63, Order 38 Rule 8

Citation : AIR 1954 Kar 39 : (1953) ILR (Kar) 408 : (1954) 32 MysLJ 184

Hon'ble Judges : Medapa, C.J.; Vasudevamurthy, J

Bench : Division Bench

Advocate : V. Krishnamurthy, for the Appellant; M. Sadanandaswamy, for the Respondent

Judgement

Vasudevamurthy, J.—The plaintiff's suit for declaration of title, possession and mesne profits of a garden land has been partly decreed by the District Judge, Shimoga and defendants 1 to 4 and 6 have appealed. Defendant 5 has been formally impleaded as respondent 2 and the plaintiff is respondent 1. The plaintiff has also filed cross-objections regarding the 4 share of the garden which has not been decreed in his favour.

2. According to the plaintiff, the suit property belonged to a joint Hindu family of one Benavannagowda Gowda and his three undivided brothers. For failure to pay land revenue it was forfeited to Government in or about the year 1937, but it could not be disposed of in revenue auction for want of bidders and it was resumed or taken under Government "phada"; subsequently as Benavanna-Gowda paid up all the dues it was granted to him. For some monies due by him and his brothers the plaintiff filed a suit O. S. No. 27 of 35-36 in the Court of the Subordinate Judge at Shimoga, and in execution of that decree purchased the suit property along with some other items in Court sale on 1-10-42. After the sale was confirmed he was put in possession in Mis. No. 11 of 43-44. At that stage the father of defendant 6, one Chennabasappa now dead and who was the then Manager of the family of the defendants filed a suit O. S. No. 160/43-44 in

the Shimoga Munsiff's Court for a declaration of his title and for permanent injunction against the plaintiff alleging that he was in possession, and obtained an order of temporary injunction restraining the plaintiff from entering the suit garden. Under colour of that order he then removed the areca and paddy crop for the year 1943-44. Chennaba-sappa's suit was decreed in his favour by the Munsiff but, on appeal, was dismissed by the Subordinate Judge of Shimoga and the dismissal was confirmed in the High Court. In spite of that decision the deceased Chennabasappa and after him defendants 1 to 6 his legal representatives have been continuing in unlawful possession of the land and were liable to deliver up possession and mesne profits.

3. The defendants pleaded that the suit property belonged solely to Renevannagowda and was his self-acquisition. One Krishnappa filed a suit against him for some monies due by him in O. S. No. 335/26-27 in the Shimoga Munsiff's Court and brought it to sale in Ex. case No. 191 of 31-32 when it was purchased in Court auction by one Sundarasastry. After the sale was confirmed in his favour on 24-12-1934, Sundarasastry was put in possession through Court on 1-1-35 in Mis. No. 121/34-35. He subsequently sold the garden to Chennabasappa, father of defendant 6, on 30-6-43. Sundarasastry and after the sale by him Chennabasappa and the defendants were all along in possession and enjoyment of the suit property. The plaintiff had got the suit property attached before judgment in O. S. 27/35-36 which he had brought against Benavannagowda and his brothers. Sundarasastry had then put in a claim objecting to the attachment in Mis. Case No. 20V of 35-36. That claim had been allowed in favour of Sundarasastry as far back as on 14-3-1937. The plaintiff had not got that order set aside and the same had become conclusively binding on him. Nevertheless he had played a fraud on the Court by getting the suit property sold subsequently in execution in the Subordinate Judge's Court at Shimoga without disclosing to that Court the fact that Sundarasastry's claim against the attachment had been allowed as aforesaid & he could not acquire any right under such a fraudulent sale.

The Suit O. S. No. 160/43-44 filed by Chennabasappa in the Munsiff's Court at Shimoga for a declaration of title and permanent injunction was decreed in his favour by the Munsiff, Shimoga, as admitted in the plaint. But on appeal in R.A. No. 16/45-16 the Subordinate Judge rejected the plaint only on a technical ground that an extract from the Record of Rights had not been filed along with the plaint, and in -- "S. A. No. 356 of 1946-47 (Mys) (A)" that order was confirmed. There had been therefore no decision on the merits against the defendants in those appeals and three criminal complaints filed by the plaintiff against the defendants complaining of trespass and that in respect of the produce of this suit garden had ended in orders of discharge. The defendants had considerably improved the garden and in the event of the plaintiff succeeding they were entitled to be reimbursed the value of the same. The plaintiff had brought this suit on account of ill-will as a counter blast to some other litigation between the parties.

4. The District Judge, Shimoga, found that the suit property was the joint family property of Benavannagowda and his brothers and that it did not belong to Benavannagowda alone. He held that the order in the claim case could only affect Benavannagowda's share as Sundarasastry had bought only his right, title and interest. He did not think that the plaintiff was entitled to claim any enlargement of his rights on account of the forfeiture and other revenue proceedings. He did not also believe that the defendants had improved the suit garden. He, therefore, made a decree in favour of the plaintiff for a 3/4th share of the garden and mesne profits.

5. Mr. Krishnamurthi, learned counsel for the appellants, has contended before us that the order of the Subordinate Judge in the claim case was that the plaintiff could not validly attach before judgment the suit property as belonging to his judgment-debtors Benavannagowda and his brothers, that as that order had not been set aside within the time allowed by law, as required under Order 21, Rule 63, Civil P. C., it had become conclusive. The plaintiff could not in this suit put forward or claim the identical right which had been negated in the miscellaneous case. Mr. Sadanandaswamy, learned counsel for respondent 1, has urged that the attachment effected by his client was one before judgment and not in execution of a decree, and that consequently neither Order 21, Rule 63 which requires a suit to be filed to have an order made in a claim case set aside nor Article 11, Limitation Act which prescribes a period of one year within which such a suit must be filed applied in terms to bar the plaintiff's present suit. Moreover this suit was one for declaration of title and possession and not for setting aside the order in the claim case and it was really governed by Article 138 which gives his client 12 years from the date of confirmation of sale to bring such a suit.

6. It has been held so far back as in -- "4 Mys C C R 146 (B)" that an order passed u/s 487 of the old CPC corresponding to Order 38, Rule 8 of the present Code allowing a claim to property attached before judgment in a suit is subject to the provisions of Section 283 (Order 21, Rule 63 of the present Code) and that the plaintiff's remedy to have it set aside is a suit under that section. This decision has been followed with approval in -- "51 Mys H C R 448 (C)", where reference has also been made to -- "Pyaw Gyi Ma v. Latchmanan Chettiyar" AIR 1931 Rang 183 (D) and -- "Maliknarjuna v. Virayya" AIR 1918 Mad 26 (FB) (E). See also -- Dhan Bibi Vs. Mrinalini Ghosh and Others, . Order 21, Rule 63, Civil P. C. declares that where a claim or an objection is preferred to an attachment the party against whom the order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.

It has been held in -- "44 Mys HCR 589 (G)", while dealing with a similar provision under Order 32, Rule 103 that the effect of the failure to file a suit within one year of an order made under Order 21, Rule 97 to set aside that order and to establish his right to present possession of the property in dispute, the

claim to such possession is concluded and even as a defendant he cannot resist the recovery of possession by the opposite party. It was observed in that case that as between the parties to that order there was a bar provided under Order 21, Rule 103 and as between themselves the unsuccessful party lost his right to possession. He could not also resist the claim of the plaintiff for recovery of possession as a defendant in the suit for the same reasons as would preclude him from suing as plaintiff to recover possession. It was further pointed out in that case that any other way of construing those provisions would be to allow the unsuccessful party to circumvent the law. See also -- "Azizullah Khan v. Ghulam Hussein" AIR 1924 Sind 97 at p. 99 (H); -- "Nema Gauda v. Paresha" 22 Bom 640 (I); -- "Ma Sein Htay v. Maung Mya" AIR 1935 Rang 161 (J), and Mulla's Code of Civil Procedure, 11th Edn; page 848 where it is observed that "subject to the result of such suit the order shall be conclusive" in Rule 63 of Order 21 means that unless the suit is brought as provided in that rule the party against whom the order is made cannot assert either as plaintiff or as defendant in any other proceedings the right denied to him by the order; vide -- "Bailur Krishna v. Lakshmana" 4 Mad 302 (K); 22 Bom 640 (I); -- "Surnamoya Dasi v. Ashutosh Goswami" 27 Cal 714 (L); -- "Kayyana Chittemma v. Dossy Gavaramma" 29 Mad 225 (M); -- "Yarakayya v. Venkata Krishnamaraju". AIR 1918 Mad 693 (1) (N); -- Akkammal Vs. Komarasami Chettiar and Others, ; -- Premsookh Das and Others Vs. Satyanarain Singh and Others, .

7. We have therefore to see what in this case is the nature and effect of the order passed in the claim preferred by Sundarasastry against the plaintiff who had attached the suit property as belonging to his debtors Benavannagowda and his three brothers. That order has been marked as Ex. I in this case. In his application under Order 38, Rule 8 Sundarasastry had claimed the property attached in the plaintiff's suit O. S. No. 37 of 35-36 as his own and as being in his possession and enjoyment. The plaintiff contested the claim and after recording evidence, during the course of which Sundarasastry examined himself and his tenant Nagabhatta and produced copies of the sale certificate issued in his favour, after the Court confirmed the sale in his favour a receipt evidencing delivery of possession by Court on 1-1-1935 (sic). The plaintiff examined himself, and he and a witness whom he examined gave evidence that the property belonged to the joint family of Benavannagowda and his brothers. The Subordinate Judge held that the evidence disclosed that possession of the property was with Sundarasastry and that the copy of the sole certificate showed that the same had been sold subject to a hypothecation in favour of the plaintiff. The latter and Benavannagowda had unsuccessfully tried to have the Court sale set aside and both in the Subordinate Judge's Court and on appeal it was held that the attachment which was challenged was apparently got effected merely to harass the petitioner & could not be sustained. That order clearly recognized Sundarasastry's prior purchase under the Court sale in Ex. 191/31-32 in O. S. No. 338/26-27 to attach the property as still belonging to Benavannagowda and his brothers. After this order has become conclusive under Order 21, Rule 63, it

would be idle for the plaintiff to contend that he can again put forward the same contention, viz., that the property belonged to the joint-family of Benavannagowda and his brothers in this suit between himself and the defendants who claim under Sundarasastry merely because he has chosen to frame it as a suit for declaration of title and possession.

8. Mr. Sadanandaswamy has urged that Article 11 does not in terms apply to the present suit as it refers to a suit to set aside or avoid the effect of an order passed in respect of an attachment in execution of a decree and not an attachment before judgment. That question has been, however, set at rest so far as our Court is concerned, and it has been held by a Bench of this Court in -- 51 Mys HCR 448 (C)", that Article 120 and not Article 11, Limitation Act applies to a suit to set aside an order made on a claim in respect of an attachment before judgment though such claim or objection was preferred after decree in the course of execution proceedings. The same view has been taken in a recent decision of the Calcutta High Court in -- Dhan Bibi Vs. Mrinalini Ghosh and Others, . The plaintiff's suit which was filed on 11-12-43 is long after even the six years prescribed by Article 120 from the date of the order in the claim case, viz., 14-8-37 even if it can be construed as one to set aside that order.

9. Mr. Sadanandaswamy has next urged that as the suit land had been forfeited to Government under the provisions of the Mysore Land Revenue Code and transferred to "Government Phada" in the year 1937 for non-payment of land Revenue, whatever rights Sundarasastry acquired under his purchase in Court sale were lost. He represents that the khata of the land stood in the name of a deceased man Krishnabhata when the land was forfeited; that it was restored to Benavannagowda and that the latter must be deemed to have become its absolute owner again after Sundarasastry lost his rights by the forfeiture. Section 54, Land Revenue Code is, however, clear and a mere forfeiture followed by the restoration to the defaulting "holder" Benavannagowda does not wipe out all the earlier rights. It has also been held by this Court in -- 18 Mys CCR 76 (Q)", that neither the Mysore Land Revenue Code nor the rules thereunder contemplate the purchase on behalf of Government land which has been "forfeited" by reason of non-payment of the land revenue; and a mere forfeiture, while it no doubt operates, so far as Government is concerned, as a resumption of the holding, does not, unless it is followed by a sale, necessarily extinguish rights and equities that may be subsisting as between private parties. There is an exactly similar contention that the restoration of the khata to the defaulter was equivalent to a new and absolute grant of the land freed from all previously existing rights and equities was negatived. There is therefore no substance in this contention which has been rightly held against Respondent 1 by the District Judge. See also -- "Amolak v. Dhondi" 30 Bom 46 (R).

10. Mr. Krishnamurthi has urged that the plaintiff had deliberately suppressed the order; against the appellants in the claim case while obtaining an order for sale of the property as belonging to all the brothers and had got even

Benavannagowda's right, title and interest sold up and that he cannot be permitted to come to Court to enforce such a tainted claim under a sale based on a fraud practised on the Court. It is not necessary for us to go into that question or to consider whether the suit property belonged to Benavannagowda alone or his brothers also in the view we have taken that the plaintiff is concluded by the order in the claim case and is precluded from bringing the present suit.

11. In the result this appeal is allowed and the plaintiff's suit is dismissed with costs throughout. The cross-objections are also dismissed but without costs.

12. Appeal allowed cross objections dismissed.