

(1935) 01 MAD CK 0017
In the Madras High Court

Nelluri Venkayya

APPELLANT

Vs

Devabhaktuni Raghavayya and Others

RESPONDENT

Date of Decision : 25-01-1935

Acts Referred:

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

Citation : AIR 1935 Mad 596 : (1935) 41 LW 726 : (1935) 68 MLJ 590

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The 3rd defendant is the appellant. He preferred a claim to the suit property under Order 21, Rule 63, CPC in

connection with the proceedings in execution of his decree started by the second defendant against the first defendant. The plaintiff's case was that

the property was given to his maternal grandmother at a partition between the sons of whom one was the first defendant and that it was

bequeathed to him under a will. On the first occasion the first Court found that the partition alleged by the plaintiff was proved but that the will

relied on by him was not genuine. The plaintiff's suit was therefore dismissed. On appeal the learned judge came to the conclusion that what the

lower Court should have considered was the question of possession on the date of the claim proceedings and that the Munsif was wrong in having

disposed of the case on the question of title. The Subordinate Judge therefore remanded the suit to the lower Court but in remanding it he

forwarded for the lower Court's consideration the petition of defendants 2 and 3 for framing an additional issue. The following additional issues

were then framed: (1) whether the plaintiff is entitled to the suit property. (2) whether the plaintiff had possession of the suit property, on the date of

the claim petition. It will be observed that the first additional issue directly raised the question of title to the property. On that issue it was found that the plaintiff was not entitled to the suit property, and on the question of possession it was found, ""that as the will Ex. A relied on by the plaintiff has been found to be not genuine and as the plaintiff has no title to the suit land, the first defendant's enjoyment of the suit land on the date of the plaintiff's claim petition and on the date of attachment and previously cannot be considered to be on behalf of the plaintiff"". In the result the District Munsif held that the plaintiff had no possession of the suit property and that the first defendant had possession of the suit property on the date of the attachment and on the date of the claim petition. On this finding the suit was dismissed.

2. In appeal the learned Judge expressed the opinion that the only point for determination is as to who was in possession of the suit property on the date of attachment and on that he concluded that it must be taken that the possession of the sons must be on behalf of the plaintiff who was believed by them to be the owner and so it was held that the plaintiff had established his claim. The learned Judge in the concluding paragraph of his judgment left the question of title open between the plaintiff and those who are entitled to the suit land, saying specially that he has not gone into this on appeal.

3. I must observe that, having regard to the history of the case, it is very strange that the learned Judge did not consider the question of title. The question was specifically raised by the additional issue and was expressly found upon, on remand. Further, the learned Judge's view that it is immaterial to consider the question of title in investigating the claim under Order 21, Rule 63 is also not correct. This Court had held (see (Kotikalapudi) Pakirayya Vs. (Kodiyala) Kamasastri and Another, that the terms of Order 21, Rule 63 are wide enough to include a suit based upon title. The point to be observed is that the rule does not specifically say either that it is possession on the date of the claim proceedings that should be established or that it is the title of the claimant that should be established. The words are, ""the claimant may institute a suit to establish the right which he claims to the property in dispute"". In order to prove that he has right to the property in dispute a consideration of his title as well as

of possession will be relevant. The two questions cannot be separated one from the other, for, in finding out who is in possession of the property, the question as to who has title to it will be very relevant because ordinarily possession will follow title. I am mentioning this only to illustrate the statement that the terms of the order are wide enough to include title as well. The lower Court was therefore wrong in leaving the question of title open for another litigation when it was specifically raised in the case, and, as I have said, found upon by the Court on remand. In these circumstances I would set aside the findings of the lower Appellate Court and ask the Court to dispose of the appeal after considering the question whether the plaintiff has established his right which he claims to the property in dispute, which is a question for consideration under Order 21, Rule 63, Civil Procedure Code. As I have already indicated, in arriving at a conclusion on this question the consideration of the question regarding title as well as of possession will be relevant.

4. As all the evidence has been given in the case, there is no need of fresh evidence. I set aside the decision of the lower Appellate Court and remand the appeal to the Subordinate Court of Guntur for disposal according to law in the light of my observations.