
(1970) 10 KL CK 0006
In the High Court Of Kerala
Case No : Second Appeal No. 638 of 1965

Padmanabha Pillai Krishnan Nair

APPELLANT

Vs

Punnosse Abraham and Others

RESPONDENT

Date of Decision : 08-10-1970

Acts Referred:

Transfer of Property Act, 1882 — Section 44, 52, 73

Citation : AIR 1971 Ker 154

Hon'ble Judges : P. Subramonian Poti, J

Bench : Single Bench

Advocate : A.S. Narayanan Asan, for the Appellant; N.V. Prabhakaran, Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

P. Subramonian Poti, J.—The plaintiff in a suit for declaration that plaint items 3 and 4 belong to him having failed in the courts below, has filed this second appeal. It is necessary to state a few facts to understand the controversy between the parties. There are 5 items in the plaint schedule. These items belonged to one Ulabannan Purpose, father of defendants 1 to 5. Under a settlement executed by him the plaint properties were allotted to his wife with the stipulation that on her death item 5 was to devolve on the 5th defendant and items 1 and 3 together with items 2 and 4, they being the buildings standing thereon, were to devolve equally on defendants 1 to 5. Defendants 3 to 5 were conducting a chitty as foremen. The 14th defendant was a subscriber in that chitty. For paid up subscriptions he filed a suit O. S. 529 of 1107 and obtained a decree. In execution of the decree against the 3 foremen items 3 and 4 were purchased by him and delivery was obtained by him through court on 15-11-1956.

Plaintiff purchased the said item from the auction purchaser. It may be remembered that the chitty foremen were only three out of the five children of Ulahannan Punnoose and item 3 with item 4, the building thereon, which was

sold in court auction devolved on all the children of Ulahannan Punnoso on the death of their mother. First defendant who is one of the brothers of defendants 3 to 5 had filed O. S. 525 of 1122 against defendants 2 to 5 and others for partition of these plaintiff schedule items. A final decree for partition was passed in March 1958. Item 3 with item 4 building thereon which had been sold in court auction in execution of the decree against defendants 3 to 5 was allotted in the partition exclusively to defendants 1 and 2. It is alleged in the suit that the allotment of items 3 and 4 to defendants 1 and 2 under the partition decree was fraudulent and was intended to defeat the plaintiff from getting at these items, title to which was obtained by him under the court sale. It is therefore prayed in the suit that defendants 1 and 2 may be restrained from executing the partition decree in O. S. 525 of 1122, and taking delivery of these items.

It is also prayed that, in the alternative the plaintiff be allotted so much of the properties out of items 1, 2 and 5, so as to make up of the value of items 3 and 4. The suit was resisted by the first defendant who contended that the suit was not maintainable and plaintiff was not competent to impeach the decree in O. S. 525 of 1122. It was pleaded that the court auction purchase and delivery in O. S. 529 of 1107 were not binding on the first defendant as they were hit by lis pendens. The trial court accepted this plea and dismissed the suit. The appellate court by a judgment which, on a reading, makes very little sense, dismissed the appeal. The plaintiff has come up in second appeal.

2. I agree with the trial court (I cannot agree or disagree with the appellate court as it is not easy to understand what is really said by the Judge) that plaintiff cannot seek declaration or title with regard to items 3 and 4. As the decree in O. S. 529 of 1107 was against defendants 3 to 5 alone and they are only 3 out of five joint owners, the decree must be subject to the result of the partition suit filed by any one of them who was not a party to O. S. 529 of 1107, and pending on the date of the court sale. The suit property was allotted in the partition decree to defendants 1 and 2, who were not bound by the decree in O. S. 529 of 1107. It is not shown that such allotment was vitiated by circumstances, such as fraud, alleged in the plaint. If so, the court sale will not operate to confer any title on the plaintiff as against defendants 1 and 2. Hence the relief sought for against defendants 1 and 2 to declare title to items 3 and 4 and to restrain the defendants from executing the partition decree should fail.

3. Though the plaintiff thus fails in the main relief prayed for, the question whether he is entitled to the alternative relief claimed in the suit merits consideration. In effect, what is prayed for is the allotment out of the items of properties which defendants 3 to 5, the judgment-debtors in O. S. 529 of 1107, obtained for their share under the partition decree. On the rule of substitution of securities relief is sought for by the plaintiff.

4. When a co-parcener or a co-owner transfers his undivided right in all the co-parcenary or common properties and subsequently there is a partition between the parties it is open to the purchaser of the co-parcener's or co-owner's

undivided share to seek allotment to him of the properties specifically allotted to the member who has assigned his right earlier to him That, of course, is a right recognised on equitable considerations. How far this principle would apply in the case of an alienation, not of an undivided share of a coparcener in all the properties, but of a specific item of property is a moot question. The views of the High Courts in India on this question do not appear to be uniform. Whether the principle of substituted securities could be extended to a sale through court is also another question on which there seems to be considerable controversy and want of unanimity among the High Courts in India. Both these questions require to be considered in this appeal since it is the purchase of two specific items of properties in court auction which is the basis for the plea of substitution urged by the plaintiffs Sri Narayanan Asan, counsel for the appellant urged that in view of the decision of this Court in C.S. Ramakrishna Iyer Vs. Koolimuttam Karuppa Udayyar's son Suppayya Udayar and Others, , so far as this Court is concerned the matter is settled. But I do not think that these questions, as such, have been considered in that decision. Counsel Sri N. V. Prabhakaran who was requested by me to act as amicus curiae, since defendants 3 to 5 were not appearing in the appeal, was of considerable assistance to me.

5. There is much to be said on the question of the right of an alienee from a coparcener to proceed against the property allotted to such coparcener in a partition. I would first consider the case of an alienation of a specific item of property by a co-parcener or a joint owner and the right of such alienee to proceed against other items allotted to the alienating co-parcener or co-owner as the case may be, in a partition. I will then consider the question whether it would make any difference if it is not a private sale, but a court sale.

6. Justice Varadachariar in Ramanna Chettiar Vs. K. Manickam Chettiar and Others, expressed the view that where a member of a Joint Hindu family mortgages certain specific items of joint family property as belonging to him and on a subsequent partition, he obtains a portion of the mortgaged property and also other properties towards his share, if he sells such other property to another, the mortgagee cannot enforce his mortgage by sale of the property so sold. In such a case, according to the learned Judge, there is no scope for applying the doctrine of substituted securities. This view has commended itself to Vishwanatha Sastri J., in Subbayya v. Sri-rangam AIR 1956 AP 188 (FB) Vishwanatha Sastri J., in that decision, analysed the position and on such analysis came to take the view that the doctrine of substituted securities would be available only in the case of alienation of the entire undivided interest in the properties of a co-parcener and not in the case of a sale of a specific item of joint family property by a coparcener.

The reasoning of the learned Judge appears to be that when A sells a particular item of property to B as if it is his own land and it is found that A has no title to the land, it could not be said that B is entitled to compel A to sell the land. If the vendor's title is defeated by the superior or paramount title of his co-parceners it

would not make any difference to the vendee's right. If the question was to be viewed merely as one of a right arising from the contract between the parties, what the learned Judge has said may be true. But it is by the recognition of a principle of equity which would operate so as to substitute securities that the doctrine itself has come into existence and if that doctrine operates to confer an equity by way of substituted securities when the undivided share of a co-parcener in all the properties of the family is conveyed, why operation of such equity should not be conceived of in the case of sale of a specific item is not quite clear from the judgment of the Full Bench. In fact the case before the Bench was not one of a private sale. It was one by court auction.

A later Division Bench of the Andhra Pradesh High Court which apparently did not accept the view taken by the earlier Full Bench of that court considered the observations made by the Full Bench on the question as mere obiter in so far as the decision on the question of substituted securities in a private sale was not called for in the Full Bench case. That related to rights arising to a court auction purchaser and since the Full Bench also found that a court auction purchase cannot involve the principle of substituted securities there was no necessity to consider the question whether the doctrine would be applicable in the case of a private sale of a specific item of joint property by a co-owner. I am referring to the decision of the Andhra Pradesh High Court in *Sita-mahalakshmi v. Ramachandra Rao*, AIR 1957 AP 572. Chandra Reddy J. said:

"(17) it is seen that the question of the rights of a purchaser of specific item of property from a co-parcener by a private treaty was not in issue and was not referred to the Full Bench, I may mention in passing that the referring order of My Lord the Chief Justice shows that the right of a purchaser in a private sale to be entitled to the equity to proceed against the substituted property was not questioned and a distinction was drawn between a purchaser in a private sale and a purchaser in a Court sale in that respect. Therefore, any expression of opinion on their part not covered by the reference is only obiter. But, even as an obiter dictum, it is entitled to great weight and we would have followed it but for the various reasons mentioned herein."

Commenting on the view expressed by Vishwanatha Sastri J. in the Full Bench case the learned Judge said:

"(18) The view of Viswanatha Sastri J., in the Full Bench in regard to this question is founded upon the observations of Bashym Iyenger J., in ILR 1902 Mad 690 (FB) that the remedy of the purchaser in such a case is only to claim compensation, and the judgment of Varadachariar J., in *Ramanna Chettiar Vs. K. Manickam Chettiar and Others*, . So far as Bashyam Iyengar J's remark in ILR (1902) Mad 690 (FB) are concerned they could not be construed as excluding the rights of a purchaser to proceed against substituted security. In my opinion, that is one of the remedies indicated by the learned Judge. He was not considering all the courses open to such a purchaser and this problem was not present to his mind. Therefore, that cannot furnish any basis for the view against the theory of

substituted property.

xx x xx (2) The proposition as stated by the learned Judge does not find support in any of the reported cases. On the other hand, there are a number of decisions of that Court and of other High Courts which justify the extension of the theory of substituted security to mortgages of particular items of property. Nowhere has it been postulated that it should be confined only to mortgages of undivided shares. Adverting to *Muthiaraja v. Appaiaraju* ILR (1911) Mad 175 the learned Judge said that the distinction between a mortgagee of an undivided share and a mortgagee of a special portion of property was not material for that case. He merely purported to state the effect of the authorities and therefore the statement of law "that the mortgagee of an undivided share in common property, or of one of the joint properties before partition from one of the snares is only entitled to proceed against substituted property which falls to the share of the mortgagor at the partition unless the partition has been unfair or is in fraud of the mortgagees" did not warrant the extension of the doctrine of substituted security. But it appears from the order of reference that the case related to a mortgage of one of the joint family properties.

xx x xx The view of Viswanatha Sastri, J., is opposed to the preponderance of judicial opinion including his own as already noticed. In the circumstances, with great respect, I regret my inability to follow the obiter dicta of the learned judge in 1956 A W 251 = AIR 1956 AP 188 (FB). It may be remembered that the very case of ILR 43 Mad 309 : (AIR 1920 Mad 316) has accepted the correctness of the proposition stated by Sankaran Nair J. in ILR 38 Mad 684 : AIR 1914 Mad 440. In my opinion, the law as stated by Sankaran Nair, J. in ILR 38 Mad 684 : AIR 1914 Mad 440 and accepted as correct in several decided cases and approved by well recognised authors like Mayne and Mullah is good."

7. The view taken by the Madras High Court in *Ramanna Chettiar Vs. K. Manickam Chettiar and Others*, was considered by a Full Bench of the Madras High Court in *Issaku v. Seetharamaraju*, AIR 1948 Mad 1 . The Full Bench overruled the earlier decision in *Ramanna Chettiar Vs. K. Manickam Chettiar and Others*, . This Full Bench decision of the Madras High Court has also been noticed by the Division Bench of the High Court of Andhra Pradesh in AIR 1957 AP 572

8. My learned brother Madhavan Nair J., has attempted to analyse the basis of the right of an alienee from a co-parcener of a specific item of property to invoke the principle of substituted securities. Whether the alienee would get any right in the property allotted to the alienating co-parcener or whether it is only an equity that he could claim has also been considered by the learned Judge, I am referring to the decision in *C.S. Ramakrishna Iyer Vs. Koolimuttam Karuppa Udayyar's son Suppayya Udayar and Others*, . The learned Judge expresses the view that it was incorrect to say that the alienee does not get a present right in the property on the making of the alienation but will get such right only on the making of a partition. The learned Judge further finds that the title, that is to say, the event that divests the co-parcener of his right and invests the same in

the alienee is the alienation, and not the partition. My learned brother was therefore of the view that the alienee may have both a right and an equity -- the right of the undivided co-parcener in the family which vests in him on the execution of the alienation, and the equity to a preferential allocation of the alienated portion of the family property -- if a definite portion has been the subject of transfer to him -- to the share of his alienor.

9. I agree with the view expressed by the Andhra Pradesh High Court in AIR 1957 AP 572 which is also in consonance with the view expressed by my learned brother Madhavan Nair J. I see no reason why if equity operates to enable an alienee of the undivided share of the properties of the co-parcener to seek allotment of the properties of the co-parcener to himself, such equity should not operate in favour of an alienee of a specific item of immovable property from a co-parcener, to seek allotment to himself of property allotted to the alienating co-parcener, to the extent of the value of the item alienated to him.

10. The further question is whether any difference could be found between a court auction sale and a private sale. It is the decision in *Sabapathi v. Thandavaroya* AIR 1920 Mad 316 that appears to have given rise to a controversy on this point. In that case plaintiffs vendor purchased certain properties in execution of a money decree against first defendant and obtained a certificate of sale. At the time of attachment a partition suit was pending between first defendant and his co-parceners. The decree in the partition suit allotted certain properties to first defendant which included some only of the items included in the sale certificate. Plaintiff sued for the allotment of the full extent of the area purchased by him out of the items allotted to first defendant under the partition decree. There was no dispute as to the claim of the plaintiffs to allotment of such of those items covered by the sale certificate and which items had been allotted to the first defendant. But the dispute concerned other items allotted to the first defendant which were not covered by sale certificate.

Whether the plaintiff can proceed against those Hems and seek recovery of those items in substitution of the items covered by sale certificate was the question with which the Division Bench was concerned. The learned Judges were not prepared to extend the principle of substituted securities to a case of a court sale. They rested their decision mainly on two points. According to the learned Judges there was no privity of contract between the auction-purchaser and the judgment-debtor, and there was also no warranty of title in a court sale and therefore what the purchaser obtained in a court auction was only the right and title of the judgment-debtor, whatever it be.

11. Though there is no privity of contract in a court sale it does not appear to be material in considering the question of the equity which a purchaser may seek, A purchaser stands really in the shoes of the judgment-debtor. If an alienee of the judgment-debtor is entitled to an equity in the case of a private alienation, why such equity should be denied in the case of a court sale has not been considered by the learned Judges. It is true, that there is no warranty of title in court sales.

This means only that in court sales all that is guaranteed is that the purchaser shall get the rights whatever that may be, of the judgment-debtor in the property. The rule of caveat emptor, no doubt, applies to such sales. But that does not mean that the purchaser does not get the title of the judgment-debtor with all the incidents arising out of a sale as in the case of a private alienation by the judgment-debtor. He would get properties subject to the same rights and equities to which the judgment-debtor is entitled. I see no connection between the absence of warranty of title or the absence of a privity of contract in a court sale and the equities that arise to an alienee which enable him to invoke the doctrine of substituted securities.

12. The decision of the Madras High Court came up for comment in the decision of the High Court of Bombay in Vasudeo Dagadulal and Others Vs. Kankoochand Hirachand Visashrimali and Others, . Relying upon a passage from Mayne's Hindu Law and Usage and after considering the decisions bearing on the question, Bhagwatj J., speaking for the Benco said:

"This, in our opinion, is the real ratio which should govern the decision of cases of this type. The real question to consider while deciding whether there is any equity in favour of the alienee or the auction purchaser is whether he has provided consideration for the same. Whether it is a transaction brought about as a result of a contract entered into between the alienor and the alienee or is the result of the party being an auction-purchaser at an auction sale held at the instance of the Court would not make the slightest difference to the position."

I am in entire agreement with the view expressed by the Bombay High Court. A contrary view has been expressed again in the Andhra Pradesh decision to which I have adverted earlier. That is in AIR 1956 AP 188 (FB). The Full Bench took the view that the doctrine of substituted securities cannot be invoked by a court auction purchaser and no equity could be urged by him to seek allotment of properties falling to the share of the judgment-debtor in a subsequent partition. The Bombay view expressed by the Division Bench of the Bombay High Court in Vasudeo Dagadulal and Others Vs. Kankoochand Hirachand Visashrimali and Others, was noticed by the learned Judges. According to the learned Judges what passes to a purchaser at a court sale in execution of a money decree is the right, title and interest of the judgment-debtor in the property sold and if what was put up for sale was a specific property, then what the purchaser gets by the sale is only that property. If the interests of a co-parcener in property A is sold in execution of a decree and the sale is confirmed and a sale certificate is issued in respect of A, the purchaser cannot ask the Court to substitute property B or a portion of it, if it is found later that the judgment-debtor had no title to the whole or part of A. The answer to this is what has been said by Madhavan Nair J. in C.S. Ramakrishna Iyer Vs. Koolimuttam Karuppa Udayyar's son Suppayya Udayar and Others, . It is wrong to assume that the purchaser in such a case does not get any right. He certainly gets rights in the property and he has also an equity. In exercise of the right and invoking the equity, such purchaser seeks

to proceed against the right of the co-parcener. The learned Judge in para 14 of the decision in C.S. Ramakrishna Iyer Vs. Koolimuttam Karuppa Udayyar's son Suppayya Udayar and Others, concludes:

"I would therefore hold that the alienee, by virtue of his right acquired under the assignment or the court-sale, is entitled to sue for partition, in his own right, of the joint property in which he is interested; and it requires no borrowing of the shoes of his vendor to enforce his rights."

13. To sum up, the doctrine of substituted securities will be applicable not only when the undivided share of a coparcener in all the items of the coparcency or the undivided share of a co-owner in all the items owned jointly by the co-owners is alienated but even when a specific item of property is alienated by such co-parcener or co-owner and ultimately it is found that the alienating co-parcener or co-owner is allotted some other item in partition. The doctrine of substituted security would apply irrespective of the question whether the right of a co-parcener or a co-owner is transferred by private sale or by court auction purchase. When no allotment has been made in partition to such co-parcener or co-owner, the alienee or the auction purchaser, as the case may be, will be entitled to seek partition and also allotment at such partition to himself of so much out of the properties as may fall to the share of the coparcener or the co-owner as is required to make up the value of the property sold to the alienee or the auction purchaser as the case may be.

14. Applying these principles to the case before me, I think, the plaintiff is entitled to succeed in the matter of seeking allotment out of items 1, 2 and 5 to the extent required to make up the value of items 8 and 4 purchased in court auction. The decree passed here will be considered as a preliminary decree and final decree will be passed by the court below after determining the extent of property required to make up the value of items 3 and 4 out of items 1, 2 and 5 in the plaint schedule.

15. The appeal has abated as against the first respondent whose representatives have not been brought on record. Respondents 4 to 15 who are now interested in suit items 1, 2 and 5 have not entered appearance, In the result, Second appeal is allowed to the extent indicated above and dismissed in all other respects. In the circumstances, parties will suffer costs.