

(1932) 03 MAD CK 0005
In the Madras High Court

Pillutla Venkatasubbamma and Another	APPELLANT
Vs	
Gollapudi Ramanadhayya and Others	RESPONDENT

Date of Decision : 08-03-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22(4)

Citation : AIR 1932 Mad 722 : (1932) 36 LW 604 : (1932) 63 MLJ 845

Hon'ble Judges : Ramesam, J; Madhavan Nair, J

Bench : Full Bench

Judgement

Ramesam, J.—These are two cross-appeals against the decree in O.S. No. 2 of 1925 on the file of the Additional Subordinate Judge's

Court of Bapatla. The plaintiff in the suit was one Gollapudi Ramanadhayya, a retired Pleader of the District Court of Guntur. The suit is filed for

partition of certain properties into two equal shares and for recovery of possession of one share with profits. There were four items of property

which were the subject of the suit. They originally belonged to one P. Subramaniam, who was the adoptive father of Mangayya, the deceased

husband of the 2nd defendant. Subramaniam executed a deed of usufructuary mortgage, dated 21st September, 1878, in favour of one Chimpiri

for 50 years. Chimpiri assigned the mortgage bond by a document, dated 27th July, 1885, Ex. A, to one Krishnayya who assigned his interest by

sale deed, dated 19th July, 1908, Ex. G, in favour of the plaintiff and Mangayya, the son of the original mortgagor. The plaintiff's case was that

Mangayya, in Ex. G, was only a benamidar for the 1st defendant and the 1st defendant is therefore entitled to a half share of the mortgaged

properties and the plaintiff to the other half, that afterwards by the plaintiff himself and in the case of items 3 and 4 by the husband of the 1st defendant

under sale deeds, Exs. C and I, dated 10th December, 1900 and 17th December, 1900, respectively. The Subordinate Judge gave a decree for partition of the suit properties and for delivery of half share to the plaintiff. He also found that Mangayya, in Ex. G, was not a benamidar for the 1st defendant. Appeal No. 467 of 1925 was filed by the 2nd defendant against the decree in favour of the plaintiff. In the appeal the only point raised related to Ex. C. The 2nd defendant contended that the sale deed, Ex. C, was benami for the 2nd defendant and this being found against the 2nd defendant, the point is repeated in the appeal.

Appeal No. 67 of 1926 was filed by the 1st defendant in respect of the finding that Mangayya, in Ex. G, was not a benamidar for the 1st defendant. Taking up Appeal No. 467 of 1925 first, we see no reason to differ from the conclusion of the Lower Court. The consideration for Ex. C consists of Rs. 200 which the vendee agreed to pay in full satisfaction of the decree in O.S. No. 798 of 1889 obtained by Mahalakshamma, wife of the vendor's maternal uncle against his father Subramaniam and Rs. 100, cash paid before the Sub-Registrar. One of the attestors to Ex. C was the plaintiff's clerk and he paid the money before the Sub-Registrar. There is no reason why this payment before the Sub-Registrar should be discredited. As to the other payment of Rs. 200 to Mahalakshamma, the matter is shrouded in some obscurity. The plaintiff is not able to say that he paid the amount direct to Mahalakshamma. He had been executing the decree on her behalf as a pleader and in that capacity he made the payment to himself. There are other dealings between Mahalakshamma and himself. Mahalakshamma died leaving her two daughters who were living in the plaintiff's house and the matter was ultimately adjusted between them and himself. One thing is certain, namely, no further execution of the decree was taken out against Mangayya, and this is all that the vendor can insist upon. The extinction of that decree is the consideration for the sale and as the decree was no more executed against him he got the consideration stipulated for. We find that Ex. C is supported by consideration. Appeal No. 467 of 1925 therefore fails and must be dismissed with costs.

2. We now come to Appeal No. 67 of 1926. This appeal was not pressed by the appellant and is withdrawn. It is therefore dismissed with costs

of the 2nd respondent. But an important question arises in regard to this appeal. The plaintiff filed a memorandum of objections in relation to the mesne profits against the 2nd defendant and her tenants. This memorandum of objections was filed in Appeal No. 67 of 1926 and not in Appeal No. 467 of 1925. The reason that the plaintiff urges is that the tenants were not parties in Appeal No. 467 of 1925 and as he desired to have a decree for mesne profit both against the 2nd defendant and her tenants he could file the memorandum of objections only in Appeal No. 67 of 1926. To get rid of this memorandum of objections the 2nd defendant now contends that Appeal No. 67 of 1926 does not lie as it was only against a finding and as the appeal does not validly lie there can be no valid memorandum of objections in it. In reply it is urged by the plaintiff and by the 1st defendant that the suit itself being one for partition, each sharer was in the position of a plaintiff. The 1st defendant could have asked for a decree for her half share and as this was refused by the Lower Court an appeal lies. To the argument so stated, the 2nd defendant objects that no court-fee was paid by the 1st defendant in the Court below. The result of accepting the 2nd defendant's argument could be that as no court-fee was paid by the 1st defendant in support of her claim for a decree for half share, there is no valid claim in the Court below and therefore no valid appeal in this Court. The question therefore resolves itself into this, namely, when in a suit for partition one of the sharers asks for a decree for his share he should have paid court-fee to make his claim effective. If there is a valid appeal in this Court, the withdrawal of the appeal by the appellant does not prevent the hearing of the memorandum of objections under Order 41, Rule 22, Clause (4), Civil Procedure Code. But if the appeal itself was not validly filed, then the memorandum of objections could not be heard. In *Shivmurteppa v. Virappa* ILR (1899) 24 Bom. 128 it was observed at page 130:

It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him, and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right.

3. With reference to an objection raised by the Subordinate Judge that the defendant will get his share and without any costs to him in court-fees, it was observed:

A defendant claiming a share on partition is, qua that claim, in the position of a plaintiff and could be called on to pay court-fee on the value of his claim.

4. But that judgment does not make it clear when the court-fee can be demanded. That case arose before the present Stamp Act (II of 1899) was passed. The Act had been passed a month before the judgment of the High Court was delivered. But as no reference was made to the Act, the

remarks of the High Court must have been made apart from the Stamp Act. In *Nawab Mir Sadrudin v. Nawab Nurudin* ILR (1904) 29 Bom. 79

the question was incidentally gone into by Sir Lawrence Jenkins, C.J., afterwards a Judge of the Privy Council. There the question arose in the

stage of the execution after the passing of a decree. The learned Judge held that the order requiring the decree-holder to pay court-fees is

erroneous when there is no such condition in the decree. In *Hem Chandra Mahto v. Prem Mahto* (1925) 90 I.C. 739 the question was elaborately

examined by Mullick, Offg. C.J., and Kulwant Sahay, J. (Patna). It was there held that the defendant is merely to ask for his share and it is then

open to the Court to order the defendant's share also to be separated, and the right of the Crown to some revenue on the claim of the defendant is

satisfied by the direction in the Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition and except that

stamp duty no other duty as court-fee is payable by the defendants in such a suit. We agree with the reasoning of Kulwant Sahay, J., in this

judgment. The learned advocate for the 2nd defendant relied on the analogy of an administration suit and the decision in *Shashi Bhushan Bose v.*

Manindra Chandra Nandy ILR (1916) 44 Cal. 890. But, in our opinion, this has nothing to do with the matter and does not touch the reasoning in

Hemchandra Mahto v. Prem Mahto (1925) 90 I.C. 739. The first of the two sentences from *Shivmurteppa v. Virappa* ILR (1899) 24 B. 128,

already quoted by me, was quoted with approval in *Tukaram Mahadu v. Ramchandra Mahadu* ILR (1925) 49 Bom. 672. But nothing is said

about court-fees. In *T.S. Ramaswami Aiyar and Another Vs. M.A. Rangaswami Aiyar*, it was held in an administration action that the Court is not

entitled to demand from the creditors of the deceased court-fees on the value of their claims and Section 11 of the Court Fees Act should not be

applied by analogy. We do not agree with the decision in *Peda Nagabhushanam v. Pitchayya* (1917) 6 L.W. 448 in so far as it lays down that

court-fees are to be paid. That decision might be distinguished on the ground that the decree provided that each of the defendants must pay the

necessary court-fee before getting his share. We prefer the reasoning in the Patna decision already referred to. We are therefore of opinion that

Appeal No. 67 of 1926 was validly filed and the withdrawal of the appeal by the appellant cannot affect the memorandum of objections. The

memorandum of objections has therefore to be considered and disposed of.

5. It relates to (1) the plaintiff's claim for mesne profits for an extra year, and (2) the difference in the rate awarded by the Subordinate Judge and

the rate now claimed. The Subordinate Judge has awarded mesne profits only for three years. By the time the suit was filed, namely, 19th

February, 1923, mesne profits for four years had accrued due to the plaintiff, the Maghabaula Amavasya of the four years all falling within three

years prior to the plaint. The plaintiff claims for each year Rs. 330-7-6 instead of Rs. 300 awarded by the Court below. Without going into further

details we may at once say that the learned advocate for the respondent has rightly conceded these matters. Therefore it is enough to say that these

two items are allowed in favour of the plaintiff.

6. The next item in the memorandum of objections relates to the plaintiff's claim for the subsequent profits. The Subordinate Judge left this for

enquiry. But it appears that the various lease deeds filed in the case cover the subsequent years also, certainly up to March, 1928, when the

usufructuary mortgage expired. Therefore there is no need for further enquiry. Here again we may observe that the learned advocate for the

respondent has rightly conceded and therefore we hold that the plaintiff is entitled to mesne profits up to March, 1928. Therefore the plaintiff is

entitled to subsequent profits at Rs. 344-8-0 per annum for five more years. According to the definition in the CPC mesne profits include interest.

It is also so held in (1900) L.R. 27 I.A. 110 (Privy Council) and *Vellathusseri Chakkala Kumpil Pankunni Menon Vs. Vellathusseri Chakkala*

Kumpil Raman Menon, . But we think in this case it is enough to award interest at the rate of 4 per cent, per annum from the date of accrual up to

the date of payment.

7. There is only one other point which remains to be noticed. The suit was for partition on the ground that the plaintiff and the 1st defendant were joint usufructuary mortgagees of the suit land. A decree was given on that footing. The decree was passed in 1925. The appeals and the memorandum of objections were also filed in 1925. The mortgage itself expired in March, 1928. After that date the usufructuary mortgage ceased and the usufructuary mortgagee's right also is extinguished. The mortgagor who is now represented by the 2nd defendant would be entitled to the properties but for the fact that he in the meanwhile sold the properties. So far as items 1 and 2 are concerned, they were sold to the plaintiff under Ex. C and he is therefore entitled to possession as standing in the shoes of the mortgagor from March, 1928. The result is that the partition decree given by the Court below becomes unnecessary. It covers items 1, 2, 3 and 4 and now it is not necessary to divide these four items into two equal halves. The plaintiff becomes entitled to items 1 and 2, wholly and it is enough to vacate the Lower Court's decree and to modify it by saying that the plaintiff will be given delivery of possession of items 1 and 2 and he is also, entitled to mesne profits from March, 1928, up to the date of delivery of possession or three years from to-day whichever happens earlier. These mesne profits will, in the first instance, be collected from defendants 3 to 9, who are the tenants of these two items. If any amount could not be recovered from the tenants, it can be recovered from the 2nd defendant. The subsequent profits from today will be recovered from the tenants. The necessity for the modification of the decree so far as the memorandum of objections is concerned arose (first) on account of the slips of the Subordinate Judge and secondly on account of the mortgage expiring while the appeal was pending and the appeal happened to remain undisposed of for live years. We do not therefore make any order as to costs of the memorandum of objections.

Madhavan Nair, J.

8. I agree and have nothing to add.