

(1925) 09 MAD CK 0024
In the Madras High Court

Secretary of State

APPELLANT

Vs

Dugappa Bhandary and Others

RESPONDENT

Date of Decision : 23-09-1925

Acts Referred:

Transfer of Property Act, 1882 — Section 51

Citation : AIR 1926 Mad 921

Hon'ble Judges : Ramesam, J;Phillips, J

Bench : Full Bench

Judgement

Phillips, J.—This is a case of an alleged escheat of the properties of an Aliyasantana family of South Kanara. The undisputed facts are as

follows: About 1850 the Haladi family consisted of two members, Puttu Shettithi and her son, Daraya Shetti. One Venkamma Shettithi was then

adopted from another family and she had a daughter, Kollu Shettithi, who married Daraya Shetti's son Nandiappa Shetti and died in 1872, They

had a daughter Durgi Shettithi, who died while still a minor in 1876. In 1864, Daraya Shetti executed what is called a Tahanaman, Ex. DD, in

which he stated that there were no other heirs in his family except himself and Kollu Shettithi. He then entrusted the management of the family and

the family property to his son Nandiappa Shetti and he also made a provision that if Kollu Shettithi had no issue, Nandiappa Shetti should enjoy

the property mentioned therein, Daraya Shetti died in 1866, and from that time Nandiappa Shetti appears to have been in possession and

management of the family property. Kollu Shettithi died at about the age of 20 in 1872, and her daughter Durgi Shettithi died in 1876.

2. In 1878 four persons belonging to the Kavanjur family brought a suit against Nandiappa Shetti and others on the ground that they were

members of Daraya Shetti's family entitled to succeed to his estate. In the appellate Court, the suit was dismissed and from that date Nandiappa

Shetti appears to have remained in possession of the property. In 1886, he said the property to his wife Venkamma Shettithi and his son Koraga

Shetti. In 1898, in pursuance of a compromise of some litigation Venkamma Shettithi and her son resold the property to Veeranna Shetti, an elder

brother of Nandiappa Shetti. After Veeranna Shetti's death, Defendants Nos. 1 and 2 came into possession. In 1903 one Koraga Shetti, P.W.

No. 12, sent in petitions to the revenue authorities stating that the property of Daraya's family had become escheated to Government, and an

enquiry was held, but in 1905 the proceedings were dropped. They were revived in 1910 on the petition of one Ganapa Shetti, and in 1911 the

Government ordered the property to be escheated.

3. The main question for determination is whether this property has escheated to Government. The Subordinate Judge has found that there were

reversionary heirs alive at the time of Durgi's death. In coming to this conclusion he seems to have thrown the burden of definitely proving the

absence of heirs upon the Government and, inasmuch as the Government dropped the escheat proceedings in 1905, he holds that there was an

admission by the Government that there was an heir to the property in existence when Durgi died. In cases of this sort, as pointed out in *Gridhari*

Lall Roy v. Bengal Government [1867] 12 M.I.A. 448 it is for the Government to prove at least prima facie, that the last holder died without heirs

and then it is open to the claimant to prove either his own title, or to set up the title of a third party. The first question then for determination is: Has

Government proved at least prima facie that Durgi Shettithi died without heirs ? (His Lordship then discussed whether the evidence adduced by

Government established a prima facie case that Durgi Shettithi died without heirs.) It has been definitely, laid down in the case of *Marumakathayam*

families in Malabar, which are governed by rules very similar to those applicable to Aliasantana families, that when a tarwad, or family, becomes

extinct, the other tarwads who had become divided from that branch are entitled to succeed but in this Presidency it has never been definitely

decided which branch has the preferential claim, whether the branch which is most nearly related in blood or the branch which became divided at

the latest point of time. In any case it cannot be held that a divided family, however long it may be since the division took place, necessarily

succeeds, and I think there is considerable force in the observation in Mr. Justice Suhdara Iyer's Book (Professional Ethics) at page 191 that:

there must at least be community of pollution in order to constitute heirship.

4. Under Hindu Law heirs must come within 14 degrees of the deceased and similarly there must be some limit to the remoteness of relationship in

Aliyasantana families, and it is unlikely that heirship would extend to a remote relation who did not observe pollution. in the present case it is in

evidence that Anthaya Shetti of Choradi family was divided off from the Kavanjur family, and it is alleged that they both originally formed one

family jointly With the Haladi family. Inasmuch as the claim of the Kavanjur family has been negated by the decision of the District Court, prima

facie the Choradi family which was a branch of the Kavanjur family would be disentitled to succeed. In these circumstances Government must be

held to have adduced sufficient evidence to make out a prima facie case that Durgi Shettithi died without heirs. If the defendants wish to negative

this contention, it lies upon them to prove that this Anthaya Shetti, or any other person whom they may choose to set up was actually an heir to

Durgi Shettithi. For proving this they merely rely on the fact that the Government dropped the escheat proceedings in 1905 and on the evidence

of P.Ws. Nos. 3 and 12, that the Haladi family and. Anthaya Shetti's family divided long ago, but both these witnesses couple this admission with

a statement that Durgi Shettithi had not any heirs thus showing that in their opinion the relationship was too remote to constitute heirship. It is,

therefore unnecessary in this case to decide a point which has been urged at some length viz., the exact nature of kinship which would constitute a

person an heir under the Aliyasantana Law On this point therefore, I find that Durgi Shettithi died without heirs and that the property escheated to

Government The next point for consideration relates to the alleged mulgeni rights created by Daraya Shetti in the plaint property. In 1936 he

granted a mulgeni lease to the Kolkebail family. This was transferred (excepting one small portion bearing a rental of annas 4) to Nandiappa Shetti,

Daraya's son: vide Ex. III. Again in 1862 Daraya Shetti executed another mulgeni lease in favour of his wife Krishnama Shettithi. It is contended

for the respondents that these two mulgeni leases are binding on the property. So far as the first lease in favour of Nandiappa Shetti is concerned,

we find that after the judgment of 1856 there is no record of its existence; on the contrary we see that in Ex. DD, which definitely refers to the

mulgeni lease in favour of Krishna Shettithi. there is no reference to the lease in favour of Nandiappa Shetti. Inasmuch as Nandiappa Shetti was

very intimately concerned in Ex. DD, the omission, I think, is very important. Both the above mulgeni leases are in respect of plaint Item No. 2 in

Schedule A, and it would appear from the fact that the second mulgeni lease is said to be in respect of property with a beriz of Rs. 72. that It

included the whole, of Item No, 2. The mulgeni lease in favour of Nandiappa Shetti was for land bearing a beriz only of Rs. 24, It is, therefore,

very probable that the prior mulgeni in favour of Dorayya's son was merged in the later geni chit in favour of his wife whose heir the son would be.

It is certainly quite clear from Nandiappa Shetti's dealings with the property after 1876 that he never specifically put forward a claim to his mulgeni

right. It may therefore, be inferred in the absence of evidence to the contrary that this mulgeni right ceased to exist, at any rate before 1864 when

Ex. DD was executed. As regards the second mulgeni in favour of Krishna, Shettithi it is argued by the learned Government Pleader that it was an

invalid grant and is not binding on Government. That it is not a valid grant may be conceded for the proceedings evidenced by the judgment Ex.

VII go to show that the transaction was a collusive one entered into by the manager of the family in order to benefit his wife. As there was at least

one other member of the family living on the date of the grant it would not be binding on her unless it were for family necessity, and of this latter

there is no evidence. It is then contended for the respondents that the Government has no right to object to the geni Chit, firstly, on the ground that

no reversionary heir can question an alienation made by a member of the family and secondly, that the right to question it is barred by limitation. In

support of the first contention the respondents rely on *Thayyil Mammad v. Purayil Mammad* [1920] 44 Mad. 140 in which it was held that under

Marumakathayam Law, the Attala dakkam heir, i. e., the reversionary heir, succeeds only to such of the properties of the tavazhi as have not been

disposed of by its last members. This decision appears to be opposed to an unreported decision in Second Appeal No. 857 of 1884, and

accordingly it would seem only natural that when a reversionary heir succeeds to the right of a person entitled to question the alienation, the

reversioner himself would prima facie have that right. It is, therefore, possible that the decision in *Thayyil Mammad v. Purayil Mammad* [1920] 44

Mad. 140 may require re-consideration, but for the purpose of this suit, I think the question can be decided on the second contention raised by the

respondents, viz., the . bar of limitation.

5. The mulgeni chit was granted in 1862 when Kolly Shettihi was alive She was then aged about 10. She attained majority whether we fix the age

of majority at 15 or 18 year's, at least two or three years before her death in 1872. The period of limitation thus began to run before her death and

would not be interrupted by the minority of Durgi Shettithi. The right of the family to set aside the alienation was, therefore barred in 1874, i.e.,

before the death of Durgi Shettithi. The right of Government, theirfore, to question this alienation is barred by limitation and the property can only

be recovered subject to the mulgeni right created in 1862

6. The third and last question for consideration relates to the right of the defendants to compensation for improvements made upon the land and the

right of Government to mesne profits in the past. When Government demanded possession from the defendants, an offer was made to pay Rs.

1,396-4-0 to Defendants Nos. 1 and 2:W1 as compensation for the improvements effected since 1905, the Government thus recognizing that

owing to their conduct in granting a patta to Defendants Nos. 1 and 2 in 1905, they ought in equity to recognize the right of defendants to make

improvements after that date.

7. It is suggested for the respondents that the defendants are entitled under the customary law of South Kanara to compensation for all the

improvements effected on the land. They rely on cases reported as *Daramma v. Mariamma* [1914] 24 M.L.J. 397 and *Ramappa Vs. Abdulla*

Beari, . In the first place the right there considered was the right of tenants to improvements and the right was limited to improvements which would

be beneficial to the, holding. In the present case, however, it cannot be said that the defendants are tenants of the land under Government within

the ordinary meaning of the law of landlord and tenant, and I do not think they can base their claim on this ground. The ground on which they must

rely is the right given u/s 51 of the Transfer of Property Act which says that when the transferee of immovable property makes any improvement on the property believing in good faith that he is absolutely entitled thereto, the transferee has the right to require the persons causing eviction to have the value of the improvement estimated and paid. The question then arises whether the defendants believed in good faith that they were, absolutely entitled to the land, They are the heirs of Veeranna Shetty, the elder brother of Nandiappa Shetti. Nandiappa Shetti obtained possession of the land after Durgi Shettithi's death, knowing full well that he had no title thereto and that he was a mere trespasser. Subsequent dealings with the land, as the result of which Defendants Nos. 1 and 2 are in possession, did not affect the original title in any way. The original possession was gained by trespass and it can hardly be said that a person who enters upon land knowingly as a trespasser can bona fide believe that he is absolutely entitled thereto. It has been held in *Narayana Aiyar v. Sankaranarayana Aiyar* [1914] 1 L.W. 369 that it does not follow from mere negligence that the purchaser did not believe in good faith that he was the full owner. This ruling is in accordance with the definition of good faith in the General Clauses Act but under that definition it is essential to prove that the transferee was in fact honest in his conduct. Negligence may in certain circumstances be consistent with honesty, but where the title is obviously founded on possession which is knowingly obtained by trespass, it is impossible to hold that the trespasser honestly believed that he was the absolute owner. These remarks apply directly to Nandiappa Shetti only, but as the predecessor-in-interest of Defendants Nos. 1 and 2 was elder brother of Nandiappa, they are all members of one family. This would apply equally to Defendants Nos. 1 and 2 unless they prove positively that they acted in ignorance of Nandiappa's conduct. This they have not done. I would, therefore, hold that the defendants are not legally entitled to the value of the improvements u/s 51 of the Transfer of Property Act. Inasmuch as the Government did recognize their possession of the land by issuing a fresh patta in 1905 and also made an offer to compensate them for improvement since that date, I think that they are now equitably precluded from denying the defendant's right to improvements made since 1905. The improvements have been valued by a Commissioner, a Supervisor and a Tahsildar, and the Subordinate Judge has come to a finding as

to the value of the improvements. That Valuation is not now disputed and consequently the Defendants Nos. 1 and 2 will be entitled to the value of improvements effected since 1905 on the lands in their possession. A great portion of the value will be payable to tenants and consequently the defendants will only be allowed to draw the amount relating to lands in their actual possession.

8. The rate of mesne profits has been determined by the Subordinate Judge, and although his finding has been questioned, the learned Government

Pleader does not seriously press this point, and the only question for determination is the date from Which such mesne profits are payable.

Inasmuch as the property really vested in Government from the date of escheat, viz., 1876, the Government would be legally entitled to mesne

profits from that date and this view was held in S.A. No. 221 of 1915. The claim in the plaint is, however, limited to the period since 1898 when

the predecessor of Defendants Nos. 1 and 2 came into possession, and there is no reason why the profits from that date should not be awarded.

The Government has a legal title to the mesne profits and although it is contended that they have by their laches disentitled themselves, the

respondents' vakil is unable to point out in what their laches consist. It is suggested that inasmuch as the Government has taken a very long time in

establishing their right to an escheat they have been guilty of laches. It is impossible for Government officers to become aware at once of every

case of escheat, and unless there was a neglect of duty in ascertaining the fact, it cannot be held that the Government or its officers have been guilty

of any dereliction of duty. The case relied on by defendants Juggernath Sahoo v. Syud Shah Mahomed Hossein [1874] 2 I.A. 48 has, therefore,

no application to the present case. The Government is entitled to the mesne profits at the rate found by the Subordinate Judge from 1898 till date

of possession with interest at 6 per cent, per annum.

9. The appeal is accordingly allowed and there will be a decree for the plaintiff as indicated above with proportionate costs throughout. Respondent

will pay costs on Items 1 and 3 and on Item 2 respondent will receive 2/3 costs and pay 1/3 to Government.

Ramesam, J.

10. (His Lordship after stating the facts as. given in the judgment of Phillips, J.,

and discussing the evidence adduced by Government to prove their case: continued) I am inclined to think that the plaintiff has discharged the burden that rests upon him of making out a prima facie case that there are no heirs see Gridhari Lall Roy v. Bengal Government [1867] 12 M.I.A. 448. So far as any definite evidence can be given the plaintiff has shown that there are no heirs. As to distant branches what we have is very vague and it is for the defendant to prove any pedigree showing the existence of a heir. I, therefore, think that the Government have established that the properties have escheated.

11. I agree with my learned brother that the plaintiff is now precluded from questioning the mulgeni lease of 1862. As this mulgeni lease covered the whole of Item 2 (vide para. 3 (3) of the plaint) it is unnecessary to consider the first mulgeni lease of 1838 as it is admitted that it covered only a portion of Item 2. Probably it ceased to exist as my learned brother has found.

12. As to improvements, the question arises only as to Items 1 and 3 as we have found that Item 2 is subject to a mulgeni lease and the defendants are not liable to be evicted, the plaintiff being only entitled to the rents. I agree with my learned brother that the defendants are not entitled to improvements under the Customary Law of South Kanara, but if at all, only u/s 51 of the Transfer of Property Act and that they are entitled to improvements effected after 1905; it seems to me that the defendants are entitled to such of them as were effected after 1898 and before 1902.

As Durgi Shettithi died in 1876 and as no claimant came forward and established his claim successfully by 1888 the wife and son, of Nandiappa

Shetti, who obtained the sale-deed Ex. GG from Nandiappa Shetti, completed in 1888 a title by prescription against all possible claimants other

than Government. Between 1888 and 1902 there is nothing to show that it was very clear that there were no possible heirs who might have

claimed the property or that Veeranpa Shetti, the vendee under Ex. HH, knew definitely that there were no heirs other than Government who might

have claimed the property. Thus though prior to 1888 Nandiappa Shetti and his wife and son might be regarded as trespassers of the property,

Veeranna Shetti, after his purchase in 1898, might have thought that his vendors had an absolute title of the property and that he himself purchased

an absolute title. It is true he being a brother of Nandiappa Shetti knew the

immediate prior history of the family. But there is nothing in such prior history or otherwise to show that there might not, be heirs who could claim this property between 1876 and 1882. It seems to me that it is more likely that Veeranna Shetti might have bona-fide thought that there might have been heirs who could have claimed the property, but by their failure to claim it he obtained an absolute title in 1898, than that he definitely knew that there are no other heirs entitled to the property and the Government are, therefore, entitled to It by escheat and he has therefore obtained an absolute title to the properties. Any how, the Tahsildar issued the patta or kudtledar in Veer anna Shetti's name (see Ex. Q) and, therefore, he was justified in thinking that even the Government has no title. I, therefore, think that the defendants are also entitled to all improvements made on Items 1 and 3 between 7th September 1898, the date of Ex. HH, to May 1902, when the case about escheat was started. I may also observe that a patta was issued to Veeranna Shetti; for it is observed in para 6 of Ex. W:

It is on this purchase right that Veeranna Shetti happened to be kudtledar in Fasli 1312:

vide Narayana Aiyar v. Sankaranarayana Aiyar [1914] 1 L.W. 369 and Durgozi Row v. Fakeer Sahib [1907] 30 Mad. 197. Where the

improvements are effected by tenants their position is even better on the question as to whether they were effected, bona fide. But, as the period

is small and the question is of importance as to "Item 1 only, I do not think it necessary to differ from the order proposed by my learned brother.

13. The next point relates to mesne profits. The Government claim them from 1898. The respondents' vakil relied on Ramaswami Iyer v.

Venkatarama Iyer AIR 1924 Mad. 81 and Subbe Goundan v. Krishnamachari AIR 1922 Mad. 112. But these cases relate to claims by members

of joint families seeking to repudiate alienations by a father or by a manager of the family. In this case, repudiation by the plaintiffs involved a

consideration of Various equities and in such cases it might well be said that the right to mesne profits arises only from the date of the repudiation.

No. such equity arises in the present case. The respondent also relies on Juggernath Sahoo v. Syud Shah Mahomed Hossein [1874] 2 I.A. 48, but

it cannot be said that the Government are guilty of any laches in this case.

Therefore, the Government are entitled to mesne profits from the 7th September 1898, the date from which they claim, such profit being the actual profits of Items 1 and 3 as found by the Sub-Judge, minus the assessment and land-cess, and the rent of Rs. 76 for Item 2 minus assessment

14. I agree with my brother's order about Costs.