
(1928) 11 MAD CK 0011
In the Madras High Court

Thirukaval Chetti and Others

APPELLANT

Vs

Karia Goundan and Others

RESPONDENT

Date of Decision : 06-11-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : AIR 1930 Mad 72

Hon'ble Judges : Walsh, J

Bench : Division Bench

Judgement

Walsh, J.—This is a revision petition against the order of the Subordinate Judge of Dindigul in A.S. No. 120 of 1925 on the file of this Court

allowing an amendment of the plaint and remanding the suit to the lower Court for ascertaining the amount of compensation due to the plaintiffs

from defendants 7 and 23 to 25. The facts which have led up to this order are as follows. The suit was for redemption of 16 items of property

mortgaged usufructually by the predecessor-in-title of the plaintiffs to the predecessors-in-title of the defendants. The Court of first instance found

that the plaintiffs had no title as regards items 1 to 12 of the mortgaged property and as regards the four remaining items that they had sold away

the equity of redemption and had purchased it in the case of only one item 14, with which alone the appeal and the present petition are concerned.

It was found that defendant 6 who had purchased this property from defendants 5 and 7 had acquired absolute title and that the plaintiff had lost

the right of redemption by limitation. The plaintiffs sought to amend their suit by asking for damages against defendants 5 and 7, which was refused

by the Court of first instance but allowed on a revision petition to the High Court in the case reported in Kariya Goundan v. Thirukkaivelu Chetty

AIR 1925 Mad. 585. The plaintiffs had repurchased the equity of redemption from one Ajam Khan but the Court held that the document under

which they made this purchase would not be binding on the heirs of Ajam Khan as the plaintiff had imagined at the time of the plaint. This objection

to the validity of the document was taken by the defendants for the first time during arguments of the case and I am told by the petitioner's

advocate that it was due to a certain decision of the Privy Council which had been given after the suit commenced. In appeal, the learned

Subordinate Judge allowed an amendment by adding the heirs of Ajam Khan as parties and found that defendants 5 and 7 were bound to pay

compensation to plaintiffs and remanded the suit to the lower Court for ascertaining the amount of compensation due in the shape of mesne profits.

2. It was sought to be argued before me that there could be no damages awarded for what was lost by limitation. It is not, however, open to the

petitioners to take this ground in a revision petition which must be confined to the point on which the remand was made. Other matters have to be

taken in the ordinary course of appeal: vide Jainul Abideen Marakayar and Others Vs. Habibulla Sahib, . The only question therefore before me is

whether the amendment should have been allowed and the suit remanded for taking evidence. It is objected that as the suit has not been disposed

of on a preliminary issue, Order 41, Rule 23 does not apply. Assuming that the rule does not apply, it is now well established that the Court has

inherent power to make such remand u/s 151: vide Anthappa Chetty v. Ramanathan Chetty [1919] 37 M.L.J. 53. Mallayya v. P. Veerayya AIR

1927 Mad. 335, Karuppanna Pillai Vs. Ethumalai Pillai, ; Mallayya v. Veerayya AIR 1927 Mad. 335, (Dwarampoodi) Venkamma Vs. Goparaju

Perraju, , Suppiah Nadar Vs. T.S. Muthia Pillai and Another, . Jainul Abideen Marakayar and Others Vs. Habibulla Sahib, . The only question

therefore is whether in making the remand the Court has transgressed any rule of law, or of procedure so that it must be held to have acted without

any jurisdiction. It is argued for the petitioners that the amendment involves a change of the plaintiff's case since they had distinctly stated in their

plaint that they were the full possessors of the equity of redemption in this item by purchase from Ajam Khan, whereas now they may be turning

out to be only joint owners of the equity of redemption.

3. It is further argued that there was no reason for the defendants petitioners to take any ground of non-joinder of parties in their written statements

as there was nothing in the plaint to disclose such non-joinder. Finally it is urged that evidence of mesne profits should not be now allowed since

the plaintiffs had the opportunity of adducing it before and did not do so. I do not think the petitioners have any real grievance in the matter of the

amendment. In suits for redemption of mortgages it is necessary to add any one who may have any interest in the redemption in order that the

mortgagee may not be worried by multiplicity of suits. But it does not affect the real question between him and the mortgagors once they are all

brought on the record. Moreover, in this case it was the petitioners themselves who raised during the course of the argument the objection that

Ajam Khan's heirs were necessary parties. They need not have raised this objection at all had it not been obviously to their interest to do so, and

they cannot therefore object with very good grace to an amendment of the plaint being allowed, which has become necessary owing to their

objection and which does not substantially affect the question at issue. As regards the admission of evidence, it is seen from the judgment of the

Court of first instance that evidence was adduced but it related to all the items 1, 2, 13 and 14 together, and the learned District Munsif himself

states:

If the damages had to be assessed, more evidence will have to be taken. That course, however, is unnecessary in my view, as the suit is liable to

be dismissed for non-joinder of parties.

4. Thus evidence of mesne profits was tendered as regards item 14 and the Court of first instance has clearly stated that it would not take more

evidence on the point since the suit had to be dismissed for non-joinder, of parties. I do not find that there is any reason to suppose that the Court

has exercised its inherent powers of remand without jurisdiction.

5. The last objection is that the learned Subordinate Judge should not have awarded the petitioners to pay costs of the appeal. The only instance

which the learned advocate for the petitioners was able to show me of an order as to costs being interfered with in revision is Brij Behari Lal v.

Shivanath Prasad [1916] 23 C.W.N. 1354. That was a peculiar case in which it was held that the Court which gave costs had actually no power

in the circumstances to award costs at all. There is no reason to interfere in the present case. In the result, the petition is dismissed with costs.