
(1928) 03 MAD CK 0043
In the Madras High Court

Vattam-Ramakrishnayya

APPELLANT

Vs

Vattini Satyanarayana and Others

RESPONDENT

Date of Decision : 30-03-1928

Acts Referred:

Citation : AIR 1929 Mad 291

Hon'ble Judges : Reilly, J;Kumaraswami Sastri, J

Bench : Full Bench

Judgement

Kumaraswami Sastri, J.—This appeal arises out of a suit for declaring the plaintiff's right to the properties mentioned in Schedule D or in the alternative for fresh partition. The facts of the case are : There were three brothers, Ramakrishnayya, Nagabushanam and Gopalakrishnayya. On 12th April 1917, Narasimhain, P.W. 3, purchased the undivided 1/3rd share of Gopalakrishnayya in the family properties. In 1919 Narasimham became insolvent and the Official Reciver brought the properties to sale and the plaintiff became the purchaser of all the 1/3rd share. As regards Nagabhushanam, he also sold his 1/3rd share to a stranger. These properties were under a mortgage and in August 1917, defendant 1, that, is, Ramakrishnayya filed O.S. No. 517 of 1917 on the file of the Court of the District Munsif of Gudivada, to redeem the family properties. He impleaded in that suit, his two other brothers and also Narasimham, as purchaser of Gopalakrishnayya's share, and the Official Receiver. One of the contentions raised in that suit was that the sale to Narasimham was a nominal transaction and was not supported by consideration. But afterwards, Gopalakrishnayya withdrew his contention and admitted that the sale-deed had consideration and that good title passed to Narasimham. Upon that a decree for redemption was passed in favour of the plaintiff in that suit and the mortgagors. The present suit is filed by the purchaser of Narasimham's share from the Official Receiver, for partition and delivery to him of his 1/3rd share. It appears that Ramakrishnayya, Nagabhushanam and Narasimham effected a division of the properties. Partition lists, K, K-I, and L, were drawn up and they refer to the items of properties that went to each man's share. To the present suit for

partition, by the person entitled to Gopalakrishnayya's share, the defences raised were, that Gopalakrishnayya's sale of his 1/3rd share was nominal, fraudulent, collusive and without consideration and passed no title to Narasimhan, and that the suit O.S. No. 517 of 1917 renders the claim of the plaintiff untenable as his claim is barred by res judicata because no relief was given to him in that suit. As regards partition, the partition documents not being registered documents, are inadmissible in evidence, and that plaintiff cannot succeed on the footing that he is entitled to separate possession of the properties in Schedule D and that the suit is bad for nonjoinder of Gopalakrishnayya, and consequently the suit should be dismissed. It is also contended, that, even assuming that the plaintiff is entitled to the 1/3rd share, the Subordinate Judge is wrong in allowing the set off as regards mesne profits for two years, that is, the period before the plaintiff purchased, against the interest which is payable to defendant 1 who redeemed the properties.

2. As regards the contention that the sale-deed by Gopalakrishnayya to Narasimham is fraudulent, the finding of both the Courts is that the sale-deed is in favour of the plaintiff and is fully supported by consideration. We may state that in the litigation of 1917, Gopalakrishnayya began by alleging that the sale-deed was fraudulent but later on, he changed and said that he had no objection to the sale and that the property passed to his vendee- The finding of both Courts is that the sale is binding and nothing has been stated before us which would entitle us to upset that finding of fact. As regards the plea of res judicata it is untenable. O.S. No. 517 of 1917 was a suit for redemption. Gopalakrishnayya first of all disputed the validity of the transaction but later on "admitted it. There was no contest and no finding on the issue and so far as the parties to that transaction were concerned there could be none, because Gopalakrishnayya withdrew his defence. Nara-simham raised the contention that the sale was valid and it cannot be said that he failed to plead in that suit so as to bring into operation the doctrine of constructive res judicata. After Gopalakrishnayya's admission nothing further remained for adjudication so far as that question was concerned.

3. The more difficult question is as regards partition. This partition is evidenced by three partition lists Exs. K, K-1 and L. Exs K and K-1 are documents which were executed on the same-date and are really parts of the same-transaction. Ex. K is a partition list. What was done was, three lots were drawn with the names of Brahma,. Vishnu and Maheswara. Brahma fell" to the share of defendant 1, Vishnu to that of the 2nd brother and Maheswara fell to the share of Narasimham. Ex. K-1 distinctly says that the lots,, were drawn and that the parties wished, having regard to the list, to execute and register on proper stamp paper a fresh deed of partition. So far as Exs. K and K-1 are concerned, having regard to the decision in Rajangam Ayyar v. Rajangam Ayyar AIR 1922 P.C. 266 these documents are admissible in evidence to prove partition. The difficulty is with regard to Ex. L dated 10th July 1917. It divides the properties as per list Ex. K between the-2nd brother Nagabhushanam and Narasimham. We have nothing

to do with-the share of defendant 1. He admittedly got his share in all the family-properties and it is difficult to see what interest he has in the shares of the two-other parties. Ex. L is in terms a partition deed; it is inadmissible in evidences as regards the shares that fell to Nagabhusbanam and Narasimham for want of registration. It refers to a house and some lands. So far as the house is concerned, the finding of both the Courts is that the house was divided and the rent was taken in two shares and so far as the house is concerned it is certain that there was performance on both sides, of the arrangement to divide the house. It is argued by Mr. Raghava Rao for the respondent, that so far as Ex. L is concerned there has been part-performance ever since 1917, the parties having acted upon Ex. L. Defendant 1 has no interest in the matter, because he got his share, and as between the others, Nagabhushanam and Narasimham, the doctrine of part-performance will entitle the plaintiff to get his share. It is argued that the only persons entitled do not contest and that defendant 1 who has no interest has no locus standi. So far as the house is concerned, both the lower Courts found a division and separate enjoyment and there is no difficulty in holding that the plaintiff is entitled, to his share. The rent has been divided as mentioned in Ex. L, and separate possession of the property has been in both parties. It is proved that the lands have also been enjoyed separately. As regards the land, it is argued, by Mr. Raghava Rao on the authority of the decision of Ramesam, J, in Ahobilachariar and Others Vs. Thulasi Ammal and Others, , that if the lands were not enjoyed separately, it is open to us to look into the document under which they agreed it should be divided. There is no difficulty in determining apart from Ex- L what other properties each of the parties was entitled to share in. Ex K gives all the items of the property divided. We do not think that the claim as regards Schedule D properties should fail. I think Ex. L can be looked into, to determine what the properties were, that fell to each share. So far as the alternative claim for partition is concerned, there is no necessity for a fresh partition, as Schedule D properties fell to the share of the plaintiff and there is no question of a fresh partition being decreed." There is therefore no force in the contention that Gopalakrishnayya is a necessary party to the suit and that the suit should fail for non joinder.

4. There is, however, a petition by Gopalakrishnayya that he should be added as a party to the suit and that the suit should be sent back for trial after allowing him an opportunity of stating "his defence to the plaintiff"s claim. This is Civil Revision Petition No. 866 of 1926. The main ground is that the suit being one for partition, Gopalakrishnayya ought to have been made a party. We may state that so far as Gopalakrishnayya is concerned he withdrew any objection he had to the sale deed so long ago as 1917. Until this suit was filed, he has taken no steps to set aside the transaction. In the meantime, Narasimham the purchaser became insolvent and the Official Receiver sold the properties and they have been purchased by the present plaintiff. It is not suggested before us that the plaintiff had any notice that Narasimham acquired no title. The question whether Gopalakrishnayya is a necessary party would depend on whether there was

anything in the present suit by which Gopalakrishnayya could claim any equity. There is no property in which Gopalakrishnayya has an interest. There is no hardship in the present matter except the possible hardship that Gopalakrishnayya would be prevented from impeaching the validity of his sale-deed. But as stated before, he admitted the validity of the sale-deed in 1917. We do not think this is a case where any indulgence could be shown. The difference between a necessary and proper party is well known. A man may be a proper party as his presence may be desirable to bind him and prevent a multiplicity of actions or effectually to decide the equities between the parties and if the plaintiff joined him there can be no plea of misjoinder of parties. But a necessary party is one whose absence would entail dismissal of the suit for nonjoinder. In all these cases what the Courts ought to see is whether there is anything which cannot be determined owing to his absence or whether a third person will be prejudiced by his not being Joined as a party. It is not suggested before us that any equity remains to be adjudged in this suit between petitioner and Gopalakrishnayya. u/s 115, Civil P- C, we do not think that we shall be justified in saying that the lower Court acted with material irregularity or want of jurisdiction in not allowing Gopalakrishnayya to come on record. There are no equities in Gopalakrishnayya's favour so far as this suit is concerned. If his remedy by suit is not barred by limitation he can file a suit and get the appropriate reliefs.

5. As regards the amount payable by defendant 1, we think that the contention of the appellant is sound and the mesne profits for 1920 to 1922 ought not to be taken into account. What the plaintiff wants is his share which has been transferred to him by the Official Receiver. That transfer was in 1922 and it does not appear from the deed that on transfer anything has been reserved. The Official Receiver is entitled to the mesne profits for those two years. The proper course would be only to allow the set off from the date of transfer to the plaintiff. There is no dispute as to the figures and that can be easily worked out. With this modification the second appeal is dismissed and as the appellant has substantially failed in this appeal, it is dismissed with costs. The Civil Revision Petition is also dismissed with costs.

Reilly, J.

6. In this suit the plaintiff sued for recovery of Schedule D property that had fallen to him in an alleged partition in 1917, or, in the alternative, for a new partition. So far as the suit was one for a new partition Mr. Satynarayana Rao for defendant 1 contends that Gopalakrishnayya was a necessary party and that the suit could not go on without him. On that point I do not wish to express any opinion on this occasion. Mr. Raghava Rao, who appears for the plaintiff, did not argue that aspect of the case, as he rested the plaintiff's case on the old partition of 1917. There I think he was on safe ground. So far as the suit is for recovery of Schedule D property on the basis of the old partition, Gopalakrishnayya is not a necessary party. To prove the partition of 1917, Exs"

K, K-1 and L have been produced. I agree that Exs. K and K-1 are admissible in evidence. They were executed on the same day and must be treated as parts of the same transaction, and they clearly do not amount to documents effecting partition. They refer to an intention that a regular partition deed should be drawn up and registered later. Exs. K and K-1 show that the present defendant Ramakrishnayya, took one-third of the property, leaving the other two-thirds for Nagabhushanam and Gopalakrishnayya's vendee Narasimham undivided. Ex. L has been produced to show that 8 days later there was an actual division between Nagabhushanam and Narasimham. I doubt whether Ex. L is an admissible document. Mr. Raghava Rao argues that at any rate we can look into it because the division which it describes has been partly performed. There is evidence that the house which was one of the items left by Exs. K and K-1 to Nagabhushanam and Narasimham was divided between them and that from 2nd July 1917, that is from the date of Exs. K and K-1, Narasimham enjoyed half the rent of that house. That is in accordance with Ex. L. But I doubt whether it has been shown satisfactorily that it was under Ex. L, and Ex. L alone that he was so receiving the rent. However there is evidence, which has been accepted by both Courts, that the division under Exs. K and K-1 was acted upon by Ramakrishnayya and that he took his one-third of the property in that division. He cannot be heard now to dispute the fact that Nagabhushanam and Narasimham took the remaining two-thirds of the property on the occasion of that division. For the purpose of this case it does not matter even if we are left doubtful by the documents which part of the 2/3 fell to Narasimham and which to Nagabhushanam. Nagabhushanam's vendee, defendant 8, is a party to the suit, and he does not dispute that the Schedule D property was allotted to Narasimham and so came to the plaintiff. Ramakrishnayya, therefore, cannot dispute the plaintiff's right to the D schedule property in which he has no interest under the division.

7. But Mr. Satyanarayana Rao has contended that the mortgage suit which his client brought in August 1917 in its result has put the plaintiff and his vendor out of Court. The property was subject to two mortgages " when the partition under Exs. K and K-1 was made. Defendant 1, that is, Ramakrishnayya sued to redeem the property making his brothers Nagabhushanam and Gopalakrishnayya and Gopalakrishnayya's vendee Narasimham, parties. In that suit a decree for redemption was eventually made in favour of the three brothers leaving Narasimham out of account. So far as the wording of the decree goes, the result of that is that Narasimham could not redeem the property under that decree. And it appears that there was no appeal against the omission to make the redemption decree run in his favour also. Mr. Satyanarayana Rao contends that the result of that is that Narasimham has lost all his rights to that property. I think that is clearly not so. Narasimham's right to the property, that is, to Gopalakrishnayya's share of the property, was not negatived in that suit. Gopalakrishnayya at first disputed Narasimham's right by purchase from him; but he afterwards definitely and explicitly withdrew his opposition to Narasimham

in that suit. After that it was not necessary for the Court to decide in that suit any question between Gopalakrishnayya and Narasimham with regard to the property. No question between them, was actually decided. Still less was it necessary for the Court to decide any question between Ramakrishnayya and Narasimham on that occasion. The result of the decree as framed was that Ramakrishnayya or Nagabhushanam or Gopalakrishnayya could redeem the property; and in fact Ramakrishnayya redeemed it and got possession in 1920. After that either Nagabhushanam or Gopalakrishnayya could have got his share from Ramakrishnayya on payment of what was due from him to clear off Ramakrishnayya's charge on the property. If after that Gopalakrishnayya had transferred his; right to Narasimham, Narasimham could have recovered that share from Ramakrishnayya. Does it make any difference that Narasimham had acquired Gopalakrishnayya's share before the date of the decree? It can make a difference only if we suppose that the omission of Narasimham's name from the decree cut off his rights under the transfer. It is perfectly clear that the District Munsif in deciding that suit did not intend his decree to have that effect at all; and the parties who were before him could have had no idea that was likely to be its effect. Indeed I see from the record that Nagabhushanam and Narasimham appeared by the same pleader. The parties appear to have treated Narasimham as simply standing in Gopalakrishnayya's shoes. I see no obstacle in the decree in that suit to plaintiff now recovering his share of the property on payment of his or Gopalakrishnayya's share of the mortgage money and interest to Ramakrishnayya. On the question of mesne profits and interest I agree to the modification of the decree proposed by my learned brother. I agree that in other respects the appeal must be dismissed with costs and that the revision petition also must be dismissed with costs.