Ramasami Chetti and ors. Vs. Alagirisami Chetti and ors.

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Court : Chennai

Decided On : Sep-04-1903

Reported in : (1904)14MLJ14

Appellant : Ramasami Chetti and ors.

Respondent : Alagirisami Chetti and ors.

Judgement :

1. The appellant sues for a partition of the 100 kulis of punja land mentioned in the plaint and for the recovery of his one-third share therein. The land is situated in the Inam village of Attukkulam, which originally belonged in equal moieties to two brothers,--the great-grandfather of the 10th defendant and the great-grandfather of Lakshmana Iyer, on whose death his half share devolved on his daughter, the 2nd defendant. The half share of the great-grandfather of the 10th defendant devolved, share and share alike, upon the 10th defendant, his brother one Peria Lakshmana Iyer and his brother's son, the 9th defendant. The village was thus in the possession of the 2nd, the 9th and the 10th defendants and one Peria Lakshmana Iyer, as tenants in common, the 2nd defendant's share being one half and those of the 9th and 10th defendants and Peria Lakshmana Iyer being one-sixth each. These persons originally had only the melvaram right in the 100 kulis of land in question, the right of occupancy or kudivaram right being with certain ryots, who sabsequently, from time to time, relinquished their rights of occupancy prior to 1883 and thus these defendants and Peria Lakshmama Iyer became the full owners of the 100 kulis, i. e., of both the varams therein. One Nagulusami Chetti

obtained a decree against the 10th defendant in Original Suit No. 215 of 1887 and in execution thereof, he, on the 30th October 1888, attached (Exhibit VI) the 10th defend ant's share and interest in the village, describing the same under two items, the first item as the one-sixth share belonging to the defendant in the village (the extent being 100 cawnies of nanja and 900 kalis of punja) and the second item as the right to both the varams in the 100 kulis of punja (now in question), a note being added that the defendants' entire right and interest in the properties were attached. The boundaries given in respect of; the first item are apparently the boundaries of the whole village (thus including the 100 kulis forming the second item), The boundaries given in respect of the second item are apparently the boundaries of the 100 kulis alone. The second item was sold on the 5th February 1889 and purchased for Rs. 102 by the 1st defendant (in this suit), the sale being confirmed (vide Exhibit XIII) on the 10th April 1889. The first item, or rather one-half of the first item, i. e., half of one-sixth share belonging to the 10th defendant, was sold on the 1st April 1889 and purchased by the decree-holder, Nagulusami Chetti, for Rs. 75, the sale being confirmed on the 18th June 1889 (Exhibit A). The same Nagulusami Chetti obtained a decree against the widow and legal representative of Peria Lakshmana Iyer (aforesaid) the owner of an one-sixth share and in execution thereof brought to sale and purchased for Rs. 75, on the 1st July 1889, the one-sixth share in the village, belonging to the judgment-debtor (Exhibit B), the sale being confirmed on the 2nd September 1889. The description, extent and boundaries of the property are substantially the same as in Exhibit A. The same Nagulusami Chetti obtained a decree against the 9th defendant and in execution thereof attached (Exhibit L) his one-sixth share in the village, the description, extent and boundaries of the property being substantially the same as in Exhibits A. and B. The decree-holder himself became the purchaser (for Rs. 125) on the 14th April 1891, the sale being confirmed on the 29th June 1891 (vide Exhibit C). The description of the property in Exhibit C is identical with that in Exhibit L. Both in 1 and in C, reference is made to the defendaut's one-sixth share in the ' beasts, trees, tittu, tidal, tank, bund, &c.;' and in this respect they differ from Exhibits A, B and XIII. While the 9th defendant's share was under attachment, the 1st defendant, on the 10th March 1891, preferred a claim under Section 278, Civil Procedure Code, stating that he had become the purchaser of the 100 kulis of

punja (now in question) in execution of the decree in Original Suit No. 215 of 1887 (already referred to), that the 9th defendant had no manner of right or enjoyment therein, that Nagulusami Chetti, the plaintiff, had fraudulently included the same in the attachment and that it should be released therefrom (vide Exhibit O). The District Munsif fixed the 13th April 1891 to enable the parties to adduce evidence in regard to the claim petition and, on the 14th April, he held that the evidence clearly established that the 10th defendant, the defendant in Original Suit No. 215 of 1887, had only a sixth share in the 100 kulis and dismissing the claim preferred by the 1st defendant, ordered that the 9th defendant's one-sixth interest in the 100 kulis should also be sold; and on the same day, throne-sixth share of the 9th defendant in the village was sold and purchased by Nagulusami himself. After this sale, if, as alleged by the plaintiff, the 10th defendant had only a sixth share in the 100 kulis in question (as in the remaining portion of the village) and under Exhibits B and C, Nagulusami became the purchaser of the one-sixth share of Peria Lakshmana Iyer and of the one-sixth share of the 9th defendant, in the whole Village including the 100 kulis in question, the position of the various parties concerned in the village would b6 as follows :--The second defendant would continue to possess one-half share in the whole villlage : Nagulusami would bo the owner of one-third share in the whole village and of a furthor one-twelfth share thereof exclu-sive of the 100 kulis in question; the 10th defendant would bo the owner of the remaining one-twelfth share of the whole village exclusive of the 100 kulis in question, while the 1st defendant would have a sixth share in the 100 kulis in question.

2. If, however, as alleged by the 1st defendant, the 10th defendant was the separate and exclusive owner of the 100 kulis in question, the position would be as follows :--The 1st defendant would have the sole and exclusive ownership of the 100 kulis and the rest of the Village alone would be owned by the 2nd defendant, Nagulusami Chetti and the 10th defendant as tenants in common, their shares, being respectively one-half, five-twelfths and one-twelfth.

3. Nagulusami Chetti sold the entire interest acquired by him in the village, under Exhibits A, B and C, to one Alagappa Chetti, on the 11th May 1894, for Rs. 500 (Exhibit D) and the latter sold the same in equal moieties to the 10th and 9th

defendants on the 11th October 1897 (Exhibits E and F) for Rs. 540 each. The 9th defendant thus became the owner of five twenty-fourths and the 10th defendant the owner of seven twenty-fourths (five twenty-fourths plus a twelfth). Whether such ownership extended over the entire village including the 100 kulis in question or only over the rest of the village (excluding the 100 kulis) will be considered later on.

4. The plaintiff obtained a lease (Exhibit G, dated the 21st September 1897) from the 2nd defendant of her one-half share in the entire village (exclusive of the 100 kulis in question, or, at any rate, of the kudivaram right therein), for a term of 23 years in consideration of the payment of a premium of Rs. 1,960. It is perfectly clear from this document that the 2nd defendant did not reserve anything but the 100 kulis in question and that the waste lands in the village referred to by the Courts below as 250, kulis were included in the lease (vide para. 4). About the same time (on the 14th October 1897) the plaintiff obtained a similar lease, (Exhibit H) from defendants 9 and 10 of their interest (amounting together to one-half share) in the village, without any reservation, for the same term of 28 years, on payment of a premium of Rupees 1,950. Exhibits G and H have both been registered and the plaintiff's case in the present suit is that, by virtue of Exhibits G- and H, he has acquired a right to the exclusive possession for 23 years of the entire village exclusive of the 100 kulis in question and that in respect of the latter he is entitled to joint possession for the same period, with the 1st and 2nd defendants, the shares of the three being respectively one-third, one-sixth and one-half and that, as he does not like such joint possession, he desires a partition of his one-third share.

5. Among others, the principal issues framed in the case were:--Whether the 100 kulis in question became the exclusive property of the 10th defendant or continued to be the joint property of the co-sharers (issue No. 3); whether the plaintiff is estopped by the conduct of Nagulusami Chetti from denying the 1st defendant's exclusive title to the 100 kulis in question (issue No. 2); whether the plaintiff is entitled to maintain a suit for the partition of the plaint 100 kulis alone (5th issue); whether the 1st defendant is concluded by the order of the District Munsif (Exhibit O) passed in Original Suit No. 23 of 1890 (in which Nagulusami Chetti was the

decree-holder) dismissing his claim petition, from claiming the one-sixth share in the 100 kulis in question, which was therein attached as the property of the 9th defendant, the judgment-debtor therein (issue No. 7).

6. The District Munsif found that the 10th defendant owned and enjoyed the 100 kulis as his exclusive property, that the plaintiff, who derives his interest in the plaint land from defendants 9 and 10, who in their turn derived their title from Nagulusami Chetti, is estopped from disputing the exclusive title of the 1st defendant, ' and that the plaintiff's claim is a claim for a partial partition and as such is not maintainable. He accordingly dismissed the plaintiff's suit without recording any finding on issue No. 7. The District Judge, on appeal, concurring with the District Munsif that the suit was one for a partial partition and that the plaintiff was estopped from denying the 1st defendant's exclusive title to the land, confirmed the decree of the District Munsif dismissing the suit and expressly refrained from considering and deciding the 3rd issue, viz., whether the plaint land was the exclusive property of the 10th defendant, though, from the tenor of certain observations made by him in paragraph 4 of his judgment, he seems to have been inclined to take the same view of the District Munsif on that question also. It is to be regretted that in a complicated case of this sort, the Lower Appellate Court should not have considered and recorded its finding on this important issue which would go to the root of the plaintiff's case on the merit's. In support of this second appeal the pleader for the appellant contends that this cannot be regarded as a suit for partial partition inasmuch as upon his own case he is not entitled to any partition of the rest of the village to which by virtue of Exhibits G and H he became entitled to exclusive possession for the term of 23 years and that the only portion of which he can demand a partition is the 100 kulis in question to which he is entitled to possession only jointly with the 1st and 2nd defendants and that though he is only a lessee for a term of years of the interest of the 9th and 10th defendants, he is entitled to demand a partition. In our opinion this contention is well-founded, though the partition which he seeks to enforce can last only for the period of his lease. It is no doubt the law that the transferee from one or more co-sharers of a portion only of the co-tenancy cannot maintain a suit for partition of the portion transferred to him, whether for a term or in perpetuity (Par-bati Churn Deb v. Ain-ud-deen I.L.R. 7 C. 577 but in this case, the plaintiff is, so far at any

rate as the one-sixth share of the 9th defendant is concerned, a lessee of that one-sixth interest in the whole of the village: and so far as that right is concerned he is not transferee of an interest in a portion of the village and though he has acquired only a limited term insuch interest, we hold that it is competent to him to bring a suit for partition which is to last during that term (Baring v. Nash 1 Ves 551 and Heaton v. Dearden 16 Beav. 147 See also 1 Washburn's Real property, pp. 713, 715 and Freeman on Co-tenancy, paragraphs 485, 440 and 421. In our opinion Section 44 of the Transfer of Property Act adopts the same principle and provides that the transferee of an interest in the share of a co-owner may enforce, a partition of the same so far as is necessary to give effect to such transfer. And the suit cannot be regarded as a suit for partial partition, inasmuch as the plaintiff cannot include in his claim For partition the remainder of the village of which he already has the exclusive possession under Exhibits G and H with the con-sent of the, 2nd, 9th and 10th defendants who alone have any interest, there in. We cannot accede to the contention made an behalf of the respondent that the plaintiff is not entitled to the exclusive possession of the remaining portion of the village, inasmuch as the lease of the share of the 2nd defendant reserving a right in the 100 kulis in question will give him no right whatever. The plaintiff after obtaining a lease of the 21st September 1897 Exhibit G) from the 2nd defendant of the rest of the village, obtained a lease on the 14th October 1897 (Exhibit H) from the 9th and 10th defendants of their interest in the rest of the Village and of their alleged interest in the 100 kulis also. In the very passage in Washbum's Real Property, pp.687 and 688, relied oil by the learned pleader for the respondent, it is laid down that 'where one has conveyed a specific part of an estate of which he is tenant in common with others, the conveyance may be made good by the other co-tenants releasing to him their interest in such portion.' Even assuming, for the sake of argument, that Exhibit G, if it stood alone, would be inefficacious to give any right to the plaintiff, the subsequent lease, Exhibit H, obtained by the plaintiff from the other co-tenants, the 9th and 10th defendants, would operate as a release to him of their interest in the remainder of the village and thus make good the lease given by the 2nd defendant. The plaintiff, therefore, has a valid title to the possession of the remainder of the village for the term of 23 years with the consent of all the co-tenants. As, therefore, he cannot demand a partition of that, he has rightly brought

his buit for the partition pf the 100 kulis alone in which he admits that tho 1st and 2nd defendants are, jointly entitled to possession with him. In this view the cases relied on in the Courts below Parbati Churn Deb v. Aiu-ud-deen I.L.R. 7 C. 577 and Koer Hasmat Rai v. Sunder Das I.L.R. 11 C. 396 are inapplicable.

7. The next contention raised by the appellant pleader is in respect of the 7th issue which has not boon considered by either pf the Courts below and wo think his contention is well-founded that in any view of the case the plaintiff tracing his title to Nagulusami Chetti has acquired a valid title to the one-sixth share of the 9th defendant in the 100 kulis. Nagulusami as decree-holder in Original Suit No. 23 of 1890 against the 9th defendant attached his one-sixth share in the village under Exhibit L and the 1st defendant who already had purchase 1 the right, title and interest of the 10th defendant in the 100. kulis in question preferred a claim on the ground that the 9th defendant had no intrest them that the same should be released from attachment. It is clean from Exhibit O that Nagulusami opposed this claim and after investigation the District Munsif dismissed the the claim and upheld the attachment and directed the sale of the 9thdefendant's one-sixth share in the 100 kulis as well as in the rest village. It is clear from, the description of property in Exhibit C that all the property attached under 1 was sold and bought by Nagulusami himself. The 1st defendant the Claimant, did not,.being a suit to establish his right under Section 283 of the Code within one year and the order of the Munsif, therefore, has become conclusive and operated as res judicata so far as the one-sixth share disallowed to him. When both the claimant and the decree-holder proceeded on the foothig that the 9th defendant's interest in the 100 kulis also was the subject of attachment and the order of the Court was passed on that basis, it is six, impossible to accept the contention, on the part of the respondant that in truth and fact the 100 kulis were not attached and that the order of the Munsif was one passed without jurisdiction and inoperative. Even assuming ofg the order (Exhibit O), estopped under Section 115 of the Indian Evidence Act from disputing the 1st defendant's exclusive impossible to accept the contention, on the part of the respondent that in truth and fact the 100, Kulis were not attached and that the order of the Munsif was one passed without Jurisdiction and is inoperative. Even assuming that Nagulusami was, previously to the passing of the order (Exhibit O), estppped unde Section 115 of the Indian Evidence Act from disputing

the lst defendant exclusive title to the 100 kulis in question, the later estoppel by record created by Exhibit 0, so far as the one-sixth share of the 100 kulis is concerned, must prevail in favour of Nagulusami and therefore of the plaintiff as his representative in interest. The plaintiff is, therefore, entitled to the partition of the one-sixth share in the 100 kulis.

8. As regards the remaining one-sixth share also it is contended by the appellant that if the 10th defendant was not exclusively entitled to the 100 kulis the finding of the Courts below that Nagulusami and, therefore, the plaintiff are estopped from disputing the 1st defendant's title to it, is not sustainable in law. The argument on this point is two-fold :--First, that Nagulusami himself was not estopped but that even if he was so estopped he, the plaintiff, is not estopped, as he is in a position to trace his title to the one-sixth to Peria Lakshmaniah.

9. The plea of estoppel can be founded only upon any representation made by Nagulusami either by words or by conduct before the 1st defendant became purchaser of the 100 kalis under Exhibit XIII on the 5th February 1889. The only piece of evidence upon which reliance is placed is Exhibit VI, the attachment list, in O.S. No. 215 of 1886 already referred to. This of course cannot be presumed to have come to the notice of intending purchasers and if the proclamation of the sale which must have preceded the sale and was notice of the sale to intending purchasers, was in the same terms as Exhibit VI, that would be a legal basis to found the plea of estoppel upon--and if the sale of both the items took place upon the same day, it may be reasonably presumed that there was a common proclamation under which both the lots were sold and that the description of the two lots as therein given would have been the same as in Exhibit VI; but it is clear from Exhibits XIII and A that the sale of the two lots took place on different dates and were confirmed on different dates. Nothing, therefore, can be presumed as to the contents of the proclamation from Exhibit VI and unless the two items were described in one and the same proclamation as they are described in Exhibit VI, it would be impossible to hold that there was any representation by Nagulusami, the attaching creditor, to intending purchasers that the right, title and the interest of the judgment-creditor was not restricted to the one-sixth share in the 100 kulis as it was I expressly so restricted in the rest of the property. The proclamation or

proclamations under which the sales took place have not been filed nor has secondary evidence of their contents been given and, therefore, we are compelled to hold that there is no legal evidence upon which a finding of estoppel could be sustained or based.

10. The appellant's pleader also argues that even if Nagulusami were estopped, Peria Lakshmaniah, the owner of the one-sixth, would not be estopped and as he died without issue, leaving a widow Venkata Lakshmi Ammal and she has died, the 9th and 1.0th defendents have become entitled to that one-sixth share as the next reversionary heirs of parallel grade and that, therefore, the plaintiff can trace his claim to that one-sixth share to the 9th and 10th defendants and that the mere fact that the 9th and 10th defendants recited in Exhibit H, the lease executed by them in favour of the plaintiff, that they derived their title to that one-sixth from Nagulusami would not derogate from the plaintiff's title to the one-sixth if he could show that in truth and law the 9th and 10th defendants were entitled to it as the heirs of Peria Lakshmaniah and not under Nagulusami. This position would no doubt be sound if they were such heirs, a point on which there is no finding by either of the lower Courts; but as we cannot accept the finding of the Courts below on the plea of estoppel, it becomes unnecessary to call for a finding on this point. But, if Peria Lakshmaniah was not entitled to one-sixth share in the 100 kulis and the same belonged exclusively to the 10th defendant, neither could Nagulusami have obtained a title to it under the sale certificate Exhibit B, nor could the 9th and 10th defendants have inherited it from Peria Lakshmaniah. We must, therefore, call upon the District Judge to return a finding upon the 3rd issue before we can dispose of this second appeal. The respondent's pleader addressed us at considerable length contending that Exhibits B, C and 1 must be construed as relating only to the village exclusive of the 100 kulis in question and not as inclusive thereof; but the position of affairs is that the documents purport to give the boundaries of the properties attached and sold and undoubtedly the 100 kulis in question are comprised with in the boundaries given, but the extent specified in the document is, however, less by 100 kulis than the total area within these boundaries and the documents also purport to be a sale or attachment pi a share in the village. As a general rule, in the absence of anything in the context fas in Exhibit VI) leading to a contrary inference, it must be taken that all the property

comprised within the boundaries are offered for sale and purchased, if the vendor or judgment-debtor has title to the whole proporty comprised within the boundary though the extent specified in the document may not exhaust the area. If the Vendor or judgment-debtor had no title to some part of the area comprised within the boundaries, the con-veyance would not of course operate upon such portion and in those circumstances it may also be presumed that all that is offered for sale is the portion to which the vendor or judgment-debtor has title and the extent specified corresponds to such portion. If the Munsif's finding on the 3rd issue is also upheld by the District Judge (and in the determination of that issue the extent of the dry land as mentioned in Exhibits A, B, C and similar documents will be relevant as a piece of evidence to be taken into consideration) it will follow that no interest in the 100 kulis could have passed to Nagulusami as purchaser, but if the 100 kulis were not the exclusive property of the 10th defendant but belonged in shares to the tenants in common, the description of the property sold as given in the above document is sufficient to transfer to Nagulusami the interest of Che judgment-debtors under the two decrees to which Exhibits 13 and C relate.

11. The 10th and 11th issues relating respectively to the claim made by the 1st defendant for compensation for improvements made by him on the 100 kulis and the claim made by the plaintiff for past mesne profits have not been argued before us. The District Judge should, therefore, submit his findings upon these two issues as well as upon the 3rd issue upon the evidence already on record within two months from this date. Seven days will be, allowed for filing objections.