

## APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

RAMASAMI CHETTI AND OTHERS (PLAINTIFF AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

1903.  
September  
2, 3, 4.

v.

ALAGIRISAMI CHETTI AND OTHERS (DEFENDANTS),  
RESPONDENTS.\*

*Hindu Law - Partial partition - Lease of shares of some lessors in entire village and of shares of other lessors in portion - Suit for partition as to portion jointly held by lessor and some lessors - Maintainability.*

Plaintiff sued for partition of 100 kulis of land situated in the village of A. This village was, in 1883, in the possession of the second, ninth and tenth defendants and one L, as tenants in common and second defendant's share was one-half and the share of the others was one-sixth each. In 1887, the tenth defendant's one-sixth share and interest in the entire village (including the 100 kulis) was attached in execution of a decree against him. His interest in the 100 kulis was sold and purchased by the present first defendant, whilst one-half of his share in the rest of the village was purchased by the decree-holder N. In 1889 and 1891, respectively, N similarly purchased the one-sixth share in the village, including the 100 kulis, of L and of the ninth defendant, respectively. In 1894, N sold the entire interest acquired by him in the village to A, who, in 1897, sold the same in equal moieties to the ninth and tenth defendants. In 1897, plaintiff obtained a lease from second defendant of her one-half share in the entire village, exclusive of the 100 kulis, for a term of twenty-three years, and a similar lease from ninth and tenth defendants of their interest (amounting together to one-half share) in the village, without reservation. Plaintiff now sued for partition of the 100 kulis. His case was that by his leases he had acquired a right to the exclusive possession for twenty-three years of the entire village exclusive of the 100 kulis, and that in respect of the latter he was entitled to joint possession for the same period with the first and second defendants (the shares of the three being respectively one-third, one-sixth, and one-half), and that as he did not like such joint possession he desired a partition of his one-third share :

*It is*, that plaintiff was entitled to have partition, though he was only lessee for a term of years, and though that partition could only last for the period of his lease. The suit was not one for partial partition inasmuch as plaintiff was not entitled to partition of the rest of the village, to which he was entitled to exclusive possession, under his leases for twenty-three years. The only portion of the village he could demand partition of was the 100 kulis, to which he was only entitled to possession jointly with the first and second defendants.

\* Second Appeal No. 893 of 1901 presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 205 of 1900 presented against the decree of V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 168 of 1899.

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Suit for partition. The facts are fully set out in the judgment of the High Court. The District Munsif dismissed the suit, and the District Judge upheld that order of dismissal, on appeal.

Plaintiff preferred this appeal.

*P. R. Sundara Ayyar* for appellant.

*V. Krishnaswami Ayyar* and *K. N. Ayya* for first respondent.

JUDGMENT.—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 situate in the inam village of Attukkulam, which originally belonged in equal moieties to two brothers—the great-grandfather of the tenth defendant and the great-grandfather of one Lakshmana Ayyar, on whose death his half share devolved on his daughter, the second defendant. The half share of the great-grandfather of the tenth defendant devolved, share and share alike, upon the tenth defendant, his brother, one Peria Lakshmana Ayyar, and his brother's son, the ninth defendant. The village was thus in the possession of the second, the ninth and the tenth defendants and one Peria Lakshmana Ayyar, as tenants in common, the second defendant's share being one-half and those of the ninth and tenth defendants and Peria Lakshmana Ayyar 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 subsequently, from time to time, relinquished their rights of occupancy prior to 1883 and thus these defendants and Peria Lakshmana Ayyar became the full owners of the 100 kulis, *i.e.*, of both the varams therein. One Nagulusami Chetti obtained a decree against the tenth defendant in Original Suit No. 215 of 1887 and in execution thereof, he, on the 30th October 1888, attached (exhibit VI) the tenth defendant'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 cawies of nanja and 900 kulis 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 defendant's 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 first 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 tenth 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 Ayyar (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 ninth 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 L and in C, reference is made to the defendant'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 ninth defendant's share was under attachment, the first 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 ninth 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 tenth 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 first defendant, ordered that the ninth defendant's one-sixth interest

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in the 100 kulis should also be sold; and on the same day, the one-sixth share of the ninth defendant in the village was sold and purchased by Nagulusami himself. After this sale, if, as alleged by the plaintiff, the tenth 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 Ayyar and of the one-sixth share of the ninth defendant, in the whole village including the 100 kulis in question, the position of the various parties concerned in the village would be as follows:—The second defendant would continue to possess one-half share in the whole village. Nagulusami would be the owner of one-third share in the whole village and of a further one-twelfth share thereof exclusive of the 100 kulis in question; the tenth defendant would be the owner of the remaining one-twelfth share of the whole village (exclusive of the 100 kulis in question, while the first defendant would have a sixth share in the 100 kulis in question.

If, however, as alleged by the first defendant, the tenth defendant was the separate and exclusive owner of the 100 kulis in question, the position would be as follows:—The first defendant would have the sole and exclusive ownership of the 100 kulis and the rest of the village alone would be owned by the second defendant, Nagulusami Chetti and the tenth defendant as tenants in common, their shares being respectively one-half, five-twelfths and one-twelfth.

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 tenth and ninth defendants on the 11th October 1897 (exhibits E and F) for Rs. 540 each. The ninth defendant thus became the owner of five twenty-fourths and the tenth 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.

The plaintiff obtained a lease (exhibit G, dated the 21st September 1897) from the second 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 twenty-three

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years in consideration of the payment of a premium of Rs. 1,960. It is perfectly clear from this document that the second 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* paragraph 4). About the same time (on the 14th October 1897) the plaintiff obtained a similar lease (exhibit H) from defendants Nos. 9 and 10 of their interest (amounting together to one-half share) in the village, without any reservation, for the same term of twenty-three years, on payment of a premium of Rs. 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 twenty-three 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 first and second 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.

Among others, the principal issues framed in the case were:—Whether the 100 kulis in question became the exclusive property of the tenth 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 first 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 first 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 ninth defendant, the judgment-debtor therein (issue No. 7).

The District Munsif found that the tenth defendant owned and enjoyed the 100 kulis as his exclusive property, that the plaintiff, who derives his interest in the plaint land from defendants Nos. 9 and 10, who in their turn derived their title from Nagulusami Chetti, is estopped from disputing the exclusive title of the first defendant, and that the plaintiff's claim is a claim for

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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 first 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 third issue, viz., whether the plaint land was the exclusive property of the tenth 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 as 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 merits.

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 twenty-three 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 first and second defendants and that though he is only a lessee for a term of years of the interest of the ninth and tenth 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-shares 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 (*Parbati Churn Deb v. Ain-ul-deen*(1)), but in this case, the plaintiff is, so far at any rate as the one-sixth share of the ninth 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 in such interest, we hold that it is competent to him to bring

(1) I.L.R., 7 Cal., 577.

a suit for partition which is to last during that term (*Baring v. Nash*(1) and *Heaton v. Dearlen*(2); see also 1 Washburn's 'Real Property,' pages 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 consent of the second, ninth and tenth defendants who alone have any interest therein. We cannot accede to the contention made on 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 second 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 second defendant of the rest of the village, obtained a lease on the 14th October 1897 (exhibit H) from the ninth and tenth 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 Washburn's 'Real Property,' pages 687 and 688, relied on 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 ninth and tenth 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 second defendant. The plaintiff, therefore, has a valid title to the possession of the remainder of the village for the term of twenty-three years with the consent of all the co-tenants. As, therefore, he cannot demand a partition of that, he has rightly brought his suit for the partition of the 100 kulis alone in which

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(1) 1 Ves. & B., 551.

(2) 16 Bear., 147.

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he admits that the first and second defendants are jointly entitled to possession with him. In this view the cases relied on in the Courts below, *Parbati Churn Deb v. Ain-ul-deen* (1) and *Koer Hasmat Rai v. Sunder Das* (2) are inapplicable. [The judgment then dealt at length with the other issues in the case and findings were called for.]

## APPELLATE CIVIL.

*Before Sir S. Subrahmanya Ayyar, Offg. Chief Justice, and  
Mr. Justice Boddam.*

1903.  
September  
17.  
October 6.

GOSETI SURBA ROW AND OTHERS (DEPENDANTS), APPELLANTS,

v.

VARIGONDA NARASIMHAM (PLAINTIFF), RESPONDENT.\*

*Evidence Act—1 of 1872, s. 92 (proviso 4)—Agreement in writing registered—  
Oral evidence of discharge—Admissibility.*

An usufructuary mortgage deed was executed in favour of S, who took possession of the mortgaged land. The deed was registered. S died, and his adopted son brought the present suit to recover a portion of the land so mortgaged, alleging that, during his minority, the first defendant had taken wrongful possession of the property. The first defendant was the heir of the mortgagor. His defence was that the equity of redemption had become vested in himself and another as the heirs of the deceased mortgagor; that he, as a person thus entitled to a moiety of the estate, had entered into an oral agreement with plaintiff's adoptive mother and guardian for the redemption of his share only, and that, in pursuance of that agreement, he had paid her a moiety of the mortgage amount, and redeemed the lands in question as falling to his share:

*Held*, that he was not precluded by section 92 (proviso 4) of the Evidence Act from proving this oral agreement.

Suit for land. The facts material to the decision were stated in the judgment of the Officiating Chief Justice as follows:—"An usufructuary mortgage dated the 16th May 1898 was executed in favour of one Subbarayudu, who took possession of the mortgaged lands and subsequently died. The plaintiff, who is Subbarayudu's

(1) I.L.R., 7 Cal., 577.

(2) I.L.R., 11 Cal., 396.

\* Second Appeal No. 189 of 1902, presented against the decree of M. D. Bell, District Judge of Vizagapatnam, in Appeal Suit No. 78 of 1901, presented against the decree of C. Bappayya Pantulu District Munsif of Vizagapatnam, in Original Suit No. 387 of 1900.