
(1930) 08 MAD CK 0015
In the Madras High Court

Appayya Banga (dead) and Others

APPELLANT

Vs

Koraga alias Santhappa Kajava

RESPONDENT

Date of Decision : 04-08-1930

Acts Referred:

Citation : (1930) 32 LW 957 : (1931) 60 MLJ 85

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff to recover possession of

the plaint item 1 with mesne profits or in the alternative for partition of plaint items 1 and 2 into two equal shares and for delivery of one such share

to him with mesne profits. The plaintiff's case is that plaint items 1 to 3 belonged to his father and his two brothers, the defendant and one

Tamayya Banga, that there was an oral division of these items between the three brothers, in which item 1 fell to the plaintiff's father's share, item

2 to the defendant and item 3 to Tamayya Banga. Tamayya Banga has been in separate enjoyment of his share of the property. As regards

item 1, the plaintiff alleged that when his father became the ejman of the family the defendant was allowed to remain in possession of that item on

behalf of his father, and as his father's right had been sold to him he now claims possession of that item or a half share of items" 1 and 2 as the

defendant has mixed up the two items. The defendant, on the other hand, contended that all the properties were gifted to his mother and as her

surviving son he is now absolutely entitled to the properties by right of survivorship. He also disputed the validity of the assignment of the plaintiff.

2. The Lower Courts found that there was an oral partition between the plaintiff's father and the other two brothers as alleged by the plaintiff and that his father's share was validly assigned to him. It was also found that the plaintiff's father put the defendant in possession of item 1 also, that he remained in possession of both items 1 and 2 and while so "he mixed up his share with plaintiff's father's share". In consequence of these findings and as it was not possible to identify the item which belonged to his father the Lower Courts gave a decree for partition of both the items 1 and 2 into two equal shares and for delivery of one share! to the plaintiff. I may state here that no plea of adverse possession to the plaintiff's father's share of the property was set up by the defendant. The defendant admitted that he was in possession of the two items but stated that he had been holding them under a maintenance allotment which he has not been able to prove. It is clear that the defendant has not been able to put forward any valid title to the plaintiff's item 1 and it is also clear that possession of the plaintiff's item 1 from the plaintiff's father is admitted by him. The question is, in such circumstances, whether the plaintiff is entitled to get partition of both the items on the ground that he is not able to identify item 1 as the defendant has mixed up his share with the plaintiff's share, which, in other words, means that the defendant has obliterated the boundaries of the two items and made it impossible for the plaintiff to identify his share.

3. Mr. Sitarama Rao's argument for the appellant shortly stated is this--that, in a suit for ejectment, so long as the plaintiff is unable to identify the property from which he desires to eject the defendant, he is not entitled to a decree for partition and that the Courts have no jurisdiction to grant the plaintiff's prayer in such a case "unless some equity is super-induced by the act of the parties". In support of this proposition reliance has been placed on the leading decision in *Wake v. Conyeys* (1759) 1 W.& T.L.C. 167 : 1 Eden. 331 and the subsequent cases *Speer v. Crawter* (1817) 55 E.R. 997 : 2 Mer. 410 and *Miller v. Warmington* (1820) 37 E.R. 452 : 1 Jac. & W. 484. These cases have been referred to in *Kavasji v. Hormasji* ILR (1904) B. 73. Reference has also been made to *O'Hara v. Strange* (1847) 11 Ir. Eq. Cas. 262 and *Story's Equity Jurisdiction*, Vol. II, Section 840 and *Hunt on Boundaries* 256, etc. On the strength of these authorities it is argued that confusion of boundaries per se is no

ground for interference by the Court and that the plaintiff in this case is not entitled to claim any relief as he is not able to show that the defendant is

his tenant, agent or bailee or is a person in a fiduciary position towards the plaintiff which makes it incumbent on him to co-operate with him in re-

establishing his title. It is admitted that the plaintiff and the defendant are not joint tenants or tenants-in-common or co-parceners. The question is

whether in such circumstances the plaintiff is entitled to the relief of partition granted to him by the Lower Courts.

4. In *Wake v. Conyers* (1759) 1 W. & T.L.C. 167 : 1 Eden. 331 it was pointed out--

That the Court has no power to fix the boundaries of legal estates unless some equity is super-induced by the act of parties as some particular

circumstance of fraud or confusion where one party has ploughed too near the other, or the like; nor has this"" Court a power to issue such

commissions, of course, as here prayed.

5. In *Speer v. Crawter* (1817) 35 E.R. 997 : 2 Mer. 410 the Master of the Rolls after referring to the case of *Wake v. Conyers* (1759) 1 W. &

T.L.C. 167 : 1 Eden. 331 stated thus:

In the same case of *Wake v. Conyers* (1759) 1 W. & T.L.C. 167 : 1 Eden. 331, Lord,. Northington says, that, in his apprehension, this Court has

simply no jurisdiction to settle the boundaries even of land, unless some equity is super-induced by act of the parties. I concur in that opinion, and

think that the circumstance of a confusion of boundaries furnishes, per se, no ground for the interposition of the Court.

The present bill, in point of statement, laid a sufficient ground for such interposition, for it alleged the confusion to have taken place by the fault, or

the neglect, of the owners of Imworth, while lessees of Weston. Hut that is not only not made out, but it is disproved. If the ancient boundaries of

the two manors be really unknown, as the plaintiff alleges they are, how are Commissioners to ascertain them? or what is to be done if they cannot

be ascertained? When it is through the default of a tenant or copyholder, that boundaries are confused, the Court provides for the case of its being

impossible to ascertain them, by directing so much of the defendant's own land to be set out, as shall be equal to the quantity originally granted or

leased. But, because, the owner of a manor can no longer find all the wastes that may once have belonged to it, he is not to have the deficiency

made good out of his neighbour's estate.

6. In *Miller v. Warmington* (1820) 37 E.R. 452 : 1 Jac. & W. 484 the following observations appear:

But if the difficulty of finding the boundaries were established, it is clear the plaintiff does not stand in a predicament that gives him a right to apply

for a commission. This is the case of persons claiming by an adverse title; there is no connection between them, to serve as a foundation for the

Court to proceed on in ordering a commission. This subject was very luminously considered by the late Master of the Rolls in *Speer v. Crawter*

(1817) 35 E.R. 997 : 2 Mer. 410; and that case has settled that you must lay a foundation for this species of relief, not merely by showing that the

boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of

which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the Court will not interfere

between independent properties, and confusion of boundaries per se is no ground to support such a bill.

7. The decision in *Kavasji v. Hormasji* ILR (1904) B. 73 after referring to the above leading; decisions declined relief to the plaintiff as the learned

Judges found that the litigants were independent proprietors and it was impossible to regard them as individuals having such relations the one to the

other as would entitle the Court, to treat the whole of land in their possession as a common fund capable of adjustment in giving each party a

specified proportion of the property.

8. Having regard to the principles enunciated in the above cases it is necessary in this case to examine in what circumstances item 1 came to the

possession of the defendant and how it was being held by him during all these years in order to find out whether the plaintiff can rely on any equity

in his favour.

9. I have already stated that the property belonged to the plaintiff's father and his two brothers of whom the defendant is one. After division of the

property between the brothers, the plaintiff's father was in possession and enjoyment of item 1. It was then that he put the defendant in possession

of that item. The fact that the defendant obtained possession of that item from the plaintiff's father is in my view a very important circumstance in

this case. No doubt the defendant's was put in possession of the property as an allotment for maintenance but this has been found against by both the Lower Courts. The defendant has not put forward any adverse title to the property. So it comes to this that the plaintiff has clearly established his title to the property in question and has proved that his father put the defendant in possession of it and that the defendant has not any title to it at all. The plaintiff has also proved that the defendant has by obliterating the boundaries made it impossible for him to identify the item belonging to him.

10. In the above circumstances can it be said that there is no equity in favour of the plaintiff which would require the Court to order partition? In

my opinion the parties in this case cannot be said to be independent proprietors in the sense in which that term has been used in some of the cases

above referred to. On principle one can understand why in a simple case of two independent proprietors who own adjoining lands with respect to

which confusion of boundaries has taken place, the Courts refuse to help the plaintiff if he is not able to prove by evidence the boundaries of his

estate. Of course, if he is able to prove that the defendant is a joint tenant or a tenant-in-common or a coparcener or holds his land as his agent,

trustee or occupies a fiduciary position towards the plaintiff with respect to the land, then it is agreed that when the boundaries have been

obliterated the equitable jurisdiction of the Court may be invoked in favour of the plaintiff to grant him partition. But do these cases of well-

recognised legal relationship exhaust the category of equities which would make it incumbent on the defendant to co-operate with the plaintiff in

establishing his title? I think not. In my opinion the principle that in a case of confusion of boundaries the Courts will not interfere unless some

equity is super-induced by the act of the parties has to be applied with reference to the special features of each case. If the list of relationship is

strictly limited to the classes mentioned above which is the contention very strongly urged before me, then it seems to me manifest injustice may be

done, in cases like the present. I do not think the principles enunciated in the cases referred to above preclude the Courts from interfering in cases

where obviously refusal to interfere will cause injustice to the plaintiff on account of misconduct on the part of the defendant with respect to

property which he holds from him and to which he has no title. In this case it is noteworthy that from the year 1887 to 1908 the property was being

leased sometimes in the name of the plaintiff's father or in the defendant's name simply and at other times in their joint names. After the death of

the father in 1919, though by that time partition had been effected between the brothers, the patta of item 1 had been transferred to the joint names

of the plaintiff and the defendant and from the year 1908 to as recent a date as 1920 it was the defendant that paid the assessment on behalf of the

pattadar of plaintiff's father. It is true that the plaintiff has not been able to prove a specific case that the defendant was his lessee which he alleged

in this and some other prior litigations; but the facts that I have just mentioned are sufficient to show, in my opinion, that the defendant, who has

admitted possession of the property from the plaintiff's father, may (if necessary) be said to be his agent so far as that item is concerned. In *Miller*

v. Warmington (1820) 37 E.R. 452 : 1 Jac. & W. 484 already referred to, speaking of *Speer v. Crawter* (1817) 35 E.R. 997 : 2 Mer. 410 the

Master of the Rolls stated (this passage is quoted above) that:

That case has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the

confusion has arisen from some misconduct on the part of the defendant or those under whom he claims, of which you have a right to complain and

which renders it incumbent on him to co-operate in reestablishing them.

11. This is all what the plaintiff has to prove in order to succeed in cases of this description. I think the plaintiff in this case has a right to complain

inasmuch as he has proved that the defendant by his misconduct brought about a confusion of the boundaries of the property after he obtained

possession of it from his father, and that, therefore, he is entitled to invoke the equitable interference of the Court on his behalf.

12. I would, therefore, uphold the judgment of the Courts below and dismiss the second appeal with costs.