

(1958) 12 KL CK 0001
In the High Court Of Kerala
Case No : A.S. No. 602 of 1953

Damodaran

APPELLANT

Vs

Karimba Plantations Co. Ltd. and Others

RESPONDENT

Date of Decision : 18-12-1958

Acts Referred:

Evidence Act, 1872 — Section 83

Citation : (1959) KLJ 372

Hon'ble Judges : T.K. Joseph, J;G. Kumara Pillai, J

Bench : Division Bench

Advocate : M.U. Isaac, for the Appellant; T.C. Raghavan for Respondents 3 and 4 and K. Kutti krishna Menon for Respondents 6, 8 and 9, for the Respondent

Final Decision : Dismissed

Judgement

T.K. Joseph, J.—The subject-matter of this litigation is an extensive hill tract in Karimba Desom, Walluvanaud Taluk, South Malabar. The suit was instituted by the 1st plaintiff who was appointed Receiver in O.S. No. 112 of 1933 of the Subordinate Judge's Court, Palghat, to manage the estate including sthanom and Devaswom properties of Kuthiravattath Nayar, the 3rd plaintiff in the suit. During the pendency of this suit the 1st plaintiff was removed from office and the 2nd plaintiff was appointed as Receiver, in O.S. No. 100 of 1947 on the file of the District Court, South Malabar. He in turn was replaced by the 4th plaintiff who was appointed by the Court of Wards which obtained management of the estate later. According to the original plaint, the properties described in the schedule appended to the plaint belonged to Pulappatta Thiruvilayanad Bhagavathi Devaswom owned by the Kuthiravattathu estate. These lands are marked as plots A, A1 and A2 in the plan-Ext. A44 filed along with the plaint. The Sthanom was enjoying the properties, granting leases and licences to several persons for cutting timber. On 3rd January 1943 such a lease was granted to one Athan Rowther and on the termination of the period of one year, he surrendered possession. Thereafter the right of cutting trees of specified girth was granted to

the 11th defendant by a deed dated 10th March 1946 and while the latter was in possession Defendants 1 to 9 obstructed his work. He took up the matter to the Criminal Court but did not pursue the same. However he informed the 1st plaintiff about the matter and on enquiry the 1st plaintiff found that Defendants 1 to 4 who claimed title under Defendants 5 to 9 had entered into possession of plot A1 and that they had cut and removed trees in the said plot and planted the land with rubber. They were also found attempting to trespass into plot A2. As Defendants 1 to 4 denied the plaintiff's title/the suit was filed for establishing the title of the sthanom, for recovery of plot A1 from Defendants 1 to 4, for an injunction restraining the Defendants from entering into possession of plot A2 and for damages for waste committed in the property. The plaint was later amended so as to include an alternative prayer for recovery of plot A2 also in case the Defendants were found to be in possession of the same. Defendants 1, 2, 3, 4, 7, 8, 9 and 12 filed written statements. The defence contentions so far as they are material for the decision of this appeal are that neither the Devaswom nor the Estate of Kuthiravattathu Nair has title to the properties, that Defendants 1 to 4 are in possession of plots A1 and A2 having obtained the same under Defendants 5 to 9 who had a kanom right under the 10th Defendant's Kattussery family. They contend that their possession is lawful and that they are not liable to be evicted. The 10th Defendant who was Kattussery Mootha Nair at the time of the institution of the suit died later and his successor was impleaded as supplementary 12th Defendant. The latter claimed these properties as belonging to his sthanom and thus denied the title of the plaintiffs. After an elaborate trial the court below found that the plaintiff had not established title or possession within 12 years of the suit and the suit was accordingly dismissed with costs. The 4th plaintiff has therefore preferred this appeal. The main question which arises for decision is that of title. Defendants 5 to 9 and under them Defendants 1 to 4 admittedly are entitled to the land lying to the east of the hill tract belonging to the 3rd plaintiff's estate. The real dispute between the parties is whether the disputed land forms part of the 3rd plaintiff's estate or whether the same is included in the lands owned by the 12th Defendant's sthanom, demised to the family of Defendants 5 to 9. As the land is unsurveyed, the matter has to be decided without the aid of revenue records relating to the same. However it was agreed by both sides that the case could be decided on the finding regarding the location of one of the eastern boundaries of the plaintiff land viz., Karvazhi Thodu. There is dispute between the parties about the location of this thodu or stream. The stream is marked in the plan Ext. C1 prepared by the Commissioner deputed by the lower court. While the plaintiff contends that it is the stream marked E in Ext. C1, the defence case is that it is either E2 or E3 in Ext. C1. Whether it is the stream marked E2 or E3, the disputed lands will be outside the eastern boundary mentioned in the plaint. The appeal was argued by both sides on this basis.

2. Before considering the evidence for the purpose of locating Karvazhi Thodu, it is necessary to observe that the plan Ext. C1 produced by the Commissioner is

not of much help. It was not actually prepared by the Commissioner but by P.W. 2. This procedure was wholly unauthorised because the court directed the Commissioner to prepare the plan and he was not to get the plan prepared by somebody else. Ext. C1 as it was originally produced did not indicate the location of the thodu as pointed out by the Defendants. The Commissioner was asked later to show their location and it was only at that stage that E2 and E3 were marked in Ext. C1. P.W. 2 who prepared Ext. C1 also prepared the plan Ext. A44 which was filed along with the plaint. As to how far P.W. 2 was prepared to help the plaintiffs can be seen from the fact that he categorically stated that there were no streams at the places indicated by the Defendants. P.W. 1, the Head-Clerk of the plaintiffs' estate, however admitted with some reluctance the existence of streams at the places marked E2 and E3. In his chief examination he stated that E2 and E3 were "varichals" and that only chals where water will flow in summer and winter are called thodus. In cross-examination he stated that Vellachals and thodus are the same. Though the expression used at that stage was "Vellachal" as distinct from Varichal, he admitted later that E2 and E3 were Vellachals which means streams or thodus. He deposed "Vellachal E2 and E3 marked in Ext. C1 exists," Thus though P.W. 1 finally admitted the existence of the thodus marked E2 and E3, P.W. 2 was not only not prepared to mark the same in Ext. C1 but he was ready to state on oath that there were no thodus at those places. The deposition of P.W. 2 shows that he cannot be relied upon. At first he said "I prepared a sketch from the spot. I prepared the plan from my house. The sketch is still with me". Before the Chief-examination ended he added "Ext. C1 was drawn by me. I have written the names. On the first day I was not ready to go with the Commissioner. On the 3rd day I went. The Commissioner was then there. The Commissioner had prepared a sketch with the assistance of Amsom Menon by the time I reached there. With the sketch I inspected the properties once more. The sketch was found to be correct." Ext. C1 was drawn to the sketch handed over to me". Thus it is not clear whether Ext. C1 was prepared on the basis of the sketch prepared by P.W. 2 or the Commissioner. Neither the sketch prepared by the Commissioner nor the one prepared by P.W. 2 has been produced in the case. P.W. 2 admitted that E2 and E3 were drawn in Ext. C1 by him. This was after the plan was remitted back to the Commissioner. However he admitted that he did not go to the spot with the Commissioner after the plan was remitted for rectification. The facts stated above show that no reliance can be placed on the fact that these streams were not shown in Ext. C1 when it was first prepared. The dimensions of the streams shown by the plaintiff and the defendants as marked in Ext. C1 also cannot be taken as correctly indicating their actual dimensions. We make this observation because it was argued on behalf of the appellant that Karvazhi thodu marked E in Ext. C1 is bigger in size than those shown by the Defendants and that the bigger stream was likely to have been mentioned as the boundary.

3. Reference has already been made to the fact that P.W. 1 admitted the existence of the thodus E2 and E3 showed in Ext. C1. The question thus resolves

itself into this, namely, whether Karvazhi thodu is either E2 or E3 as contended by the Defendants or E as pointed out by the plaintiff. An important fact which has to be taken into consideration in this connection is that the thodu marked E does not satisfy the requirement of a boundary since it is admitted that Defendants 5 to 9 owned properties on its western side. This means that if the thodu E is the boundary it does not come down to the south to meet the southern boundary. It is impossible to conceive that such a description would have been adopted by the 3rd plaintiff or his predecessors. If the lie of the land is as stated by the plaintiffs, the plots B2, B3 and Survey No. 193 should also have been mentioned as the eastern boundary of the plaintiff property. Unlike the thodu E, west of which the Defendants owned properties, E2 is a thodu to the west of which lie lands belonging to the plaintiffs.

4. That Karvazhi thodu cannot be located as contended by the plaintiff can be seen from certain records binding on the plaintiff's estate. Kattussery Mootha Nair had demised certain properties on Ubhayapattom to one Narayanan Namboodiri and the 3rd plaintiff in his personal capacity had obtained an assignment of the lease-hold right in some of those properties. Narayanan Namboodiri had to pay certain amounts to Kattussery Mootha Nair under the deed of Ubhayapattom and a suit was instituted as O.S. No. 145 of 1936 of the District Munsiff's Court of Walluvanad for recovery of such amounts. The 3rd plaintiff in this suit was the 2nd defendant in O.S. No. 145. He filed a written statement," copy of which is Ext. B2. A decree for recovery of the amounts was passed in that suit and in execution Narayanan Namboodiri's tenancy right which had become vested in Kuthiravattath Nair and others was sold in court sale and purchased by the decree-holder. Ext. B1 is copy of the sale certificate. Item No. 7 in Ext. B1 is described as Kilayanmala pathi, lying north of item No. 8. The latter item comprises surveyed land included in several sub-divisions of survey No. 193 which are marked in Ext. C1. These lie far to the west of the stream marked E in Ext. C1 and plot 7 is north of that. It follows that the stream pointed out by the plaintiff as Karvazhi thodu could not be the eastern boundary of the plaintiff's Malavarom since Kattussery Mootha Nair admittedly had a vast tract of land lying to the west of it. The western boundary of item 7 in Ext. B1 is Karkuzhi thodu. Whether this means karvazhi thodu or not, it is clear that there was a stream which formed the western boundary of lands belonging to Kattussery Mootha Nair which lay to the west of the stream E in Ext. C1. The name of item No. 7 in Ext. B1 is Kilayanmala pathi. Kilayanmala admittedly belonged to Kattussery Mootha Nair and it is now in the possession of Defendants 1 to 4. According to the plaintiff's case Kiliyanmala lies to the east of Karvazhi thodu. This cannot be correct since Kilayanmala pathi lies west of the several subdivision of S. No. 193 described as item No. 8 in Ext. B1. This supports the defence case that the hill shown by the plaintiff as Chemmanthittamala is really Kilyanmala. Thus though the plaintiff property is unsurveyed land the description of adjoining lands in documents which are binding on the plaintiffs and which comprise surveyed lands indicates that the plaintiff's case cannot be true.

5. Coming to the plaintiff's documents it must be observed that there is no document of title as such for the plaintiff and those documents on which the plaintiff relies as transactions in respect of the property are leases granted by the plaintiff's sthanom in the past. Shri M.U. Isaac learned counsel for the appellant conceded that Exts. A9 to A26 which are lease deeds executed by the plaintiff's sthanom in the past are not helpful for locating Karvazhi thodu. However a brief reference to the same is necessary since the respondents rely on these for a limited purpose viz., that the stream E is not Karvazhi thodu. Exts. A9 to A11 are the earliest lease deeds but as these include not merely Chemmanthittamalavarom but other properties also, the boundaries given are not of Chemmanthittamalavarom alone. Ext. A12 of the year 1889 is the earliest document which gives separate boundaries for Chammanthittamala. It is significant to note that Karvazhi thodu was not mentioned in Ext. A12 as one of the eastern boundaries of Chemmanthittamala and pathies. The same is the case in respect of Ext. A13 of the year 1904. This means that Karvazhi thodu could not have been contemplated as a boundary at that time. Item No. 3 in Ext. A12 comprises Karvazhikad and Kyvalakad Parambas which are described as lying to the south of Chemmanthittamala. The survey numbers of Kyvalakad are 180/4A and 182/1A as seen from Ext. A33, a deed taken by the 3rd plaintiff. These survey numbers lie to the west of the stream marked E2 in Ext. C1. Ext. A34 shows that the survey numbers of Karvazhikad Paramba is S. No. 182 and that it is bounded on the east by a stream. S.No. 182 also lies west of the stream E2. These do not touch the stream E and this is yet another reason for holding that the stream marked E is not Karvazhi thodu which separates the plaintiff's land from that of Kattussery Mootha Nair. Coming to the other boundary marks in the south of Chemmanthittamala which along with Puthukadu mala formed item No. 1 in the plaint schedule, these are Korambanchola paramba (S. No. 180) Kanniyadanchola (S. No. 1.81) etc. The survey numbers for these properties are taken as given in Ext. C1 and those show that these properties lie farther to the west of Karvazhikad and Kyvalakad. The location of these boundary marks can be fixed as the same are surveyed lands and the southern boundary of item No. 1 in the plaint schedule therefore clearly shows that if Karvazhi thodu is E in Ext. C1, the southern boundary will not touch it but that E2 will satisfy the requirements of the eastern boundary since the southern boundary mark starts from there. The survey plan Ext. B55 is also useful as it gives the location of the survey numbers which form the southern boundary. Ext. B10, a receipt granted by Kattussery Mootha Nair which also gives the names and survey numbers of the surveyed parambas in the south supports the defence case on the point.

6. The appellant has a case that the property comprised in S. No. 193 lying to the west of the southern part of this thodu marked E in Ext. C1 is known by the name Karvazhi paramba and that the thodu must have obtained its name from this paramba through which it flows. This assumption regarding the name of the property does not appear to be correct. Ext. A36 is a certified extract from revenue records showing the names of the lands in Karimba Desom and S. No.

193 is described as Karushi Vadakkekara Malayariku Paramba. The name of this property is not exactly identical with that of the thodu. On the other hand we have referred to the fact that it is seen from Ext. A34 which is a document binding on the plaintiff's estate that Karvazhikad paramba is S. No. 182. We are therefore unable to uphold this argument. It was also urged that the thodu shown as E is much longer than either E2 or E3 and that it must therefore be the real boundary mark described as Karvazhi thodu. We have already referred to the fact that no reliance can be placed on the dimensions of these thodus as shown in Ext. C1 as P.W. 2 who prepared it seems to have done so with the avowed object of helping the plaintiff. In fact P.W. 1 had to admit that even the names of some of the southern parambas were wrongly given in Ext. C1. The Defendants were complaining from the very beginning that the boundary marks were not correctly shown in Ext. C1. Even the full length of stream E2 is not shown in Ext. C1, which starts from the north and flows to the south. According to Ext. C1, E2 is seen to stop on the northern border of S. No. 193/1. If it is a stream as it is now admitted to be, it is not clear how it can end in that fashion unless it goes underground when it reaches S. No. 193/1, which is nobody's case,

7. The appellants placed reliance mainly on Exts. A1 to A7 which relate to an earlier suit O.S. No. 11 of 1899 of the Subordinate Judge of South Malabar, Palghat by one Rarichan Moopan against Mannarghat Moopil Nair and others. Kuthiravattathu Nair, got himself impleaded as supplementary defendant No. 4. Rarichan Moopan had filed an earlier suit as O.S. No. 14 of 1893 but that was dismissed due to certain technical reasons and Ext. B45 is copy of the decree. Ext. A1 is copy of the plaint in O.S. No. 11 of 1899. Rarichan Moopan claimed the eastern side of Chemmanthittamala and his claim was resisted by Kuthiravattathu Nair. Ext. A4 is a plan prepared for the earlier case and the appellant wants to rely on the same for establishing the fact that Kuthiravattathu Nair successfully resisted the claim of Rarichan in respect of the property which forms the subject matter of the present suit. We do not consider it proper to place any reliance on this plan which has not been properly proved in this case. Section 83 of the Evidence Act provides: "The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purpose of any cause must be proved to be accurate". Commenting on the section it is observed in Woodroffe and Ameer Ali's Law of Evidence, "Maps or plans made for the purposes of any cause must be proved to be accurate. They must be proved by the persons who made them. They are post litem motam and lack the necessary trustworthiness. Where maps are made for the purposes of a suit, there is, even apart from fraud, which may exist, a tendency to colour, exaggerate, and favour which can only be counteracted by swearing the maker to the truth of his plan. The rights of property as between two parties cannot be affected by a map drawn for a totally different purpose and a purpose totally irrelevant to the subject of the dispute between them." Ext. A4 does not satisfy the requirements of section 83 as its

accuracy and trustworthiness have not been proved. We are therefore unable to hold on the strength of Ext. A4 that the property in dispute in the earlier suit referred to above is identical with that in the present suit.

8. Ext. A5 is copy of the judgment in O.S. No. 11 of 1899. It is seen that Rarichan Moopan's suit was dismissed as against Kuthiravattathu Nair. We do not see how Ext. A5 can help the appellant. Kattusseri Mootha Nair had applied to get himself impleaded in the suit, but his application was not allowed. Ext. A5 is thus a suit in which Kattusseri Mootha Nair was not a party. Learned counsel for the appellant strenuously contended that Ext. A5 could at any rate be relied on as an instance where Kuthiravattathu Nair successfully asserted title to the plaint property. We have already pointed out that Ext. A4 cannot be relied on for establishing the identity of the property. Even apart from this, there is the fact that that suit happened to be dismissed as Rarichan Moopan failed to prove his title. This does not mean that Kuthiravattathu Nair established his title as against Kattusseri Mootha Nair. We are therefore of opinion that Exts. A1 to A5 cannot prove the plaintiff's title.

9. After the unsuccessful termination of this litigation Rarichan Moopan appears to have taken a deed Ext. A8 from Kattusseri Mootha Nair for a property lying north of Kiliyanmala and also north and east of Chemmanthittamala of Thiruvaiyanad Devaswom. We do not see how Ext. A8 can help the appellant. Kiliyanmala which is claimed by Defendants in this suit was not part of the property demised under Ext. A8 and there is no dispute in this suit that Chemmanthittamala belongs to Devaswom. The circumstances under which Ext. A8 was executed in 1901 or as to whether Rarichan Moopan got possession thereunder are not proved in this case. The documents mentioned above which alone were referred to during the course of the arguments here do not establish the plaintiff's title to the lands in dispute in this case. We are of opinion that the plaintiff's sthanom is entitled only to the lands lying to the west of the thodu marked E2 in Ext. C1 which is the real Karvazhi thodu, This is the conclusion reached by the learned Subordinate Judge also and we accept the same. In view of our finding on the question of title, the question whether the plaintiff has proved possession within 12 years of the suit does not arise. It follows that the appeal must fail. We therefore confirm the decree of the trial court and dismiss the appeal with costs, one set only, for the contesting respondents.