

(1958) 02 KL CK 0018

In the High Court Of Kerala

Case No : S.A. No's. 1546 and 1547 of 1954 (M) .

Narayanan Namboodiri

APPELLANT

Vs

Raman Nair and Others

RESPONDENT

Date of Decision : 03-02-1958

Acts Referred:

Malabar Land Registration Act, 1895 — Section 19

Citation : (1958) KLJ 457

Hon'ble Judges : N. Varadaraja Iyengar, J

Bench : Single Bench

Advocate : N. Sundara Iyer and V.R. Venkitakrishnan for appellant in both Appeals, for the Appellant; C.S. Swaminathan, for 3rd Respondent in S.A. 1546 of 1954 and 2nd Respondent in S.A. 1547 of 1954, K.V. Suryanarayana Iyer, M.U. Isaac, For 4th Respondent in S.A., 1546 of 1954 and 3rd Respondent in S.A. 1547 of 1954 and Ravi Varma for 1st Respondent in S.A. 1547 of 1954, for the Respondent

Judgement

N.V. Iyengar, J.—These two second appeals arise respectively out of two connected suits O.S. 612 of 1950 and O.S. 142 of 1952 both on the file of the Ottapalam Munsiff's Court. As they involved practically the same question they were heard together and are being disposed of by this common judgment. The first of these suits O.S. 612 of 1950, was filed by the Kizhakkedath Manakkal in Walluvanad Taluk, as plaintiff, for declaration of their title and possession of certain forest land and also for damages for destruction of the northern boundary thereof, as against the 1st defendant Kuttan Moothan. The 1st defendant claimed title in himself, as Kanomdar under the 2nd defendant, Vadakkunathan Devaswom and repudiated the allegation of mischief. This suit was taken in continuation of an earlier suit O.S. 117 of 1948 filed by the plaintiff against the 1st defendant alone, for mere injunction, but dismissed with liberty reserved, to agitate title afresh. During the course of the suit, the 1st defendant filed O.S. 142 of 1952 against the Manakkal and its tenants, for compensation for alleged theft of cashewnut crop and manure leaves from the; property. On agreement of

parties the suits were tried and disposed of together with the result, that the Manakkal was found to have failed to discharge the burden, which according to the court, rested on them, to make out their title and possession within 12 years and further that they were liable for theft of certain cashew crop from the property. Accordingly O.S. 612 of 1950 was dismissed in toto while O.S. 142 of 1952 was decreed in favour of the 1st defendant though not to the full extent claimed by him. Two separate appeals were taken by the Manakkal before the Subordinate Judge's Court of Ottapalam but without success. They have therefore now come up before this Court with these appeals and the main complaint urged on their behalf is that the courts below have misled themselves by adopting a wrong rule as to burden of proof. And I may say at once that there is a good deal of force in this complaint.

2. The disputed property is the south eastern portion of S. No. 74/.1 of Pullapatta Desom, 81 x 48 six feet koles in extent and is identified in Ext. C-1 commissioner's plan in the case as Plot A. Plot B to the south comprising S. No. 78/1 and 78/6 is admittedly Umbilchola paramba belonging in jenmom to the Manakkal and it is their claim that the disputed property is the northern section of this paramba. The Manakkal admits that the patta for S. No. 74/1 is in the name of the Devaswom but they say that that circumstance is immaterial in the light of section 19 of the Malabar Land Registration Act. The 1st defendant purchased his kanom right in November, 1937, in execution of the decree in O.S. 420 of 1935 obtained by the Devaswom against its kanom tenant and it is his case that the disputed property is comprised in item 6 of the sale sannad where the description is given as Mandazhi Patinharakara Paramba 150 x 115 six feet koles in S. No. 74/1 and 74/7. According to the plaintiff, this extent falls short of the disputed property as established by the evidence in the case, particularly the data collected by the commissioner of court in previous litigation O.S. 85 of 1946 on the file of the Ottapalam Munsiff's Court, between these parties.

3. This suit O.S. 85 of 1946 was filed by the 1st defendant against his brother's son Kunchunni Guptan as 1st defendant and the Devaswom as 2nd defendant for recovery of the southern portion of S. No. 74/7 just east of and touching the disputed property in this case, and describing it as "some portion" of Mandazhi Patinharakara Paramba. Kunchunni Guptan contested the suit on the basis of his father's rights under Ext. A 9 pattomchit of 1917 executed by the Manakkal. The Manakkal was thereupon impleaded in the suit as supplemental 5th defendant. Ext. A 7 is a plan prepared by P.W. 2 a lawyer, as commissioner of court in connection with that suit. The property in dispute therein is marked as A B C D in Ext. A 7. The Commissioner's report Ext. A 8 shows, that on behalf of the present plaintiff, his Kariasthan Raman Nair claimed the property as belonging in jenmom to the plaintiff's mana. In Ext. A 8 the commissioner observed: "The Southern boundary is Umbilchola paramba. It is in the possession of the 5th defendant and is the jenmom of the 5th defendant. The western boundary is Umbilchola paramba and there is a cashewnut garden there. It belongs to Kizhakkedath Mana and is looked after by one Kuttipra Narayana Moothan under the 5th

defendant it is registered as the jenmom of the 2nd defendant. The northern boundary is Mandazhi Paramba. It is in the possession of the plaintiff and is the jenmom of the 2nd defendant." The point of significance for us in Ext. A 8 is that the western boundary referred to in the above extract is the disputed property in this Case. And what is of still more significance is that at the instance of the Manakkal's kariasthan several measurements were taken by the commissioner as noted in Ext. A 7 and these proved that the plot 150 x 115 koles purchased by the 1st defendant did not extend to the south of a line X A B, X being a point on the western boundary of 74/1 in line with B A the northern boundary of the property in dispute in that case. The line A X as actually drawn in Ext. A 7 is slanting southward but objection would appear to have been taken in court subsequently, that the line ought to have been drawn straight west so as to take in the southern portion of S. No. 74/1 for a uniform length of 38 koles north to south, as appertaining to the Manakkal's Umbilchola paramba. The plaintiff has, in this suit no doubt claimed a 48 koles length north to south, viz. 10 koles more than what would appear to be the correct position but that, as his Learned Counsel submits, is no reason why he should be denied to a lesser extent at least.

4. Learned Counsel for the respondents strenuously argued that much weight cannot be given to the findings of the commissioner P.W. 2 in O.S. 85 of 1946 as above. For he must have relied on the representations of the plaintiff's kariasthan in the matter and there was no judicial determination either. But there is no positive evidence led in this case by either 1st or 2nd defendant, that the Mandazhi Patinharakara Paramba extend right up to the southern boundary of S. No. 74/1. Not only so, but the pleadings of the 1st defendant in the prior suit O.S. 117 of 1948 showed that he claimed only a part and not the whole of the disputed plot as comprised in his kanom holding Mandazhi Patinharakara Paramba. The description made so early as 1917 in Ext. A 9, of the western boundary therein, as the Manakkal's jenmom holding, serves again to confirm the finding of the commissioner P.W. 2. It could not be denied by either of the defendants 1 and 2 that Ext. A 9 came into effect, seeing that it was that instrument that was sought to be attacked in O.S. 85 of 1946 to which both were parties. Indeed the Devaswom must be deemed to have given up its whole case when it gave the alias Umbilchola in describing this property in Ext. B 5 renewal of 1943, in favour of the 1st defendant. And finally it is noteworthy that in dismissing the previous suit O.S. 117 of 1948, the learned Judge in appeal observed that he had to do so mainly because the plaintiff was then seeking relief in respect of a northern boundary outside the 38 koles length.

5. The courts below were conscious that there was practically no evidence on the side of the defendants 1 and 2 in proof of their title or possession. But they thought that it was solely for the plaintiffs to prove their title and that because Ext. A 9 or Ext. A 7 & 8 did not clinch the matter in favour of the plaintiff, they had to hold against them. But they forgot in this connection that the property involved was forest waste, situate unenclosed in the midst of still larger waste, where the real principle to be applied was indicated by their Lordships of the

Privy Council in *Lukhi Narain Jagadob v Jodu Nath Deo* ILR 21 Cal. 504 as follows:-

It is of frequent occurrence, especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line upon the evidence which is laid before it. The ordinary rule regarding the onus incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants; and it is the duty of the defendant, as much as the plaintiff, to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would be incapable of judicial settlement.

The fact that there are a few cashewnut trees in the property does not, in my judgment, affect the matter. Judged from this stand point it seems to me that the plaintiffs have established their title to the southern portion of the plot A in Ext. C 1 plan and measuring 81 x 38 six feet koles.

6. As regards possession there is no reason to disbelieve P.W. 1 the kariasthan of the plaintiff when he spoke to it. Anyhow there are the observations of P.W. 2 commissioner in O.S. 85 of 1946 in Ext. A 8 in support of the plaintiff The 1st defendant's case as to theft of crops, though pending suit, to a certain extent probabalises the case of the plaintiff as to their enjoyment of the property.

7. Learned Counsel for the 2nd respondent wanted to raise the question that the survey and settlement of the boundary line between S. No. 74/1 on the north and S. Nos. 78/1 and 6 on the south must be deemed to have concluded the relative rights of the parties in respect of the properties covered by the survey numbers and that the plaintiff Manakkal must be held to be precluded from agitating any question of their rights in S. No. 74/1. But this matter was not raised in the courts below and depending as it did on a large number of facts, I declined to go into it. I therefore allow the appeals and grant a decree in O.S. 612 of 1950 in favour of the plaintiff therein to the extent of declaring their title to and possession of the southern portion of the plot A in Ext. C 1 plan and measuring 81 x 38 six feet koles, the rest of the plaint claim being dismissed. The suit O.S. 142 of 1952 will stand dismissed. Ext. C 1 plan will be appended to the decree. In the circumstances of the case both parties will suffer their costs throughout.