

(1938) 09 MAD CK 0028
In the Madras High Court

Tallapragada Achutharamayya

APPELLANT

Vs

Ayyagari Soorappayya and Another

RESPONDENT

Date of Decision : 09-09-1938

Acts Referred:

Citation : AIR 1939 Mad 61 : (1938) 48 LW 595 : (1938) 2 MLJ 894

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—These appeals arise out of a decision of the survey officer under the Madras Survey and Boundaries Act. Second Appeal No. 537 relates to a suit in which the appellant was the plaintiff and sued for possession on the basis of a favourable decision of the survey officers; whereas S.A. No. 538 relates to O.S. No. 154 in which the respondent who was an unsuccessful claimant before the survey officer sued to set aside the survey officer's decision. The decision of the survey officer in appeal is contained in Ex. F, dated 31st October, 1924. According to the appellant the relevant survey notification is Ex. S, dated 22nd November, 1926. But the learned Subordinate Judge has accepted the respondent's contention that limitation began to run only from a subsequent survey notification, Ex. X, dated 21st April, 1931. If this contention is wrong, the respondent's suit O.S. No. 154 is clearly time barred with reference to the terms of Section 14 of the Madras Survey and Boundaries Act. The learned Subordinate Judge gives no reasons for holding that the notification with which we are concerned is Ex. X and not Ex. S. The appellant adduced in evidence his own application to the survey authorities for a copy of the final notification relating to the survey of the village with which we are concerned, in response to which application a copy of the notification (Ex. S) was issued "to him. This notification clearly purports to be a notification u/s 13 of the Act that the survey of certain villages including the suit village is complete. Ex. X on which the respondent relies purports to be a notification that the "survey of sub-divisions consequent on the re-settlement miscellaneous inspection" of certain villages including the suit village is complete. The learned Munsif points out that there is

no evidence whatever that the delimitation of the boundaries which formed the subject of the complaint to the survey officer was part of the post survey operations terminating with Ex. X and not part of the main survey terminating with Ex. Section The fact that the survey department itself regarded Ex. S as the final notification terminating the survey is shown by the copy application. I have myself no doubt that Ex. S is the final notification and that Ex. X relates to what is in effect a supplemental survey terminated by a supplemental final notification. Except in so far as it relates to boundaries changed in the course of the supplemental survey, I do not see how Ex. X can be taken to extend the time for filing a suit to contest the correctness of the boundaries laid down in the main survey which had been terminated by the statutory notification of 1926. It follows that the respondent's suit O.S. No. 154 of 1931 was barred by limitation and was rightly dismissed by the trial Court. S.A. No. 538 of 1934 must therefore be allowed with costs throughout.

2. The other appeal - the appeal from the decision in the appellant's suit - raises questions of greater difficulty. Granting that the decision of the survey officer finding title to the disputed land in favour of the plaintiff concludes the question of title as on that date, the question remains whether the respondent can or cannot resist the plaintiff's suit based on the survey officer's order by proving adverse possession. There is a definite plea of adverse possession in the respondent's written statement and though no specific issue has been raised, the question of possession has been gone into in detail by both the Courts and I think the respondent would be entitled to rely on his plea, if it could be established by good evidence. Now quite clearly no plea of adverse possession would be of any avail unless he could tack on to more recent possession his alleged hostile possession anterior to the survey officer's order. Whether this is legally permissible or not, is a question on which there has been a good deal of difference of opinion. The Full Bench, in the case of Muthirulandi Poosari and Another Vs. Muthandi Poosari and Others, , held that when there was a dispute about a boundary which had been the subject of an order by the survey officer u/s 11 of Act IV of 1897, that order, if not set aside in appeal or by a suit as contemplated in the Act, was conclusive as to the rights of the parties and none the less so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession. Now in the face of this decision, it is clearly not open to the respondent who was found by the survey officer not to be entitled to the land in dispute, to urge in reply to the plaintiff's suit based on the survey officer's decision that that decision was wrong. Consequently he cannot contend that he had a title, whether documentary or by virtue of adverse possession, at the time when the adverse order of the survey officer was passed. I think that it would also follow from the Full Bench decision that if the survey officer's order gave a definite finding that the respondent was at the time of his order out of possession and that possession lay with the appellant, it would not be open to the respondent to urge that the finding is wrong and to base a claim on adverse possession continuing from a time anterior

to the survey officer's order. But when the order of the survey officer is based on evidence of title and does not purport to give a finding regarding actual physical possession at the time of the order, or when it finds that the unsuccessful claimant was in physical possession but was in possession only as a trespasser, can the unsuccessful claimant in a subsequent proceeding urge by way of defence that he has acquired title by adverse possession tacking together hostile possession anterior to and subsequent to the survey officer's order? On this question there is a definite ruling of a Bench of this Court in *Azhagaperumal Pillai v. Rasa Pillai* (1931) 62 M.L.J. 399 to the effect that the decision of the survey officer, not purporting to record any definite finding or actual possession, does not ipso facto dispossess any party nor make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at its date. I may point out that the head note of this decision leaves out the qualification regarding the absence from the survey officer's decision of any adverse finding regarding actual possession. This omission is unfortunate and possibly has tended to a misunderstanding of the decision itself. Now this decision has been considered in two subsequent rulings. The case of *Ramamurti v. Gajapatiraju* (1932) 64 M.L.J. 361 : ILR 1932 Mad. 366 is a decision by Wallace, J., in a Letters Patent Appeal on a difference of opinion between Waller, J. and Krishnan Pandalai, J., of whom the former took the view that the decision in *Azhagaperumal Pillai v. Rasa Pillai* (1931) 62 M.L.J. 399 was wrong whereas the latter considered that it was right. Wallace, J., dissented from the Bench decision and held that it was contrary to the Full Bench ruling in *Muthirulandi Poosari and Another Vs. Muthandi Poosari and Others*, , the plain meaning of which was that the decision of the survey officer is conclusive on the question, of possession. This decision has been followed by Butler, J., in (*Penumetcha*) *Seetharama Raju Vs. Kalidindi Narayanaraju and Another*, . Now with the greatest respect to the learned Judges who decided these cases, it does seem to me that they have overlooked the qualification of the ruling of the Bench in *Azhagaperumal Pillai v. Rasa Pillai* (1931) 62 M.L.J. 399 with reference to the absence from the survey officer's decision of any finding regarding actual possession. Accepting the rule laid down by the Full Bench that the survey officer's decision is conclusive as to the rights of parties none the less because the unsuccessful party is not ousted from possession, it seems to me apparent that the survey officer's decision can only be final to the extent to which it purports to decide the rights of the parties. If it decides that the unsuccessful claimant is out of possession, then in my opinion it would not be open to that party, in the absence of a successful suit, as contemplated by the Act, to contend in subsequent proceedings that the survey officer was wrong and that he was actually in possession. The survey officer having decided that the unsuccessful claimant had no title, it would not be open to that party in subsequent proceedings to contend that he had on the date of the survey officer's order acquired title by adverse possession. But if the survey officer, merely on a consideration of the documentary evidence of ownership, gives an adverse finding regarding title, I see no reason why that finding should bar the

unsuccessful claimant from contending in subsequent proceedings that at the time of the survey officer's order he had trespassed successfully on the land in question and that his unlawful possession continued and was openly hostile to the real owner for the period necessary, taking into consideration possession anterior to and posterior to the survey officer's order, for establishing title by adverse possession. Similarly, if the survey officer goes into the facts, finds that the unsuccessful claimant is in possession but that his possession is unlawful and lays down the boundary in accordance with his finding as to title, I see nothing in the survey officer's order to debar the unsuccessful party from asserting in a subsequent proceeding that his unlawful and hostile possession recognised to exist in the survey officer's order continued for such a period as to justify the plea of title by adverse possession in a later suit. In my mind, the governing factor must be what the survey officer actually decided. In the light of the Full Bench ruling the unsuccessful claimant cannot go behind that decision, but I see no reason why he should not in subsequent proceedings put forward any claim which is not inconsistent with that decision.

3. If this view of the law is correct, it follows that it is open to the respondent in the suit brought by the appellant to establish title by adverse possession if he can prove continuous possession both before and after the survey officer's order for the statutory period, always provided that the survey officer's order does not give a definite finding regarding the factum of possession at the time of his order which would bar the tacking of pre-survey possession which is necessary to complete the full period. The original order of the survey officer in this case is Ex. D. The finding regarding possession there is that the appellant and the respondent had originally a common tenant and that it was only after 1918 that it was possible for the respondent to assert possession adverse to the appellant. There is no clear finding one way or the other on the question of who was in physical possession at or about the time of the survey officer's order, which is based on documentary title. The order in appeal proceeds entirely on the documentary title together with evidence of payment of kist and does not refer to physical possession at the time of the order in question. I must hold that there is nothing in either of these orders to bar the respondent from contending that he was at that time in actual enjoyment of the land in a manner hostile to the appellant.

4. Now, the two courts below have differed in their views of the evidence of actual enjoyment of the land. Unfortunately the learned Subordinate Judge's finding which would ordinarily be binding on me as a finding of fact is vitiated by the totally unjustifiable procedure which he has adopted. In paragraph 9 of his judgment he states that he made a local inspection in the presence of vakils and parties. That is of course a quite unobjectionable procedure; in fact Order 18, Rule 18, Civil Procedure Code, expressly provides for it. After making certain observations, about what he saw, he goes on to say:

At the time of the local inspection a number of persons on both sides flocked

there and when I asked them at the request of both sides vakils, every one of them including very old persons has stated that it is a joint well and that the 1st defendant Soorappayya and other sharers also have been using it. There is not a single individual who supported the theory of this plaintiff and that also completely probalises what is contained in the old documents of 1852 Exs. I and II.

5. Then he goes on to make remarks on the inability of the plaintiff - apparently by the well-side still - to answer the learned Judge's questions about the land, the trees and the well. Then he sets forth the views of the respondents' vakils, who is described as a gentleman with a lot of experience as to the evidentiary value of certain trees and the age thereof and he comments on the absence of any explanation either by the appellant's vakils or by the appellant or by his people about this important piece of evidence on behalf of the respondent.

6. Now it is, I think, unnecessary to quote any authority for the view that this is emphatically not the way in which a case should be tried and that these are not the materials upon which a judgment should be based. When the Judge welcomes the presence of crowds of anonymous villagers and indulges in informal enquiries amongst the people in those crowds for the purpose of obtaining guidance in deciding the rights of the parties and treats the result of those enquiries as evidence in the case, there is an end of all judicial procedure. A judgment must be based on evidence which is admissible in law. There is no objection to a Judge viewing the place in dispute in order to enable him to visualise the locality and to appreciate the evidence before him. But there is absolutely no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and inquiries of all and sundry regarding their views of the rights of the parties with the object of founding a judgment on what he has heard. It is of, course argued for the respondent that the learned Judge has also considered the admissible evidence and that this irregular procedure should not be taken to vitiate his judgment. Unfortunately it is not possible to accept that contention. The learned Judge appears to have attached importance to this well-side inquiry, to have formed an opinion as a result of what he heard therein and to have considered the admissible evidence in the light of the opinion which he had already formed. One cannot too strongly deprecate this procedure; and clearly no finding of fact based on such materials and achieved by such a procedure can be supported in second appeal.

7. In the result therefore Second Appeal No. 537 is allowed and the appeal is remanded to the lower appellate Court for disposal after recording a definite finding on the question whether the defendants has established title by adverse possession, taking into consideration any evidence which may be available regarding possession anterior to the survey officer's order. Appeals Nos. 47 and 32 (covered by S.A. No. 537) of 1932 will accordingly be re-heard by the lower appellate Court. The costs of this second appeal will abide by the result. The court-fee will be refunded.

8. It is pointed out that the plaintiff's title has been established under the survey order only to the extent of 45 cents and that as regards the balance, there is an adverse decision by the trial Court against which the appellant preferred an appeal to the lower appellate Court. I give no finding one way or other as to the rights of the parties in this excess over the 45 cents found to be within the appellant's holding by the survey officer. Obviously the legal position regarding this excess area is quite different from the position regarding that portion which has been included in the appellant's holding by the survey officer's decision. As to the excess area the plaintiff clearly has to establish his title and the lower appellate Court must give a finding thereon.

9. Leave to appeal is refused.