
(1911) 01 MAD CK 0018
In the Madras High Court

Thandavaraya Odayan

APPELLANT

Vs

Narayana Goundan and Others

RESPONDENT

Date of Decision : 26-01-1911

Acts Referred:

Citation : 9 Ind. Cas. 505

Hon'ble Judges : Wallis, J;Sankaran Nair, J

Bench : Division Bench

Judgement

1. The property was allotted to the second defendant at the partition of 1878. The District Judge finds that the third defendant, who was also a

party to the partition took possession or remained in possession after the partition. The presumption is that he held possession after the portion on

behalf of his minor nephew, the second defendant. If so, it is on him to show when his possession became adverse. The District Judge has not

considered this aspect of the case. Before deciding the case, we must ask the District Judge to find, on the evidence on record, whether the third

defendant has been in adverse possession of the second defendant's portion for more than the statutory period. The finding should be submitted

within six weeks from this date, and seven days will be allowed for filing memorandum of objections.

2. In compliance with the above judgment the District Judge submitted the following

Finding

3. In Second Appeal No. 322 of 1909 I have been directed to find whether the 3rd defendant has been in adverse possession of the 2nd

defendant's portion of the house in dispute for more than the statutory period.

In the first sentence of their judgment their Lordships say that the property was allotted to the 2nd defendant at the partition of 1878. I am afraid that their Lordships were led to make this observation in consequence of two clerical errors in para. 2 of my judgment. The first mistake is at line 20 on page 18 of the printed paper, and the second mistake is at line 27 of the same page. At line 20 for ""The evidence shows that 1st and 2nd"" please read The evidence shows that 1st and 3rd"" and at line 27 for ""1st and 2nd defendants"" please read, ""1st and 3rd defendants."" I regret having made the mistakes. That they are clerical errors is clear from the fact that in the very same paragraph I have stated that at the time of partition, the 2nd defendant was living at Kandiyandai with his grandmother, and that it is clear from the evidence that the 2nd defendant has all along been executed from possession of any portion of the house.

Both the District Munsif and this Court have found that, at the time of partition, the 2nd defendant was given no share in the family house, including the site (or backyard to the south of it). At the time of partition the 2nd defendant was 12 years old (see the evidence of 1st defendant at line 22, page 26 of the printed paper). Plaintiff also admits (line 32 at page 21 of the printed paper) that 2nd defendant was 35 years old in January 1908.

Thus, on plaintiff's own admission 2nd defendant attained majority in 1691. If 2nd defendant desired a share in the family house he could have filed a suit for partition within 3 years after he attained majority, i.e., before 1894. As he did not institute a suit, his right to any share in the family house was extinguished in 1895. I prefer, however, the evidence of the 1st defendant, who is an uncle of the 2nd defendant, and, therefore, more likely to know the correct age of 2nd defendant than the plaintiff. The 1st defendant says that the 2nd defendant was 12 years old at the time of the partition. Therefore, 2nd defendant attained majority in 1884, and he should have instituted a suit not later than 1890. As he did not institute a suit his title to a share in the family house was extinguished in 1891. Now that I have pointed out that the opening remark of their Lordships was, in all probability, based upon two mistakes in my judgment, I doubt if they will still hold that the 3rd defendant held possession, after the partition, on behalf of the 2nd defendant. Granting, however, that he did hold possession on behalf of the 2nd defendant it cannot I, think, be denied that the

3rd defendant's possession became adverse in 1890, when the 2nd defendant attained majority. The evidence shows that for 16 years after he attained majority the 2nd defendant did nothing. Then he and 1st defendant sold the house in dispute by Exhibit C to the plaintiff. This sale-deed is itself evidence that the house did not belong to the 2nd defendant's branch of the family alone, for, if it did, there was no necessity for the 1st defendant to execute the sale-deed. My finding is that 2nd defendant having been excluded from the partition in 1878, 3rd defendant's possession became adverse from that date, and that even if it is presumed that the 3rd defendant held possession on behalf of the 2nd defendant his possession became adverse in 1884.

4. This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court, the Court delivered the following Judgment.

5. We accept the finding and dismiss the Second Appeal with costs.