

## Gnanaprakasam vs Smitha And Ors. on 9 August, 1999

### Equivalent citations: (1999)3MLJ778

#### JUDGMENT

S.S. Subramani, J.

1. In both the above second appeals, plaintiff in the respective suits are the appellants. O.S. No. 251 of 1996 was filed by the appellant in S.A. No. 1772 of 1998. O.S. No. 227 of 1996 was filed by the appellant in S.A. No. 136 of 1999. Both the suits were filed in District Munsif's Court, Padmanabhapuram.

2. Material averments of the case may be summarised thus:

Under Exs.A-1 to A-4, plaintiff, in O.S. No. 251 of 1996 purchased the plaint schedule property having an extent of 8 acres and 80 cents in Survey Nos. 113/2 and 115/2 of Thirparappu Village, Kalkulam Taluk. Those documents were executed by none other than the defendants in that suit. All these properties originally belonged to one George and Soosammal George, and they sold the property to one Sankaran, first defendant in that suit. Sankaran executed Exs.A-1 to A-4 in favour of plaintiffs who claim to be in possession of the plaint schedule property. The reason for filing the suit was, there is no separating boundary between the property purchased by them and the remaining property retained by their vendor. They wanted fixation of boundary and also for a permanent injunction restraining the defendants from interfering with their possession and enjoyment of the suit property.

3. In the written statement filed by defendants, they contended that plaintiffs therein are not entitled to the property. It is their case that the entire property in Survey Nos. 113/2 and 115/2 is having only an area of 23 acres and 95 cents out of which they have already sold 23 acres and 60 cents in favour of Satyadas Estate, and what remains is only 30 cents. (1st defendant sold another 5 cents also). Plaintiffs who claim 8 acres and 60 cents are not entitled to have the boundaries put up on the basis of Exs.A-1 to A-4. They prayed for dismissal of the suit.

4. O.S. No. 227 of 1996 was tiled by second defendant in O.S. No. 251 of 1996 while she was a minor. Pending suit, she attained majority, and she has been recorded as such. According to her, she is in possession of the very same property on the basis of the sale deed taken in her name in 1981. She is in absolute possession. She wants to restrain the defendants (who are plaintiffs in the other suit, viz O.S. No. 251 of 1996) from interfering with her possession.

5. Both the above suits were clubbed together, and evidence was taken in O.S. No. 251 of 1996. Exs.A-1 to A-23 were marked on the side of plaintiffs and Ex.B-1 was marked on the side of

defendants. Commissioner was also deputed to demarcate the line or boundary after identifying the plaintiff schedule property. The Commissioner's report has been marked as Ex.C-1 and plan as Ex.C-2. First plaintiff Gnanapraksam examined himself as P.W.I and another witness as P.W.2. No oral evidence was adduced on the side of defendants.

6. The trial court, after considering the entire evidence, came to the conclusion that the plaintiffs in O.S. No. 251 of 1996 are entitled for demarcation of boundaries as found by the Commissioner. One half of the expenses for putting up the boundaries was also directed to be recovered from first defendant. The trial court found that the defendants cannot dispute the title of the plaintiffs when they themselves were parties to the document. The trial court found that the contention that 23 acres and 60 cents were sold and only 30 cents remains cannot be accepted when the property covered under Ex.B-1 has not been identified by defendants. Believing the evidence of P.W.I, the trial court found that the plaintiffs are in possession under Exs. A-1 to A-4, and they are entitled to have the boundaries fixed as prayed for.

7. The suit filed by defendants as O.S. No. 227 of 1996 was dismissed on the ground that they have not adduced any evidence, either oral or documentary, and the cause of action has not been proved.

8. Against the said judgment, second defendant in O.S. No. 251 of 1996 who is the plaintiff in O.S. No. 227 of 1996, preferred A.S. Nos. 179 and 180 of 1997, on the file of Sub Court, Padmanabhapuram. Before the lower appellate court, defendants filed additional documents and they were marked as Exs.B-22 to B-12. Those documents are the various sale deeds referred to in Ex.B-1 non-encumbrance certificate. The lower appellate court reconsidered the entire evidence and held that on the basis of Exs.B-2 to B-12, Plaintiffs cannot have title to 8 acres and 60 cents, and consequently dismissed the suit. A.S. No. 180 of 1997 which arose from O.S. No. 227 of 1996 was also dismissed on the ground that there was no evidence in that case.

9. It is against these judgments, the above second appeals have been preferred by the respective plaintiffs.

10. Though several questions of law have been raised in the memorandum of appeal in both the appeals, learned senior counsel for appellant submitted that only the following substantial questions of law arise for consideration in these second appeals:

(1) Whether the suit for fixation of boundaries is maintainable? and (2) Whether the defendants are estopped from putting forward a contention as is now raised in the written statement?

11. In Second Appeal No. 136 of 1999, learned Counsel for appellant admitted that no evidence has been let in, either oral or documentary. In a suit for injunction, it is the duty of the plaintiff to prove the cause of action pleaded, and also substantiate that he is entitled to the reliefs prayed for therein. When the plaintiff has not adduced any evidence to substantiate the pleadings, the trial court dismissed the suit, and the findings of the trial court were confirmed by the lower appellate court in appeal. In such a case, I do not think any substantial question of law arises, warranting interference

under Section 100, C.P.C. S.A. No. 136 of 1999 is, therefore, dismissed. Connected C.R.P., viz., C.M.P. No. 1808 of 1999 for interim injunction is also dismissed.

12. In Second Appeal No. 1772 of 1998, appellant there in wanted to put up a boundary. It is admitted that the neighbouring property owner is the defendant. Plaintiff herein has alleged that the suit property therein is a rubber estate and rubber plants have been recently planted. In between the rubber plants, there are 800 alpheas trees, and the defendants are attempting to cut and remove the same. It is said that while describing the property sold to plaintiffs, five cents have been excluded and since there was difficulty in demarcating five cents, defendants are trying to interfere with plaintiff's possession. It is further averred that as between the plaintiff's and defendants' property, a boundary has to be put up excluding the five cents Reserved for first defendant. According to him, he is entitled to enjoy the property which has been purchased by him, and he is also entitled to prevent the defendants from committing acts of waste and also from committing trespass upon his property.

13. The question whether a suit for putting up boundary is maintainable before a civil court, came up for consideration before the Honourable Supreme Court in the decision reported in E. Achuthan Nair v. P. Narayanan Nair and Anr. , wherein in paragraph 2, it has been held thus:

The only question argued before us by the learned Counsel for the appellant was that a suit for demarcating the boundary of a property was not maintainable when the plaintiff himself was uncertain about the precise boundary. He placed reliance upon a judgment of the Bombay High Court in *Kavasji Jameshaiji v. Hormasji Nassarnahishet* and a judgment of a learned single Judge of the Kerala High Court in *Rayappan v. Yagappan Nadar*. In these two cases, the learned Judges purported to follow the statement of Lord Keeper Henley in *Wake v. Conyers* decided in 1759 where he had said "the court has, in my opinion (and if parties are not satisfied, they have resort elsewhere), no power to fix the boundaries of legal estates, unless some equity is super induced by the act of the 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". We do not think that we will be justified in importing into our jurisprudence the technicalities of English law and the distinction made by the English courts between legal estates and equitable estates. In India, the question whether a suit is cognizable by a civil court is to be decided with reference to Section 9 of the Civil Procedure Code. If the suit is of a civil nature, the court will have jurisdiction to try the suit unless it is either expressly or impliedly barred. A dispute "regarding identification of boundary between two adjacent land owners is certainly a dispute of a civil nature and it is not barred either expressly or impliedly ....

The aforesaid judgment of the Honourable Supreme Court was against the judgment of a Division Bench of the Kerala High Court reported in *P. Narayanan Nair v. S. Achuthan Nair and Anr.* 1973 K.L. T. 299. Their Lordships of the Honourable Supreme Court confirmed the view taken by the Division Bench, and the relevant

portion of the judgment rendered by the Judges of the Kerala High Court was also incorporated in the judgment of the Honourable Supreme Court. Relevant portion reads thus:

We can also state from our experience at the bar that this type of suits are not unfamiliar to this part of our country. In fact in several areas of the State, suits for determination of boundaries when the boundaries between the holdings are disputed are a matter of common occurrence and the maintainability of such suits, has not, till recently, been doubted.... It is not necessary to further go into this question since we see no warrant to follow the English law based, as it is upon its peculiar historical background. The question in the Indian context is not whether any equitable consideration has to be shown before a plaintiff in a suit gets the relief, and, therefore, what was said in the decisions of the English courts on this particular form of action may not have relevance here. As we pointed out earlier in this judgment, the only question that may be relevant to the issue in a suit of this nature in the court in India is whether the suit is one of a civil nature. Once it is shown that it is, no other question would arise and the courts will have to entertain the suit and try it on the merits. The decision in *Kavasji v. Hermasji*, which has also been referred to by Varadaraja Iyengar, J. in *Rayappan v. Yagappan Nadar*, has simply purported to follow the English cases without considering how far the law should be applicable to this country. We, therefore, are of the view that the decision *Rayappan v. Yagappan Nadar*, has not laid down the correct law and has, therefore, to be overruled. Justice Viswanatha Iyer who agreed with Justice Poti but added a brief note of his own, stated:

Disputes as regard the location of boundary separating adjacent lands of different owners may arise under ever so many circumstances. One common instance is where portions of survey field are transferred or allotted to different persons without mentioning either the side measurements or other necessary measurements to fix the geometrical shape of the plot at the spot. The area and location alone may have been shown in the transfer deed or the partition deed. Without changing the location, the area conveyed or allotted may be sought to be located in one or more alternative geometrical shape by one owner. This may clash with the claim of the other person to have his area located in a particular geometrical shape. Again any one party may wish to have the limits of the area belonging to him demarcated so that he may either enclose the area to prevent trespass or to exercise acts of possession without encroaching into the neighbouring plot. If the other party on demand does not co-operate, a cause of action arises to have the limits of his property determined through court. Again the property conveyed or allotted may have been described only with reference to neighbouring properties. Those properties may or may not have been limited in extent and shape to a survey field. In that case, a fixation of the boundary of those properties may be necessary to fix the boundaries of the properties conveyed or allotted. If there is no co-operation in doing that, that may result in a dispute. These instances are only illustrative and not exhaustives. All these disputes

are disputes of a civil nature and they can form the subject matter of a suit under Section 9, C.P.C. There is no express or implied bar under any other law....

According to me, whenever there is a dispute between two parties as regards the location of a boundary separating their neighbouring properties and if on a demand to co-operate in fixing the boundary, it is not given, a suit will lie at the instance of the demanding party. So, I agree with my learned brother that the decision in Rayappan v. Yagappan Nadar is not correct and had to be overruled.

14. In a suit for fixation or demarcation of boundary, the party may not be in a position to seek recovery or seek injunction as a main relief, since that will depend upon the fixation of the dividing line. The main relief in such suit can be one for fixation of boundary and the other reliefs, if necessary, will be consequential or incidental. In view of the law declared by the honourable Supreme Court, the suit for demarcation of boundary is maintainable.

15. The further question that arises for consideration is, whether the plaintiff is entitled to have the boundaries fixed on the basis of Commissioner's report and plan. In the written statement filed by respondent therein, they admit that as per Ex.A-1 to A-4, plaintiff has purchased 8 acres 60 cents. There is also mention about the sale deeds. Sale deed No. 2310 of 1988 for 4 acres in R.S. 115/2, which stands in the name of first plaintiff. Sale deed No. 2311 of 1988 for 1 acre 30 cents in R.S.115/2 stands in the name of second plaintiff. Sale deed dated 15.12.1988 bearing No. 2312 of 88 for 70 cents in R.S. 113/2 stands in the name of 2nd plaintiff. Another sale deed No. 1469 of 89 dated 14.8.1989 for 2 acres, 80 cents, also stands in the name of second plaintiff. These are admitted in paragraph 2 of the written statement in O.S. No. 251 of 1996. A further contention is raised by defendants that even though the document executed covers an area of 8 acres, 60 cents, they have already executed a sale deed under Exs.B-2 to B-12 for 23 acres and 60 cents, and the balance alone was available with them for sale. Therefore, plaintiffs are not entitled to put up boundaries as claimed by them. I do not think that the defendants are entitled to put forward such a contention as against the plaintiffs. Having sold the property to plaintiffs, they are bound by the covenants. In the decision reported in Durga Prasad v. Deep Chand , in paragraph 32 (at page 80), their Lordships have said that:

It is usual to insert a warranty of title in most sale deeds and when that is not done the law imports one....

16. In Deep Chandra v. Sajjad Ali Khan , in paragraph 112, it was held thus (relevant portion):

...Section 55(2), T.P. Act clearly embodies a warranty of title. It is now beyond question upon the authorities that this sub-section embodies an absolute warranty of title. Unless there is an agreement to the contrary, every sale implies this warranty of title....

17. Under Section 55(2) of the Transfer of Property Act, a seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has

power to transfer the same. The section further says that the benefit of the contract shall be annexed to run with the land. In view of this legal position, defendants are estopped from contending that they have not conveyed title to the plaintiff appellant herein. The trial court rightly held that the defendants are estopped from denying the title of the plaintiff. But the lower appellate court did not consider the same and gave importance to Exs.B-2 to B-12, sale deeds executed in favour of Satyadas Estate. Property covered under Exs.B-2 to B-12 has not been identified. At this juncture, learned Counsel for appellants also brought to my notice that in the no encumbrance certificate which the respondents have produced before the trial court as Ex.B-1, the total extent for these survey numbers is far in excess of 23 acres and 95 cents. As per Ex.B-1, an area of 43 acres is included in Survey Nos. 113 and 115. The Lower appellate court held that the defendants are not competent to execute the sale deed for the area claimed by plaintiff. Having executed the sale deed claiming that they are the owners of 8 acres, 60 cents, they cannot be allowed to contend that they are not competent to sell the property. As between the parties to the contract and persons claiming under them, Section 55(2) of the Transfer of Property Act will govern. The warranty of title will stop the defendants from putting forth such a contention.

18. A contention was raised by defendants that Satyadas Estate is in possession of the property, and without them on the party array, the suit cannot be maintained. At the same time, even though they have taken such a contention, in the suit filed by Smitha (D-2 in O.S. No. 251 of 1996) as O.S. No. 227 of 1996, she claimed that she is in possession of the property. From such inconsistent stand, it is clear that the defendants in O.S. No. 251 of 1996 want to withdraw from the commitment which they have made under Exs.A-1 to A-4. The trial court has rightly held that they have not taken a definite contention as to whether they are claiming title over the property by themselves, or whether they are claiming title in some other third party. On going through the written statement filed by defendants in O.S. No. 251 of 1996, I find that they have no definite case, and the pleadings are also very vague.

19. In view of my findings above, the substantial questions of law are found in favour of the appellant in Second Appeal No. 1772 of 1998, and S.A. No. 1772 of 1998 is allowed. The judgment and decree of the lower appellate court in A.S. No. 179 of 1997, on the file of Sub Court, Padmanabhapuram is set aside, and that of the trial court in O.S. No. 251 of 1996 is restored. Plaintiffs in O.S. No. 251 of 1996 are entitled to have the boundary fixed as prayed for and also as directed by the trial court appellant in Second Appeal No. 1772 of 1998 is entitled to his costs in the second appeal.

20. As stated supra, Second Appeal No. 136 of 1999 is dismissed. No costs. Connected C.M.Ps. in both the Second Appeals are closed.

21. Commissioner has filed a memo for additional remuneration. Appellant in S.A. No. 1772 of 1998 is directed to pay an additional remuneration of Rs. 3,000 (Rupees three thousand only) to the Commissioner within four weeks from to-day, and file the voucher before court. Office is directed to post the Contempt Application on 12.8.1999 (Thursday).