

**Bilkish Begum Vs. Govindan**

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**SooperKanoon Citation :** [sooperkanoon.com/1169266](http://sooperkanoon.com/1169266)

**Court :** Chennai

**Decided On :** Dec-10-2013

**Judge :** R.Karuppiah

**Appellant :** Bilkish Begum

**Respondent :** Govindan

**Judgement :**

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:10.12.2013  
CORAM THE HONOURABLE MR.JUSTICE R.KARUPPIAH S.A.Nos.189 & 190 of  
2005 and CMP.Nos.2684/2005 in S.A.No.189/2005 and CMP.No.2685/2005 in  
S.A.No.190/2005 Bilkish Begum ...Appellant in both the appeals Vs. Govindan  
..Respondent in both the appeals PRAYER in S.A.No.189 of 2005: The Second  
Appeal is filed by the Appellant against the judgment and decree made in  
A.S.No.18 of 2003, on the file of Subordinate Court, Tirupattur dated 30.07.2004  
reversing the judgment and decree in O.S.No.79/1999, on the file of the Principal  
District Munsif Court, Ambur, dated 28.03.2002. PRAYER in S.A.No.190 of 2005:  
The Second Appeal is filed by the Appellant against the judgment and decree  
made in A.S.No.67 of 2003, on the file of Subordinate Court, Tirupattur dated  
30.07.2004 reversing the judgment and decree in O.S.No.89/1999, on the file of  
the Principal District Munsif Court, Ambur, dated 28.03.2002. For Appellant : M/s.  
V. Ragavachari in both appeals For Respondent: Mr.G. Jeremiah in both appeals

**JUDGMENT**

Both the second appeals filed by the appellant/plaintiff in O.S.No.79 of 1999 and defendant in O.S.No.89 of 1999 against the common judgment and decree made in A.S.No.18 of 2003 and A.S.No.67 of 2003 wherein reversing the common judgment and decree made in O.S.Nos.79 of 1999 and 89 of 1999 respectively by the trial court.

2. For the sake of convenience, the plaintiff in O.S.No.79 of 1999 and defendant in O.S.No.89 of 1999 referred as appellant and defendant in O.S.No.79 of 1999 and plaintiff in O.S.No.89 of 1999 is referred as respondent hereafter in this appeal.

3. Appellant who is the plaintiff in O.S.No.79/1999 filed a suit for the reliefs of declaration and permanent injunction.

4. Respondent herein who is the plaintiff in O.S.No.89 of 1999 also filed suit for the reliefs of declaration and permanent injunction.

5. Briefly the case of the appellant/plaintiff in O.S.No.79 of 1999 and defendant in O.S.No.89 of 1999 is that the suit properties originally belonged to one Ammayee Ammal by virtue of sale deed dated 01.11.1952 executed by one Chinnathai @ Sundaramal and Egambaram. The above said Ammayee Ammal sold the properties to one Fairoz Basha @ Abdul Mazith on 29.03.1958. The above said Fairoz Basha @ Abdul Mazith had formed a cart track in S.No.578/1 about 0.09 cents and in S.No.578/2 in about 0.04 cents and also put up a well and pumpset about 0.03 cents as a common property. The above said Fairoz Basha @ Abdul Mazith sold the entire properties to one Habeebunisa Saheba on 25.03.1968 and handed over the possession also. The above said Habeebunisa Saheba had sold about 2 acres (i.e.,) portion of the property in S.No.578/1 alone with a right in the cart track in S.No.578/1 and also one-fourth right in common well and other space on 01.06.1972 in favour of Rajeswari Ammal. Again on the same date, Habeebunisa Saheba had sold 0.82 cents in S.No.578/1 and 0.18 cents in S.No.578/2, totally one acre along with right to use the cart track in S.No.578/1 and S.No.578/2 and one fourth right in the common well and other space to the one Gangammal and delivered possession on the same date. On the same date, (i.e.,) on 01.06.1972, Habeebunisa Saheba had also sold about one acre in S.No.578/2 to one Lakshmiammal. The above said Rajeshwari Ammal had sold

her properties purchased on 01.06.1972 to one A.P.Velu on 07.11.1973 and the above said A.P.Velu sold the properties to one Rathinam on 18.04.1998 about 2 acres of land. The above said Rathinam has purchased another portion of the property from Lakshmi Ammal about 1200 cents of land in S.No.578/2 on 29.12.1986. Therefore, both Rathinam and his wife, Gangammal were absolute owners of the suit properties by virtue of sale deeds and they were enjoying the same absolutely and sold the entire properties on 29.10.1995 to the appellant and delivered the possession also. The appellant had applied for grant of patta on 26.12.1997 and the suit properties were also divided and assigned new Survey Numbers as 2/2A2, 2/2B, 2/2C, 2/2D. The respondent attempted to trespass the suit properties on 25.06.1999 and hence, filed the suit in O.S.No.79 of 1999 for the above said reliefs.

6. The respondent herein who is plaintiff in O.S.No.86 of 1999 and defendant in O.S.No.79 of 1999 pleaded in his plaint and written statement and denied the various contentions of appellant. According to the respondent, the suit properties originally belonged to his great grand-mother Chinnathai @ Sundarammal as per sale deed dated 10 Avani 1905, and she was in possession and enjoyment of the properties. Later, she died leaving behind her daughter by name, Rammakal and she was in possession and enjoyment of the properties and died leaving behind her only daughter, Unnamalai Ammal as Legal heir and she was in possession of the properties till her death on 08.07.1996 leaving behind her only son, the respondent herein as legal heir. Therefore, the respondent is in possession of the properties. Further, the respondent's mother Unnamalai Ammal already filed a suit against the Rathinam and his wife for declaration and possession in O.S.No.1427 of 1994 on the file of the District Munsif Court, Tirupattur and it was transferred to the District Munsif Court, Ambur and re-numbered in O.S.No.634 of 1996. After contesting, the said suit was decreed on 29.07.1998 which holds that the Unnamalai Ammal was the owner of the properties. As per the above said decree, Execution Petition was filed as REP No.95/98 for possession through Court and got possession of properties on 05.06.1999. The appellant is not in possession and also the suit filed by appellant is barred by res judicata in view of decree in O.S.No.634 of 1996. Therefore, prayed for dismissal of the suit filed by appellant and grant reliefs as prayed for in his suit.

7. The Trial Court had framed four issues in O.S.No.79 of 1999 and four issues in O.S.No.89 of 1999 and tried both suits in common. On the side of the appellant, examined four witnesses as PW1 to PW4 and marked 10 documents as EX.A1 to Ex.A10. On the side of the respondent, examined three witnesses as DW1 to DW3 and marked six documents as Ex.B1 to Ex.B6.

8. Considering the above said oral and documentary evidence adduced on both sides, the Trial Court granted reliefs as prayed for by the appellant in O.S.No.79 of 1999 and decreed the suit accordingly. The Trial Court dismissed the suit filed by respondent in O.S.No.89 of 1999.

9. Aggrieved over the above said common decree and judgement passed by the Trial Court, the respondent herein filed two first appeals i.e., A.S.Nos. 18 of 2003 and 67 of 2003.

10. The first Appellate Court has considered the submissions of both side and finally, allowed the A.S.No.18 of 2003 filed by respondent and set aside the decree and judgment passed by the Trial Court in O.S.No.79 of 1999 and dismissed the suit. The First Appellate Court also held that since the plaintiff in O.S.No.89 of 1999 got decree in earlier proceedings no need to grant another relief of declaration and therefore, the first appellate court partly allowed the A.S.No.67 of 2003 and granted the relief of permanent injunction alone.

11. Aggrieved over the above said common judgment and decree passed by the first appellate court, appellant herein filed these two second appeals.

12. Both second appeals are admitted on the following substantial questions of law: i) Whether the Lower Appellate Court is right in reversing the decree of the Trial Court without adducing proper reasons for its reversal?. ii) Whether the Lower Appellate Court is right in holding that the suit filed by the appellant is hit by the principles of res judicata contrary to the judgment of the Supreme Court in 2004 A.I.R. SCW5998".

13. Heard the learned counsel for both sides and perused the entire materials available on records.

14. Appellant, who is the plaintiff in O.S.No.79 of 1999 filed a suit for declaration and permanent injunction and the description of the properties stated in the plaint as follows: SCHEDULE OF PROPERTY Vellore District, Ambur Sub District, Vaniyambadi Taluk, Ambur Town, Village S.No.578/1 extent 2.94 acres. S.No.578/2 Extent 1.22 acres with a well in S.No.578/1, 5 H.P. Electric motor and pump set Service connection 78 in 0.03 cents with cart-track formed in 0.09 cents in S.No.578/1 and cart-track formed in 0.04 cents in S.No.578/2 with all coconut and other trees. As per new Sub divisions: T.S.No.2/A2 Extent 0.8171 sq. metres. Kist 5=00 T.S.No.2/B2 Extent 0.0124 sq. metres. Kist 5=00 T.S.No.2/C2 Extent 0.3912 sq. metres. Kist 5=00 T.S.No.2/D2 Extent 0.4105 sq. metres. Kist 5=00 15. The respondent herein filed a separate suit in O.S.No.89 of 1999 seeking the reliefs of declaration and injunction and the suit properties described in the plaint as follows: SCHEDULE OF PROPERTY eh/o/thzpak;gho jhYf;fh. Mk;g{h; rg;/o Mk;g{h; (tHp) jhh;tHp fpuhkj;jpy; ,dk; g[".;ir rh;nt vz; 578 be/ Vf;fh; 8/14f;F jP/U:/14/4/0. ,jpy; bjd;g[wk; Vf;fh; 4/00 nghf tlg[wk; ,Uf;Fk; Vf;fh; 4/14f;F jPh;it U:

7. 4/0 ,jpy; bjd;g[wk;hf Vf;fh; 1/50 nghf tlg[wk; ,Uf;Fk; Vf;fh; 2/64f;F jPh;it 4/10/0 nkw;go ek;ghpy; cs;s br';fy; fl;L fpzW g{uz ghj;jpaKk; ,ij nrh;e; fhy;tha; ghj;jpaKk; ,jw;F jw;ngghija rh;nt tp!;jPhpzK; jPh;it Sl. S.No.Hec. Assessment 1. 2/2A085-40 Rs.4.26 Rkhh; 13 taJs;s 90 fhg;g[ bjd;id kuk; 3 khku';fs; cs;sJ/ 2/ 2/2B001-24 Rs. 0.06-5.H.P nkhl;lhh; gk;g[brl; xd;W cs;sJ/ fpzW cs;sJ/ 3/ 2/2C040-86 Rs.2.04 Rkhh; 13 taJs;s 80 fhg;g[ bjd;id kuk; cs;sJ/ 4/ 2/2D043.TO Rs.2.12 fhypahd g[".;ir epyk;/ 16. The case of the appellant is that the suit properties originally belonged to one Ammayee Ammal by virtue of sale deed dated 01.11.1952 executed by one Chinnathai @ Sundarammal and Egambaram and the above said Ammayee Ammal sold the suit properties to one Fairoz Basha @ Abdul Mazith on 29.03.1958 under Ex.A1. The above said Fairoz Basha @ Abdul Mazith sold the entire properties to one Habeebunisa Saheba on 25.03.1968 under Ex. A2, sale deed. The above said Habeebunisa Saheba sold the properties under Exs.A3 to A5 in favour of R. Gangammal, M. Lakshmi and S. Rajeshwari Ammal on the same date, i.e., on 01.06.1972. The above said Rajeshwari Ammal sold the properties purchased by her to one A.P. Velu on 07.11.1973 under Ex. A6 sale deed and the above said A.P.Velu sold the above said properties to one Rathinam on 18.04.1988 under Ex. A8. The Lakshmi Ammal also sold her properties to the

same Rathinam on 29.12.1986 under Ex. A7. Accordingly both the above said Rathinam and his wife, Gangammal have absolute right over the suit properties and on 29.10.1995 sold the entire suit properties to the appellant under Ex.A9, sale deed and the appellant has also applied for grant of patta on 26.12.1997 and also the suit property were divided and assigned new survey numbers under Ex.A10 and therefore, the plaintiffs claimed title over the suit properties mentioned in the above said suit in O.S.No.79 of 1999.

17. The respondent has filed the suit in O.S.No.86 of 1999 and contended that the suit properties originally belonged to his great grand mother, Chinnathai @ Sundarammal and as per sale deed dated 10th of Tamil month Avani, 1905 and after her death, her only daughter namely, Rammakal entitled to the properties and the above said Rammakal died leaving behind her only daughter, Unnamalai Ammal and she died on 08.07.1996. After her death, the respondent herein is entitled to the properties as the only legal heir of his mother, Unnamalai Ammal.

18. Further, the learned counsel appearing for for the appellant has submitted that the respondent's mother, Unnamalai Ammal already filed the suit in O.S.No.634 of 1996 as against the Rathinam and his wife, Gangammal for declaration and possession over the suit properties and the suit was decreed on 29.07.1998. As per the above said decree, Execution Petition was filed in REP.No.95/98 and delivery was given on 05.06.1999 To prove the same, the respondent has filed Exs.B1 to B4 copy of plaint, copy of judgment, receipt for possession and delivery warrant.

19. A careful perusal of the description of the properties mentioned in both the suits revealed that there are various differences in survey number, extent, boundaries. It is also revealed that the total extent of old survey No.178 is 8 acres 14 cents. Both the appellant and respondent claimed right over the portion of the properties in the total extent (i.e.,) appellant claimed total extent of two acres and ninety four cents but the respondent claimed total extent of two acres and sixty four cents. Therefore, both the parties ought to have taken steps to appoint the Commissioner to identify the properties claimed by both sides with the title deeds and decree and judgment was produced by both sides. But both sides have not

taken any steps to identify the properties claimed by both sides before courts of law.

20. Anyhow in the interest of justice, this Court is of the view that the identity of the properties claimed by both parties to be measured by the Commissioner with Surveyor as per survey records and also as per the documents relied on by both sides. Without the above said particulars, both the courts below have wrongly given the findings. Therefore, the findings of both the courts below are not correct.

21. In the above said circumstances, it is absolutely necessary to set aside the decrees and judgments passed by both the trial court and first appellate court and remitted back the matter to the first appellate court for the appointment of the Commissioner so as to identify the properties in dispute with the help of Surveyor as per survey records and also the documents relied on by both sides and then, after giving opportunity to both sides, pronounced judgment by the first appellate court.

22. In view of the above said findings, the common judgments and decrees passed by both the courts below are to be set aside and remitted back to the first appellate court for appointment of Commissioner to identify the suit properties in both suits with the help of Surveyor and on the basis of survey records, documents relied on by both sides and then pronounced judgment after giving an opportunity to both sides and answered the substantial questions of law accordingly.

23. In the result, both the second appeals are allowed and the judgments and decrees passed by both the courts below are set aside and both appeals (i.e.,) A.S.No.18 of 2003 and A.S.No.67 of 2003 are remitted back to the first appellate court for appointment of R.KARUPPIAH,J gv Commissioner to identify the suit properties in both suits with the help of Surveyor and as per survey records and also the documents relied on by both sides, filed a report and plan and then, the first appellate court is directed to pronounce judgment after giving sufficient opportunity to both sides. Both sides should bear the expenses equally. The first appellate court is also directed to dispose of the appeals within a period of six months from the date of receipt of copy of this order. Consequently, connected Civil Miscellaneous Petitions are closed. No order as to costs. 10.12.2013 Index

:Yes/No Internet: Yes/No gv To 1. The Subordinate Court, Tirupattur.

2. The Principal District Munsif Court, Ambur. S.A.Nos.189 & 190 of 2005 and CMP.Nos.2684/2005 in S.A.No.189/2005 and CMP.No.2685/2005 in S.A.No.190/2005

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