



S.A.No.555 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.03.2023

CORAM

**THE HONOURABLE Mr. JUSTICE V.LAKSHMINARAYANAN**

**S.A.No.555 of 2006**

1. Babu

2. Dayalan (Deceased)

3. D.Chandra

4. D.Muthukumaran

5. Sumitha

...Appellants

(Appellants 3 to 5 brought on record as LR's of the deceased 2<sup>nd</sup> appellant vide order of the Court dated 25.11.2014 in M.P.Nos. 1 to 3 of 2014 in S.A.No.555 of 2006).

Vs.

1. Rangadass Naidu

2. Raghu Naidu

...Respondents



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**Prayer:** Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the I Additional Subordinate Court, Cuddalore dated 14.10.2005 in A.S.No.28 of 2005 confirming the Judgement and Decree of the Additional District Munsif Court, Cuddalore dated 30.09.2004 in O.S.No.158 of 2004.

For Appellants : Mr. G.R.M.Palaniappan

For Respondents : Mr. D.Baskar

### **JUDGMENT**

The plaintiffs in O.S.No.109 of 2001 on the file of the Subordinate Court, Cuddalore, which was re-numbered due to enhancement of pecuniary jurisdiction as O.S.No.158 of 2004, on the file of the Additional District Munsif, Cuddalore, are the appellants in this Second Appeal. The parties are referred to in the same rank as before the Trial Court.



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2. The plaintiffs sought for the relief of declaration, permanent injunction and recovery of damages. The case of the plaintiffs is that there were two brothers, namely, Narayanasamy Naidu and Venkatasamy Naidu, were the owners of the schedule mentioned properties. The brothers partitioned several properties amongst themselves and kept apart the suit property to be enjoyed in common. This was by way of a registered partition deed dated 15.09.1936, which is marked as Ex.B.1. The suit schedule property is marked as D-Schedule property in the said partition deed.

3. The said Narayanasamy Naidu had four children, namely, Dhandapani, Srinivasalu, Jayaraman and Ramanujam. Dhandapani had two daughters, one of whom is called Delli Bai. The said Delli Bai sold the property on 01.09.1988 in favour of Raghu Naidu who is the 2<sup>nd</sup> defendant. Another son of Narayanasamy Naidu, one Jayaraman settled his undivided 10 cents in favour of his son Subramania Naidu on 23.12.1980. The said Subramania Naidu in turn sold the property in



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favour of one Neelathachi Ammal on 09.06.1983. The said Neelathachi Ammal inturn sold the property to Raghu Naidu on 04.03.1998. The 1<sup>st</sup> defendant, Rangadoss Naidu purchased the property directly from Srinivasalu Naidu by way of sale deed dated 24.11.1983. The plaintiffs claimed adverse possession as the D-Schedule property in the partition deed, which is the subject matter of the present suit, was not included in the plaint schedule property in O.S.No.205 of 1964. The said suit was a partition suit filed amongst the legal heirs of the said Narayanasamy Naidu.

4. Now we have to move to the other branch, namely, the branch through Venkatasamy Naidu. The head of this branch is one Venkatasamy Naidu and he had three sons, namely, Perumal Naidu, Duraisamy Naidu and Bashyam Naidu (the defendants claimed that his name was not Srinivasalu Naidu but was Bashyam Naidu). There has been no litigation in the family of Venkatasamy Naidu and the plaintiffs on the death of Perumal Naidu claimed that since Venkatasamy Naidu had enjoyed the property exclusively, they



succeeded to the estate through their father Perumal Naidu. Therefore, by ouster they are entitled to the entire 80 cents.

5. On a consideration of the oral and documentary evidence the learned Additional District Munsif, Cuddalore, had dismissed the suit. This Judgment and Decree was taken on appeal by the appellants herein to the I Additional Subordinate Court, Cuddalore in A.S.No.28 of 2005. The learned I Additional Subordinate Court, Cuddalore concurred with the finding of the Trial Court and dismissed the appeal. Challenging the same the plaintiffs are the appellants before this Court

6. This Second Appeal was admitted on the following Substantial Questions of Law:

*“1. When the appellants had proved their long, open uninterrupted and hostile possession to the exclusion of the respondents and their predecessors in title for over the statutory period, Whether the courts below are correct in law in rejecting the claim based on Ouster, merely because*



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*such right was claimed under the nomenclature of prescriptive title?*

*2. When it is axiomatic in law that the mofussil pleadings cannot be viewed with ritualistic rigour, Whether the use of wrong phrase, would disentitle the appellants from Claiming a right to which they are otherwise entitled to?*

*3. Whether the lower appellate Court is correct in law in summarily rejecting the document produced at the appellate stage, in contravention of the provisions of Order 41 Rule 27 of the Code of Civil Procedure?*

7. I have carefully considered the arguments of the learned counsels appearing for the appellants and the respondents.

8. The claim of ouster has to be proved strictly, especially when the plaintiffs have to come forward with a case that they are co-owners. Despite being aware of being excluded from joint family property, the



defendants kept quiet and permitted the co-sharers in possession to enjoy the property exclusively **as their own**. In the case on hand I do not have to look further than the admission made by P.W.1 in the following lines:

“என் தந்தை பெருமாள் நாயுடுவோ அல்லது வாதிகளாகிய நாங்களோ வழக்கு சொத்து 80 செண்டிலும் முழுவதும் எங்களுக்கே பாத்தியம் என்று எழுத்து முலமாக உரிமை உண்டு என்று எந்த காலத்திலும் கூறியது கிடையாது. “கிரையம் கொடுத்த 3 நபர்கள் போக மற்ற 4 பாகஸ்தர்களிடம் என் தந்தையோ வாதிகளாகிய நாங்களோ எழுத்துமுலமாக விடுதலைப்பத்திரம் எழுதி வாங்கவில்லை. வழக்கு சொத்து பொறுத்து பாஸ்தர்களுக்கு எதிரிடையாக நாங்கள் எப்போதும் அனுபவ பாத்தியம் கொண்டாடியது இல்லை”



9. This admission of P.W.1 shows that at no point of time they had enjoyed the property exclusively. On the contrary, the documents filed by the defendants would go to show that they had exercised their right as co-owner and had alienated their undivided 10 cents of lands on 23.12.1980, 09.06.1983, 04.03.1998 and 01.09.1998. Apart from this, the plaintiffs' branch through Venkatasamy Naidu had also exercised their right and had alienated undivided 10 cents on 24.11.1983 in favour of the 2<sup>nd</sup> defendant.

10. Mr. G.R.M.Palaniappan, learned counsel for the appellants / plaintiffs would submit that as this property had not been included in O.S.No.205 of 1964, which is the partition suit between the family members of Narayanasamy Naidu, implies that they do not claim a share over this property. I am not able to agree with the said submission because of the following aspects:

*O.S.No.205 of 1964, as already stated was a partition suit amongst the brothers, namely, Narayanasamy Naidu and Venkatasamy Naidu.*



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*Admittedly, in the instant case, the share of D-schedule property in the partition deed dated 15.09.1936 was kept in common. When the property has been kept in common and when the parties do not want to break the unity of ownership, I cannot presume that presentation of O.S.No.205 of 1964 meant that they do not claim any share over the property, held in common by family members of Narayanasamy Naidu and Venkatasamy Naidu.*

11. The long possession of co-owner does not fructify into ouster. The evidence on record shows that few of the co-owners have exercised their right and had alienated the property in favour of the defendants.

12. The learned counsel for the appellants would make a plea that a decree for partition can be granted in the suit. I am afraid that I cannot do that in the present proceedings because all the sharers are not before this Court and the defendants have only purchased the shares of



Dhandapani Naidu, Jayarama Naidu and Srinivasalu Naidu. The plaintiffs have not impleaded any of the legal heirs of Srinivasalu Naidu, Ramanuja Naidu i.e., sons of Narayanasamy Naidu nor their paternal uncle Duraisamy Naidu or his legal heirs.

13. In the absence of all the sharers before this Court, the issue under Order VII Rule 7 of the Code of Civil Procedure cannot be exercised to grant decree for partition. The properties being enjoyed in common and all being the co-owner the question of granting injunction also does not arise. Hence, the Substantial Questions of law are answered against the appellants.

14. In the result, the Second Appeal is dismissed. Considering the relationship between the parties no cost is being imposed.

**20.03.2023**

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Internet : Yes/No  
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To

1.The I Additional Subordinate Court,  
Cuddalore.

2.The Additional District Munsif Court,  
Cuddalore



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**V.LAKSHMINARAYANAN, J.**

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