



S.A. No. 1415 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED : 04.03.2024

CORAM

THE HONOURABLE MR. JUSTICE V.LAKSHMINARAYANAN

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1. Dhanalakshmi
2. Parameshwari
3. Murugaswamy
4. Somu @ Kandaswamy
5. Duraiswamy
6. Mani

... Appellants

Versus

1. Mohan
2. Saraswathi
3. Nachimuthu Gounder
4. Jayalakshmi
5. Appan @ Murugesan
6. Nachimuthu Gounder
7. Muthathal
8. Karuppathal
9. Kalavathi
10. Chinnammal
11. Meenakshi
12. Lakshmi
13. Rajathi
14. Palaniswamy
15. Nachimuthu @ Thakkali Rasu
16. Mohanasundari
17. Govindaswamy
18. Nachimuthu



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19. Lakshmi
20. Saraswathi
21. Veluswamy
22. Kannammal
23. Vijayalakshmi
24. Gomathiselvi
25. Ramaswamy
26. Gandhimathi
27. Parasakthi
28. Kalaivani
29. Palaniammal
30. S.Vasanthi
31. S.Baby
32. T.Saraswathi
33. Chinnamal
34. Jayanthi
35. Jothimani
36. Chinnammal
37. S.Selvakumar
38. A.Kannan

(R37 and 38 are impleaded vide order of court dated 18.08.2022 made in C.M.P.Nos. 2188 and 6404 of 2021)

39. Palanisamy

(R39 is impleaded as party respondent vide court order dated 11.12.2023 made in C.M.P.No.27854 of 2023)

... Respondents

Prayer:- Second Appeal filed under Section 100 C.P.C., against the judgment and decree dated 03.06.2013 made in A.S. No. 41 of 2011 on the



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file of Addl. District Judge, Dharapuram in reversing the judgment and decree in O.S.No. 181 of 2010 dated 11.04.2011 on the file of the Subordinate Judge, Dharapuram.

For Appellants : Mr.T.Murugamanickam,
Senior Advocate for
Mr.N.Srinivasan

For Respondents : Mr.N.Ponraj for
Mr.C.Prabhu for R1

Mr.R.Asokan for R11 to R36

Mr.N.Manokaran for R37 to R39

JUDGEMENT

The present Second Appeal arises out of judgment and decree of the court of Addl. District Judge, Dharpuram in A.S.No. 41 of 2011 dated 03.06.2013 in reversing the judgment and decree of the court of Subordinate Judge, Dharapuram dated 11.04.2011.

2. For the sake of convenience, the parties are referred as per the ranking in the suit.

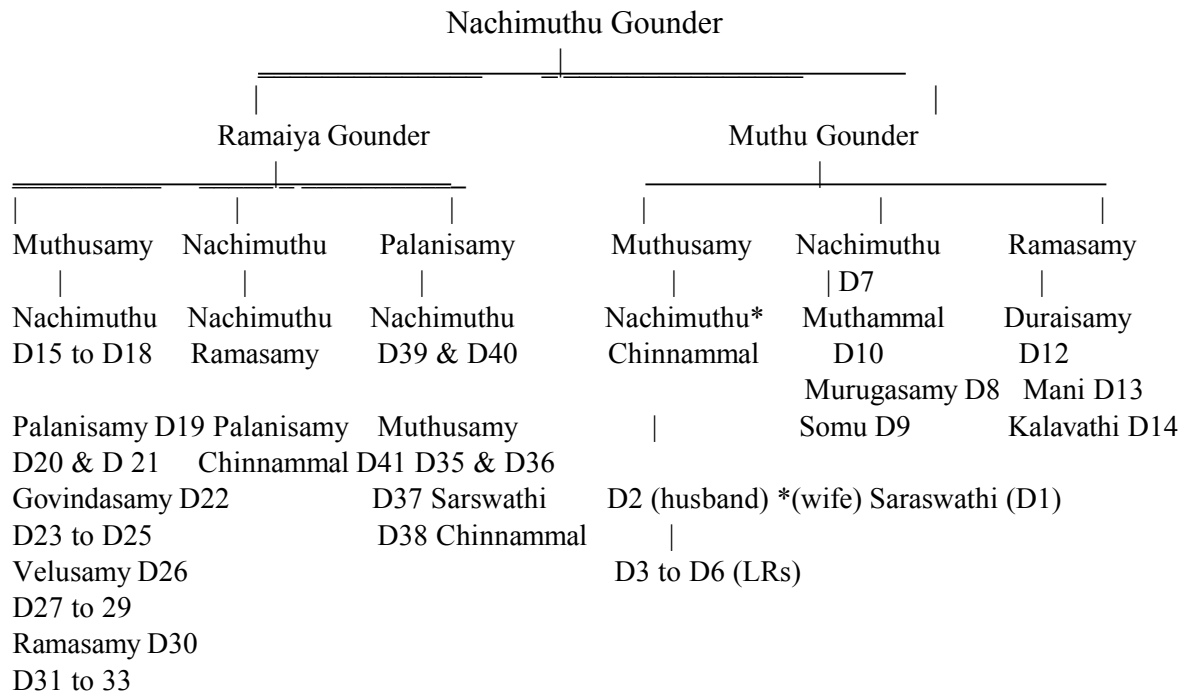
3. O.S.No. 181 of 2010 on the file of the Subordinate Judge, Dharapuram is the suit for partition.



4. The case of the plaintiff Mohan, is that he had purchased the property from the legal heirs of one Ramaiya Gounder, who was in joint possession and enjoyment of suit schedule mentioned property along with his brother Muthu Gounder. As there was no division in status between the parties and since he had purchased the property to an extent of 3.13 acres by way of a registered sale deed dated 29.03.2007 and since his demand for partition remained unsatisfied, he filed a suit to enforce partition of properties.

5. The genealogical tree for the purpose of disposal of this case is as follows:-

GENEALOGICAL TREE





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6. The defendants entered appearance and 13th defendant filed a detailed written statement. According to him, the joint purchase of suit schedule property by two brothers Ramaiya Gounder and Muthu Gounder is true. It was also admitted that Ramaiya Gounder and Muthu Gounder divided the properties other than the suit schedule mentioned property by way of a registered partition deed dated 26.07.1926. They further pleaded that though the suit property was not divided under the said document, it fell to the share of the younger brother Muthu Gounder and was enjoyed by him exclusively.

7. According to the defendants, on 11.09.1947 Muthu Gounder and his three sons partitioned the property among themselves. On 10.04.1949 Ramaiya gounder and his three sons namely Muthusamy gounder, Nachimuthu gounder and Palanisamy gounder entered into a registered partition in respect of their joint family properties. Further, on 28.08.1958 another registered partition took place between Muthusamy gounder and Palanisamy gounder, the eldest and youngest son of Ramaiya gounder in



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respect of their family properties. In none of the partition deeds dated 10.04.1949 and 28.08.1958 the suit property was included as it was not enjoyed either by Ramaiya gounder or his sons. The suit property has always been in the exclusive possession and enjoyment of the legal heirs of late Muthu gounder.

8. Pending the suit, an application was taken out to file additional written statement, which was allowed and in the additional written statement, the plea of ouster was taken by the defendants.

9. On the basis of these pleadings, the court framed the following issues :-

“1) Whether the particulars as to the legal heirs of deceased Muthu gounder as stated in the plaint are correct?

2) Whether the suit is bad for non-joinder of necessary parties?

3) Whether the suit property already fell to the share of Muthu Gounder and became exclusive property of LR's of Muthu Gounder?



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- 4) *Whether the plaintiff is not entitled to claim any share in the suit property on the principle of estoppel and also ouster?*
- 5) *Whether the description of the suit property is correct?*
- 6) *Whether the plaintiff is entitled to the relief of partition and separate possession as prayed for?*
- 7) *To what relief the plaintiff is entitled to?*

10. Originally, the Suit had been numbered before the District Court, Erode and thereafter, it was transferred to the Fast Track Court, Dharapuram. Due to enhancement of pecuniary jurisdiction, the suit was finally transferred to the file of Subordinate Judge, Dharapuram and numbered in O.S.No.181 of 2010. As additional statement had been filed, Additional issues were framed, which are as follows :-

“1) Whether the vendors of plaintiff had no title and possession over the suit properties?

2) Whether the court fee paid is correct?

11. On the side of plaintiff, two witnesses were examined and Exs.A1 to A20 were marked. On the side of defendants, the 1st defendant, who had remained exparte alone examined herself as D.W.1 and marked Exs.B1 to



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12. The learned trial judge after discussion and consideration of evidence, oral and documentary presented before him, came to a conclusion that the plaintiff's vendor had been ousted from the property and therefore, he dismissed the suit.

13. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No. 41 of 2011 before the II Addl. District Judge at Dharapuram. The learned II Addl. District Judge came to the conclusion that there is no ouster and therefore, granted the decree for partition.

14. Against the reversal findings, this Second Appeal has been presented before this court and on 20.12.2013, the Second Appeal was admitted on the following substantial questions of law :-

“1) Whether the learned first appellate judge right in granting relief of partition when the plaintiff's vendor has no saleable right in the suit property?”



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2) *Is the learned Appellate Judge right in not non-suiting the plaintiff when he is not entitled to the relief as prayed for by the doctrine of ouster?*

3) *Whether the learned first Appellate Judge right in shifting the burden on the appellants when the same has been discharged by them under documents Ex.B3 and Ex.B4 and is the learned first Appellate Judge right in not considering Ex.B3 and Ex.B4 in its proper perspective?*

4) *Whether the learned first Appellate Judge is right in granting the relief of partition, rejecting the appellants case of ouster, on the basis of the contents of Ex.A5 admittedly when the same is no spoken in the previous registered partition deeds Ex.B3 and B4 by the plaintiff's vendor?*

5) *Is the learned first Appellate Judge right in reversing the well considered judgment of the trial court on the basis of Ex.A5 when admittedly Ex.A5 can be looked into only in the light of Ex.B3 and B4 and not independently? ”*

15. Today, I heard Mr.T.Murugamanickam, learned Senior Advocate



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appearing for Mr.N.Srinivasan, learned counsel for appellants and Mr.Ponraj, learned counsel appearing for Mr.C.Prabhu, learned counsel for 1st respondent, Mr.R.Asokan, learned counsel for respondents 11 to 36 and Mr.N.Manokaran, learned counsel for respondents 37 to 39. I took up all the questions of law together as the matter is inextricably interlinked.

16. Mr.T.Murugamanickam, learned senior counsel would contend that there is no dispute, that the suit schedule mentioned property has been purchased on 26.06.1920 by Ramaiya Gounder and Muthu Gounder, sons of Nachimuthu Gounder from one Manicka Gounder. He brings to my notice that under Ex.B1 and B2, the brothers executed partition deeds between themselves and under the said deeds, division took place for several properties, but the suit schedule mentioned property has not been included in the same. However, he would point out that under Ex.B2, dated 11.09.1947, the branch of Muthu Gounder alone divided the property among themselves. In that partition, the suit schedule property was allotted to the share of Muthu Gounder and his son Ramasamy gounder. Subsequently, Muthu gounder and his three sons partitioned the property



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under Ex.B3. Thereafter, yet again a partition deed was executed between Muthu Gounder and his minor son Ramasamy Gounder in respect of properties, which fell to their share under Ex.B2 and other properties. This document had been marked on the plaintiff's side under Ex.A6. This was how the property was dealt with by Muthu gounder's family.

17. The other relevant documents to be dealt with are Ex.A1, which is a suit for partition filed inter-se between sons of Ramaiya gounder and in that suit, this suit property is not the subject matter of division. Thereafter, on 03.12.2003 under Ex.B5, widow and wife of Nachimuthu Gounder, one son of Muthusamy gounder and grandson of Muthu Gounder executed a general deed of Relinquishment. It is pertinent to note that no schedule of property was given and in this document, Saraswathy's title and interest in the property came to her father-in-law Muthusamy gounder, to her brother-in-law Nachimuthu gounder and his son and daughters. In a quick succession, another partition deed was executed within one month on 02.01.2004 under Ex.B6. This was the partition between Nachimuthu Gounder, son of Chellamuthu Gounder, his son and daughters with regard



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to the properties that came down from the share of Muthusamy gounder, son of Muthu gounder (original purchaser in the year 1920) were dealt with under this document, which is total extent of 3.13 acres out of their share of 4.92 acres.

18. On the basis of this registered partition document, Mr.T.Murugamanickam would argue that the branch of Muthu Gounder had excluded the elder brother Ramaiya Gounder from possession and enjoyment of property and in other words, the plea is one of ouster.

19. I now turn my attention to how the properties are dealt with by the families of Ramaiya gounder. From the above purchase in the year 1920 till Ex.A5, the properties were not dealt with by any registered document by their branch of family. For the first time, son of Ramaiya gounder, Nachimuthu gounder and his wife and three sons entered into a partition deed under Ex.A5. This is the registered document dated 27.09.1971. Though several properties were divided, insofar as the suit schedule mentioned property is concerned, it was treated as “மாசாவளி பூமி” and the document reads this property and the house properties would be divided at a later date.



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WEB COPY 20. Mr. N.Manokaran, learned counsel for respondents would submit that the plea of ouster had been taken only after the closure of evidence that too in the additional written statement filed by the 13th defendant. He would submit that this was not the plea originally taken by the defendants and it is an after thought. He would further submit that insofar as revenue records are concerned, the names of family members of both Ramaiya Gounder and Muthu Gounder were found. By virtue of the same, joint patta was granted and this itself is sufficient to show that they had been in enjoyment of the property. He would further urge that none of the partition deeds were brought to the knowledge of the family of Ramaiya gounder and therefore, the plea of ouster is not entertainable. This argument of Mr.N.Manoharan was adopted by Mr. C.Ponraj and Mr.R.Asokan, learned counsel for the other respondents.

21. I have carefully considered the arguments on either side and I have applied my mind on facts and I have gone through the records.



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22. In order to constitute an ouster, the defendant must give a clear and categorical proof that his possession is adverse to the claim of the other sharer/heir, against whom he puts up the plea of ouster. Law presumes that one sharer being in possession of the property, is for and on behalf of other sharer. In order to succeed in a plea of ouster, it must not be secretive arrangement, within family of sharer in possession. It should be open and hostile. There should be an assertion of such hostile title to the knowledge of the other sharers. It should be within the notice of other heir. Such assertion of hostile title, if made and only if the sharers keeps quiet without doing anything to negate such an assertion, it commences the beginning of ouster.

23. Further, a plea of ouster blooms into the exclusion of the other sharer only after lapse of 12 years from the date of assertion.

24. In the facts of the case, as narrated above, the factum that under Ex.A1, brothers Ramaiya gounder and Muthu gounder purchased the property is not in dispute. It is also not in dispute that Ramaiya Gounder and



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Muthu Gounder had partitioned other holdings other than the suit property.

Insofar as the partition documents, which were relied upon by Mr.Murugamanickam, none of them were to the knowledge of the branch belonging to Ramaiya Gounder's family. A break in the series of documents is the partition deed that had been entered between Muthu Gounder and his minor son Ramasamy gounder under Ex.A6. As rightly pointed out by Mr.N.Manokaran, what was divided, is only half of share of 9.85 acres that had been purchased by Ramaiya gounder and Muthu gounder. If Muthu gounder had any intention of ousting his brother's family from the property, the partition would not have been half share of 9.85 acres i.e. 4.92 acres, but entire extent of 9.85 acres itself. This shows that atleast till 21.11.1955 to the knowledge of the family, Muthu Gounder had only the half share, which they had dealt with.

25. No doubt, under Ex.B2 in the partition between Muthu Gounder and his three sons, Muthusamy gounder, Nachimuthu gounder and Ramasamy gounder, the schedule has been shown as entire extent of 9.5 acres in Survey No.139, but this document is of the year 1947. When the



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subsequent document Ex.B6 was written by Muthu gounder. He and his son Ramasamy seem to have happy with division of only 4.92 acres. Apart from that, when Muthusamy gounder and his brother Palanisamy gounder divided the property, they have not shown this property in the schedule, which is clear from Ex.B4.

26. Similarly, while coming to the other branch of Ramaiya gounder, when they entered into partition deed dated 27.09.1971, they have specifically stated that insofar as this “மாசாவளி பூமி” and house property is concerned, they will divide them subsequently. Much weight has been laid on this document by the learned trial judge to state that no suit for partition had been presented by Ramaiya gounder family. Therefore, it shows their exclusion. This turns the principle of ouster upside down. A joint family is deemed to be joined till they partitioned the property either by way of a document or through the process of a court. Now, a joint family wants to put its affairs and holdings is not for the court to dictate. If Ramiya gounder's family did not want to partition the property and wanted to keep it jointly till the time is with them no more, does not imply that they have argued to the



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branch of Muthu Gounder family to exclude them from the suit property.

Exclusion required positive proof.

27. The execution of partition document inter se the cousins and uncles of the plaintiff's vendor cannot be treated as an assertion of independent right. This is because in the revenue records, the names of both the branches are found. I am unable to come to the conclusion that since one branch of the brothers have executed one document after another among themselves, the entire branch of the sharers belonging to other branch are excluded. I am unable to sustain the view of the learned judge that since no action was taken from 27.09.1971 till the purchase was made by the plaintiff in the year 2007, the branch of Ramaiya gounder stood excluded. This is especially so in the light of Ex.A6.

28. I have to commence this judgment stating the judgments of ouster of co-owner. There is no necessity for co-owners to assert every once in a while, in order to prove that he is in continuous possession jointly. The person pleading ouster ought to show that he has asserted his title openly



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and he had been continuously in possession of the property in total exclusion of the other co-owner. This aspect has been properly appreciated by the lower appellate judge. The lower appellate Judge has applied the correct principles of ouster and has come to the conclusion that absence of revenue records from 1926 to 2005 show that one branch of the family alone was enjoying the property exclusively points to the joint possession of both branches. I concur with the view that has been taken by the lower appellate court.

29. In fine, the judgment and decree of the court of Addl. District Judge, Dharapuram in A.S.No.41 of 2011 dated 03.06.2013 in reversing the judgment and decree of the Subordinate Judge, Dharapuram in O.S.No.181 of 2010 dated 11.04.2011 is confirmed. The Second Appeal is dismissed. In fine, there shall be a decree for partition. The learned judge will take note of recent pronouncement of judgment of Supreme Court and shall not wait for application for passing of final decree from either parties. He is directed to proceed immediately on the receipt of copy of judgment or production of certified copy or web copy thereof by any of the party and issue notice to all



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parties and he shall appoint an advocate commissioner for the purpose of suggestion/division of property and conclude the entire proceedings within a period of 9 months from the date of conclusion of final decree proceedings.

30. With the above observation, this Second Appeal is dismissed. No costs.

04.03.2024

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To

Addl. District Judge,
Dharapuram.



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V.LAKSHMINARAYANAN, J.

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