



S.A.No.700 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.01.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No. 700 of 2021
&
C.M.P. No. 13982 of 2021

N.Arumugam

...Appellant

Vs.

1.Kaliyammal

2.Vetrimalarnithi

3.Gnanaudayanithi

4.Annai Sriveeraji

...Respondents

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 31.03.2021 passed in A.S.No.2 of 2015 on the file of the Principal Sub Ordinate Court,



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Tindivanam by confirming the Judgement and Decree dated 19.01.2015 made in O.S.No.469 of 2009 on the file of the Principal District Munsif Court, Tindivanam.

For Appellant : Mr. M.Boopathy

For Respondents : Mr. J.Antony Jesus.

J U D G M E N T

The unsuccessful defendant in a suit for partition is the appellant before this Court. The facts are briefly set out herein below and the parties are referred to as the plaintiffs and the defendant respectively.

2. The plaintiffs had filed the above suit for partition and separate possession of their 2/3rd share in the suit property on the file of the Principal District Munsif, Tindivanam. The case of the plaintiff is that the suit property belonged to one Valliyammal. She had a daughter Sokkammal, who is the mother of the plaintiffs, the defendant and another daughter Ponnammal. Valliyammal had executed a registered



settlement deed in favour of Sokkammal in respect of the suit property and other properties. Sokkammal was married to one Narayanasamykounder. The said Sokkammal, Narayanasamykounder and Ponnammal had all died intestate without making any arrangements in respect of the suit property.

3. Therefore, the plaintiffs had requested the defendant who had been managing the suit property to partition their 2/3rd share in the suit property. Till January 2008, the plaintiffs have been receiving their share of the usufructs from the suit property but after January 2008, the defendant had stopped giving them their share. Therefore, the plaintiffs have come forward with the suit for partition.

4. The defendant had filed a written statement inter alia denying the claim of the plaintiffs and stating that the said Sokkammal had executed an unregistered Will in his favour in the year 1992, in respect of the suit property measuring an extent of 78 cents. That apart, he would submit that the plaintiffs have not made any claim to the



property from the year 1996, when the mother had passed away and therefore he had perfected title by adverse possession. He would submit that even according to the plaintiffs they are not in joint possession since the year 2000. Therefore, he had perfected title to the suit property.

5. The Trial Court had framed the following issues:

“1. 1 முதல் 4 வாதிகளுக்கு வழக்கு சொத்தில் 2/3 பாகம் உரிமையானது என்று விளம்புகை செய்ய முதல்நிலை தீர்ப்பாணை பிறப்பிக்க வாதி தகுதியுடையவரா?

2. 1 முதல் 4 வாதிகளுக்குண்டான 2/3 பாகத்தை நீதிமன்ற ஆணையர் மூலம் வாதிகளுக்கு கிடைக்க செய்ய இறுதிநிலை தீர்ப்பாணை பிறப்பிக்கத்தக்கதா?

3.வாதிகள் தனி மனு மூலம் வழக்கு சொத்தில் வாதிக்குண்டான மகதூல் ஆதாயத்தைப் பெற தகுதியுடையவர்களா?



- 4.வழக்கு சொத்தில் 4 வாதிகளுக்குண்டான 2/
3 பாகத்தை 2ம் வாதியின் மூலம் கிடைக்க
நீதிமன்ற உத்தரவு பிறப்பிக்கத்தக்கதா?
- 5.இதர பரிவாரமென்ன?

Additional Issue:

1.14.02.1992 தேதியில் சொக்கம்மாள்
பிரதிவாதி பெயருக்கு எழுதி வைத்ததாக
கூறப்படும் உயில் உண்மையானதா?
செல்லத்தக்கதா? அந்த உயில் அமுலுக்கும்
அனுஷ்டானத்திற்கும் வந்துள்ளதா?
அதனடிப்படையில் பிரதிவாதி தாவா சொத்தை
அடைந்து அனுபவித்து வருகிறாரா?

6. The Trial Court had considered the discrepancies in the evidence of D.W.1 and D.W.2 and particularly took note of the cross examination of D.W.2, who would contend that he has signed the document 10 years prior to his deposing as witness and that the



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defendant was present at the time of execution of the alleged document.

Though in his chief examination he would submit that he had been called for attesting a Will, in cross examination he would submit that he does not know the contents of the document which he had signed. That apart, the Will does not contain the signature of the Testatrix in the first two pages, which contains the contents of the Will and the LTI is only on the last page, which does not contain any recitals and only contains the signatures. Therefore, the Trial Court had disbelieved the Will and ultimately, the suit was decreed.

7. Challenging the said Judgement and Decree, the defendant had filed A.S.No.2 of 2015, on the file of the Principal Sub Court, Tindivanam. The Lower Appellate Court had also confirmed the Judgement and Decree of the Trial Court. Challenging the same, the defendant is before this Court. When the matter had come up for admission on 09.09.2021, notice was ordered and the learned counsel had appeared for the respondents and argued the matter.



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8. Mr. M.Boopathy, learned counsel appearing on behalf of the defendant would submit that the said Sakkammal had executed Ex.B.1, Will in favour of the defendant and the same has been proved by examining the attesting witness as D.W.2. That apart, the plaintiffs have not sought to exercise any right over the property all these years and have come forward to file the suit only in the year 2009 and therefore the defendant had perfected title by adverse possession.

9. The learned counsel would submit that both the Courts below have not rendered any finding with reference to the question of ouster. That apart, the plaintiffs were very much aware about the Will which is evident from the evidence of P.W.1, who has stated that the Will was shown to her lawyer even before the filing of the suit. He would therefore submit that the appeal should be allowed and the suit be dismissed.



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10. Per contra, Mr. J.Antony Jesus, learned counsel appearing on behalf of the plaintiffs would submit that the Will has been created after filing of the suit, since in the written statement the defendant had not mentioned the date of the Will but has simply submit that the Will was executed in the year 1992. Further, the above Will has not been signed by the Testatrix on the sheets containing the recitals. Therefore, the Will has not been executed by the deceased Sokkammal. He would further submit that D.W.2 evidence cannot be believed and he is an interested witness.

11. Heard the learned counsels on the either side.

12. The entire case of the defendant hinges on two aspects:

(i)The property has been bequeathed to him under a Will dated 14.02.1992.

(ii)That the defendant has perfected title through adverse possession.



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13. A perusal of the Will would show that the Will has not been signed / LTI affixed by the Testatrix in pages one and two, where the recitals are contained. It is only in the last page, where only the words “இதன் மத்தியில் 0.78 செண்டு” is found that there is a left thumb impression and the signature of the witness and the scribe. Therefore, the Will has not been executed by the deceased Testatrix.

14. To prove the execution, the plaintiffs have relied upon the evidence of D.W.2. D.W.2 in his chief examination has stated that he was called by one Ezhumalai son of Kuppusamy Gounder to sign the Will of Sokkammal. The said Ezhumalai had also brought the scribe. The Testatrix had given the details and thereafter the scribe had prepared the Will, read it over to the Testatrix and the Testatrix had affixed her LTI. Thereafter, DW.2 and the other attestors had affixed their signature and finally the scribe had put his signature. In the chief examination, there are no details as to the date on which he had been asked to sign the Will.



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15. However, in the cross examination D.W.2 would submit that he had put the signature in Ex.B.1, 10 years ago i.e., in the year 2004 at Irayanoor. He would, in his cross examination also admit that he was not aware as to who had drafted Ex.B.1. He has also admitted that he does not know the contents of Ex.B.1. He would state that the defendant was present at the time when he had put his signature.

16. It also appears from the evidence that the witness has earlier given evidence for the defendant in some other suit. Therefore, his evidence cannot be believed particularly when Ex.B.1, Will has not been signed / LTI affixed by the Testatrix on the sheets containing the recitals. Therefore, the findings of the Courts below with reference to Ex.B.1 has to necessarily be failed.

17. With reference to plea of ouster, the written statement does not contain the ingredients for a plea of ouster. It is well settled that in order to establish adverse possession of one co-owner against another,



it is not enough to show that they are not in joint possession and that they are not in enjoyment of the property. There must be an open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. That apart, it is for the person who is setting up a plea of ouster to prove the same. In the instant case, neither these pleadings have not been set out by the defendant nor have they proved ouster.

18. In the Judgement reported in ***AIR 1957 SC 314 – P.Lakshmi Reddy Vs. L.Lakshmi Reddy***, the Hon'ble Supreme Court has held as follows:

“4.Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario. (See Secretary of State for [India v. Debendra Lal Khan](#) [(1933) LR 61 IA 78, 82]). The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the



competitor. (See *Radhamoni Debi v. Collector of Khulna* [(1900) LR 27 IA 136, 140]). But it is well- settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Cores v. Appuhamy* [(1912) AC 230]). It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by



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one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other.”

19. In the Judgement reported in **1995 (4) SCC 496 – Vidya Devi**

Vs. Prem Prakash, the Hon'ble Supreme Court has held as follows:

“Ouster does not mean actual driving out of the co-sharer from the property. It Will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of



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course, file appropriate suit including suit for joint possession within time rescribed by law.”

20. In the light of the above Judgements and perusal of the written statement, it is clear that the three elements necessary for establishing the plea of ouster is absent. Therefore, the defendant has neither proved the Will nor ouster and the Judgement and Decree granting partition cannot be found fault with.

21. Accordingly, the Second Appeal is dismissed. Consequently, the connected Civil Miscellaneous Petition is closed. No costs.

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Internet : Yes/No
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To

1.The Principal Sub Ordinate Court,
Tindivanam

2.The Principal District Munsif Court,
Tindivanam.



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P.T. ASHA, J,

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