

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 28.01.2015

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

S.A.No.1396 of 2003

Palanisamy

...Appellant/Defendant

vs.

Mariamammal

...Respondent/Plaintiff

Second Appeal against the judgment and decree dated 30.04.2002 made in A.S.No.193 of 2001 on the file of the District Judge, Salem, confirming the judgment and decree dated 11.09.2001 in O.S.No.957 of 1998 on the file of the Principal District Munsif, Salem.

For appellant : Mr.P.Jagadeesan

For respondent : Mr.D.Shivakumaran

JUDGMENT RESERVED ON : 10.12.2014

JUDGMENT

The second appeal is filed by the defendant against the concurrent findings of the courts below.

2. The suit was filed by the respondent/plaintiff for partition claiming half share in the suit property. The plaintiff contended that the suit property was purchased by her and her husband. They had one daughter, chamundeshwari. The plaintiff and her husband separated due to a dispute. When the daughter was a minor, the plaintiff's husband sold the property in favour of the defendant's father by executing the sale deed for himself and as guardian of the minor child. The plaintiff's husband had falsely declared that the plaintiff was no more. Claiming the sale deed to be invalid and not binding on her and the sale deed could only bind half share of her husband, the plaintiff had filed the suit for partition.

3. Resisting the claim, the defendant contended that the plaintiff is not the wife of late kulandaigounder, that the property was purchased by kulandaigounder in his name and in the name of his wife, that the kulandaigounder was in absolute possession, that he had mortgaged the entire property on 22-1-1975 and subsequently sold

the property to the defendant's father on 06-12-1976. Subsequent to the sale, the defendant's father until his life time and subsequently the defendant has been in continuous, uninterrupted possession for 32 years and therefore claimed to have perfected the title by adverse possession.

4. Considering the oral as well as documentary evidence, preliminary decree has been passed in favour of the plaintiff. The same was also confirmed by the first appellate court. Aggrieved, the defendant is before this court.

5. At the time of admission, the following substantial questions of law were framed:

1. Whether or not the sale of the entire property by Kolandai Gounder under Ex.A2 in favour of the appellant's father operate against all the co-owners and consequently the appellant and his predecessors in title perfected their title to the suit property by way of adverse possession?
2. Whether the sales effected by a co-owner in favour of a stranger bars the right of the non-alienating co-owner also and the question of ouster does not apply to a stranger?

6. The learned counsel appearing for the defendant submitted that the courts below committed grave error in overlooking the fact that the plaintiff deserted her husband and their daughter who was in a tender age and after the efforts to trace her turned futile, she was presumed dead as she was unheard for more than seven years.

7. The learned counsel also drew the attention of this court towards the mortgage deed marked as Ex.B12 dated 22.01.1975 to agitate that the courts below failed to consider that the plaintiff's husband had mortgaged the entire property in favour of the defendant's uncle and therefore, he alone was in possession of the property. The learned counsel further contended that earlier the plaintiff's husband and subsequently the defendant's father and after his death, the defendant was in open, continuous and uninterrupted possession. The revenue records also stand in the name of the defendant and his predecessors, who have been paying the kist charges for more than 30 years and therefore, they have perfected the title by adverse possession.

8. The learned counsel for the appellant/defendant relying upon the judgments reported in AIR 1972 Kerala 229 (Karthiyayani .vs. U.Kallyani), 1967(1) MLJ 383 (P.N.Kailasanatha Mudaliar .vs. Viswanatha Mudaliar), 1942 (2) MLJ 321 (T.P.R.Palania Pillai (died) and others .vs. Amjath Ibrahim Rowther and another) and 1999(1) MLJ 173 (Sundaravalli Ammal Versus Perumal & Others) in support of his contention that the period for calculating the adverse possession would have to be reckoned from the date on which the entire property was mortgaged by the plaintiff's husband on 22.01.1975 or 06.12.1976, the date on which the property was sold to the defendant's father and the notice of ouster would not be applicable in case of a stranger and therefore the defendant has perfected the title by adverse possession.

9. The learned counsel for the appellant further contended that both the courts erred in holding that the defendant had not specifically pleaded ouster when there was sufficient pleadings regarding adverse possession and hence sought the second appeal to be allowed.

10. Per contra, the learned counsel for the respondent/plaintiff relying upon the judgments in 2001(10) SCC 434 (Janaki Pandyani .vs. Ganeshwar Panda (dead) by LRs.), 2013 (8) MLJ 116 (T.A.Mohamed Moideen (died) .vs. T.A.Haja Hussain) and 2014 (5) MLJ 705 (G.Radhakrishnan .vs. Kanna Pillai) contended that the possession of a co-sharer cannot be held to be adverse in the absence of partition and unless hostile title is asserted to the knowledge of owner, the plea of adverse possession cannot be invoked. The learned counsel further contended that the courts below were right in holding that in the absence of specific pleadings and evidence regarding ouster and hostility, the plea of adverse possession could not survive. Hence, no interference is called for.

11. Heard both the parties and perused the records.

12. In the case on hand it is not in dispute that the property was purchased in the joint names of the plaintiff and her husband. Reasons may be different, but the fact remains that the plaintiff deserted her husband and daughter and she has come back to claim her right in the property after 28 years. However, before she could stake a claim to her share, the property was sold by Ex.B2 to the defendant's father, declaring her to be dead in the sale deed. Even before the sale, the plaintiff's husband had mortgaged the entire property to one kuppan on 22-01-1975 by a registered deed and to discharge that mortgage, the property was sold to the defendant's father.

13. In the above facts, the question that arises for the consideration of this court to decide the substantial questions of law is whether the above actions of the plaintiff's husband as a co-owner would oust the right of the plaintiff to seek the decree of partition.

14. The judgment relied upon by the learned counsel for the defendant in AIR 1972 Kerala 229 (Karthiyayani .vs. U.Kallyani) deals with the adverse possession against non-alienating co-owners by stranger put in possession under usufructuary mortgage. The relevant portion is as follows:

"11. As regards the property other than that Covered by Ext. D11 the coowners were in possession ever since Charu died in 1117 and in regard to such property a stranger was put in possession under Ext D13 mortgage in 1119. The suit is filed more than 12 years of that date. The very fact that a stranger has been inducted into possession and consequently possession of the original coowners terminated would be sufficient to put the other coowners to notice of the conduct of the alienating coowners. Therefore ouster would be to their notice and possession of the transferee would be adverse from the date of Ext. D13 as regards the property which the mortgagee was put in possession of under Ext. D13. Hence I must agree with the courts below in finding that the claim of the plaintiff in regard to the area of the suit property excluding that covered by Ext. D11 is barred by limitation. "

15. In the judgment reported in 1967(1) MLJ 383 (P.N.Kailasanatha Mudaliar .vs. Viswanatha Mudaliar), this court held that that adverse possession i.e., ouster in such a case, started from the date of possession by the mortgagee and not from the date of ouster to the knowledge of the other members. The relevant paragraph at page reads as under:

" It is significant to notice that the learned Judge has emphasized that the fact that the property as a whole is described in the schedule and that the schedule did not expressly say that what was sold was only the right, title and interest of the judgment-debtor, would indicate that what was sold was the entire property. From this decision, it is seen that so long as there is no exclusion of the share of the son, the sale of

the entire property, as such described in the sale certificate, would be sufficient to convey the entire property. In the instant case, there is not only no exclusion of the shares of the sons, but what was sold was expressly the entire 2/3rd share using the "all estate clause". Further, under section 8 of the Transfer of Property Act, in the absence of a different intention expressly or by necessary implication, a transfer of property should pass to the transferee all the interest which the transferor is capable of passing in the property. This principle underlying section 8, Transfer of Property Act, was applied by the Bench decision in Muthiah Chettiar v. Rajalu Ayyar Nagaswami Ayyar & Co., already referred to. For all these reasons, I hold that the Official Assignee intended and actually conveyed the 2/3rd share in the house including the plaintiff's shares and the first defendant also bargained for and purchased a 2 /3rd share in the entire house.

Even assuming that under Exhibit B-1, the shares of the plaintiffs were not conveyed, the plaintiff's rights, long ago, became barred by limitation and extinguished, as a result of ouster. Learned Counsel for the appellants drew my attention to some decisions in which it was held that as between co-owners, the mere fact that one co-owner is in possession of the entire property would not be sufficient evidence of ouster so as to extinguish the rights of the other co-owner. The principle of those cases will have no application in the instant case as in this case there has been an alienation by the Official Assignee which amounts to alienation by a co-owner to a stranger. In such a situation, the decision of the Bench of this Court in Palani Pillai v. Ibrahim Rowther, clearly applies. In that case in respect of property owned by the members of a Muhammadan family, some of the co-owners executed a usufructuary mortgage of certain specific items and the mortgagee entered into possession of the mortgaged items. It was held that adverse possession i.e., ouster in such a case, started from the date of possession by the mortgagee and not from the date of ouster to the knowledge of the other members. The principle of this decision is that while possession of one co-owner is in itself rightful and does not imply hostility, the position is different when the stranger is in

possession and that his possession itself indicates that it is adverse to the true owners. It is unnecessary to refer to other cases on the point and it is sufficient to refer to the decision of the Supreme Court in *Chenbasavana Gowd v. Mahabaleswarappa*, in which the principle was applied in the case of a lease by the father including the son's share. Learned Counsel for the appellants lastly urged that in the instant case, the plaintiff's father and grand-father had been in occupation of the house and that that should be regarded as recognition of the plaintiffs' right to a 5 /21 share. This argument is totally devoid of substance. So far as the 1st plaintiff is concerned, in the same place he was living in a rented house and came to occupy the house in 1956. In the affidavit which he filed in Appeal No. 65 of 1961, Exhibit B-9, he has stated that it was only in 1951, he came to know that the suit property was his family property and that it was only when he began to live in a rented house that some villagers told him that he need not live in a rented house when he has himself got a house meaning the suit house, in his own right. This shows that till 1956, the 1st plaintiff never knew that he had a right in this house. Under these circumstances, it is impossible to recognise the possession, if any, of the plaintiffs' father or grand-father as referable to the plaintiffs' right. Unless the plaintiffs are able to establish that the first defendant allowed the plaintiffs' father and grandfather to remain in occupation of the house, recognising the plaintiffs' right in pursuance of an arrangement with the plaintiffs, express or implied, the possession of their father, even if true, would not enure for the benefit of the plaintiffs. This question has been considered by the learned District Munsif in paragraphs 12 and 13 of the judgment. The conclusion arrived at by him is correct and is supported by adequate and satisfactory evidence, with the result that the plaintiffs' right, if any, must be deemed to have been extinguished by ouster and adverse possession from the year 1930. I have no doubt in my mind that all these thirty years, the 1st plaintiff himself knew that the entire 2 /3rd share in the house had been told to the first defendant. It was only as a result of recent misunderstandings, the plaintiffs had embarked upon this frivolous and vexatious

litigation. Looked at from any point of view, the plaintiffs' suit lacks substance and has been rightly dismissed."

16. In the judgment reported in 1942 (2) MLJ 321 (T.P.R.Palanial Pillai (died) and others .vs. Amjath Ibrahim Rowther and another), the Full bench of this court held that adverse possession as against the members cannot be said to begin only from the date of ouster to their knowledge. The relevant paragraphs are extracted hereunder:-

"2. There is a conflict of authority in this Court on the question whether it is necessary in order to support a plea of adverse possession that knowledge of adverse possession must be proved. The appeal came in the first instance before King, J., and in view of this conflict he has referred to a Full Bench the following question:

Where some co-owners usufructually mortgage specific items of property held by the members of a Mohammadan family and the mortgagee enters into possession of the mortgaged items under his mortgage deed, is a suit to recover the share therein by other members of the same family barred by article 144 of the Limitation Act at the end of twelve years of such possession or does adverse possession begin as against the other members only from the date of ouster to their knowledge?

The weight of authority in this Court is in favour of an affirmative answer being given to the first part of the question. There are decisions of the Calcutta and Bombay High Courts to the same effect, and support for the majority view is also to be obtained from the decision of the Privy Council in Secretary of State for India in Council v. Debmara Lal Khan (1933) 66 M.L.J. 134: L.R. 61 I.A. 78 : I.L.R. 61 Cal. 262: (P.C.).

5. .... But it was also pointed out that while the possession, of one co-owner is, in itself, rightful, and does not imply hostility the possession is different when a stranger is in possession. The possession of a stranger in itself indicates that his possession is adverse to the true owners.

7. Possession to be adverse must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor, as the Privy Council pointed out in Secretary of State for India in Council v. Debendra Lal Khan (1933) 66 M.L.J. 134: L.R. 61 I.A. 78: I.L.R. 61 Cal. 262 (P.C.). As already indicated we are of the opinion that the judgment lends strong support for the majority opinion of this Court. In that case a zamindar claimed against the Crown title to a fishery in a navigable river by reason of adverse possession. The learned Counsel who appeared for the Crown advanced the argument that adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there was no authority for this requirement. It was sufficient that possession was overt and without any attempt at concealment so that the person against whom time was running ought if he exercised due vigilance to be aware of what was happening.

8. When one of several co-sharers lets into possession a stranger who proceeds to cultivate the land for his own benefit the other co-sharers must, unless they deliberately close their eyes, know of what is going on., but if they are so regardless of their own interests they must take the consequences. Where a person who is in possession under a usufructuary mortgage granted by one of several coparceners remains in possession of the land and cultivates it for years, a position which we have here, there can be no doubt that the requirements of continuity, publicity and extent for adverse possession are fully complied with. Consequently we would answer the first part of the question referred in the affirmative and the latter part in the negative. It follows that the decisions in Muthukrishna Aiyangar v. Sankaranarayana Aiyar (1914) 27 M.L.J. 600, Ramachandra Deo v. Balaji (1940) 1 M.L.J. 673: I.L.R. (1940.) Mad. 245. Venkatarama Aiyar v. Subramania Sastri (1923) 20 L.W. 122. Moidin v. Kunhalikutti (1935) 42 L.W. 798. and Govindaswami Chettiar v. Kothandapani Chettiar (1926) 52 M.L.J. 203. must so far as they indicate a contrary opinion be deemed to be overruled. "

17. In the judgment reported in 1999(1) MLJ 173 (Sundaravalli Ammal Versus Perumal & Others), this court has held that the period of adverse possession starts from the date of sale. The relevant paragraphs are as follows:

"4. In this second appeal we are concerned only with respect to items 1 and 2 of the plaint 'A' schedule property, which items were denied to the plaintiff on the ground that the defendants 3, 4, 7 and 8 had prescribed title by adverse possession. Since I have to assess the correctness of the said judgment and decree of the lower appellate court, I am not going into the other facts. It is not in dispute that these defendants 3, 4, 7 and 8 derived title from the first defendant under the sale deeds. The plaintiff/appellant claims right in the said property both as a heir of Arumugam Pillai and also on the basis of the Will alleged to have been executed by Pappathi Ammal on 9.1.1973. But the courts below have concurrently disbelieved the same. Against the said finding, there was no appeal before the lower appellate court by the plaintiff.

6. Though the plaintiff/appellant claims right in the property through Pappathi Ammal, the sale of the suit properties by the first defendant is as early as in 1962 under Ex.B-2. From the date of purchase of the said properties, the contesting defendants are in exclusive possession, adverse to the interest of the said Pappathi Ammal. So, the submission of the learned counsel that the limitation will start only from the date of death of Pappathi Ammal cannot be countenanced.

7. The Apex Court, in the decision in Annasaheb Bapusaheb Patil v. Balwant Babusahed Patil Annasaheb Bapusaheb Patil v. Balwant Babusahed Patil Annasaheb Bapusaheb Patil v. Balwant Babusahed Patil , A.I.R. 1995 S.C. 895 has held as follows:

"Where possession could be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will

not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all."

There cannot be any dispute about the proposition that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. But in this case, the contesting defendants were not having any valid title with respect to the share of Pappathi Ammal, through whom the appellant/plaintiff claims right in the property. So, with respect to that share of the property, it cannot be said that the contesting defendants were in possession of the same with valid title. So, they cannot (sic.) claim any adverse possession against the said Pappathi Ammal or the plaintiff.

11. The Bombay High Court also has taken similar view in *Anjanabai v. Jaswantibai*, A.I.R. 1993 Bom. 134 following the decision of the Full Bench decision of this Court, in *Palania Pillai v. Amjath Ibrahim*, A.I.R. 1942 Mad. 622:(1942)2 MLJ. 321 (F.B.) which runs as follows:

"The decision of the Full Bench in 1899 I.L.R. 23 Bom. 137, would squarely apply to the facts involved in the present case. The very fact that the stranger has been inducted into possession and consequently, the possession of the co-owners terminated would be sufficient to put the other co-owners to notice of the conduct of the alienating co-owners. Therefore, ouster would be to their notice and the possession of transferee would be adverse from the date of possession."

18. Per contra, learned counsel for the respondent/plaintiff has relied upon the following judgments in support of his contention that the possession of a co-sharer cannot be held to be adverse in the absence of partition and unless hostile title is asserted to the knowledge of owner, the plea of adverse possession cannot be invoked:-

(i) In the judgment reported in 2001(10) SCC 434 (Janaki Pandyani .vs. Ganeshwar Panda (dead) by LR.), the Hon'ble Apex Court has held that adverse possession cannot be claimed by one co-sharer against another so long as the property has not been partitioned. The relevant portion is as follows:

" 2. After we heard learned counsel for the appellant and perused the record, we are of the view that the judgment of the High Court is not sustainable in law. The High Court found that Ext. B-1 was not signed by Madhusudan Panda and was not proved. Therefore, the High Court cannot make Ext. B-1 as the basis for acquisition of title by adverse possession. This approach of the High Court in holding that the defendants have acquired title to property by adverse possession was erroneous. Further, merely because the defendants had converted the thatched house into a tiled house and also dug a well, it does not mean it was an ouster of the plaintiff. Admittedly, the property in dispute is a joint family property and the plaintiff and the defendants are the co-sharers of the property. In fact, there is no partition of the property and so long as the property is not partitioned, it continues to be a joint Hindu family property. Under such circumstances, one co-sharer cannot claim adverse possession against the other co-sharer. In view of the said legal position, the High Court fell in error in holding that the defendants had acquired title in the property by adverse possession. "

(ii) In the judgment reported in 2013 (8) MLJ 116 (T.A.Mohamed Moideen (died) .vs. T.A.Haja Hussain), this Court has held that Simply because twelve years' period might have got expired without one of the co-sharers being in possession, that would not attract the concept 'ouster' in favour of the possessor or owner and there should be clear proof to demonstrate and display that the co-owner in possession started enjoying the property as his own property detriment to the interest of the other co-sharers not in possession. The relevant paragraphs are extracted hereunder:-

"7. No doubt, so far as this case is concerned, the pleadings before the court were not adequate. However, this a suit for partition, in stricto sensu, the rules relating to the pleadings cannot be bull-dozed in and throw the baby along with the bathe water. The question of adverse possession, in matters of this nature would not

arise in view of the decision of the Hon'ble Apex Court reported in (2007) 4 MLJ 912 (SC) (P.T.Munichikkanna Reddy and others vs. Revamma and others). Certain excerpts from it would run thus:

"5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. (See *Downing v. Bird*; *Arkansas Commemorative Commission v. City of Little Rock*; *Monnot v. Murphy*; *City of Rock Springs v. Sturm*.)

6. Efficacy of adverse possession law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See *American Jurisprudence*, Vol. 3, 2d, p. 81.) It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the intention to dispossess cannot be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.

2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

9. It is interesting to see the development of adverse possession law in the backdrop of the status of right to property in the 21st century. The aspect of stronger property rights regime in general, coupled with efficient legal regimes furthering the rule of law argument, has redefined the thresholds in adverse possession law not just in India but also by the Strasbourg Court. Growth of human rights jurisprudence in recent times has also palpably affected the developments in this regard.

New consideration in adverse possession law

10. In that context it is relevant to refer to *JA Pye (Oxford) Ltd. v. United Kingdom* wherein the European Court of Human Rights while referring to the Court of Appeal judgment *JA Pye (Oxford) Ltd. v. Graham* made the following reference:

"Lord Justice Keene took as his starting point that limitation periods were in principle not incompatible with the Convention and that the process whereby a person would be barred from enforcing rights by the passage of time was clearly acknowledged by the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms). This position obtained, in his view, even though

limitation periods both limited the right of access to the courts and in some circumstances had the effect of depriving persons of property rights, whether real or personal, or of damages: there was thus nothing inherently incompatible as between the 1980 Act and Article 1 of the Protocol."

14. Importantly, intention to possess cannot be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialise.

21. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in *Karnataka Board of Wakf v. Govt. of India* in the following terms: (SCC p.785, para 11)

"Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

22. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner.

32. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in *S.M. Karim v. Bibi Sakina* in the following terms: (AIR p.1256, para 5)

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

A bare poring over and perusal of the said precedent would highlight and spotlight the fact that possession by one co-owner amounts to possession by the other co-owner. Simply because twelve years' period might have got expired without one of the co-sharers being in possession, that would not attract the concept 'ouster' in favour of the possessor or owner. There should be clear proof to demonstrate and display that the co-owner in possession started enjoying the said property as his own property detriment to the interest of the other co-sharers not in possession."

(iii) In 2014 (5) MLJ 705 (G.Radhakrishnan .vs. Kanna Pillai), this court has held that the person who claims adverse possession had to plead and prove that possession was nee vi, nee clam, nee precario, ie., peaceful, open and continuous. The relevant paragraphs are as follows:-

"6. In order to answer the issues raised in the appeal, it is necessary to consider the essential requirements as to the pleadings regarding adverse possession, which has been laid down by the Apex Court in the case of Karnataka Board of Wakf Vs. Government of India & others (2004) 10 SCC 779.

"Therefore, a person who claims adverse possession should show:

- (a) on what date he came into possession,
- (b) what was the nature of his possession,
- (c) whether the factum of possession was known to the other party,
- (d) how long his possession has continued, and
- (e) his possession was open and undisturbed "

It would be relevant to point out that these details are lacking in the pleadings of the present case.

.....

10. It is not the case of purchasers/defendants 2 to 5 that the suit property is a separate property of the first defendant. In other words, they have admitted that it is the joint family property belonging to the plaintiff and the first defendant. Contending that the father- plaintiff was living away from his son / first defendant and that he was not in physical possession of suit property for several years and that he has not objected to the execution of sale deeds by the first defendant, the defendants contended that the first defendant has prescribed title by adverse possession.

10.1. This plea is incorrect. Every co-owner has equal right to the possession of every bit of joint property and none of them can exclude the other from the enjoyment thereof. Many a time joint possession is inconvenient. There may be arrangements for the exclusive enjoyment of

different portions of the common property. Again, a co-owner may possess exclusively any property which had not been hitherto enjoyed by any other co-owner. For want of knowledge or for other reasons, the other co-owners would not have protested. That does not mean that they have consented or relinquished their right over the property. The exclusive possession must point out any act which is inconsistent with joint ownership.

12. When a co-owner set up a plea of ouster to prove adverse character of such possession by asserting affirmatively and that too, to the knowledge of other members that he asserted the exclusive hostile title and if the possession continues for statutory period of more than twelve years, then only, the co-owner / purchaser from the co-owner can succeed. Therefore, it is necessary to find out whether the burden of proof has been discharged either by the first defendant or by defendants 2 and 3 who are claiming title through the first defendant.

12.1. The burden of proof lies on the party who claims adverse possession. The defendants had to plead and prove that the possession of the first defendant was nee vi, nee clam, nee precario, i.e., peaceful, open and continuous. This has been so held in the case reported in (1993) 4 SCC 375 (Parsinnin vs. Sukhi), cited supra.

12.2. As per the decision reported in (1995) 4 SCC 496 (Vidya Devi vs. Prem Prakash) (in para 27 and 28), in case of co-owner, three elements are necessary for establishing the plea of ouster. declaration of hostile animus;

long and uninterrupted possession of the person pleading ouster; and

exercise of right of exclusive ownership, openly and to the knowledge of other co-owner.

12.3. One who holds possession on behalf of another, does not, by mere denial of others title, make his possession adverse so as to give himself the benefit of statute of limitation. This is the proposition held in the decision

reported in (1995) 2 SCC 543 (Annasaheb Bapusaheb Patil Vs. Balwant).

12.4. It has been held, in the context of co-sharer, in (1980) 4 SCC 396 (Karbala Begum vs. Mohd. Sayeed), that mere non-participation in the rent and profits of the land of a co-sharer does not amount to ouster.

13. If the facts of this case are tested on the bed rock of the principles enunciated by the Supreme Court, it will be clear, as already stated, that the case of the defendants suffer from lack of pleadings and evidence.

14. Just because the plaintiff was living away from the first defendant, just because the plaintiff married a lady of his own choice and just because the plaintiff did not live jointly with the first defendant, it will not lead to the conclusion that the plaintiff is not a joint family member. The first defendant has not proved the intention to claim the property adverse to the interest of the plaintiff, leading to the invasion of the rights of the plaintiff.

15. The Courts below have rightly appreciated the legal proposition in proper perspective and therefore, there are no grounds to interfere with the judgments and decree of the Courts below.

16. In the result, the second appeal is dismissed. The judgement and decree dated 16.09.2004 in A.S.No.20 of 2004 before the Sub Court, Panruti, confirming the judgment and decree, dated 27.02.2004 in O.S.No.107 of 2002 on the file of the District Munsif Court, Panruti, are confirmed. No costs. Consequently, C.M.P.No.10677 of 2005 is also dismissed."

19. In the judgments relied upon by the appellant/defendant, it has been laid down that the sale by the co-owner to a stranger of the entire property would amount to ouster of the rights of other co-owner if he/she does not challenge the same within the period of limitation. The judgments also lay down that the period of limitation would have to be computed from the date on which the stranger/mortgagee was put into possession. However, it is to be noted here that the plaintiff's husband had misrepresented in the sale deed that the plaintiff had passed away and on that basis claimed himself and his daughter to be the absolute owners. The defendant also accepted that his father is a cousin of the plaintiff. Therefore, the father of

the defendant would have known the truth that the plaintiff was still alive. As rightly held by the courts below, the mortgage and alienation was also within seven years from her disappearance and therefore, the presumption is dead also would not hold water. The sale of the plaintiff's share is therefore invalid. Hence, in the facts of this case, this court is of the view that the plea of ouster by a co-owner of the rights of other co-owner is unsustainable. Hence the judgments relied upon by the learned counsel for the appellant/defendant would not come to his aid in the present facts. To plead and succeed that a person has perfected his title by adverse possession, he has to necessarily prove that he had held the property in hostile to the title of the true owner with his knowledge. The same is evident from the judgments relied upon by the learned counsel for the respondent/plaintiff. Similarly, mere changes in the revenue records would not entitle the co-owner or the purchaser to claim that he had perfected the title by adverse possession in the absence of proof of satisfying that the defendant or his father was nee vi, nee clam, nee precario, i.e. peaceful, open and continuous. The word open would signify the hostility of title to the knowledge of the true owner. Similarly, when the title of the owner is questioned, there cannot be any plea of perfection of title by adverse possession. Also, from the evidence, it is also clear that the defendant has not proved that there has been some changes to the land. The land remains to be vacant. The defendant has also not proved that he has the knowledge of the plaintiff asserted the hostile title. Nevertheless, the plea of ouster was not even pleaded. Hence this court finds no reasons to interfere with the judgements and decrees of the courts below. The substantial questions of law are answered in negative.

20. In the result, the second appeal is dismissed thereby confirming the concurrent judgments and decrees of the courts below. No costs.

Sd/-

Assistant Registrar

Dated:19.2.15

True Copy

Sub Assistant Registrar

To

1. The District Judge, Salem.

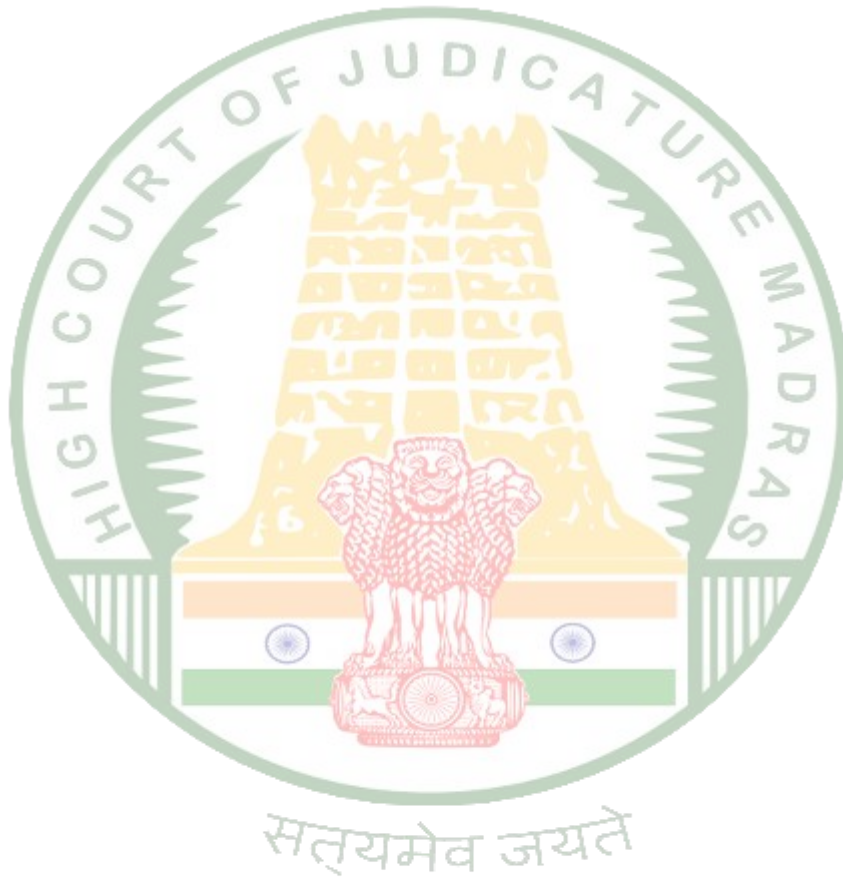
2. The Principal District Munsif, Salem.

+1 cc to Mr.P.Jagadeesan, Advocate,SR.4495

+1 cc to Mr.D.Shivakumaran, Advocate,SR.4368.

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P.D. JUDGMENT IN  
S.A.No.1396 of 2003



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