

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.09.2017

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

A.S.No.51 of 2011
and
CMP.No.14367 of 2017

1. Ammasiammal (Deceased)
(1st Appellant died. Appellants 2 and 3 recorded
as LR's of the deceased 1st appellant vide order
of Court dated 05.04.2017 made in AS.No.51 of
2011 in Memo SR.No.10638 of 2016)

2. Pachiammal
3. K.Rajamanickam ...Appellants

vs.

1.M.Karuppannan
2.K.Chenniappan
3.K.Nandakumar
4.R.Saroja ... Respondents

Appeal suit is filed under Section 96 and Order 41 Rule 1 and 2 of
Code of Civil Procedure to set aside the judgment and decree dated
25.06.2010 in OS.No.71 of 2008 on the file of the Addition District Judge and
Fast Track Court IV, Coimbatore at Tirupur.

For Appellants : Mr.V.Lakshminarayanan
for Mr.M.Guruprasad

For Respondents : Mr.S.V.Jayaraman, Senior Counsel
for K.Govi Ganesan

JUDGMENT

The plaintiffs in OS.No.71 of 2008, a suit for partition are the appellants. According to the plaintiffs, the suit properties belonged to one Muthu Gounder who died leaving behind his wife Ammasiammal, two daughter viz., Silambathal and Pachaiammal and one son Karuppannan. It is also claimed that Silambathal died leaving behind one son K.Rajamanickam. The wife, the daughter of Muthu Gounder and the son of Silambathal viz., Ammasaimammal, Pachaiammal and K.Rajamanickam are the plaintiffs. The first defendant Karuppannan is the son of Muthu Gounder and defendants 2, 3, and 4 are his children.

2. According to the plaintiffs, the suit 'A' Schedule property was allotted to Muthu Gounder in the partition that took place in 1940 between Muthu Gounder and his brothers. The suit 'B' Schedule property was purchased by the said Muthu Gounder on 09.10.1948. It is also claimed that the father of Muthu Gounder, Chennmalai Gounder and Muthu Gounder died intestate. Therefore, the plaintiffs would claim that they are entitled to 3/4 share in the suit properties.

3. The said suit was resisted by the defendants contending that the properties are ancestral properties of Muthu Gounder. According to the

defendants, the said Muthu Gounder died prior to 1956, therefore, the first defendant as sole surviving coparcener become entitled to the entirety of the property.

4. Insofar as the claim of the first plaintiff Ammasiammal is concerned, the suit was resisted on the ground of ouster. It was also further contended that the suit is bad for partial partition inasmuch as the plaintiffs have not included an extent of 92 ½ cents which was allotted to Muthu Gounder under the partition that took place in the year 1940.

5. On the above contentions the learned trial Judge framed the following issues and an additional issue:

1. Whether the plaintiffs are entitled for the partition of the suit property?
2. Whether the plaintiffs have lost their right if any by ouster?
3. Whether the suit is bad for non-joinder of necessary parties?
4. To what relief, if any, the plaintiffs are entitled?

Addition Issue:

1. Whether the suit is bad for partial partition?

6. On the side of the plaintiffs, PW1 to PW3 were examined and Exs.A1 to A4 were marked. On the side of the defendants, DW1 to DW3 were examined and Exs.B1 to B11 were marked.

7. On a consideration of the oral and documentary evidence the learned trial Judge concluded that the suit is bad for partial partition. It was also found that the claim of Ammasiammal is barred by ouster. As regards the death of Muthu Gounder, the learned trial Judge concluded that since Muthu Gounder died in the year 1950 prior to the Hindu Succession Act, 1956 the second plaintiff and the mother of the 3rd plaintiff would not be entitled to any share.

8. Insofar as the claim of the first plaintiff is concerned, the learned trial Judge held that by virtue of the Hindu Women's Right to Property Act, 1937, she would be entitled to ½ share in the suit property. The learned trial Judge however concluded that the first plaintiff has been ousted from enjoyment of the properties for several years and therefore, her claim cannot be entertained. On the above findings the learned trial Judge dismissed the suit. Aggrieved, the plaintiffs are on appeal.

9. The first plaintiff Ammasiammal died intestate pending the appeal. The appellants as well as first respondent have been recorded as her legal representatives.

10. Heard Sri.V.Lakshminarayanan, learned counsel for Mr.M.Guruprasad for the appellants and Mr.S.V.Jayaraman, learned Senior Counsel for Mr.K.Govi Ganesan for the respondents.

CMP.No.14367 of 2017:

11. The appellant has now come forward with an application in CMP.No.14367 of 2017 seeking an amendment of the plaint. By incorporating para 4(a) as well as seeking to amend the 'A' and 'B' Schedule property. Insofar as the 'B' Schedule property is concerned the plaintiff seeks an amendment to include 2 lines which have been omitted.

12. According to the affidavit filed in support of the said application the mistake had occurred because of the fact that Muthu Gounder has purchased an extent of 92 cents from the legal representatives of Aayi Gounder in the year 1948. The extent as well as Survey number being the same, a bonafide omission occurred while incorporating details of the property in the plaint. The extent of 92 cents that was purchased from legal

representatives of Aayi Gounder under sale deed dated 09.10.1948 was shown as 'B' Schedule in the original plaint. But the extent of 92 cents which is allotted to the Muthu Gounder in the partition deed dated 14.12.1940 was omitted to be included. The amendment sought for, if allowed, would cure the defect of partial partition.

13. The respondent had filed the counter affidavit contending that the application is belated therefore, the same should not be allowed. It is also contended that the appellants are attempting to introduce a new case.

14. I have considered the rival submissions on the application for amendment, of course the plea that the suit is bad for partial partition was taken in the additional written statement. The plaintiffs did not choose to take steps to include the properties at that time.

15. The fact that there was a confusion from the description of properties found in the partition deed dated 14.12.1940 and the sale deed dated 09.10.1948 cannot be brushed aside. While Muthu Gounder was allotted an extent of 92 cents in Survey No.243/2 and 244/4 in the partition, he had purchased an extent of 92 cents in the very same survey numbers from the legal representatives of Aayi Gounder under a sale deed

dated 09.10.1948. Probably the confusion arose because of the identity of the Survey numbers as well as extent of properties.

16. I find the explanation offered by the plaintiffs for not including this property in the suit for partition is acceptable. After all no prejudice would be caused to the defendant if the amendment is allowed and the said property is also made subject matter for the suit for partition. Of course Sri.S.V.Jayaraman, learned Senior Counsel appearing for the respondents would contend that the defendants would be entitled to file additional written statement if the plaint is amended.

17. I do not see any necessity for the defendants to file an additional written statement in the case on hand. It is they who contended that the property allotted to Muthu Gounder in the partition that took place on 14.12.1940 was not included in the suit for partition. The partition deed dated 14.12.1940 has been marked as Ex.B1 by the defendants only so they were aware of the existence of the property. Therefore, I find that the contention that they should be permitted to file additional written statement is nothing but attempt to drag on the proceedings which have been pending since 2007, for almost 10 years now.

18. In view of the above the application for amendment will stand allowed and the plaint will be amended as prayed for. The appellants are directed to file an amended copy of the plaint.

AS.No.51 of 2011:

19. Now coming to the main appeal, Mr.V.Lakshminarayanan, learned counsel appearing for the appellants would contend that the father Muthu Gounder died after 1956 and therefore, the plaintiffs would be entitled to 1/4 share in all the properties.

20. Admittedly the properties are ancestral properties which belong to the family of Chennmalai Gounder father of Muthu Gounder and they were allotted to Muthu Gounder in the partition that took place in the year 1940. It is not the case of the appellants that Muthu Gounder had some other business and he had purchased the properties under the sale deed dated 09.10.1948 from and out of the said income, therefore, the said properties belong to Muthu Gounder exclusively.

21. In the absence of such a plea the property that was purchased by Muthu Gounder under a sale deed dated Ex.B2 dated 09.10.1948 will also have to be treated as joint family properties. If the properties are joint

family properties what is the manner of devolution would depend on the date of death of Muthu Gounder. Apparently there is no evidence to show the exact date of death of Muthu Gounder.

22. The learned trial Judge has concluded that the plaintiffs have failed to establish the date of death of Muthu Gounder and therefore the plaintiffs 2 and 3 cannot claim a share without establishing that Muthu Gounder died after 1956.

23. Mr. V.Lakshminarayanan, learned counsel for the appellant would assail these findings and contend that there is enough evidence to fix the year of death of Muthu Gounder, he would contend that in a civil case Court can go by preponderance of probability and proof beyond doubt is not necessary.

24. On the question of ouster the learned counsel would contend that the mother was always in possession of the properties along with the first defendant and in certain occasions the first defendant had dealt with the property as son of Muthu Gounder cannot be put against her to claim ouster.

25. Per contra Mr.S.V.Jayaraman, learned Senior Counsel appearing for the respondent would contend that unless there is concrete evidence to show the date of death of Muthu Gounder there cannot be a decree for partition particularly in favour of plaintiffs 2 and 3. On the question of ouster the learned counsel would contend that the trial Court was justified in holding that the first defendant had in fact asserted hostile title to the knowledge of the plaintiffs and therefore the finding on the ouster has to be sustained.

26. On the above pleadings the following points arises for consideration:

1. Whether the trial Court was right in accepting the plea of ouster put forward by the first defendant?

2. Whether the trial Court was right in concluding that Muthu Gounder died prior to 1956?

3. Whether the suit can be said to be bad for partial partition?

Point No.1:

27. A plea of ouster being a plea as against co-owners requires proof beyond doubt. It is one plea where the civil Court cannot go by preponderance of probabilities. It is for the person who pleads ouster to

prove that he has dealt with the property as his own to the knowledge of the other co-owners to their detriment.

28. The defendants would mainly rely upon the revenue records and electricity consumption cards and receipts of payment of electricity consumption charges as proof of ouster. The trial Court has accepted the said claim. I do not think the trial Court was right in accepting the claim of the first defendant regarding ouster.

29. The division Bench of this Court in *Mohaideen Abdul Kadir and others Vs. Mohammad Mohaideed Umma by Agent Habeeb Mohammad Thambi and others* reported in *MANU/TN/0594/1969 :: 1970 ILR 2 Mad 636*, while dealing with ouster has observed as follows :

“As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord ROBERTSON in delivering the judgment of the Board in Radhamoni Debi v. Collector of Khulna I.L.R.(1930) Cal.943 where his Lordship said that:

the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

The classical requirement is that the possession should be nec vi nec clam nec precario. Mr.Dunne for the

Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening.

Vide also Palania Pillai v. Ibrahim Rowther I.L.R. (1943) Mad. 15 (F.B.) following the abovesaid observations of the Privy Council.

103. In the case of an ouster of a co-owner, the position is essentially different. It must be brought to the knowledge of the co-owner concerned, that his rights are invaded in open assertion of a hostile title. As amongst co-owners, there is unity of possession. Possession of one co-owner is presumed to be on behalf of all the co-owners. To constitute ouster, there must be something more than mere exclusive possession and a receipt of income. There must be, for an ouster, a hostile open denial and repudiation of the rights of other co-owners and this denial or repudiation must be brought home to the co-owners. This does not necessarily mean that the co-owner sought to be ousted or excluded should be informed or told as such by the other co-owners. Courts in proper cases may legitimately infer from the facts established that the excluded co-sharer had knowledge that his title had been denied and repudiated

by the hostile assertion of the other co-owner. I may refer to the following observations of Natesan J., in *Ameer Bibi v. Ghinnammal* (1967) 1 M.L.J. 461 where the learned Judge has observed that the Court can infer ouster if acts of adverse possession are sufficiently overt and from the attendant circumstances impute knowledge of hostile possession:

All the authorities make one thing clear, that the acts that might constitute acts of adverse possession as between strangers do not necessarily have such effect as between tenants-in-common, as their acts of assertion may be capable of being explained as consistent with the joint title. However a tenant-in-common cannot close his eyes and ears and ignore overt acts of hostile possession and plead absence of knowledge of such acts. If the acts of adverse possession by a co-tenant in occupation are sufficiently overt and the attendant circumstances warrant that a reasonable, prudent and attentive man cannot but infer that adverse rights are being asserted against him, the acts would be ouster. While there is no actual notice of the denial of title of the co-tenant not in occupation, the tenant in occupation must make his possession visibly hostile, notoriously and ostensibly exclusive and adverse to impute knowledge of the

hostile possession to the co-tenants sought to be ousted.

This decision has been followed and referred to with approval in the latest Bench decision of this Court in Sinnaraj Pillai v. Bamayee Ammal MANU/TN/0578/1967: (1968) 2 M.L.J.639.”

30. In view of the law laid down by the Division Bench, I do not think the plea of ouster can be sustained in the case on hand. What is relied upon by the first defendant to show ouster are only the revenue records and documents relating to electricity service connection. As a son of the father who died sometime in the late 1950s, it is quite natural that the mutations were effected in the name of the first defendant. Therefore, I do not think that alone would constitute ouster.

31. Another Division Bench of this Court in ***B.Goopalakrishnan Vs. Meganathan(died) and others*** reported in **1972 (2) MLJ 481** had held that ouster cannot be inferred by mere enjoyment of the properties for over a period of 12 years. Therefore, I do not think the trial Court was right in concluding that the first plaintiff was ousted from the enjoyment of the properties so as to dis-qualify her from seeking partition as legal representatives of the deceased Muthu Gounder.

Point No.2:

32. The plaintiffs would claim that Muthu Gounder died after 1956, whereas, the first defendant would contend that Muthu Gounder died prior to 1956 and therefore, the plaintiffs 2 and 3 will not be entitled to share in the property. It is imperative on the part of the Court to fix the date of death of Muthu Gounder.

33. From the evidence available it is seen that in Ex.A4, which is the voter identity card of the second plaintiff in which her age is shown as 47 years on 01.01.1995. Therefore, she should have born in 1948. The first defendant in his evidence has admitted that he was 12 years old when his father died and the second plaintiff is 2 years younger to him. Therefore, the first defendant should have been born in 1946. If his statement that he was 12 years old when his father died is accepted. Then the year of death of Muthu Gounder is 1958. I do not see any reason to dis-believe the version of the first defendant on this aspect. Therefore, it is clear that Muthu Gounder had died after coming into force of the 1956 Act. In that event the plaintiffs 2 and 3 would each be entitled to 1/6 share.

34. Even assuming that Muthu Gounder had died before 1956, he should have died between 1948 and 1956 by the time he died the Hindu Women's rights to Property Act had already come into force. Therefore, his wife Ammasiammal would be entitled to $1/2$ share in the joint family property and since Ammasiammal was in possession of the property that limited right had enlarged into absolute right under Section 14 of the Hindu Succession Act.

35. On the death of Ammasimmal the half share that devolved on her will have to be divided among the first defendant and the plaintiffs 2 and 3. Therefore, the plaintiffs 2 and 3 will each get $1/3$ of the one $1/2$ share which will be equivalent to $1/6$. Either way the share that the plaintiffs will be entitled to will remain the same $1/6$.

Point No.3:

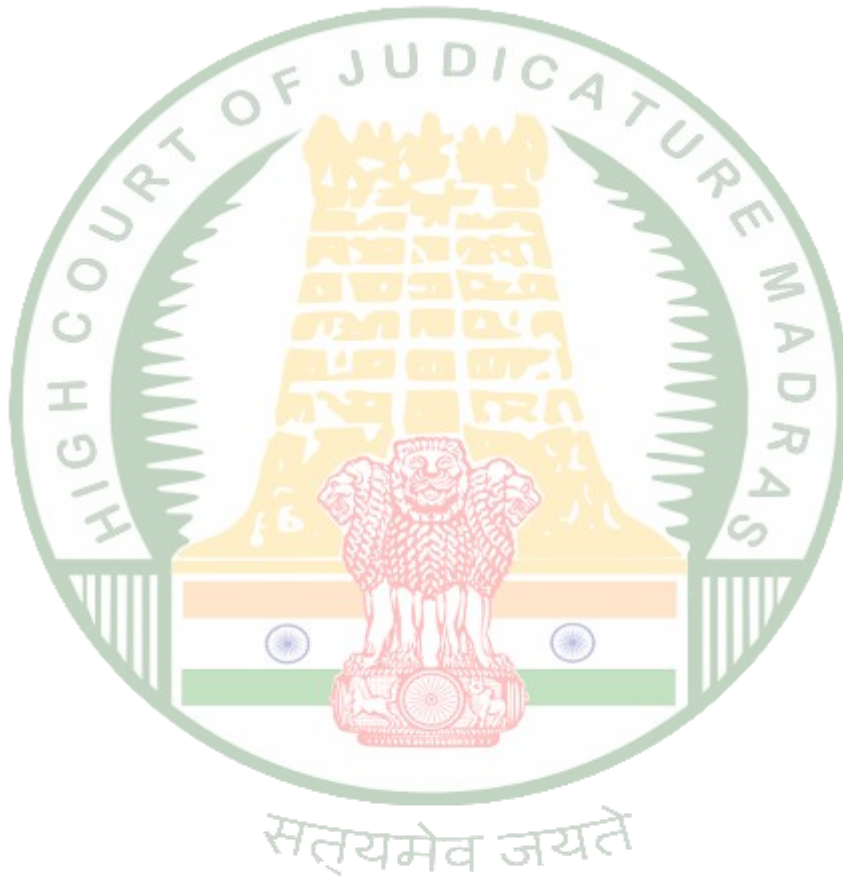
36. On the question of partial partition, now that I have allowed the application for amendment to include the property which was omitted to be included, the plea of partial partition no longer survives. Now that it has been held that the properties are joint family properties and that Muthu Gounder died after 1956. The next question that falls for consideration is

quantum of share that the parties would be entitled to if Muthu Gounder had died after 1956 leaving behind an interest in mitakshara coparcenary property under explanation to Section 6 of the Hindu Succession Act, his interest by mitakshara of coparcenary would devolve by succession under the Hindu Succession Act and not by survivorship. In deciding as to what is the interest of Muthu Gounder under mitakshara coparcenary of property, a notional partition has to be assumed prior to the death of Muthu Gounder. In such a partition, Muthu Gounder gets $\frac{1}{2}$ share and his son Karuppannan would get the other $\frac{1}{2}$ share.

37. The $\frac{1}{2}$ share of Muthu Gounder upon his death will devolve on his four legal representatives viz., the wife, two daughters and the son. Therefore, the first defendant as son, would be entitled to $\frac{5}{8}$ share and the plaintiff 1 and 2 and mother of the 3rd plaintiff would be entitled to $\frac{1}{8}$ share each. It is seen from the records that the first plaintiff Ammasimmal died intestate pending appeal. So her $\frac{1}{8}$ share will have to be divided between the first defendant and the plaintiffs 2 and 3. Each one of them will get $\frac{1}{24}$ share. Thus, the plaintiffs each will get $\frac{1}{8} + \frac{1}{24}$ which is equivalent to $\frac{4}{24}$ which is equivalent to $\frac{1}{6}$.

38. Thus the plaintiffs 2 and 3 would each be entitled to $\frac{1}{6}$ share in

the suit property. In view of the above conclusion the appeal is allowed.



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