

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.01.2018

PRONOUNCED ON : 08.02.2018

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.559 of 2003

1. Kasiammal
2. Elumalai @ Narayanan ... Appellants/Defendants in
Trial Court
Vs.
Kuppusamy .. Respondent/Plaintiff in
Trial Court

Prayer : This Second Appeal has been filed under Section 100 of Civil Procedure Code against the judgment and decree dated 12.12.2002 made in A.S.No.38 of 2002 on the file of the Principal District Judge, Villupuram, in confirming the decree and Judgment dated 06.12.2001 made in O.S.No.317 of 2000 on the file of the Principal District Munsif, Tirukoilur.

For Appellants : Mr.D.Govinda Reddy
For Respondent : Mr.T.Gandhi

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 12.12.2002 passed in A.S.No.38 of 2002 on the file of the Principal District Court, Villupuram, confirming the decree and Judgment dated 06.12.2001 passed in O.S.No.317 of 2000 on the file of the Principal District Munsif Court, Tirukoilur.

2. Parties are referred to as per their rankings in the Trial Court.

3. Suit for partition.

4. The case of the plaintiff, in brief, is that the suit properties described in the plaint 'B' schedule originally belonged to the plaintiff's grandmother Sadharam Ammal and been in her possession and enjoyment and she died intestate leaving behind her daughter Sivabakkiyam Ammal and son Perumal and after the demise of Sadharam Ammal, the plaint schedule properties were enjoyed by her legal heirs, viz., Sivabakkiyam and Perumal and Sivabakkiyam Ammal died about 20 years ago intestate and

Perumal died intestate about 15 years ago and the plaintiff is the son of Sivabakkiam Ammal and the first defendant is the wife of Perumal and the second defendant is the son of Perumal. The plaintiff's father Srinivasa Konar died about 40 years ago. The suit properties and other properties were purchased by Sadharam Ammal and her sister Seetai Ammal from one Subramaniya Achari by way of a registered sale deed dated 09.02.1924 and in the partition effected amongst them, the plaint 'B' schedule properties were allotted to Sadharam Ammal and the other properties on the northern side were allotted to Seetai Ammal and thus, the suit properties are the joint properties belonging to the plaintiff and the defendants and the profits derived from the suit properties had been given to the plaintiff by the defendants every year and while so, from 1999 onwards, the defendants had failed to share the profits derived from the suit properties with the plaintiff and left with no other alternative, the plaintiff demand partition of his half share in the suit properties and also issued a legal notice dated 02.01.2000 and the defendants did not respond to the same and hence, the suit for partition.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. The fact that the plaint 'B' schedule properties and other properties were purchased by Sadharam Ammal and her sister Seetai Ammal by way of a registered sale deed dated 09.02.1924 is correct and it is also correct to state that in the partition effected amongst above said two sisters, the plaint "B" schedule properties were allotted to Sadharam Ammal and the northern properties were allotted to Seetai ammal and the relationship between the parties is also admitted and it is false to state that Sadharam Ammal died about 35 years ago and on the other hand, she died about 50 years ago and the plaintiff's mother Sivabakkiam Ammal died about 30 years ago. After the demise of Sadharam Ammal, it is only her son Perumal, who had been in possession and enjoyment of the plaint schedule properties as her legal heir by obtaining patta, paying kist etc., as the full owner thereof and after the demise of Perumal Konar, the defendants had been in possession and enjoyment of the plaint schedule properties and thus, on account of their long, continuous and uninterrupted enjoyment of the suit properties for more than the statutory period by excluding the plaintiff and his mother, the defendants have prescribed title to the suit properties by way of adverse possession and at no point of time either Sivabakkiam Ammal or the plaintiff claimed any share in the suit properties and the suit is barred by limitation and it is false to state that the defendants had been sharing the profits of the suit properties with the plaintiff every year and stopped the same since 1999 onwards and the plaintiff is not entitled to lay any claim of right in the suit properties and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PW1 was examined and Exs.A1 to 4 were marked. On the side of the defendants', DWS1 to 3 were examined and Exs.B1 to 11 were marked. Exs.X1 and 2 were also marked. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to grant the preliminary decree as prayed for.

7. On appeal preferred by the defendants, it is found that at the initiative of the defendants, additional evidence has been projected on their behalf in the appellate Court and they have come to be marked as Exs.B12 to B15 and the First Appellate Court, on an appreciation of the materials placed and the submissions made, was pleased to confirm the judgment and decree of the Trial Court and thereby dismissed the appeal preferred by the defendants. Impugning the same, the present second appeal has come to be laid.

8. At the time of admission of the Second appeal, the following Substantial Questions of Law were formulated for consideration in the Second Appeal:-

" 1. Whether the property stands in the name of female purchaser in her name during the year 1924 is construed to be joint family property?

2. Whether the suit filed by the petitioner after 30 years of the death of his mother against his maternal uncle's son and wife is not barred by limitation?

3. As the plaintiff is not construed to be an ouster when his mother and himself were residing in a separate village and his maternal uncle was in possession of the property till his death and thereafter his son and wife continued in possession of the property as absolute owners of the property?"

9. It is not in dispute that the suit properties and other properties were purchased by Sadharam Ammal and her sister Seetai Ammal by way of a sale deed dated 09.02.1924, which document has come to be marked as Ex.A1. It is also not in dispute that in the partition effected amongst the above said two sisters, the suit properties had come to be allotted to Sadharam Ammal and the other properties on the northern side were allotted to Seetai Ammal. Thus, it is found that the parties are unison in the position that the suit properties are the properties of Sadharam Ammal. It is further not in dispute

that Sadharam Ammal died leaving behind her daughter Sivabakkiam Ammal and son Perumal as her legal heirs. According to the plaintiff, Sadharam Ammal died about 35 years ago. However, as per the case of the defendants, she died about 50 years. Be that as it may, it is found that Sadharam Ammal and also her daughter Sivabakkiam Ammal and her son Perumal had died and the same is also not disputed. The plaintiff is the son of Sivabakkiam ammal and the defendants are the wife and son of Perumal.

10. On the footing that the suit properties belonged to Sadharam Ammal, the plaintiff, accordingly, lays a claim of half share in the suit properties as her legal heir through her daughter Sivabakkiam ammal as above stated and according to the plaintiff, the defendants used to share the profits of the suit properties with him and inasmuch as they had stopped the same since 1999 onwards and as the plaintiff's request to amicably divide the suit properties for allotting his share did not yield the desired result, according to the plaintiff, he has been necessitated to lay the suit for partition.

11. Per contra, it is the case of the defendants that after the demise of Sadharam ammal, it is only her son Perumal, who had been in exclusive possession and enjoyment of the suit properties by obtaining patta, paying kist in his individual capacity and at no point of time, either Sivabakkiam Ammal or her son, the plaintiff, laid any claim of right in respect of the suit properties and further, according to them, after the demise of Perumal, it is only the defendants, who had been in continuous possession and enjoyment of the suit properties and the defendants had also disputed the claim of the plaintiff that the defendants had been sharing the profits with him continuously for several years and stopped giving the same since 1999 onwards and according to them, at no point of time, shared the profits derived from the suit properties with the plaintiff and thus, it is the contention of the defendants that on account of their long, continuous and uninterrupted enjoyment of the suit properties from the days of their predecessor in title excluding the plaintiff beyond the statutory period, according to them, they had prescribed title to the suit properties by way of adverse possession and hence, the plaintiff is not entitled to claim any share in the suit properties and the suit is liable to be dismissed.

12. Considering the pleadings put forth by the respective parties as above stated, it is evident that the defendants admitting that the plaintiff is also one of the legal heirs of the deceased Sadharam Ammal, to whom, admittedly the suit properties belonged to, are found to be resisting his claim of partition mainly on the footing that they had prescribed title to the suit properties by way of adverse possession by excluding the plaintiff beyond the statutory period on account of their long, continuous and uninterrupted enjoyment etc., In such view

of the matter, as rightly determined by the Courts below, it is only the defendants, who have to establish that they have prescribed title to the suit properties by way of adverse possession by excluding the plaintiff as projected by them.

13. In this connection, it is found that other than marking certain kist receipts as Exs.B2 to B10 and Citta extract marked as Ex.B1 and patta dated 05.07.1984 marked as Ex.B11, no other reliable and acceptable document has been projected by the defendants before the trial Court for sustaining their claim of right to the suit properties by way of adverse possession and it is also found that Exs.X1 & 2 were pressed into service before the trial Court. However, as rightly determined by the trial Court, merely on the basis of some kist receipts projected in the matter and the patta marked as Ex.B11, it cannot be construed that the defendants had prescribed their title to the suit properties by way of adverse possession. In so far as this case is concerned, it is found that the plaintiff as well as the defendants are the co-owners in respect of the suit properties and when the defendants are disputing the claim of share in the suit properties of the plaintiff only on the footing that they had prescribed title to the same by way of adverse possession, as rightly put forth by the plaintiff's counsel, the defendants have to place convincing and acceptable materials to hold that they had prescribed title to the suit properties by way of prescription as claimed by them. It is not in dispute that the possession of one co-owner is deemed to be the possession of the other co-owners and accordingly, when it is found that the defendants are claiming absolute title to the suit properties only by way of adverse possession for sustaining the said claim, they have to establish that they had been in possession and enjoyment of the suit properties continuously, uninterruptedly by exhibiting hostile attitude towards the other co-owners excluding and ousting them by assertion of independent title and sans proof, pointing to the same, it cannot be held that the defendants had prescribed title to the suit properties by way of adverse possession. As rightly contended by the plaintiff's counsel, the mere fact that a particular co-owner is not in possession along with the other co-owners by itself would not lead to the conclusion that the co-owners, who are in possession and enjoyment of the properties, are the exclusive title holders and that, they had ousted the other co-owners from title. Accordingly, it is seen that the mere mutation of the revenue records in the name of one co-owner by itself would not lead to the conclusion that he has prescribed title to the concerned properties by way of adverse possession. In this connection, the principles relating to adverse possession, which have to be established by a co-owner for seeking claim on that basis against the other co-owners had been emphasised by the apex Court in the decision reported in (1995) 2 Supreme Court Cases 543 (Annasaheb Bapusaheb Patil and others Vs. Balwant Alias

Balasaheb Babusaheb Patil (Dead) By Lrs. and heirs and others)
as follows:

"In the case of a Hindu joint family, there is community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenary property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one, therefore, is the possession of all. The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmatively that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other"

Similarly, the above said position of law has also been reiterated by the apex Court in the decision reported in (2004) 1 Supreme Court Cases 271 (MD.Mohammad Ali (Dead) By Lrs. Vs. Jagadish Kalita and others) as follows:

Held:

By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years proceeding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession. For the purpose of proving adverse possession / ouster, the

defendant must also prove animus possidendi.

However, in the event, the case of the defendant was that the predecessors-in-interest of the plaintiff ceased to be his co-sharers for any reason whatsoever, it was no necessary for them to raise a plea of ouster. In a proper case the court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession has been raised in the written statement or not which can also be gathered from the cumulative effect of the averments made therein.

Long and continuous possession by itself would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer becomes a construction trustee of other co-sharer and the right of the appellant and / or his predecessors-in-interest would, thus, be deemed to be protected by the trustees. Possession of a property belonging to several co-shares by one co-sharer,, shall be deemed to be possession on behalf of the other co-shares unless there has been a clear ouster by denying the title of other co-shares. Mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that the tile of the other co-shares was denied and disputed.

The respondents in their written statement raised a plea of adverse possession only against the third set of the defendants. A plea of adverse possession set up by the respondents does not meet the requirements of law also in proving ouster of a co-sharer. But in the event the heirs and Lrs of G and K partitioned their properties by metes and bounds, ,they would cease to be co-sharers in which event a plea of adverse possession as contradistinguished from the

plea of ouster could be raised. The respondents have failed to raise any plea of ouster. No finding has been arrived at by the High Court as to from which date they began to possess adversely against the plaintiff or his predecessors-in-interest. Mere non-payment of rents and taxes may be one of the factors for proving adverse possession but cannot be said to be the sole factor. The High Court has not assigned any reason as to how there had been an open ouster by P. Furthermore, the first appellate court applied a wrong principle of law in relation to interpretation of Article 65 of the Limitation Act 1963. The High Court fell into the same error. In the facts of the present case the question of the respondents acquiring title by ouster of the appellant on the basis of the order of the municipal authorities in the mutation proceedings does not arise. In the suit the only issue which could be raised and determined was as to whether respondents 3 was a tenant of the plaintiff. As the plaintiff or his predecessors-in-interest failed to show that respondents 3 was inducted by them, his claim for arrears of rent was rejected but the Court while determining the said issue could not have gone into a pure question of title as well as the question as to whether the respondents herein acquired title by adverse possession."

14. The same principles had been defined and explained by the Supreme Court in the decision reported in 2007 -2-L.W.955 (T.Anjanappa and Ors Vs. Somalingappa and Anr) also.

15. The position of law as regards the plea of adverse possession projected by the defendants against the plaintiff, the co-owner, being as above, it is found that long and continuous possession of the suit properties by the defendants by itself and non participation rents and profits by the plaintiff alone would not amount to ouster so as to give title in their favour by prescription. Similarly, it is also found that mere mutation of revenue records in respect of the suit properties concerned by itself would not be sufficient on their own to hold that the properties have been acquired by way of adverse possession as against the other co-owners.

16. In the light of the above position, when it is found that the defendants had projected only certain kist receipts coupled with one patta marked as Ex.B11 and as rightly determined by the trial Court, on the basis of the above set of documents, it cannot be concluded that the defendants had been exercising absolute ownership over the suit properties, continuously, uninterruptedly and exhibiting animus and hostile attitude towards the plaintiff beyond the statutory period and in such view of the matter, no exception could be taken in the determination of the trial Court that the defendants have miserably failed to establish their plea of adverse possession.

17. In the first appellate Court, further documents had been projected by the defendants in support of their case. The two sale transactions marked as Exs.B14 & 15 are found to be executed by Perumal in respect of the certain other properties and in such view of the same, merely, from the above said two sale transactions, it cannot be inferred or concluded that Perumal had been exercising absolute and full ownership in respect of the plaint schedule properties to the exclusion of the plaintiff. Accordingly, it is noted by the first appellate Court, Exs.B14 & 15 sale transactions would not in any manner serve the case of the defendants. Similarly, the Chitta extract marked as Ex.B13 also by itself would not be sufficient to conclude that the defendants had been in possession and enjoyment of the suit properties since the days of their predecessor in title for claiming the relief of adverse possession as claimed by them. Ex.B12 is only the death certificate of Perumal and would not be of any significance to uphold the claim of the defendants. Accordingly, it is found that the first appellate Court also did not find acceptance to the case of the defendants that they had prescribed title to the suit properties by way of adverse possession.

18. As rightly determined by the Courts below, merely from the documents marked as Exs.X1 & 2 through DW3 V.A.O. they being the extract of "A" Register standing in the name of the second defendant and his father and one Chinnathambi, we cannot safely conclude that the defendants had been in possession and enjoyment of the suit properties continuously, uninterruptedly, openly exhibiting hostile attitude to the knowledge of the plaintiff exercising antagonistic animus to one and all and thereby prescribed title to the suit properties by way of adverse possession. Accordingly, it is found that the Courts below did not and also rightly not placed reliance upon the above said documents for accepting the defence version.

19. In the light of the above discussions, it is found that the plaintiff being one of the legal heirs of Sadharam Ammal, the original owner of the suit properties and accordingly, when it is found that the plaintiff is entitled to claim half share

in the suit properties and when the defendants have failed to establish that they had prescribed title to the suit properties by way of adverse possession, particularly, by excluding and ousting the plaintiff and his mother beyond the statutory period as outlined in the decisions of the apex Court above cited, it is found that mere non participation of the profits of the suit properties by the plaintiff by itself would not lead to the conclusion that the defendants had prescribed title to the suit properties by way of adverse possession and accordingly, it is found that the Courts below had rightly rejected the theory of adverse possession projected by the defendants, when there is no reliable and acceptable evidence pointing to the same. The substantial questions of law formulated in this second appeal are accordingly answered against the defendants and in favoaur of the plaintiff.

In conclusion, the second appeal fails and according, is dismissed with Costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

sms
To

1. The Principal District Judge, Villupuram.
2. The Principal District Munsif, Tirukoilur.

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The Section Officer

VR Section High Court,

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S.A.No.559 of 2003

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