

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.02.2019
PRONOUNCED ON : 05.03.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.427 of 2005
and
C.M.P. No.81 of 2009

1. Tmt.Namagiri
2. Tmt.Mythili
3. Tmt.Kalarani
4. Tmt.Padma
5. Tmt.Sulochana
6. Tmt.K.Jayathi ... Appellants/Defendants 2 to 6 & 8

Vs.

1. Mr.R.Vasudevan (Deceased)
2. Tmt.G.Saroja
3. Tmt.R.V.Revathi
4. Tmt.R.V.Arundhati
5. Tmt.B.Soodamani
6. Mr.V.Mathavan
7. V.Jayalakshmi
8. V.Mohan
9. V.Mukundan
10. Indira
11. Vijaya ... Respondents
(RR7 to 11 brought on record as Lrs of the deceased
R1 vide order dated 08.02.2019 made in CMP No.4491
to 4493/2010 in SA No.427/2005)

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 14.08.2001 in A.S.No.3 of 2000 on the file of the III Additional District Court, Salem, confirming the judgment and decree dated 28.06.1996 in O.S.No.175 of 1992 on the file of the Subordinate Judge, Namakkal.

For Appellants : Mr.M.Kalyanasundaram
Senior Counsel
for Mr.G.N.Sridharan

For Respondents : Mr.S.Saravanakumar

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 14.08.2001 passed in A.S.No.3 of 2000 on the file of the III Additional District Court, Salem, confirming the judgment and decree dated 28.06.1996 passed in O.S.No.175 of 1992 on the file of the Subordinate Court, Namakkal.

2. The second appeal has been admitted on the following substantial questions of law:

"(1) Whether an undisputed and hostile possession of a suit property for a long period of over 40 years with the knowledge of the person claiming a share in the property, would defeat the prescriptive title accrued to the possessor?

(2) Whether or not the laches on the part of persons claiming a share in the property by not taking immediate action on the death of the original owner estop them from claiming a share or title to the property?"

3. The parties are referred to as per their rankings in the trial court for the sake of convenience.

4. The plaintiffs had laid the suit for partition against the defendants. The plaintiffs' suit had been upheld by the Courts below. Aggrieved over the same, the defendants have come forward with the present second appeal.

5. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

6. It is not in dispute that the suit property belonged to Singam Iyengar. It is also not in dispute that Ramaswami, Rangaswami and Parthasarathi are the sons of Singam Iyengar. The plaintiffs are the sons of Ramaswami, who died in the year 1931, it is also not disputed that Singam Iyengar died in the year 1951, his other son Rangaswami died in the year 1979 and his another son Parthasarathi died in the year 1945.

7. The first defendant is the wife of the deceased Rangaswami and the defendants two to six are the other legal heirs of the deceased Rangaswami. Rangaswami's daughter one Kamala had died and her legal heirs are the defendants seven and eight. The ninth defendant Namagirilakshmi is the wife of the deceased Parthasarathi. Pending the suit, the ninth defendant died without leaving any issue. Therefore, it is seen that the

suit property belonging to Singam Iyengar would devolve upon his legal heirs, namely his three sons, as above stated namely, Ramaswami, Rangaswami and Parthasarathi. Inasmuch as the legal heir of Parthasarathi namely Namagirilakshmi had died without leaving any issue, it is evident, as determined by the Courts below, that the suit property would devolve upon the other two sons of Singam Iyengar and on their death, upon the legal heirs of the other two sons of Singam Iyengar. As above noted, the plaintiffs are the sons of Ramaswami and the defendants one to eight are the legal heirs of Rangaswami. Thus, it is seen that in the normal course of inheritance, the plaintiffs would be entitled to obtain half share in the suit property and accordingly, claiming the above said share, the plaintiffs have come forward with the suit against the defendants for partition.

8. The main defence taken by the defendants to resist the plaintiffs' suit is one of ouster and adverse possession. According to the defendants, briefly stated, it is only they and their predecessors in interest, namely, Rangasami, who had been in the possession and enjoyment of the suit property for more than forty years by paying house tax, etc., to the knowledge of the plaintiffs and by way of the same, it is stated that they had ousted the plaintiffs from the enjoyment of the suit property and accordingly have prescribed title to the suit property by way of the adverse possession and hence, the plaintiffs are not entitled to claim partition in the suit property.

9. In the light of the abovesaid defence set out by the defendants, once it is noted that the plaintiffs, as the legal heirs of Ramasami, would be entitled to claim half share in the suit property and when their claim of partition is resisted by the defendants only on the plea of adverse possession and ouster, it is for the defendants to prove the abovesaid plea taken by them for negating the relief sought for by the plaintiff.

10. It is seen that the suit has come to be laid by the plaintiffs on 19.05.1992. Thus, as rightly determined by the Courts below, to claim the absolute title to the suit property by way of the ouster and adverse possession, the defendants should establish that they had been in the possession and enjoyment of the suit property for twelve years or more prior to the institution of the suit by excluding the plaintiffs and also exercising the ownership over the suit property openly, continuously and uninterruptedly beyond the statutory period with animus possidendi and thereby entitled to claim exclusive title to the suit property and thereby deprived the claim of partition put forth by the plaintiffs in respect of the suit property. With reference to the above said plea taken by the

defendants, the defendants have come forward with seventeen documents marked as Exs.B1 to B17. They are found to be the tax receipts in respect of the suit property standing in the name of Rangaswami, of them, the documents marked as Exs-B1 to B4 are found to be dated 20.03.1972, 20.03.1972, 14.03.1973 and 14.03.1973 respectively and the other documents ranging from Exs-B5 to B17 are found to be within the period of twelve years prior to the institution of the suit. In such view of the matter, the above said documents would be of no use to sustain the plea of ouster and adverse possession set out by the defendants. Thus, it is noted that other than the documents marked as Exs-B1 to B4, they having come into existence in the year 1972-73, there is no other valid and acceptable materials placed on the part of the defendants to establish that they and their predecessors in interest had been exercising right and ownership over the suit property exclusively openly, continuously and uninterruptedly by denying the title of the plaintiffs one way or the other with animus possidendi beyond the statutory period and in such view of the matter, it is found that the documents projected by the defendants would be of no use to sustain their abovesaid plea of ouster and adverse possession as putforth by them for depriving the claim of partition of the plaintiffs in respect of the suit property. As rightly determined by the Courts below, the plaintiffs and the defendants, being found to be the co-owners of the suit property, as per law, the possession of one co-owner is deemed to be the possession of the other co-owners and in such view of the matter, merely because the defendants and their predecessors in interest had been enjoying the suit property for several years and the plaintiffs had not been enjoying the same for one reason or the other, that by itself, would not deprive the plaintiffs from claiming their share in the suit property as per law.

11. As rightly putforth by the plaintiffs counsel, the defendants having taken the plea of ouster and adverse possession for negating the partition sought for by the plaintiffs, it is seen that it is only the defendants who have to establish the abovesaid plea and in the decision of the Apex Court reported in 2016 (4) SCC 434 (Nagabhushanammal (dead) by legal representatives vs. C.Chandikeswaralingam), it has been held that the plea of ouster is a weak defence in a suit for partition of family property and it is strong if the defendant is able to establish consistent and open assertion of denial of title, long and uninterrupted possession and exercise of right of exclusive ownership openly and to the knowledge of the other co-owner. Furthermore, the judgment of the Apex Court reported in 2015 (1) SCC 417 (N.Padmamma and others vs. S.Ramakrishna Reddy and others), reiterates the principles of as to how the plea of adverse possession and ouster should be pleaded and established

by the co-owners against the other co-owners and the position of the law with reference to the same has been outlined by the Apex Court in the abovesaid decision in the following manner:

"A....-Possession of a co-heir is to be treated as possession of other co-heirs - Same cannot be adverse to other co-heirs not in possession merely by any secret hostile animus on his own part in derogation of other co-heirs' title - Ouster of the other co-heirs must be evidenced by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other.

B. Property Law - Adverse possession - Co-heirs or co-sharers - When may oust other co-heirs or co-sharers - Held, possession of a co-heir is in law treated as possession of all the co-heirs - If one co-heir has come in possession of the properties, it is presumed to be on the basis of a joint title - A co-heir in possession cannot render his possession adverse to other co-heirs not in possession, merely by any secret hostile animus on his own part, in derogation of the title of his other co-heirs - Ouster of the other co-heirs must be evidence by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other - Limitation Act, 1963, S.27 and Arts.64 and 65.

10. It is fairly well-settled principle of law that the possession of a co-heir is in law treated as possession of all the co-heirs. If one co-heir has come in possession of the properties, it is presumed to be on the basis of a joint title. A co-heir in possession cannot render its possession adverse to other co-heirs not in possession, merely by any secret hostile animus on his own part, in derogation of the title of his other co-heirs. Ouster of the other co-heirs must be evidence by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other. Reference may also be made to the decision of this Court in P.Lakshmi Reddy v. L.Lakshmi Reddy wherein this Court has succinctly summed up the legal position as under:

"4. 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 is the non-possessioning 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. 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 one of them to the knowledge of the other so as to constitute ouster."

11. Relying upon the principles stated above, this court in Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee, almost in similar circumstances held:

"10. In this case we have to consider whether the appellants had laid a claim which a co-sharer could not put forward except by pleading ouster or any other independent ground. Even if they were in actual Khas possession within the meaning of Section 2(k) of the Act it must be held that the plaintiff who was a co-sharer was in constructive possession through the appellants as 'under the law possession of one co-sharer is possession of all the co-sharers'. We see no reason to hold that the observations of this Court to the above effect in P.Lakshmi Reddy v. L.Lakshmi Reddy are not applicable to the case before us. The appellants do not claim to be trespassers on the property: neither did they claim any title to the lands adversely to the plaintiff-respondent. The deeming provision of Section 6 must therefore ensure for the benefit of all who in the eye of the law would be regarded as in actual possession. It follows that the plaintiff had not lost his share in the Bakasht lands and had a right to them though not a tenure-holder or proprietor but certainly as a Raiyat under the provisions of the Land Reforms Act. The

appeal must therefore be dismissed with costs."

Considering the principles of law outlined by the Apex Court in the abovesaid decision, it is found that the possession of a co-heir is to be treated as the possession of the other co-heirs and it is only the co-heir who is taking the plea of ouster and adverse possession, has to establish his case for depriving the claim of partition put forth by the other co-heir and in such view of the matter, when the materials placed on record by the defendants do not show or indicate that they had been exercising absolute and exclusive ownership of the suit property openly, continuously and uninterruptedly with animus possidendi to the knowledge of the plaintiffs or their predecessors in interest, in such view of the matter, as rightly determined by the Courts below, merely because the defendants had been retaining the possession of the suit property for several years, that alone, would not be the sole criteria for holding that they have prescribed title to the suit property by way of the ouster and adverse possession particularly sans material pointing to the same. As rightly determined by the Courts below, the defendants cannot be allowed to set up an exclusive title to the suit property, particularly against the plaintiffs, who are admittedly the co-owners of the suit property.

12. The defendants counsel contended that the witness examined on the side of the plaintiffs has admitted as regards the continuous enjoyment of the suit property by Rangaswami and his legal heirs and by way of the abovesaid admission coupled with the evidence adduced by DW1, according to him, the plea of adverse possession and ouster put forth by the defendants should be held to have been established and thereby contended that the Courts below had not considered the above said facts in extenso and in the proper perspective and therefore, the judgment and decree are liable to be set aside. Even assuming for the sake of arguments that the defendants and their predecessors in interest Rangaswami had been in the possession and enjoyment of the suit property for more than forty years or so, as rightly contended by the plaintiffs counsel, mere possession howsoever long, that by itself, would not enable the defendants to take the plea of ouster and adverse possession unless they establish the abovesaid plea by placing acceptable and reliable materials as outlined by the Apex Court in the abovesaid decision. As above noted, when other than the documents marked as Exs-B1 to B4 pertaining to the year 1972 to 1973, the other documents projected by the defendants being found to be within the period of twelve years prior to the institution of the suit and furthermore, the abovesaid documents are also not found to be showing continuous enjoyment of the suit property by the defendants and their predecessors in interest and in addition to

that when the defendants have not come forward with the specific case as to when from their possession and enjoyment of the suit property has become adverse to the plaintiffs and when the said adverse possession had culminated to the knowledge of the plaintiff and in such view of the matter, the mere possession of the suit property by the defendants and their predecessors in interest would not enable them to resist the claim of partition putforth by the plaintiffs qua the suit property.

13. The principles of law outlined in the other decisions relied upon by the defendants counsel reported in 2015 (17) SCC 1 (M.Venkatesh and others Vs. Commissioner, Bangalore Development Authority) and 1995(4) SCC Supreme Court Cases 496 (Vidya Devi alias Vidya Vati (dead) by Lrs Vs. Prem Prakash and others) are also taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

14. In the light of the abovesaid discussions, I do not find any error or mistake in the determination of the Courts below that the defendants had failed to establish the plea of ouster and adverse possession putforth by them and accordingly, the Courts below had rightly held that the mere possession of the suit property by the defendants over a period of time, by itself, would not constitute the plea and proof of ouster and adverse possession putforth on their part and thereby deprived the plaintiffs from claiming their due share in the suit property. The substantial questions of law formulated in the second appeal are accordingly answered against the defendants and in favour of the plaintiffs.

15. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(Admin)

//True Copy//

Sub Assistant Registrar

nsd/bga

To

1. The III Additional District Judge, Salem.
2. The Subordinate Judge, Namakkal.

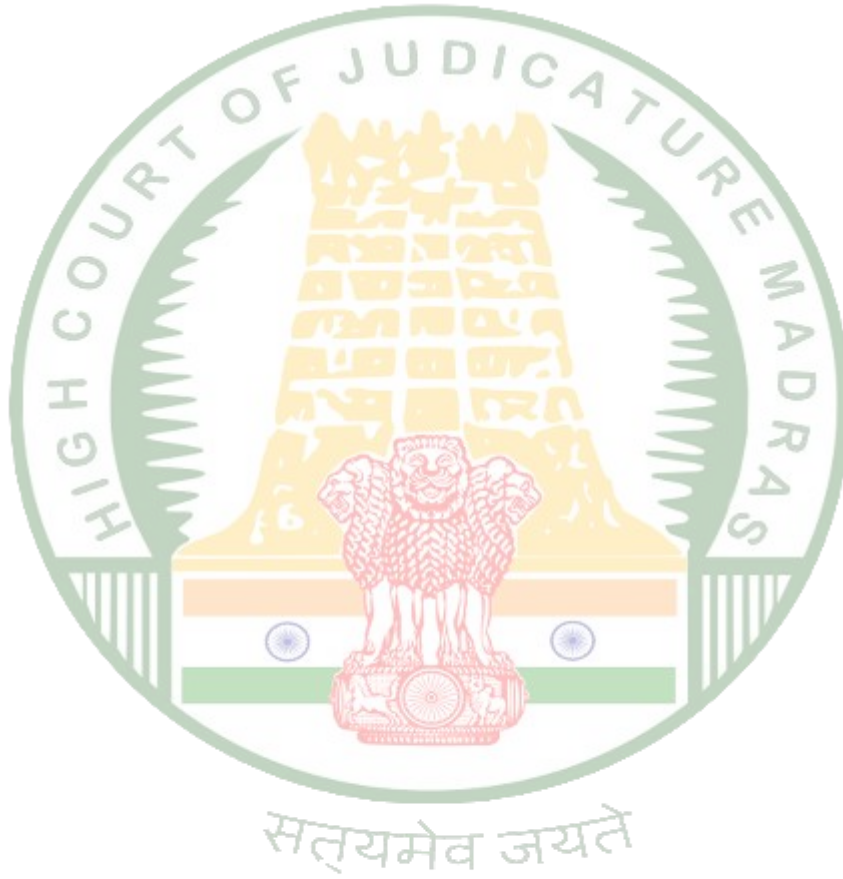
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The Section Officer, V.R.Section,
High Court, Madras.

+1 cc to Mr.GN.Sridharan, Advocate, Sr.No. 20368

judgment made in
S.A.No.427 of 2005

CSL/24.06.2019



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