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IN THE HIGH COURT OF JUDICATURE AT MADRAS

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CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

S.A.No.91 of 2012

Muthukumarasamy ... Appellant/1st Respondent/1st Defendant
(2nd Defendant Parvathy died and the
1st defendant is already on record)

versus

1. Kannammal
2. Loganayaki
3. Shanmugam
4. Illavarasi ... Respondents/Appellants/Plaintiffs

Second Appeal filed under Section 100 of C.P.C., against the Decree and Judgment of the learned Additional District Judge, Fast Track Court No.3, Coimbatore dated 6.4.2011 in A.S.No.103 of 2007 reversing the judgment and decree of the learned Subordinate Judge, Pollachi dated 29.08.2006 in O.S.No.6 of 2005.

For Appellant .. Mr.V. Nicholas

For Respondents .. Mr.R. Babu

JUDGMENT

Aggrieved over the judgment and decree of the First Appellate Court reversing the finding of the trial court dismissing the suit filed for partition, the present second appeal is filed. The parties are arrayed as per their rankings before the trial Court.

2. The brief facts leading to file this Civil Revision Petition are as follows:

2.(a) The suit property is originally belonged to one Ramasamy Gounder. Plaintiffs 1 and 2 are his daughters. First defendant is son and second defendant is his wife. Ramasamy



Gounder's other daughter Umadevi died on 21.9.1990 leaving behind 3rd and 4th Defendants, her legal heirs. The Said Ramasamy Gounder owned the suit property ancestrally. He died on 30.1.1976. After the death of the Ramasamy Gounder, Plaintiffs are entitled to claim share from the share of their father. Despite the request made by the deceased daughter Umadevi, the Defendant did not agree for the partition. Therefore, legal notice was issued on 12.12.1998. However, the first defendant issued reply with false allegations. Therefore the Plaintiffs filed the suit stating that they are entitled to 1/10th share each, in the suit property.

2.(b) It is the contention of the 1st Defendant that Plaintiffs 1 and 2 were got married by giving Seervarisai (ÓtÇir) and spending amounts. The First Plaintiff was married some 45 years back and second plaintiff was married 39 years back. Ever since the date of their marriage, they are living in their marital homes. Even during the life time of father, he gave 2.13 cents in Survey No.283/2 to the husband of the first plaintiff in lieu of some loan. The suit property was in possession of the first defendant and his father jointly. First defendant has discharged the loan obtained by father from one Krishnasamy Gounder and Palani Gounder. He has also discharged loan obtained by father from the co-operative bank. After the death of the father, first defendant alone is in enjoyment of the suit property as absolute owner. He only performed marriage of his other sister Umadevi. The contention that the Plaintiffs that they are in joint possession of the property is denied. After the death of Ramasamy neither the plaintiffs nor the second defendant have claimed right over the same. After the death of his father the First Defendant has developed the property and planted coconuts and mortgaged the property and obtained loans. The plaintiffs and Late Umadevi never objected the first defendant enjoying the property. Therefore, it is the contention of the plaintiff that he is in possession of the suit property exclusively hostile to the interest of the plaintiffs. His possession is open, continuous and uninterrupted. Suit has been filed after 28 years, after the death of the father. Therefore, the suit is barred by limitation.

2.(c) Second Defendant is also filed written statement supporting the case of the First Defendant.

3. Before the trial Court on the side of the plaintiffs P.W.1 was examined and Ex.A.1 to Ex.A.10 marked. On the side of the Defendants D.W.1 and D.W.2 were examined Ex.B.1 to Ex.B.47 marked. The trial Court has framed 3 issues and finally held that the Defendant has proved the plea of ouster and adverse possession, thereby dismissed the suit. First Appellate Court has framed point for consideration as follows:



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1. Whether first defendant has prescribed title by adverse possession over the suit properties?

2. Whether the right of the plaintiffs have been ousted by long possession by the first defendant?

3. Whether the plaintiffs are entitled to any share in the suit properties as pleaded in the plaintiff?

4. Whether the Judgment and decree of the trial Court are sustainable?

and ultimately allowed the appeal by setting aside the judgment of the trial Court and passed preliminary decree. As against which the present second appeal is filed.

4. The second appeal was admitted on the following substantial questions of law:

"(i) When the first defendant was in possession and enjoyment of the suit properties by exercising his right, adversely, openly, continuously and to the knowledge of the plaintiffs for more than 30 years since the death of the father on 30.01.1976 who have not made any objection for such possession and enjoyment of the first defendant and thus it has been established that the first defendant has perfected title by adverse possession and the plaintiffs are ousted from the suit properties?

(ii) Whether the lower appellate Court is correct in holding that the denial of right would commence only from the date of the reply notice dated 17.12.1995 and therefore, the first defendant has not perfected title by adverse possession?

(iii) When it is not necessary that adverse possession should be brought to the knowledge of the persons against whom it is claim and that it should be sufficient that possession and enjoyment is open and without any concealment and the persons against whom time was running were aware of what was happening whether the lower appellate Court is correct in holding that the first defendant has not proved adverse possession which is contrary to the principles of law regarding adverse possession?



(iv) Whether the suit is barred by limitation?"

5. Learned counsel appearing for the appellant would contend that the death of the father in the year 1976 is not in dispute. Similarly the marriage of the first and second plaintiffs were conducted more than 39 years and 36 years are also not in dispute. Ever since the date of marriage, they are residing with their respective matrimonial homes. Whereas the first defendant is in exclusive possession of the entire property. He developed the property and the documents filed on his side clearly prove that his possession is open, continuous and uninterrupted and hostile to the interest of the other co-owners. The Plaintiffs have been ousted from the suit property. First Defendant also mortgaged the property as individual owner of the property and patta was also obtained by him. Revenue records also stands in his name. All these facts clearly established the factum of ouster and adverse possession. Hence, submitted that the First Appellate Court has not appreciated the facts properly and decreed the suit.

6. Whereas the counsel appearing for the Respondent would contend that the relationship between the parties are cordial. Therefore, one of the male member enjoying the property when the relationship was cordial such long possession may not amounts to ouster as well as adverse possession. It is common knowledge that after marriage female members normally residing in the matrimonial homes. Therefore, merely because they are resided their respective matrimonial homes, it cannot be said that they are ousted from the suit property. The possession of one co-owner is always deemed to be in possession of others. The First Appellate Court has rightly found that the plea of ouster and adverse possession have not been established. Hence, prayed for dismissal of the appeal.

7. The relationship between the parties are not in dispute. Originally suit properties are ancestral properties of Ramasamy Gounder. He died on 30.1.1976. This fact is also not in dispute. The suit has been filed in the year 2005 after a delay of 28 years. It is the contention of the Plaintiffs that they are entitled to share from their father's share. They are in joint possession of the property. Whereas it is the contention of the first defendant that the plaintiffs were not in joint possession, only the first defendant excluding others is in possession of the property. His possession is exclusively hostile to the interest of others. He has exercised his right as absolute owner of the property. It is to be noted that now well settled principal of law is that the possession of one co-owner is always deemed to be in possession of other co-owners in



the joint family properties. The only exception is ouster and adverse possession. The plea of ouster and adverse possession not only be pleaded but also has to be established on record. On entire written statement of the defendant though it is stated in general that after death of his father he is in possession of the property continuously therefore he is perfected title in adverse possession. There is no specific plea as to when such possession become adverse to the interest of the plaintiff and other co-owners. When his intention to hold the property adverse to others culminated has not been pleaded in the written statement. In the judgement of the Apex Court in Jai Singh and others v. Gurmej Singh [Civil Appeal No.321 of 2009 dated 20.1.2009] the Apex Court relied upon a judgment of the full bench of the Punjab and Haryana High Court reported in Lachhman Singh v. Pritam Chand [AIR 1970 P & H 304] and held as follows:

"5. In response, learned counsel for the respondent supported the judgment of the High Court.

6. It is to be noted that the subsequent Full Bench judgment in Bhartu's case (supra) the earlier decision in Lachhman Singh's case (supra) was distinguished on facts.

7. The principles relating to the inter-se rights and liabilities of co- sharers are as follows:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the



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knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

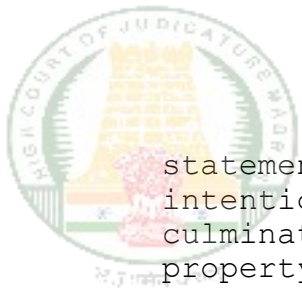
8. In Kochkunju Nair v. Koshi Alexander [AIR 1999 SC 2272] the Apex Court has held as follows:

"Ownership imports three essential rights namely, (i) right to possession; (ii) right to enjoy; and (iii) right to dispose. If an owner is wrongly deprived of possession of his property he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All co-owners have equal rights and co-ordinate interest in the property though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory interest in every infinite small portion of the subject-matter and each has the right irrespective of the quantity of his interest, to be in possession of every part and parcel of the property jointly with others. (vide Mitra's Co-ownership and Partition, Seventh Edn.)"

9. The Apex Court in Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd., and others [(2007) 8 SCC 705] has held that the right of the property now considered to be not only a constitutional right but also human right. Even claim of adverse possession has to be read in consonance with human rights, right to property. In paras 53, 54 and 55 it is held as under:

"52. The courts should, therefore, strive to find a balance of the competing interest.

Human Rights Issue :



statement, absolutely there is no pleading as to when his intention to hold the property adverse to the co-owner culminated. So, merely pleading that he is in possession of the property continuously, such possession may not adverse possession to others particularly the co-owners. It is common knowledge that when only single male member in the family he had to be in possession of the property after the death of his father, since the daughters were already married. Therefore, merely on the basis of such situation one cannot contend the he has perfected title by adverse possession. The main reliance placed by the defendants to show that he has mortgaged the property and availed loan from the co-operative bank under Ex.B.32 and Ex.B.33 and the husband of the First Plaintiff also signed as witness.

11. It is to be noted that admittedly the first defendant alone is a male member is the only son of the deceased. His mother second defendant is aged one. As long as he is continuing in possession it is a common knowledge that based on his possession he can avail loans in co-operative bank. Merely on the basis of such loan alone it cannot contend that his possession is adverse. The evidence of P.W.1 clearly indicate that the relationship was cordial till they demanded partition. Of course in the mortgage deeds Ex.B.32 and Ex.B.33 first plaintiff husband signed as witness. As long as the relationship of parties were cordial at the relevant point of time, the husband of the plaintiff signing as witness enabling his brother in law to avail some loan from the co-operative bank cannot be taken as such that the entire property itself was given to the first defendant and all the plaintiffs have relinquished their share in the suit property. Similarly, though the revenue records also stand in the name of the first defendant, it is to be noted that revenue records normally easily obtained by the person who is in possession of the property. Mere mutation of first defendant's name in the revenue records it cannot be stated that the possession has become adverse to the interest of others. The Plaintiffs are admittedly married and residing in their husbands house far away from the suit property. That being the position, it normal for first defendant to obtain revenue records on his own name. Therefore, that itself cannot be a ground to hold that he perfected title by adverse possession and the plaintiffs are totally ousted from the property. Simply one of the co-owners who is in long possession and makes some development that also cannot be construed as adverse to others. The animus to possess the property exclusively to the detriment of other co-sharer must be established on record.

12. As long as relationship of the parties are cordial, merely other co-owners have not demanded share immediately and



one co-owner is in exclusive possession of the property, whatever may be the long possession that will not become adverse to other co-owners automatically. It is to be noted that only in the year 1998 trouble started when the legal notice was issued to the plaintiff. Thereafter, it appears that the 1st defendant has filed suit for injunction against the plaintiffs. That suit also got dismissed. Only thereafter, the defendant has started showing animus to hold the property exclusively. Only in the reply notice he has expressed his hostile intention. The suit has been filed within twelve years from that reply notice. Therefore, merely the first defendant as a single male member was in possession more than a statutory period, such possession cannot be construed as adverse to others, since possession of one co-owner is always deemed to the possession of other co-owners. The First Appellate Court rightly appreciated facts and decreed the suit. Accordingly, substantial question of law answered against the Appellant and the Second Appeal is dismissed.

13. In the result, the Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

ggs.

To

1. The Additional District Judge,
Fast Track Court No.3, Coimbatore.

2. The Subordinate Judge, Pollachi

+1cc to Mr.V. Nicholas, Advocate SR.No.41737

+1cc to Mr.B.Kumarasamy, Advocate SR.No.42323

S.A.No.91 of 2012

KJ(CO)
GMY(20/08/2019)