

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.09.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.54 of 2014

and

M.P.No.1 of 2014

Chenniappan

..Appellant/1st Defendant

Vs.

1.Valliammal

2.Saraswathy

3.Parvathi

..Respondents 1 &2/Plaintiff

..3rd Respondent/2nd Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 16.08.2013 made in A.S.No.117 of 2009 on the file of Principal District and Sessions Judge, Erode, partly allowing the judgment and decree dated 08.12.2008 made in O.S.No.175 of 2004 on the file of the Principal Subordinate Court, Erode.

For Appellant : Mr.N.Manokaran

For Respondents: Mr.A.Sundaravadhanam
(for R1 & R2)

No Appearance (for R3)

J U D G M E N T

The 1st defendant in O.S.No.175 of 2004 is the appellant herein. The suit in O.S.No.175 of 2004 was filed by the plaintiffs therein seeking partition and separate possession of their 1/8th share in the suit properties.

2. According to the plaintiffs, the suit properties are ancestral properties of their father M.Rangasamy, who died on 03.04.1969, leaving behind his wife Kuppayammal, the plaintiffs, the 2nd defendant daughter and the 1st defendant son. The mother Kuppayammal died on 20.04.1993. Therefore, according to the plaintiffs, they would be entitled to 1/8th share each in the suit properties.

3. The suit was resisted by the 1st defendant contending that the deceased Kuppayammal had bequeathed her share in the

properties to him and therefore the plaintiffs cannot claim a share as legal heirs of Kuppayammal. As regards the claim of the plaintiffs' partition of the estate of Rangasamy, the defendants would contend that the suit is actually barred by limitation. He would also contend that the right from the date of death of Rangasamy, that is, 03.04.1969, the 1st defendant alone has been in exclusive possession of the properties to the knowledge of the plaintiffs. The plaintiffs who are aware of the fact that the 1st defendant had exercised his right over the properties as the heir of Rangasamy, have slept over their rights for a period of 12 years and therefore, they are not entitled to partition.

4. At trial, the 1st plaintiff was examined as P.W.1 and one Palanisamy was examined as P.W.2. Exs.A1 to A6 were filed. The 1st defendant was examined as D.W.1 and he also examined Palanisamy and Subramaniam as D.Ws.2 and 3. Exs.B1 to B27 were marked on the side of the defendants.

5. The learned trial Judge upon consideration of the evidence on record, concluded that the plaintiffs were ousted from the enjoyment of the properties for a considerable period of time from 1969 to 2003. Therefore, they cannot seek partition. The trial Court also held that the plaintiffs who have been excluded from enjoyment of the properties to their knowledge, are barred from seeking a relief of partition in view of Article 110 of the Limitation Act. The learned trial Judge also found that the Will dated 06.06.1991 relied upon by the defendants, which is marked as Ex.B14, has been proved in accordance with law and dismissed the suit. Aggrieved, the plaintiffs filed an appeal in A.S.No.117 of 2009.

6. The lower appellate Court, upon re-consideration of the evidence on record, concluded that there is no scope application of Article 110 of Limitation Act to the case on hand. The lower appellate Court found that mere fact that improvements were made by the 1st defendant in some of the suit properties, after the death of his father would not amount to Ouster. The lower appellate Court also found that the plea of the ouster raised by the 1st defendant was not available to him. In view of the said findings, the learned Principal District Judge allowed the appeal and granted 1/10th share in the suit properties. The lower appellate Court confirmed the finding of the trial Court regarding the validity of Ex.B14 Will. The lower appellate Court further observed that the properties in which improvements were made by the 1st defendant, can be allotted to him at the time of final decree proceedings.

7. Aggrieved, the 1st defendant has come with this appeal.

8. The following substantial questions of law were framed at the time of admission for determination in this appeal.

- i. Whether the suit for partition filed by the respondents 1 and 2 /plaintiffs is barred by Article 110 of Limitation Act?
- ii. Whether the First Appellate Court is right in decreeing the suit for partition after overlooking the oral and documentary evidences of the first defendant's plea of ouster for a period of 35 years, which would disentitle the plaintiffs to get any right in the suit property?
- iii. Whether in law the First Appellate Court was not wrong in overlooking the plea of ouster and adverse possession raised in the written statement, if so, whether such findings would not amount to perverse and misleading of the evidences on record? (sic)

9. I have heard Mr.N.Manokaran, learned counsel appearing for the appellant and Mr.A.Sundaravadhanam, learned counsel for the respondents 1 and 2. The 3rd respondent though served, has not appeared either in person or through counsel duly instructed.

10. Mr.N.Manokaran, learned counsel appearing for the appellant/1st defendant while elaborating the questions of law, would contend that the evidence on record would show that the plaintiffs have not chosen to assert their rights for a period of 33 years, that is from 1969 to 2003. Admittedly, his father Rangasamy died on 03.04.1969 and the notice demanding partition was issued only on 25.11.2003, that is, nearly after 34 years. Therefore, according to Mr.N.Manokaran, the plaintiffs suit is hopelessly barred by limitation. He would submit that Article 110 of the Limitation Act would apply to the facts of the case and hence the suit filed after 12 years from the date of the death of the predecessor in interest, is barred by limitation.

11. Contending contra, Mr.A.Sundaravadhanam, learned counsel appearing for respondents would submit that Article 110 of the Limitation Act itself would not apply to the case on hand. He would point out that Article 110 of the Limitation Act would apply only where the co-owner or the member of the family alleges that he has been excluded from the enjoyment of the Joint family property. He would also contend that the limitation contemplated under Article 110 of the Limitation Act

would start to run only from the date on which the exclusion becomes known to the plaintiffs.

12. In the absence of any evidence to show that the plaintiffs were excluded from the enjoyment of the properties and that they were aware of the fact, Article 110 of the Limitation Act cannot be applied. As regards ouster, Mr.A.Sundaravadhanam, learned counsel appearing for the respondents would submit that mere long possession of co-owner of the suit properties, will not amount to ouster. The essential ingredients of ouster according to him are:

i) Declaration of hostile animus;

ii) Long and uninterrupted possession of the person pleading ouster;

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

13. Claiming that even though the first two ingredients can be said to have been established the third ingredient being absent, the 1st defendant cannot claim that he has perfected title by ouster.

14. Mr.N.Manokaran, learned counsel appearing for the appellant would rely upon the judgment of the Hon'ble Supreme Court in Pangu Alias Apputty (Dead) through legal representatives and others Vs Narayani and others reported in (2014) 15 Supreme Court Cases 432 in support of his submissions. The learned counsel would draw my attention to paragraphs 32, 35 of the said judgment of the Supreme Court in support of his contentions.

15. Even though, the Hon'ble Supreme Court has used the term "Ouster" in the said judgment on facts, I find that that was not a case of co-owners. The suit was laid by the daughters of one Valli seeking partition. The defendants who are the children of sons of Valli, resisted the suit contending that they have been in possession of the property, asserting adverse title and have perfected title to the property by adverse possession. The Hon'ble Supreme Court in that decision found that the sons of Valli or their children, do not have right over the property of Valli and it would devolve on her daughters after her death and admittedly Valli died in the year 1942 and the suit came to be filed sometime in 1990. It was in these circumstances, the Hon'ble Supreme Court concluded that the defendants therein, children of the sons of Valli have perfected

their title by adverse possession. The fact set out by the Hon'ble Supreme Court in paragraph 30, reads as follows:

"30.....Undisputedly, the possession of the suit schedule properties has been with the deceased's son, namely, Kunhan and Ayyappan during their life and thereafter Defendants 1 to 9 for more than 50 years, therefore, their plea that they have perfected their title to the suit schedule properties by adverse possession as they are strangers to the properties in question for the reason that they are not entitled for a share of the streedhana properties of Valli is valid and legal and therefore, the finding of fact recorded by the High Court is correct."

16. Therefore, the Supreme Court did not consider the case of ouster among co-owners. It was the case between sisters and brothers children. Hence, I find the said judgment cannot be applied to the case on hand, as it did not specifically deal with the question of ouster.

17. Mr.N.Manokaran, learned counsel also invited my attention to the Judgment of this Court in Venkataramana and others Vs. N.Munuswamy Naidu and others reported in 2010 (4) CTC 640, wherein this Court has considered the scope of Article 110 of Limitation Act. The judgment proceeds on the inference that the plaintiffs have been excluded from the enjoyment of the property from 1969. The learned Judge had relied upon certain paragraph from the book "Law of Limitation and adverse possession" by Rastomji to come to the said conclusion. In this context, it will be worthwhile to refer to two earlier Division Bench judgments of this Court which have not been adverted to by the learned single Judge in the case of Venkataramana and others Vs. N.Munuswamy Naidu case (cited supra).

18. In Mohaideen Abdul kadir and Others V. Mohammad Mohaideen Umma by Agent Habeeb Mohammad Thambi and Others reported in 1970 ILR (2) MAD 636 and B.Gopalakrishnan v. Meganathan (died) others reported in (1972) 2 MLJ 481, I had an occasion to consider the above judgments in my judgment in T.S.Prakash Chand Gong Vrs. Hansraj (deceased) and others dated 09.01.2018 in C.S.No.781 of 2005.

19. In Mohaideen Abdul kadir and Others V. Mohammad Mohaideen Umma by Agent Habeeb Mohammad Thambi and Others reported in 1970 ILR (2) MAD 636, the Hon'ble Division Bench had 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."

20. In *B.Gopalakrishnan v. Meganathan* (died) others case reported in (1972) 2 MLJ 481, another Division Bench of this Court had held that ouster cannot be inferred by a mere enjoyment of the properties over a period of 12 years. In *Sabura Ammal and others v. Ali Md. Nachiar and 32 others* reported in 1970 (2) MLJ 398, a Division Bench of this Court, while laying down the essentials of plea of ouster, has observed as follows:

"A party who sets up a hostile title to the exclusion of co-heirs must be definite and equivocal in his assertions. When the assertions are in the nature of "hide and seek", that is to say mutually contradictory and merely intended for the purpose of taking a tactical advantage out of a litigious situation, it cannot be considered as an assertion of a hostile title adequate for the purpose of becoming the starting point in the acquisition of title by

adverse possession

The co-owner's assertion of a hostile title must be one exclusively for himself in the property. It should be such as would be Inconsistent with any other co-sharer being entitled to possession. It would thus be clear that the co-sharer in possession may not admit title of a particular co-sharer, because in his view the real co-sharer Is somebody else, and not the co-sharer who puts forward his title. In such circumstances, the co-sharer claiming adverse title must be considered as not having put forward his title of any other co-sharer; he should be considered as only expressing his doubt about the title of a particular co-sharer who claims such title but he has not gone further and set up title exclusively in himself to the whole property ."

21. Mr.A.Sundaravadhanam, learned counsel appearing for the respondents would draw my attention to the judgment of the Hon'ble Supreme Court in Nagabhushanammal (dead) by legal Vrs. C.Chandikeswaralingam reported in (2016) 4 Supreme Court cases 434. He drew my attention to paragraphs nos 21 and 24 which reads as follows:

"21. The other main defence in the suit is ouster and limitation. 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.

24. This Court in Vidya Devi v. Prem Prakash [(1995) 4 SCC 496] held that : (SCC p.505, para 28)

"28. 'Ouster ' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-

owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law"

22. Mr.Sundaravadhanam, learned counsel would contend that the 1st defendant has not made out the case of 'ouster' as pleaded by him. In the absence of evidence to show that the 1st defendant exercised title or right over the property and has excluded the other co-owners from enjoyment of the property, ouster cannot be inferred.

23. I have considered the rival submissions.

24. On the question of applicability of Article 110 of the Limitation Act, I find that the said Article will not apply to the case on hand. It would apply only to the suit for partition filed by a member who has been excluded from possession or enjoyment of the joint family property and Article 110 of Limitation Act reads as follows:

S.No. (Article)	Description of suit	Period of Limitation	Time from which period begins to run
110	By a person excluded from a joint-family property to enforce a right to share therein	Twelve years	When the exclusion becomes known to the plaintiff

25. A reading of the said Article would show that the commencement of period of limitation is when the exclusion becomes known to the suing coparcener/the plaintiff. Therefore, when the defendant seeks protection under Article 110 of Limitation Act, he has to establish that the suing co-sharer was excluded from the enjoyment of the properties to his knowledge. It is settled law that possession of one co-sharer is on behalf of the other Co-sharers. If the Co-sharer in possession, raises the plea ouster or the bar under Article 110 of the Limitation Act, it is incumbent on such co-sharer to prove that the exclusion was to the knowledge of the other co-sharers. Unfortunately, I find total lack of evidence on the side of the defendant in this regard. Further, Mr.N.Manokaran, learned counsel for the appellant would contend that the very fact that the appellant/1st defendant had made improvements would show that the plaintiffs were not in possession of the properties atleast from 1969 to 2003. It would also demonstrate that they were aware of exclusion. I am unable to agree with the said

submission of the learned counsel, since inference of the exclusion is not possible. Exclusion should be proved by tangible evidence. One cannot infer exclusion from enjoyment of the co-sharers inasmuch as the law is well settled to the effect that one co-sharer's possession is referable to all the co-sharers. If the Co-sharer had done certain improvements in the property with or without knowledge of all the co-sharers, that by itself, will not enable the court to infer knowledge of exclusion on the plaintiff.

26. Unfortunately, the attention of the learned trial Judge was not drawn to the earlier judgments of this Court, which deal with ouster. As regards ouster, however long the possession may be, the same will not confer absolute right on the co-sharer in possession. Strong evidence is required to show the exclusion. I am therefore unable to persuade myself to agree with the conclusions of the learned Judge in Venkataramana and others Vs.No.Munuswamy Naidu and others Supra as they run counter three Division Bench Judgments referred to above.

27. Therefore, the question of law No. 1 is answered to the effect that Article 110 of the Limitation Act cannot be made applicable on the facts of the present case.

28. As already pointed out, that the most essential requirement of ouster is that the exclusion should be proved by strong evidence. There is no evidence to show that the appellant/1st defendant was in possession of the properties to the exclusion of the sisters. Though he had effected the improvements in the properties, that would itself, in my considered opinion, will not prove ouster.

29. One another fact that would militate against the claim of the appellant is the execution of Ex.A14 Will by the mother in 1993. Under the said Will the mother has bequeathed her undivided share in the properties. On 06.06.1991, under the said will, Kuppayammal had bequeathed her undivided share in the property, that would definitely mean that the 1st defendant has acknowledged the character of the properties as joint family properties in which he has a share along with the other heirs of Rangasamy. The suit has been filed some time in 2004. Therefore, In the light of the said fact, I do not think it can be safely concluded that the 1st defendant had proved ouster. The essential requirements of ouster as set out by Hon'ble Supreme Court as well as by this Court have not been established. Therefore, the questions of law 2 and 3 are also answered against the appellant.

30. Hence, the second appeal is dismissed, confirming the judgment of the lower appellate Court. Considering the relationship between the parties, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

-s/d-
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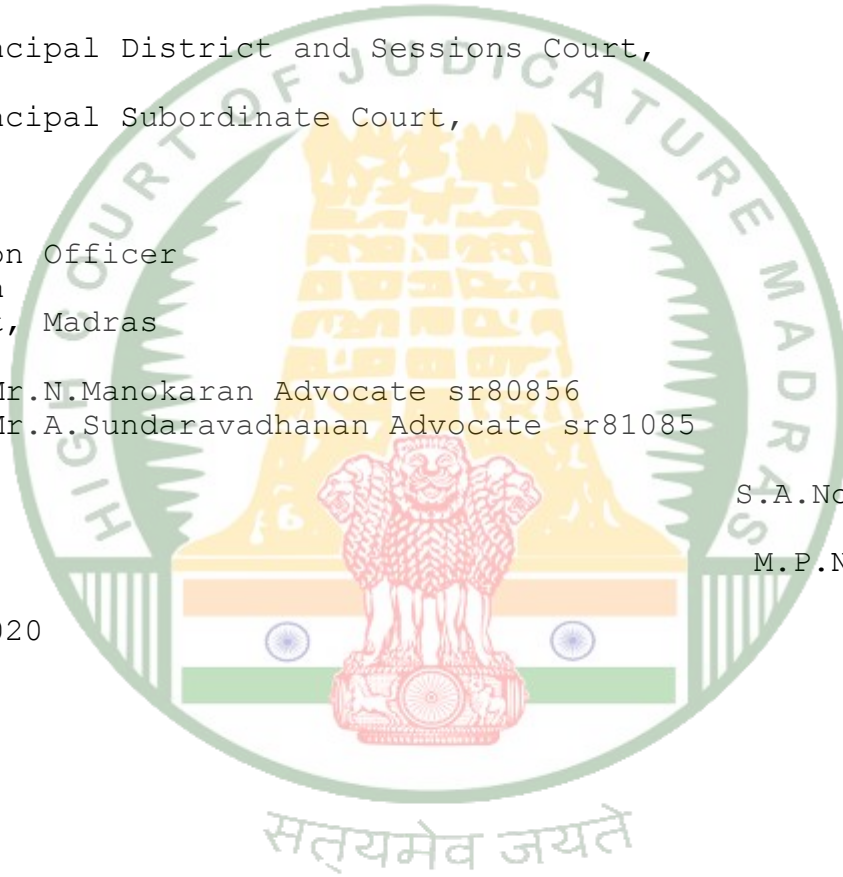
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