

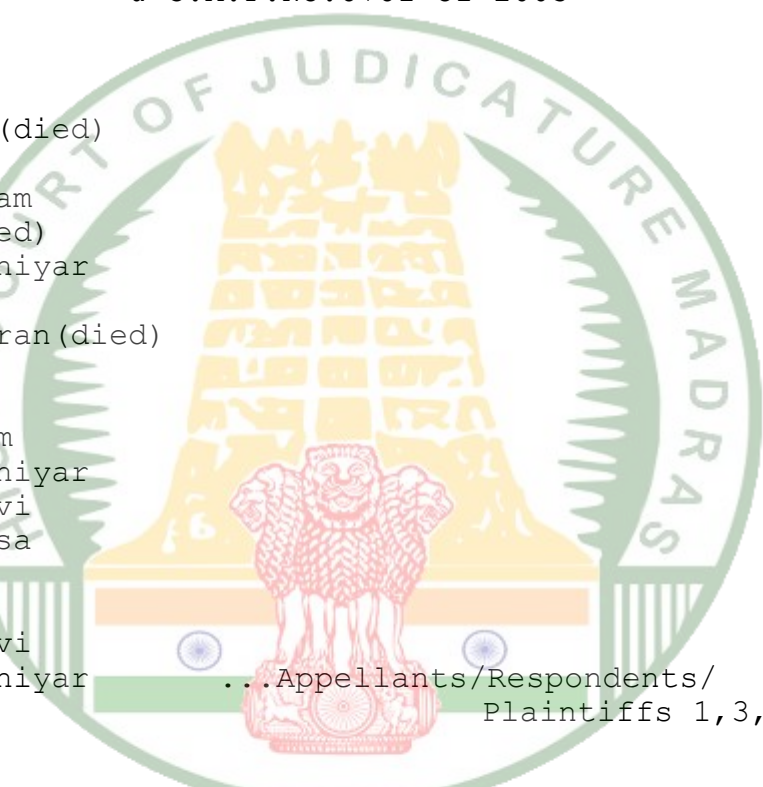
IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.03.2020

CORAM: The Hon'ble Mr.Justice N.Seshasayee

S.A.No.985 of 2003

& C.M.P.No.8781 of 2003



1.Sheik Yusuff(died)
2.Jubida(died)
3.Jumna Kallusam
4.Badarnisa(died)
5.Rabiyath Nachiyar
6.Md.Mohideen
7.Pathima Joheran(died)
8.Havva Ammal
9.Mustafa
10.Mumtaj Begam
11.Jahafar Nachiyar
12.Fathima Beevi
13.Hidhyath Nisa
14.Tajudeen
15.Hayuludeen
16.Jeharan Beevi
17.Jahafar Nachiyar ...Appellants/Respondents/
Plaintiffs 1,3,5 to 10

[Appellants 9 to 11 brought on record as LRS of the deceased 4th appellant viz., Badarnisa and 12th Appellant brought on record as LR of the deceased 1st Appellant Vz., Shiek Yusuf and Appellants 13 to 16 brought on record as LRS of the deceased 7th Appellant viz., Pathima Joheran 17th Appellant brought on record as LR of the deceased 2nd Appellant viz., Jubida Vide Order of Court dated 30/01/2020 made in CMP.No.1756, 1767, 1759, 1778,1771, 1783, 1764, 1768, 1782,1780, 1773 and 1776 of 2020 in SA.No. 985/2003 (GKIJ)]

Vs.

1.Havva Ammal
2.Sulthan
3.Majeed
4.Thalwar Ammal
5.Md.Mohideen
6.Jaibunisa
7.Muthugani
8.Fathima Beevi
9.Hathija Nachiyar
10.Md.Rowthar.

...Respondents/Appellants/
Defendants 1,4,5 to 8, 9, to 12

Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 14.10.1996 made in A.S.158/95 on the file of Principal District Judge, Nagapattinam reversing the judgment and decree in O.S.225/89 dated 24.11.1994 on the file of District Munsif Court, Nannilam.

For Appellants : Mr.K.Chandrasekaran

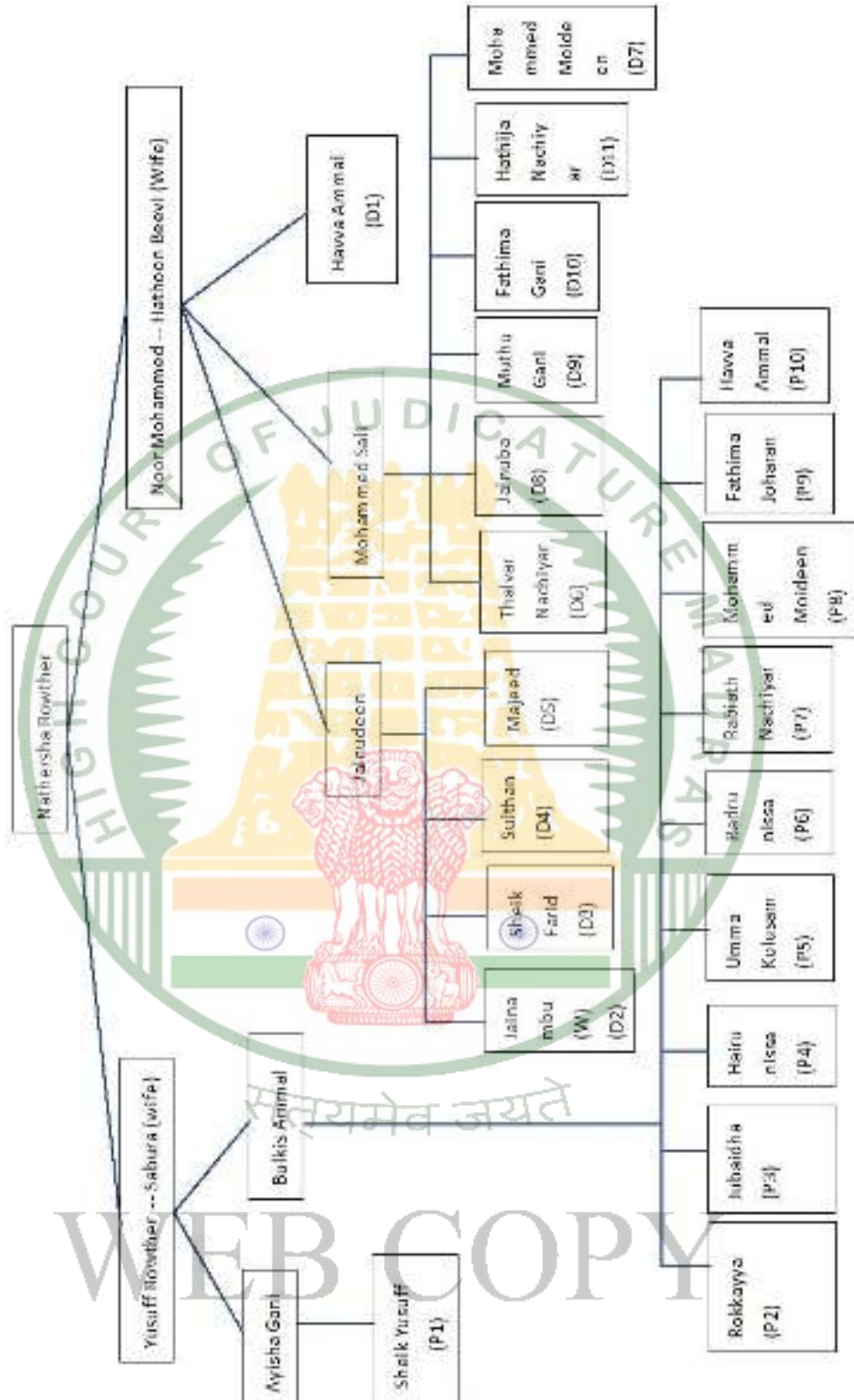
For Respondents : No appearance for RR1 to 9
R10 - Died(steps due)

JUDGMENT

1.The plaintiffs are the appellants herein. Parties are Mohammedans. They laid the suit for partition of two items of properties in O.S.No.225 of 1989. They are scheduled respectively in the plaint as A-schedule and B-schedule property. A-schedule property deals with an agricultural land, in which, the plaintiffs seek 9/24 share, and B-schedule property is a house site measuring 18 cents and a residential house building therein. In B-schedule property, the plaintiffs claim half share. The parties would be referred to by their rank before the trial Court.

2.The genealogy table appended to the plaint and reproduced herein will throw light on how the parties are positioned in relation to the B schedule property herein. The genealogy table would show that certain Nathersha Rowther is the common ancestor.

Genealogy Table



Nathersha Rowther had two sons, Yusuff Rowther and Noor Mohammed. Yusuff Rowther, in turn had two daughters, namely,

Ayisha Gani and Bulkis Ammal. The plaintiffs are the children of the two daughters of Yusuff Rowther. Turning to the other branch of Noor Mohammed, he had two sons, namely, Jainudeen and Md.Sali and one daughter by name Havva Ammal. This Havva Ammal and the heirs of Jainudeen and Md. Sali constitute the defendants in this case.

3.The trial Court dismissed the suit as regards plaintiffs claim over A-schedule property, but granted a decree for half share in B-schedule property. Aggrieved by the same, both the plaintiffs and the defendants preferred separate first appeals. While the plaintiffs have filed A.S.No.151/1995, the defendants have filed A.S.No.158/1996. The first Appellate Court partly allowed the plaintiffs claim of share in A-schedule property and it declared 7/36 share therein. So far as B-schedule property is concerned, it allowed the appeal in A.S.No.151/1995 and dismissed the entire suit. Neither the plaintiffs nor the defendants have preferred any appeal against the decree passed in A.S.No.151/1995, which relates to A-schedule property. In other words, the dispute regarding A-schedule property has attained finality in A.S.No.151/1995. The present second appeal is preferred by the plaintiffs as concerning the claim of half share in B-schedule property.

4.It will be seen from the genealogy table that on the demise of Nathersha Rowther, both his sons Yusuff Rowther and Noor Mohammed would succeed to his estate in equal shares. Necessarily, Yusuff Rowther, under who the present plaintiffs claim title would be entitled to 1/2 share and Noor Mohammed, under whom the defendants claim right would be entitled to the other half. However, the defendants plead right by continuous possession of the property for about 100 years and also plead ouster. It is on this point of defence the trial Court held against the defendants and decreed the suit, whereas, the first appellate Court has found that inasmuch as the defendants are in continuous possession of the property for close to 100 years, the plaintiffs cannot claim title.

5.The appeal is admitted for considering the following substantial questions of law;

- a) Whether the lower Court has failed to correctly appreciate the birth extract marked as Ex.A12, which is of the year 1927 and the admissions made in Ex.A10 and A.11 by Yusuff Rowthar?
- b) Whether the lower Court is right in dismissing the suit as regards 'B' Schedule property on the ground that the respondents have proved prescription of title by adverse possession and

ouster in spite of the fact there are no pleadings or proof to constitute the same?

6.1. The learned counsel for the appellants submitted that the property described in the B schedule is 18 cents plot with a house in R.S.No.125/4. The site was purchased by Nathersha Rowther, the common ancestor of both the branches in 1893 under Ext.B.2. It was further submitted that the correctness of the genealogy table was not disputed by the defendants, and in terms of the genealogy table, both Yusuff Rowther and Noor Mohammed are entitled to half share each in the B-schedule property, and this half share should necessarily devolve on their respective children. In this regard, the only contest of the defendants is that the site in B-schedule property was purchased by Nathersha Rowther, whereas, the building therein was constructed by Noor Mohammed. They also have pleaded ouster of the right of the other branch represented of Yusuff Rowther.

6.2 The learned counsel for the appellants submitted that the first appellate Court has focused exclusively on the point of possession as sufficient to exclude the right of the plaintiffs, whereas, in law it could be achieved only after a co-sharer, who seeks to exclude the right of another co-sharer, pleads and proves before the Court that he is in exclusive possession of the property hostile to the right of the other co-sharer and to the knowledge of the other co-sharer for the statutory period to oust the other co-sharer. The first Appellate Court omitted to consider that the defendants have not pleaded ouster of plaintiffs nor they have been able to demonstrate that they have been enjoying the property to the exclusion of the plaintiffs and to their knowledge that they are so excluded for a period well over 12 years.

7.1 Collating the evidence to support his statements, the learned counsel would submit;

- a) Ext.A.8, is a document dated 30.11.1945 which operates more as a declarative statement by Noor Mohammed made to Ayisha Gani and Bulkis Ammal, the daughters of his brother Yusuff Rowther agreeing to partition the family estate. This implies that in 1945, Noor Mohammed himself has acknowledged that his brother's branch has 1/2 share in the property.
- b) Subsequently, on 22.07.1948 under Ext.A.10, Noor Mohammed and Bulkis Ammal have jointly sold a piece of property (which is not the subject matter of the present suit) in which, B schedule property is described as the vendors' property, and shown as a security/property for indemnifying any possible defect in the title of the property sold under Ext.A.10. A statement is categorically made that Noor

Mohammed and Bulkis Ammal were entitled to 1/2 share each, which implies that even as on the date of Ext.A.10, Noor Mohammed has conceded that he has only 1/2 share in the property.

- c) Shortly thereafter, under Ext.A.11, dated 26.02.1951, Noor Mohammed had sold certain other properties to a third party and in this sale deed too he has offered his 1/2 share in B schedule property as a security/property for curing such defect in his title, if any, as concerning the property sold under Ext.A.11. Therefore, up till 1951, Noor Mohammed has conceded that he has only 1/2 share in B schedule property.
- d) While so, Noor Mohammed had died almost immediately after the execution of Ext.A.11, on 10.03.1951 to be precise, as evidenced by Ext.A.21 death Certificate. Thereafter, his widow Hathoon Beevi died on 28.07.1978(Ext.A.4), Jainudeen, under whom defendants 2 to 5 claim share had died on 03.12.1979(Ext.A.5). Md.Sali, under whom defendants 6 to 11 claim their right had died on 15.11.1986(Ext.A.6).

7.2 What is significant here is, argued the learned counsel, that between the date of death of Noor Mohammed in March 1951, and the death of Md.Sali on 15.11.1986, there is nothing on record to indicate that all the successors in interest of Noor Mohammed have consciously excluded the branch of Yusuff Rowther or his branch of their 1/2 share in the suit property and to their knowledge that they are being so excluded. Summing up the argument, the learned counsel submitted that the first Appellate Court has excessively relied on the fact that Hathoon beevi has executed a simple mortgage deed in Ext.B.8, dated 15.12.1954 and Jainudeen has executed another mortgage deed on 01.08.1961 in Ext.B.11 and voters list, property tax receipts and some invoices for maintenance to find that the defendants are in continuous possession of the property and maintaining the property and hence, they are entitled to property, which finding law does not accommodate.

8. There is no representation for the respondents for the second day in succession. On the earlier occasion, when the case was argued, this fact was noted by this Court.

9. This Court carefully evaluated the merit of the submissions of the learned counsel for the appellants and finds that there indeed is merit in what he contends. It is nobody's case that the defendants are not in continuous possession of the property. However, to convert such continuous possession and hold it as a point enabling those in possession, which in this case are the defendants, to exclude their co-sharer of their right in the property is far fetched. The law on ouster and law on

prescription of title by adverse possession though substantial operates on the same probability of evidence, but, in the case of the former, the Court requires an evidence which would show that such exclusion of right by one co-sharer has been done to the knowledge of the other co-sharer. In the instant case it is absent. When the first appellate Court has approached the case in contrary to the settled legal principles, necessarily this Court has to interfere the findings of the first Appellate Court. All the substantial questions of law are held in favour of the appellants.

10.The Second Appeal is allowed and the Judgment and Decree dated 14.10.1996 made in A.S.158 of 1995 on the file of the learned Principal District Judge, Nagapattinam reversing the Judgment and Decree in O.S.225 of 1989, dated 24.11.1994 on the file of the learned District Munsif, Nannilam is set aside. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

tsg

To:

- 1.The Principal District Judge,
Nagapattinam.
- 2.The District Munsif ,
Nannilam.
- 3.The Section Officer
VR Section, High Court, Madras.

KK(CO)
RMP(05/05/2021)

S.A.No.985 of 2003