



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 13.08.2020	Pronounced on:21.08.2020
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Coram::

The Honourable Dr.Justice G.Jayachandran

S.A.No.214 of 2010
and M.P.Nos.1 & 2 of 2010

1.Thangavel
2.Dhanabagiyam
3.Amirtham

... Appellants /Defendants 1 to 3
/versus/

1.Dhanabagiyam
2.Velayutham
3.Velayutham

... Respondents/Plaintiff 1,2 & 4

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, praying to set aside the judgment and decree dated 26.12.2008 made in A.S.No.117 of 2002 on the file of the Additional District Judge, Fast Track Court, Ariyalur confirming the judgment and decree dated 19.02.1996 made in O.S.No.361 of 1993 on the file of the District Munsif Judge, Ariyalur.

For Appellants : Mrs.A.Arulmozhi

For R1 : Died

For R2 : Mr.P.Valliappan

For R3 : No appearance

J U D G M E N T

(The case has been heard through video conference)

The second appeal against the concurrent finding of the Courts below in the suit for partition carry certain strange facts resulting in intrinsic question of law, which calls for consideration of this Court under section 100 of the CPC.

2. One Thangaraj s/o Padakathu Odaiyar died in the year 1967. He pre-deceased his parents. He had a brother by name Thangavel and two sisters. His father and mother had landed properties and those properties are the subject matter of the suit.

3. In the year 1993, almost 26 years after the demise of Thangaraj, suit for partition was laid by Dhanabagiyam and her son Velayutham claiming that, they are the wife and son of Thangaraj. According to their plaint, Thangaraj was ardent follower of EVR Periyar. A strong votary of social justice, widow remarriage and women's right. In the year 1957, he married Dhanabagiyam a widow. It was a suyamariyathai marriage (form of marriage sans religious rituals, propagated by EVR Periyar. On introduction of Section 7 A in Hindu Marriage Act through a State amendment in the year 1967, such form of marriage held to be good and valid in law with retrospective effect). The second plaintiff Velayutham was born to them in the year 1958. Padaikathu Odaiyar died in the year 1976 about 17 years prior to the suit. His wife Manikathammal died in the year 1986 about 6 years prior to the suit. (Neither in the pleadings nor through documents the date of death of Thangaraj, Padaikathu Odaiyar and Manikathammal provided). The "A" schedule properties held in the name of Padaikattu Odaiyar are ancestral properties. The "B" schedule properties in the name of Manikathammal are her self acquired properties. Both died intestate, so after their demise the properties has to devolve on their legal heirs. The first plaintiff Dhanabagiyam as wife of the deceased Thangaraj and Velayutham as her son through Thangaraj, sought partition and claiming 1/3rd share in the "A" schedule properties and 1/4th share in the "B" schedule properties.

4. The defendants 1 to 3 are the son and daughters of Padaikathu Odaiyar and Manikathammal. The 4th defendant is a purchaser of a house site, which is the 4th item in the "A" schedule. The suit for partition contested by the defendant 1 to 3. The fourth defendant remained *exparte*.

5. In their written statement, the plaintiffs claim of suyamariyathai marriage between Thangaraj and the first plaintiff denied. The birth of second plaintiff through Thangaraj is denied. According to the defendant, the first plaintiff was wife of one Velayutham. Thangaraj died as bachelor in the year 1967 when he was in service (Government school Teacher). His father Padaikathu Odaiyar, who was alive at that time, received the gratuity and other monetary benefits of Thangaraj. On the death of Padaikathu Odaiyar in the year 1976, the first defendant being the sole surviving male heir inherited the ancestral properties which are items 2 and 3 of the "A" schedule. The first item property in the "A" schedule is the self acquired property of Padaikathu Odaiyar through mortgage. The 3rd item property already sold to the 4th defendant. The two daughters of Padaikathu Odaiyar namely the

2nd and 3rd defendants were married 20, 30 years ago and they had relinquished their right in their parents properties.

6. As far as 'B' scheduled property, Manikathammal during her life time sold away the 2nd and 3rd item property. In the 4th item property, out of 1.45 acres she had only 1.04 acres. Remaining 41 cents was in the name of Padaikathu Odaiyar. The said 41 cents was sold out in the Court auction pursuant to the decree passed against Padaikathu Odaiyar in O.S.No.530/1956. Same was purchased in auction by one Chinna pillai Padaiyatchi. From out of this 41 cents, Chinna Pillai sold 33 cents to the first defendant in the year 1989 and the remaining 08 cents to Muthusamy Pillai. The plaintiffs who were never in joint enjoyment of the properties, had laid the suit with incorrect particulars and without proper valuation.

7. The alleged marriage between the first plaintiff and Thangaraj is not valid, even otherwise, the suit is to be dismissed on the ground of ouster and adverse possession.

8. The Trial Court framed the following issues:

- 1) Is it true that the first plaintiff and second plaintiff are wife and son of Thangaraj ?
- 2) Whether the right of the plaintiff if any, hit by limitation ?
- 3) Whether the plaintiffs are entitled for the shares as claimed?
- 4) Whether the plaintiffs have paid the proper court fees ?
- 5) What other relief the plaintiffs are entitled?

9. Two witnesses, Dhanbagiyam (plaintiff) and Ramasamy were examined as PW-1 and PW-2 respectively. Ex.A-1 to Ex.A-8 were marked as plaintiff side exhibits. Two witnesses, Thangavel (first defendant) and Maruthamuthu were examined as DW-1 and DW-2 respectively. Ex.B-1 to Ex.B-18 were marked as defendant side exhibits.

10. The Trial Court allowed the suit and passed a preliminary decree. Allotting 2/9th shares in the "A" schedule properties jointly to the plaintiffs and 1/4th share in the first and fourth items property (1.04 acres) of "B" schedule property to the second plaintiff.

11. In short, the Trial Court held that the plaintiffs have proved that Thangaraj married the first plaintiff and lived with her. The second plaintiff was born to him. Hence the

properties held by his parents who died intestate should devolve upon the legal heirs of the pre-deceased son, applying principle of notional partition.

12. The appeal preferred by the defendants 1 to 3 was dismissed by the First Appellate Court. The Lower Appellate Court confirmed the judgement and decree of the Trial Court.

13. On perusal of the records, this court formulated the following substantial questions of law:-

1) Whether the Transfer certificate issued by the Headmaster and marked as Ex A-2 is a substantial piece of evidence to decide paternity or not ?

2) Whether the trial court finding on plea of ouster and adverse possession is in tune with law ?

14. The learned counsel for the appellant would submit that, (i) the Courts below have miserably failed to appreciate the evidence properly. The pleadings and evidence placed before the Court lack the legal requirements to prove the factum of marriage between the first plaintiff and late Thangaraj. Even if applied the benefit of section 7 A of the Hindu Marriage Act, which was introduced nearly 10 years after the alleged self respect marriage, the evidence does not satisfy the requirement to validate the said marriage under Section 7A of the Hindu Marriage Act.

(ii) The courts below overlooked a vital fact that, Thangaraj was employed as teacher and died while in service. If the said Thangaraj had really a rationalist and married the first plaintiff as she claims, he would have certainly included her name as wife and the second plaintiff name as his son in his service records. He did not do so and admittedly, his service benefits were received by the Padaikathu Odaiyar the father of Thangaraj.

(iii) The documents relied by the plaintiff to prove the paternity of Velayutham are not contemporaneous documents. All those documents originated long after the death of Thangaraj. Not even a single document which came into existence during the life time of Thangaraj or to which Thangaraj was a party, produced before the court. The courts below ought to have taken adverse inference for not producing the birth certificate of 2nd plaintiff and the death certificate of Thangaraj. The Transfer certificate issued by the school authority is not piece of evidence to prove paternity.

(iv) The plaintiffs claim that they lived as joint family and enjoying the properties jointly after the demise of Thangaraj, Padaikathu Odaiyar and Manikathammal is not supported by any evidence. If she had lived with Thangaraj family and enjoying the property jointly, then she would be aware of the present owners of the properties. She would not have included properties which were sold by Manikathammal and Padaikathu Odaiyar. The courts below failed to take notice of these facts which are inferential facts for ouster and adverse possession.

(v) Even assuming, the plaintiff married Thangaraj and begotten the second plaintiff, by not asserting her right over the estate of Thangaraj for nearly 26 years and allowing the defendant to enjoy it without any interruption, the Courts below ought to have considered the laches in filing the suit for partition amounts to ouster.

15. Per contra, the learned counsel for the plaintiffs/respondents would state that, the Courts below have rightly applied the law to the facts and allowed the suit. Factum of marriage is a pure question of fact. The fact finding Courts have held in favour of the plaintiffs, which cannot be re-appreciated by the High court under section 100 CPC. Ex.A-2, school transfer certificate was not the only document relied by the plaintiffs to prove their case. The voter ID cards, sale deeds, Employment registration card are marked to prove the relationship. The evidence of PW-2 an independent witness who attended the marriage stands unimpeached. In fact, the proportion of share allotted to them in respect of "A" schedule property must be more i.e., 6/15 and not 2/9. Though no cross appeal filed, being a suit for partition, the error in share can be rectified by this Court suo motu to meet the ends of justice.

FINDING:

16. The first plaintiff to prove that Thangaraj married her in the year 1957 and it was a self respect marriage has deposed to that effect and called PW-2 to lend credence to her plea. Plaintiffs have marked 8 documents. This Court finds that none of these documents emanated during the life time of Thangaraj. The oldest document Ex.A-2 is the school transfer certificate of the second plaintiff issued in the year 1979 and Ex.A-5 the employment registration card of the second plaintiff dated 20/09/1979. The other documents like Election ID cards (Ex.A-2 and Ex.A-3) and sale deeds in favour of second plaintiff are subsequent to these documents. None of these documents are substantive piece of evidence to prove the marriage or joint living of Danabagiyam and Thangaraj as husband and wife. All about their marriage and joint living is spoken only by PW-1 and PW-2. The plaintiffs had produced the death certificate of the first husband Velayutham (died on 13/05/1946) and marked it as

Ex.A-1. This proves the fact that Velayutham whom she married died. She has not produced the death certificate of Thangaraj which occurred 10 years later. The School Transfer certificate of second plaintiff is marked as Ex.A-2. In this document, the father name is mentioned as Thangaraj. The TC was produced and marked through PW-1 and not through the school authority who are the custodian of the original records. The entries in Ex.A-2 indicates that 2nd plaintiff left the school in the year 1975. Ex.A-2 was issued in the year 1979. The entries in these records are made on the statements of others and not by Thangaraj. To know whether, the entry found in Ex.A-2 was recorded on the statement of Thangaraj is not established. The entries found in school transfer certificate can never be proof for paternity. It is not a substantive piece of evidence to prove paternity. At the most it can be used for corroboration. Rest of the documents are all have come into existence much latter and the contents are self serving. Hence they carry very less evidenciary value in this case.

17. The Courts below have arrived at the conclusion that, the first plaintiff is the wife of Thangaraj, based on presumption and assumption that no Hindu women would come forward with a claim that she had been married to a stranger and that she had borne a child for him. The said observation made by Hon'ble Judge in K.Mathialagan -vs- Maladevi (1989 (II) LW 361) is neither a law or binding precedent. The said observation has been taken out of contest by the courts below to suit their conclusion.

18. The person whom the first plaintiff claims to be her husband died long back and he left no tell tale evidence to show he married the first plaintiff, lived with her for nearly 9 years and the second plaintiff was born through him. Except the oral evidence of PW-1 and PW-2, there is no trace of evidence that he married the first plaintiff and lived with her to sir the second plaintiff. After 26 years of Thangaraj's death, the plaintiffs have come out to claim the relationship. The evidence of PW-1 and PW-2 regarding marriage and continuous cohabitation, are countered through the evidence of DW-1 and DW-2. Thus, it is oath against oath. The first plaintiff in the cross examination admits that she registered the birth of second plaintiff. For the reasons best known, the birth certificate of the second plaintiff not produced for the court scrutiny.

19. It is an undisputed fact that the death benefit of Thangaraj was received by his father. DW-1 had deposed that, his father lite the pyre and did last rites to Thangaraj. It is

not disputed by the plaintiffs that they are living in the house of Velayutham(deceased first husband). It is admitted by the first plaintiff that she inherited properties from Velayutham the patta of that property stands in her name and in the patta book her name is shown as w/o of Velayutham and not as w/o Thangaraj.

20. If the fact in issue is whether the second plaintiff attended school, then the School TC (Ex A-2) will be considered as substantive evidence to prove the fact in issue. When the fact in issue is whether he was son of Thangaraj , the entry is not substantive evidence. The school TC Ex A-2, is admissible in evidence under section 35 of the Indian Evidence Act, but it cannot be taken for proof of paternity. The first appellate court has failed to distinguish the difference between admissibility and proof.

Accordingly, the first substantial question of law is answered in negative.

21. Having held so, as pointed out by the learned counsel for the respondent, Ex.A-2 is not the only document relied by the plaintiffs. The other documents and the testimony of PW-2, indicate that the plaintiffs were enjoying the status of wife and son of Thangaraj respectively. The Courts of facts have concurrently declared their status as prayed. Hence this Court leave the finding the Courts below regarding the declaratory relief untouched except answering the first substantial question of law in negative regarding the evidenciary value of a school transfer certificate in connection with paternity proof.

22. The second substantive question of law, regarding ouster and adverse possession, this Court interfere the finding and conclusion of the Courts below for the reasons stated below.

It is pertinent to point out that, The Trial Court has framed issue regarding limitation in the light of defence ouster and adverse possession and held in favour of the plaintiff assigning reasons for not accepting the plea. Whereas the First Appellate Court though ouster plea was raised in the grounds of appeal, oblivious of this issue, not even considered it as a point for determination.

23. This Court has no hesitation, on a survey of the evidence, particularly in view of the conduct of the parties for over 26 years, in holding that the plaintiffs have lost their right in the suit "A" schedule properties by ouster and adverse possession.

Ouster: An ouster is the wrongful dispossession or exclusion from real property of a party entitled to the possession thereof. (Law Lexicon by Ramanathan).

In Md. Kaliba v. Md. Abdullah (AIR 1963 Madras 84) the learned Judge has observed:

"It is well settled law, and we think that no citation of authority is necessary that possession in the hands of a co-sharer of a property owned in common in possession on behalf of all the co-sharers. Implicit in this proposition is the further position in law that mere non-participation in the receipts from such immovable property or mere inaction in respect of it for any length of time on the part of one or more of the co-sharers is not regarded as amounting to ouster or as investing the possession in the hands of one of the co-sharers with an adverse character so as to enable him to prescribe against the other co-sharers. It is only when acts are clearly proved on the part of the co-sharer in possession which would be inconsistent with any other co-sharer being entitled to any possession or interest in any part of the property, it can be said that any question of ouster of the co-sharers not in possession can arise. In the absence of such ouster there will be no room for adverse possession or prescription in favour of the co-sharer in possession". (emphasis added)

24. In Ibramsa Kowther (Minor) & Others -vs- Sheik Meerasa reported in 1972 (85) LW 596 = 1972 AIR (Mad) 467 the doctrine of lost grant and presumed ouster where the exclusive possession of one co-owner was for a considerable length of time been explained and discussed referring all the leading judgements on this aspect. Since this judgment vividly explains the difference between the claim of ouster by stranger and a co-sharer, the relevant portions are extracted below for buttressing my reasoning.

"8. We shall briefly summaries the legal position. There is a basic distinction between adverse possession as between strangers and ouster and exclusion of co-owners. In the case of adverse possession as against strangers, it is sufficient that adverse possession is overt and without any attempt at concealment so that the person, against whom time is running, ought, with the exercise of due vigilance, to be aware of what is happening. It

is not necessary that adverse possession should be brought home to the knowledge of the owner. If his rights, have been openly usurped (not secretly), he cannot be heard to complain that the fact of adverse possession was not brought to his knowledge. If the adverse possession is open, visible and notorious, even if the owner remains ignorant and indifferent, it is his own fault. The observations in some of the cases, in general, that, in the case of adverse possession between strangers, knowledge of adverse possession on the part of the owner is an essential element of adverse possession are too widely expressed and do not represent the correct legal position. Vide: the following observations of Lord Macmillan in Secretary of State for India in Council v. Debendralal Khan, ILR 61 Cal 262 at p.266 : AIR 1934 PC 23:

"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".

In a case of ouster of a co-owner, the position is entirely different. The possession of one co-owner is presumed to be on behalf of all the co-owners in view of the unity of title and possession. Because of this presumption of joint ownership in the case of co-owners, the law requires, to constitute ouster, proof of something more than mere exclusive possession and exclusive receipt of income. Along with exclusive possession there must be an ouster, a hostile, open denial and an open repudiation of the other co-owner's right to the latter's knowledge. The co-owner in exclusive possession cannot render his possession adverse to the other co-owner merely by any secret, hostile animus on his own part in derogation of other co-owner's title. Vide the observations in P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314 at pp.317 and 318; Sinnaraj Pillai v. Ramayee Ammal, (1968) 2 Mad LJ 639 at pp.647 and 648 : AIR 1969 Madras 96

and Shambhu Prasad v. Phool Kumari, AIR 1971 SC 1337 at p.1345.

But, this does not mean that the co-owner who has been ousted or excluded should be expressly informed as such by the other co-owner. If other circumstances concur, the Courts, in proper cases, may legitimately infer, from exclusive possession for a considerable length of time, that the other co-owner has been excluded to his knowledge and that title has been denied and repudiated by the hostile assertion of the co-owner in possession. The theory of lost grant is applicable to support long continued possession for a considerable length of time and the most important element in presuming ouster is the time factor or the length of time of sole and exclusive possession by one co-owner. If a co-owner does not assert his rights for a considerable length of time with the result that the other side is handicapped, by lapse of time and disappearance of evidence, from proving that his exclusive possession was coupled with open denial and open repudiation of the title of the other co-owner either at the inception or subsequently, the co-owner who has been inactive must take the consequence for the long delay in bringing the suit which has prejudiced the other side and occasioned the loss of evidence by lapse of time." (emphasis added)

25. Now, reverting to the facts of the case in hand the evidence before us clearly show that prior to issuance of pre-suit notice dated 30.06.1993 (Ex.A-7) at no point of time the plaintiffs asserted their right over the estate of the deceased. Between 1967 to 1993 for 26 long years, they were silent and inactive. They did not repudiate the hostile assertion of the defendants. They did not claim the death benefit of Thangaraj in the year 1967. They did not sought for partition in the year 1976 when the succession opened on the death of Padaikathu Odaiyar. They did not claim any right over the property of Manikathammal soon after her death in the year 1986. They have not placed any evidence before this Court to prove they were in joint enjoyment of the property at some point of time. Contrarily, there are material evidence placed by the defendants, to assert they were in exclusive enjoyment of the suit properties as their own and dealing it absolutely with the knowledge of the plaintiffs. Few properties mentioned in the plaint schedule were alienated long back but the plaintiffs are not even aware of those alienation. This reinforce the view that the plaintiffs were never in joint enjoyment or

administration of the suit properties. Their ouster from possession is both constructive as well as physical. The defendants over a long period of time been in exclusive possession of the properties open, visible and notorious, adverse to the interest of the plaintiffs.

26. The question relating to proof of exclusion was considered by the Madras High Court to the case of Marudanayagam v. Sola Pillai reported in A.I.R. 1965 Madras 200, and the law laid down is as under:

"(11) It is settled law that lapse of time is never in itself a bar to partition and the statute of limitation will operate from the time the plaintiff is excluded from his share and such exclusion became known to him. There can be no exclusion without a denial of the coparcener's right to a share and such denial may be express or implied. While partition is demanded and refused or if the coparcener is expelled from the joint family, that would be clear exclusion. Once the plaintiff established his claim to a share in the joint family properties by showing that the family was joint and that he was a coparcener entitled to a share in its properties, the onus is on the defendants to establish exclusion to plaintiff's knowledge for over 12 years prior to suit. If authority is required for this proposition, one may refer to the decisions in Jivanbhat v. Anibhat ILR 22 Bom. 259; Ramnath Chatterjee v. Kusum Kamini Devi 4 Cal LJ 56 and the decision of a Division Bench of our High Court in Machiraju v. Simhachala 9 Mad LJ 129".

27. In the instant case, the defendant had established the exclusion of the plaintiffs for over 26 years prior to the suit. Hence, it is held that the courts below failed to analyse the issue of ouster and adverse possession properly. The facts of the case lead to the conclusion that by their conduct the plaintiffs have stayed away from the suit property. By the time they stake claim, the defendants had visibly asserted their exclusive possession and enjoyment.

28. As far as "A" schedule property is concern, by birth the second plaintiff got a vested right in the property. Same opened up for devolution on the death of Padaikathu Odaiyar in the year 1976. The second plaintiff by that time was about 18 years. (As per the SSLC certificate , the second plaintiff date of birth is 07/01/1958). From 1976 to 1993 for 16 years he did not claim right, what so ever, over the properties which stood in the name of Padaikathu Odaiyar. Therefore the open,

hostile and continuous possession by the first defendant for a period more than 12years oust the plaintiffs and confers possessory right to the defendants adverse to the plaintiffs.

29. Regarding items 1 and 4, in the "B" schedule properties from the pleadings this Court finds that these properties are self acquired properties of Manikathammal. She died in the year 1986 intestate. Succession opened up only in the year 1986. The suit is filed in the year 1993 well within the period of limitation hence the 1/4th share allotted to the second plaintiff in item 1 and item 4 (1.04 acres) by the Courts below is confirmed.

30. In the result, the Second Appeal is partly allowed. Taking into consideration the relationship between the parties, no order as to costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

rpl

To

1.The District Munsif Judge, Ariyalur.

2.The Additional District Judge, Fast Track Court, Ariyalur.

Copy to :

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

सत्यमेव जयते

+1cc to Mr.P.Valliappan, Advocate, sr no.27479

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PA (CO)
RMP (26/04/2021)