



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:02.12.2020

Pronounced on:11.12.2020

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Coram::

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

S.A.No.1020 of 2012

1.Tamilarasan

2.Jayaprakash

3.Kalayarasi

4.Baby

5.Sumathi

6.Kamalayal

.. Appellants/Defendants 4 to 9

/versus/

Marapandaram (died)

1.Senthilkumar

2.Sundaresan

K.K.Narayanasamy (died)

3.Nanjammal (died)

...Respondents/Plaintiffs 2,3/
Defendants 1, 2 & 3

4.Marayal

5.Gomathi

6.Eswari

7.Kanchana

8.Moorthi

(RR5 to 8 brought on record as LRS of the
deceased R3 viz., Nanjammal vide order
of Court dated 07.08.2019 in
C.M.P.No.5569/2018 in S.A.No.1020 of 2012
(RHJ))

.. Respondents



Prayer: Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 14.12.2011 made in A.S.No.56/2011 on the file of Additional District Judge, (Fast Track Court No.2), Gobichettipalayam confirming the judgment and decree dated 20.04.2011 made in O.S.No.336/2003 on the file of Subordinate Judge, Gobichettipalayam.

For Appellants :Mr.G.Surya Narayanan for
Mr.R.T.Doraisamy

For Respondents:Mr.S.Parthasarathy, Sr.C for
Mr.M.Nandhakumar for R1, R2
Mr.K.Mukund Rao for R4 to R8

JUDGMENT

(The case has been heard through video conference)

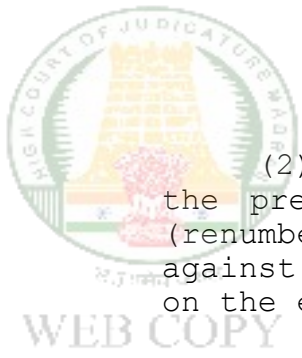
Suit for partition and separate possession was allowed by the Trial Court and on appeal, the same was confirmed. Aggrieved by the concurrent finding by the Courts below, the second appeal is filed by the defendants.

2.Like most of the second appeals, the parties contested the suit are no more and their legal heirs are carrying their batten.

3.Before adverting to the facts of the case, the relationship between the parties and the nature of dispute between them is narrated in brief. The parties to the suit property are descendants of one Marakkal, who died in the year 1978 leaving behind her husband Kalipandaram, three daughters by name, Kaliammal, Nanjammal, Marayal and one son by name Narayanasamy. Kalipandaram, the husband of Marakkal died in the year 1983. Kaliammal one of the daughters of Marakkal died intestate on 20.09.1992. The first plaintiff Marapandaram is the husband of Kaliammal. Plaintiffs 2 and 3 are sons of Kaliammal. The first defendant Narayanasamy is the son of Marakkal. Defendants 2 and 3 are the other two daughters of Marakkal. The litigation, the partition suit is by the legal heirs of the one daughter viz., Kaliammal against the son and other two daughters of Marakkal.

4.Claiming 3/12 shares in the property left by Marakkal, the present suit was filed. Before the suit for partition, there were two earlier litigations between the parties and they are:

(1) O.S.No.107 of 1999 filed by the 1st defendant Narayanasamy, S/o Marakkal for declaration and permanent injunction against his three sisters in respect of the suit property claiming absolute right over the property of Marakkal, based on an unregistered Will.



(2) suit filed by Sundareshan, who is the 3rd plaintiff in the present suit, S/o late Kaliammal in O.S.No.178 of 1990 (renumbered as O.S.No.310 of 1992) for permanent injunction against Narayanasamy 1st defendant in respect of the shop portion on the eastern portion of the suit property.

5.Both O.S.No.107 of 1990 and O.S.No.310 of 1992 were tried together and taken up for joint trial and a common judgment was rendered. Will of Marakkal propounded by Narayanasamy was held to be not proved. The appeal in A.S.No.186 of 1996 filed by the first defendant Narayanasamy against the dismissal of the suit was taken on file by the First Additional District Judge, Erode and the same was dismissed on 30.12.1997. Further second appeal also dismissed by the High Court.

6.In the said background, the plaintiffs have filed the suit for partition on the premise that Marakkal died intestate leaving behind her husband, 3 daughters and one son. After making notional partition between them, each entitled to 1/5th share. On the demise of Kalipandaram, his 1/5th devolved upon his son and three daughters. The three daughters and one son of Marakkal are entitled for 1/4th share each. As legal heirs of Kaliammal one of the sharers, her 1/4th share has to apportioned among the plaintiffs. Thus the plaintiffs together are entitled for 3/12 shares.

7.Pending suit, the first defendant Narayanasamy died and his legal heirs were brought on record as defendants 4 to 8.

8.In the written statement filed by the 4th defendant, it was contended that the suit property was purchased in the name of Marakkal in the year 1949 with the fund raised out of joint exertion of her husband Kalipandaram and son Narayanasamy. Marakkal accepted and recognised her husband and son as the absolute owner of the property. She died on 11.12.1978 bequeathing the property to the 1st defendant. He rented 374 sq.ft. in the suit property to the 3rd plaintiff for annual rent of Rs.500/-. Till March 1987, the 3rd plaintiff was paying rent regularly for his portion in occupation. However, on the instigation of his mother, he refused to pay the rent. Since she questioned the title of the 1st defendant, O.S.No.107 of 1990 for declaration and injunction was filed. To counter the declaration suit, the 3rd plaintiff filed injunction suit in O.S.No.178 of 1990 renumbered as O.S.No.310 of 1992. The suit property was in continuous enjoyment of Narayanasamy, till his death on 15.10.2003 and thereafter, in possession and enjoyment of his legal heirs, who are the appellants herein. The house tax receipt, electricity receipt and water tax receipt are in the name of Narayanasamy and he is in continuous enjoyment for more than 20 years. He has perfected title. Declaration suit filed by



Narayansamy was not dismissed on merits, but for not proving the case as per Section 63 of the Indian Succession Act. The other daughters namely, Nanjammal and Marayal who are arrayed as defendants 2 and 3, have relinquished their right in the year 2002 and executed release deeds dated 10.04.2002. Since the first defendant Narayanasamy and his children are in continuous possession and enjoyment of the suit property excluding the plaintiffs, the suit for partition is not maintainable since the contesting defendants have perfected title by adverse possession.

9.The Trial Court framed the following issues:-

(1)Whether the plaintiffs are entitled for partition and separate possession as prayed for?

(2)Whether the allegation of the defendants that the suit is not sustainable under limitation act is correct?

(3)Is it true that the share and title of the plaintiffs and 2nd and 3rd defendants over the suit property is extinguished?

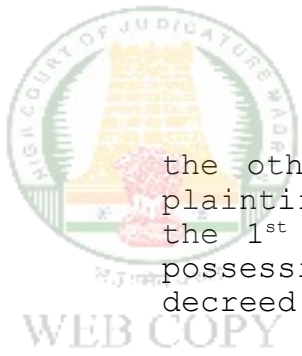
(4)Whether the suit has cause of action?

(5)What other relief?

10.Two witnesses on behalf of the plaintiffs were examined and on behalf of the defendants 9 witnesses were examined. Six exhibits for the plaintiffs and 77 exhibits for the defendants were relied.

11.The trial Court, considering the common judgment passed in the earlier suit in O.S.No.107 of 1990 and O.S.No.310 of 1992 the copy marked as Ex.A3 held that the alleged Will of Marakkal executed in favour of the 1st defendant is not proved. The injunction sought by the 3rd plaintiff against the 1st defendant dismissed on the ground that the plaintiffs and the defendants are co-owners. While so, when the parties to the proceedings are the co-owners of the suit property, the plaintiffs 1 to 3 together are entitled for 3/12 shares in the suit property.

12.The contention of the first defendant that except Kaliammal, the other two daughters of Marakkal namely, Nanjammal and Marayal had executed a release deed in his favour, was found to be a false claim, since Nanjammal and Marayal examined as DW7 and DW8 did not support the case of the 1st defendant. The other contention of the legal heirs of the 1st defendant that they have perfected title by adverse possession by remaining in continuous, open and interrupted in possession of the suit property over and above the statutory period not held in favour of the defendants. From the records, the trial Court found that from 1990 onwards, the possession of the appellants disputed by



the other co-owners. When the Court has already held that the plaintiffs and the defendants are co-owners, the possession of the 1st defendant however long it is deemed to be constructive possession on behalf of the other co-owners. The trial Court decreed the suit and preliminary decree was passed.

13. On appeal, the first appellate Court confirmed the finding of the Court below after analysing the facts of the case with the case laws of the High Court and the Supreme Court in respect of plea of adverse possession. Being aggrieved by the concurrent finding, the second appeal is filed.

14. At the time of admission, the following Substantial Questions of Law were framed to decide the second appeal:

(1) Whether the Courts below are correct in holding that the plaintiffs have cause of action to file the suit for partition on 20.10.2003, ignoring the fact that the statutory period of 12 years for adverse possession starts from 1983 and completed in 1990?

(2) Whether the Courts below are correct in holding that the limitation period of 12 years for adverse possession starts from the date of disposal of Second Appeal which arose against the judgement and decree in O.S.No.107 of 1990 and 178 of 1990?

(3) Are the Courts below committed error in not considering the law that the pendency of suit in O.S.No.107 of 1990 and 178 of 1990 are not a bar to the plaintiffs for filing suit for partition and delivery of possession within a period of 12 years?

15. The learned counsel appearing for the appellants made his submissions on two fold. First, the suit for partition is barred by limitation, as per Article 110 of the Limitation Act. From 1983, the suit property being enjoyed by the appellants hostile to the knowledge and interest of the plaintiffs. Having perfected the title by adverse possession, the plaintiffs have no cause of action for seeking partition. Next, there is no evidence for joint possession of the property. The appellants have placed ample documents like water tax receipts, tax receipts, electricity receipts and agreements to show the continuous possession of the suit property with the appellants. When the possession is not with the plaintiffs, the suit filed with fixed Court fees under Section 37(1) of Tamil Nadu Court Fees and Suit Valuation Act, is wrong.

16. The learned Senior Counsel appearing for respondents 1



and 2 submitted that Narayansamy, the father of the present appellants initially tried to deprive the lawful right of his sisters to inherit the property of their mother and father by projecting a fake Will. He was not able to prove the due execution of the said Will before the Court of law. Hence, his suit in O.S.No.107 of 1990 was dismissed by all the Courts upto the High Court. Having failed in his attempt to grab the property through a fake Will, he created release document purported to have been executed by his two sisters. However, they when mounted the witness box, they did not support the case of the appellants' father.

17.The third plaintiff was occupying a portion of the suit property as a tenant, but not under the appellants' father Narayanasamy but under Marakkal, the original owner of the suit property. On the demise of Marakkal, his mother Kaliammal as one of the legal heirs was to a share in the property. The plea of Narayansamy the father of appellants that the suit property was purchased in the year 1949 from out of joint exertion of the family members namely, he and his father is pure imagination without any corroboration. Hence, the Courts below have rightly allowed the suit for partition.

18.The plea of limitation raised by the appellants is legally not sustainable and the same has been clearly explained in the judgment of the Courts below. Being a co-sharer inheriting the property from his mother, neither Narayanasamy nor his legal heirs can claim adverse possession against the other co-sharers. More particularly, when the dispute over the property between the parties have started in the year 1990 itself. After the suit filed by Narayanasamy based on the Will failed in all the three Courts, the plaintiffs have sought for partition realising that it is impossible to co-exist with the appellants as co-sharer.

19.Heard the learned counsel appearing for the appellants and the learned Senior Counsel appearing for respondents 1 and 2 and the learned counsel appearing for respondents 4 to 8. Records perused.

20.Cause of action and limitation:-

As per the plaint, paragraph No.9, the cause of action for the partition suit arose on 02.09.1999, when the plaintiffs demanded partition and the defendants were not amenable for the same.

21.Article 110 of the Limitation Act reads as below:-



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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.

22.The present suit for partition filed on 17.10.2003. Admittedly, fight over the property between the descendants of Marakkal has started in the year 1990. Narayanasamy approached the Court with the Will dated 05.12.1978 purported to have been executed by Marakkal when his possession and the title questioned. So after 1990 the matter been seized by the Court and till the disposal of the second appeal filed by Narayanasamy the father of the appellants, the cause of action seeking partition by metes and bounds deemed to be deferred. Based on the out come of the declaration suit, the suit for partition has been filed in the year 2003. It is not correct to say the limitation for filing partition suit commenced from 1983.

23.The property stood in the name of Marakkal. She died on 11.12.1978. Her husband died on 26.05.1983. In the year 1990, the co-sharers have started claiming right in the property which has prompted Narayanasamy to file the suit for declaration projecting an unregistered Will of Marakkal. The day on which, the father of the appellants filed the suit for declaration, the advantage of claiming continuous, open and uninterrupted possession of the suit property got lost. The appellants claims open and continuous of possession, since the father of appellants was enjoying the property left by Marakkal and the other three sisters were married and living elsewhere. This will not give a presumption of ouster of other co-owners. It is not the duration of continuous enjoyment, but it must be hostile to the title holder or other co-owners. The father of the appellants Narayanasamy had projected the Will of Marakkal and two release deeds of his sisters. All the three documents were held not proved. His enjoyment of the property had been questioned and interrupted as early as 1990, which was the cause of action to file a suit for declaration and injunction against the co-owners.

24.Therefore, the Courts below are right in holding that the cause of action arose only after the dismissal of the second appeal against the judgment and decree in O.S.No.107 of 1990 and not on the date of the death of Kalipandaram the husband of Marakkal.



25. The cause of action therefore, deemed to commence only on dismissal of the second appeal filed by Narayanasamy and not prior to that.

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26. The second limb of argument regarding Court fees, though it is a new submission not part of the pleadings, the same is also not a sustainable plea for the following reasons:-

27. Possession by one co-owner is not by itself adverse to other co-owners. On the contrary, possession by one co-owner is presumed to be the possession of all the co-owners, unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. In the present, there is no case to evidence to support this conclusion. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties, who are entitled to it by excluding and ousting them.

28. Court fee is payable under Section 37(1) of the Act, if the plaintiff is 'excluded' from the possession of the property. The general principle of law is that in the case of co-owners, the possession of one is in law possession in all, unless ouster or exclusion is pleaded and proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Law on this point settled long ago by Five Judges Bench of our High Court in Ramasami Iyengar -vs- Rangachariar (AIR 1940 Mad 113). In a suit for partition by a member of a joint family, Court fee payable is only under Section 37(2). Unless there is specific averment that they had been 'excluded' from joint possession to which they are entitled to in law.

29. In the instant case, the appellant initially denying the share in the property had filed suit based on a will. Later, he has pleaded, relinquishment of the shares by 2 out of 3 sharers. It is settled law that the question of Court fee must be considered by the Court in the light of the allegations in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision in the suit on merits. (Neelavathi and other -vs- Natarajan and others : reported in AIR 1980 SC 691).

30. In P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314, the Supreme Court held that the possession of one co-heir is considered, in law, as possession of all the co-heirs. The relevant portion of the said judgment is reproduced hereunder under: -



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"8...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 of the non-possessing 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. (See *Corea v. Appuhamy*, 1912 AC 230 [C]). 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."

31. In *Vidya Devi v. Prem Prakash*, (1995) 4 SCC 496, the Supreme Court discussed the three essential ingredients for establishing the plea of ouster of a co-owner as under:-

"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."

32. In *Annasaheb Bapusaheb Patil v. Balwant alias Balasaheb Babusaheb Patil*, AIR 1995 SC 895, the Supreme Court held that even mutation of the property in the name of one co-owner for collection of rent and revenue does not prove hostile act



To:-

1.The Additional District Judge
(Fast Track Court No.2),
Gobichettipalayam.

2.The Subordinate Judge,
Gobichettipalayam.

Copy to: The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.R.T.Doraisamy, Advocate, S.R.No.40574

S.A.No.1020 of 2012

CNR (CO)
CB(16/08/2021)