



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 06.01.2020

PRONOUNCED ON : 13.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S. (MD)No.89 of 2013

and

M.P. (MD)No.1 of 2013

WEB COPY

1.J.Mahalakshmi (died)
T.Saraswathi (died)
2.Kanthasamy
3.Muthulakshmi
4.Manjula
5.Muniswari
6.Velmurugan
7.Manigandan
8.Prema
9.Jeyanthi
10.Selvarani
11.Navandan ... Appellants 1 to 11 / Plaintiffs 1 to 8,10 to 13
12.V.Janakiraman
13.J.Shanmugasundaram
14.J.Manikandan
15.J.Suresh Kumar ... Appellants 12 to 15
(A-12 to A-15 are brought on record as LRS., of the deceased 1st appellant vide order dated 05.04.2011 made in M.P.(MD)No.2 of 2010 in A.S. (MD)S.R.No.13781 of 2007)

Vs.

M.Gurunathan (died)
1.R.Rathinavelu
2.Selvakumar
3.M.Meenakshi (died)
4.Kokila
5.Selvamani
6.Nagarani
7.Balamurugan
8.Vijayalakshmi
9.Selva Meena
10.Bhuvaneswari ... Respondents 1 to 10 / Defendants 2 to 11
11.M.Gnanasekaran
12.M.Kathirvel ... Respondents 11 and 12
(R11 and R-12 are brought on record as LRS., of the deceased R-3 vide order dated 11.12.2012 made in M.P.(MD)Nos.1 to 3 of 2012 in A.S. (MD)S.R.No.13781 of 2007)
(R-3 to R-7 set ex-parte, hence, notice is not necessary)

PRAYER: This Appeal Suit is filed under Section 96 of Civil Procedure Code, to set aside the judgment and decree dated 04.01.2007 made in O.S.No.41 of 2004 on the file of the Fast Track Court (Additional District and Sessions Judge), Dindigul.



For Appellants : Mr.R.Suryanarayanan
For R1, R2, R8 & R10 : Mr.R.Nandakumar
For R9, R11 and R12 : No Appearance
R3 : Died
R4 to R7 : *Ex-parte*

WEB COPY

JUDGMENT

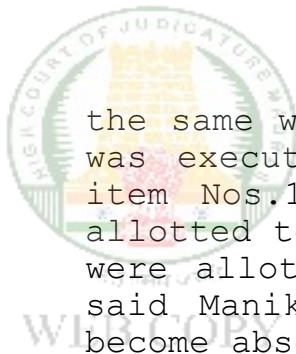
Aggrieved over the dismissal of the suit filed for partition, the present Appeal Suit has been filed.

2.The parties are referred to as per their rank before the trial Court.

3.The brief fact leading to file this appeal reads as follows:-

The suit properties are joint family property and they originally belonged to one Marimuthu Pillai. He died intestate in the year 1978 left behind the plaintiffs and defendants and his mother as his legal heirs. The plaintiffs 1 and 2 and defendants 1 to 4 are the sisters and brothers. The plaintiffs 3 to 7 are the legal heirs of one Loganayagi, who is the daughter of Marimuthu Pillai, the defendants 2, 3, 10 and 11 are the legal heirs of one Ramasamy Pillai, who is the son of the Marimuthu Pillai. Till the death of Marimuthu Pillai, the properties were managed by him and after his death, it was agreed that the properties have to be managed by his wife, namely, Manikathammal with the help of the first defendant. At that time, the first defendant was living in Iyyalur Village. It is also agreed that the income of the properties should be divided equally. At the advice of some of the family members, the said Manikathammal was managing all the properties till her death. The plaintiffs and defendants also parted with income of the property all those years. Suddenly, the defendants 1 to 3, 10 and 11 with the help of the fourth defendant refused to give any share, after death of the said Manikathammal on 20.06.1998. Therefore, the first plaintiff has issued legal notice on 27.07.1998 to the defendants 1 to 3, which was replied with untenable allegations. The allegations found in the reply are fictitious and created for the case. The said Marimuthu Pillai has never given any of his property to the first defendant. Even if it is valid, it is sham and nominal. The said Marimuthu Pillai has never parted with the possession of the property and remaining property have never been divided till now. Hence, the suit has been filed for partition.

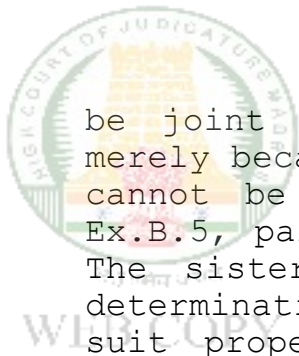
4.The first defendant has filed written statement admitting the relationship of the parties. It is the contention of the first defendant that after the death of the father, dispute arose between the sharers and at that time at the instance of the well-wishers of the family, family arrangement came into force. The plaintiffs 1 and 2 and mother of the plaintiffs 3 to 8 were present and accepted



the same whole-heartedly.. In pursuant to the same, partition deed was executed on 25.04.1980. The first defendant was allotted to item Nos.1 to 10 and the father of the defendants 2 and 3 was allotted to A schedule property in the said partition and some items were allotted to the said Manikathammal for life time. After the said Manikathammal died in the year 1998, the defendants 1 to 3 become absolute owners of the properties. The defendants 1 to 3 are enjoying the property allotted by their mother openly and continuously beyond the statutory period by ouster and adverse possession. The allegation that the mother was requested to manage the property is also denied. The said Manikathammal has never managed the property. The allegation that the plaintiffs parted with the income of the property and revenue records also changed in their name, is also denied and prayed for dismissal of the suit. The above submissions are adopted by the defendants 2 and 3.

5.The trial Court has framed five issues. On the side of the plaintiffs, P.W.1 was examined and Exs.A.1 to A.5 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Exs.B.1 to B.27 were marked. Based on the above evidence and materials, the trial Court has dismissed the suit, holding that the suit property was already partitioned in a family arrangement and the plaintiffs have never been in possession of the property. As against which, the present Appeal Suit has been filed.

6.The learned counsel appearing for the appellants submitted that admittedly, the property originally belonged to the father of the plaintiffs, now, the legal heirs are brought on record, after the death of some of the legal heirs of the original owner. The said Marimuthu Pillai died in the year 1978, leaving behind the plaintiffs and defendants and his wife as his legal heirs to succeed estate. The said Manikathammal died in the year 1998. It is the contention that the plaintiffs 1 and 2 and the defendants 1 and 4 are the brothers and sisters and one more brother of the first plaintiff Ramasamy Pillai died, leaving his children, who are the defendants 2, 3, 10 and 11 and one more sister Loganayagi had expired, leaving her husband and children, who are the plaintiffs 3 to 8. After the death of the father of the plaintiffs 1 and 2, their mother was in enjoyment of the property and their mother died in the year 1998. Therefore, the suit property is devolved on the children of Marimuthu Pillai and Manikathammal and each one have 1/6th share in the suit property. The alleged family arrangement has not been established. The partition deed relied upon by the defendants is also not binding on the plaintiffs. When the sisters were not made as parties in the partition deed, the same is not valid and will not bind on other sharers. The first defendant was residing in the village, where the suit properties situated and as he is the male member of the family, revenue records stood in his name. That itself cannot be a ground to deny the rights of the parties. Admittedly, there was no partition by metes and bounds between the family members. The possession of the first defendant is deemed to



be joint possession on behalf of other co-sharers. Therefore, merely because the suit has been filed after death of the mother, it cannot be said that the defendants have ousted the plaintiffs. Ex.B.5, partition deed is executed between two brothers and mother. The sisters were not made as parties. Ex.B5 alone is not a determinative factor to hold that the plaintiffs are ousted from the suit property. Hence, it is the contention that the evidence adduced on the side of the plaintiffs clearly proves the fact that they are entitled to a share. There is no concrete evidence available on record to hold that the co-owner is perfected the title and ousted other co-owners. The family arrangement has also not been established. Hence, it is the contention that the trial Court has not properly analyzed the evidence.

7.In support of his submissions, he has placed reliance of judgments reported in **(1990) AIR (SC) 507 (Mohd. Zainulabudeen Vs. Sayed Ahmed Mohideen and others)**, **(1995) 2 SCC 543 (Annasahed Bapusahed Patil and others Vs. Balwant Alias Balasahed Babusahed Patil (dead) by LRS., and heirs etc)**, **(1995) 4 SCC 496 (Vidya Devi Alias Vidya Vati Vs. Prem Prakash and others)** and **(2004) 10 SCC 779 (Karnataka Board of Wakf Vs. Government of India and others)**.

8.The learned counsel appearing for the respondents submitted that after death of the father of the parties, there were some disputes between the sharers. Therefore, there was a family arrangement. Pursuant to which, a partition deed was entered into between the mother of the parties and Ramasamy and Gurunathan and the same was accepted by daughters of Marimuthu Pillai. After the said partition in 1980, Ramasamy and Gurunathan died and after their death, the legal representatives are in separate possession and enjoyment with the knowledge of the plaintiffs. Ex.B.2 dated 16.04.1968 is the patta granted to the first defendant. P.W.1 admitted that her father had given some properties to one of his brothers and those properties have not been included in the suit schedule. She has also admitted about the 1st annual ceremony of her father and she did not deny the attester to the partition deed and settlement deed and her presence. D.W.1 in his evidence stated that the said Marimuthu Pillai has executed gift deed in favour of Gurunathan. The said Gurunathan in turn under Ex.B.4 has executed a settlement deed in favour of his brother Ramsamy, which was attested by D.W.2. The partition deed under Ex.B.5 executed between the brothers and mother has also been attested by D.W.2. The evidence adduced on the side of the defendants clearly indicates that there was a family arrangement. In pursuant to the same, Ex.B.5 came to be registered. The plaintiffs have also filed the suit after 19 years from the death of their father in the year 1979. They are also aware of the partition deed of the year 1980 and have not questioned the same till the death of their mother in the year 1998. The partition deed is acted upon, the plaintiffs were ousted from the suit property. The daughters of Mrimuthu Pillai have married



long prior to the father's death, which also categorically admitted by the plaintiffs in their evidence. Hence it is the contention that the trial Court has rightly analyzed the facts and dismissed the suit.

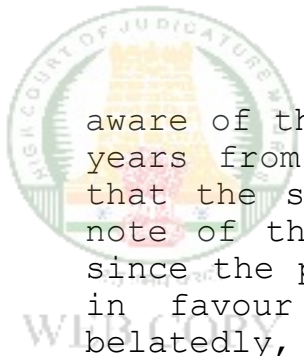
9. In support of his submissions, he has also relied upon the judgment reported in **1972 1 MLJ 466 (Minor Ibramsa Rowther and others Vs. Sheik Meerasa Rowther and others)**

10. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents and perused the materials available on record carefully.

11. In the light of the above submissions, now the points for consideration are (i) whether the family arrangement was effected in the family in the year 1980?; (ii) whether Ex.B.5 was executed in pursuant to the family arrangement between the legal heirs of Marimuthu Pillai?; (iii) whether the defendants have perfected the title by ouster and adverse possession?; and (iv) whether the plaintiffs are entitled to partition as prayed for?.

12. The suit has been filed for partition, claiming 3/6th share to the plaintiffs. It is an admitted fact that the plaintiffs 1 and 2 and defendants 1 and 4 are the brothers and sisters and children of one Marimuthu Pillai. Marimuthu Pillai died in the year 1979, leaving behind his wife Manikathammal and the plaintiffs 1 and 2 and Loganayagi, Meenakshi, Ramasamy and Gurunathan as his legal heirs. The plaintiffs 3 to 8 are the children of deceased daughter of Loganayagi and after death of the plaintiffs 1 and 2, the plaintiffs 14 to 17 were impleaded as legal heirs. Similarly, the legal heirs of other son of Ramasamy were impleaded as defendants 2, 3, 10 and 11 and the legal heirs of the first defendant were impleaded as the defendants 5 to 9.

13. It is the case of the plaintiffs that the suit property is originally belonged to his father Marimuthu Pillai and after his death, it was agreed that it should be managed by the mother till her life time. Thereafter, it should be divided equally among the legal heirs, whereas it is the case of the defendants that the property belonged to joint family property and after death of their father in the year 1979, there was a dispute between the sharers. Therefore, a family arrangement was effected in the family and all the legal heirs have accepted the family arrangement. In pursuant to the family arrangement, partition deed under Ex.B.5 dated 25.04.1980 came to be registered. The first defendant and legal heirs of other son of Ramasamy and mother of the parties are given life interest. Ever since the date of the partition deed, the defendants are in absolute possession of the property openly and continuously and they ousted the other co-owners from the suit property. Hence, it is the contention that the plaintiffs are also



aware of the family arrangement and the suit has been filed after 19 years from the death of the father. Hence, it is the contention that the suit is barred by limitation and the trial Court, taking note of the fact that the suit has been filed after 19 years and since the plaintiffs are also aware of the other gift deed executed in favour of the first defendant, they have filed the suit belatedly, has dismissed the suit.

14.A careful perusal of Ex.B.1 gift deed in respect of other properties executed by Marimuthu Pillai in favour of the first defendant on 11.11.1967 makes it very clear that the property was self-acquired property of Marimuthu Pillai. Though the defendants contended that the properties are joint family properties, the fact that the properties are individual property of Marimuthu Pillai is not seriously disputed. Such being the position, the fact that the suit properties are the joint family properties as alleged by the defendants, has not been established. Be that as it may, it is the case of the plaintiffs that the properties belonged to their father. After death of the father, the mother has maintained the property and after death of the mother, when they sought partition, the defendants refused and pleaded for family arrangement. It is well settled that the family arrangement among the family members is not alien to the society. When the parties set up a plea of family arrangement denying the right of other sharers, the burden lies on them to establish the family arrangement.

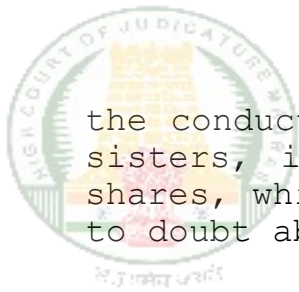
15. On perusal of the entire written statement, it is the case of the defendants that after death of the father, a dispute arose between the sharers and some of them were moving the Courts for division of the properties. Therefore, at the instance of the common people, family arrangement reached between the parties. As a result, Ex.B.5 registered partition deed came to be executed between the first defendant and legal heirs of his brother and mother on 25.04.1980. In the entire written statement, there are no pleadings as to when such family arrangement took place, where the family arrangement took place whether on the date of the alleged execution of Ex.B.5 or prior to that there is no whisper about the family arrangement. Whereas for the first time, D.W.1, who is the legal heir of one of the sons of Marimuthu Pillai, the second defendant in his chief examination, has stated that his grandfather died in the year 1979 and on the first year ceremony of the grandfather, his father has objected the gift deed executed in favour of the first defendant. Therefore, there was a family arrangement. Therefore, partition deed Ex.B.5 came to be executed between the first defendant and legal heirs of Ramasamy and mother. D.W.2 one of the attesting witnesses in the partition deed was examined to show that there was a family arrangement. In his evidence, he stated that on one year completion of death of Marimuthu Pillai, Ramasamy has demanded the property from his brother Gurunathan. Accordingly, Gurunathan has also executed gift deed under Ex.B.4. Thereafter, Ex.B.5 came to be executed, dividing the properties among the first defendant and legal heirs of Ramasamy



and the mother. At that time, the daughters of Marimuthu Pillai were present.

16.It is to be noted that D.W.1 in his evidence for the first time introduced as if such arrangement took place in the month of March, whereas D.W.2 one of the attesting witnesses in the partition deed under Ex.B.5 in his evidence has stated that only on the first year ceremony, there was a panchayat. It is to be noted that Marimuthu Pillai died on 03.01.1979 as per Ex.B.3 Therefore, the first year ceremony should have been in the month of January, whereas the D.W.1 in his evidence stated that in the month of March, panchayat was conveyed and there was a family arrangement, whereas the D.W.2 in his evidence has stated that on the first year ceremony there was a panchayat conveyed there was a family arrangement reached between the parties. This contradictory evidence of D.W.1 and D.W.2 also creates serious doubt about the alleged panchayat. It is also to be noted that admittedly, under Ex.B.1, certain properties, which are not the subject matter of the present suit, are already gifted in favour of the first defendant, which was objected by another brother Ramasamy, as per the version of the first defendant. Accordingly, the first defendant agreed to execute the half of the property to his brother under Ex.B.4. Accordingly, Ex.B.4 came to be filed.

17.It is to be noted that in fact one of the brothers has objected for entire property being gifted to the first defendant. There are other disputes between the parties. Such being the circumstances, the fact that two brothers along with his mother entering the partition deed, leaving other sharers namely daughters, creates serious doubt about the presence of the daughters. Already, there was a dispute raised by one of the brothers as the co-sharers. Such being the position, it was a normal human conduct of the sharers to get the signatures of the daughters, if really they were present at the time of alleged family arrangement. Even assuming it would be true that the daughters were present and they did not claim any share, when one of the brothers already raised dispute and the parties have wanted to settle the issues once for all, the normal conduct of the human being would be to get signature of the daughters, though no share whatsoever agreed to be taken by them. Whereas a careful perusal of Ex.B.5 shows that the partition deed executed between the first defendant and legal heirs of Ramasamy and other son and certain life interest was given to the mother. No signatures whatsoever obtained from the sisters. If really the sisters are also present at the time of executing the partition deed among two brothers, there was no reason as to why the sisters were not made as attesting witnesses to the documents or identifying witnesses. This fact creates serious doubt about the family arrangement. Once co-owners sets up plea of family arrangement, the family arrangement has to be proved with concrete evidence. When the act of the parties is against the normal human conduct, it is highly unsafe to believe such plea. In the normal course of events,



the conduct of the defendants would be to get the signatures of the sisters, if really they were present and agreed to give up their shares, which has not been done so. This is also one of the reasons to doubt about the family arrangement pleaded by the defendants.

18.It is also to be noted that though the suit has been filed after death of the mother, it cannot be said that the delay in filing the suit alone gives rise to the presumption that the family arrangement is true. It is to be noted that the trial Court has non-suited the plaintiffs on the ground that P.W.1 is also aware of the gift deed. It is to be noted that the gift deed relates to some other properties and those properties are not included in the suit schedule properties. P.W.1 has also admitted in her evidence in this regard that though certain properties in item Nos.12 to 14 were included subsequently, that were given up. The suit properties have not been covered under Exs.B.1 and B.4. Therefore, merely because the parties are aware of certain gift deeds, that cannot be a ground to defeat their rights of succession.

19.Yet another contention of the defendants is that the plaintiffs are ousted from the possession after death of their father, they are continuously enjoying the property under Exs.B.6 and 7 and patta given to the first defendant and wife of Ramasamy has been filed to show that family arrangement acted upon. It is to be noted that it is a normal conduct of a person, who is in possession of the property, to get the patta in his name. Merely because the revenue records namely patta stands in the name of some co-owners, plea of ouster and adverse possession cannot be inferred. It is well settled that the possession of one of co-owners is deemed to be possession of all. In the case reported in (1990) AIR (SC) 507 referred to above, the Hon'ble Apex Court held that where one co-heir pleads adverse possession against another co-heir then it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. The possession of one co-heir is considered in law, as possession of 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. Thus, it is well settled rule of law 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 construe ouster.

20.In the case reported in (1995) 2 SCC 543, the Hon'ble Apex Court held that the possession of the family property by a member by of the cannot be adverse to the other members, but must be held of on behalf of himself and other members. The possession of one, therefore, is the possession of all. The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmation that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property



and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other.

21. In the case reported in 1972 (1) MLJ 466, referred to above, as relied upon by the respondents, the Division Bench of this Court has held that the suit is filed after 30 years, after death of his father, as a result of the inordinate delay, other persons who were parties to the arrangement and who could have given evidence are dead. Even if there should be any gap or defect in the evidence, the adverse inference will have to be drawn against the plaintiff, in view of inordinate delay, the the plaintiff must take the responsibility for the same. In the same judgment it is also held that the possession of one co-owner is presumed to be on behalf of all the co-owners in view of the unity and 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-owners 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 the other co-owner's title.

22. Having regard to the above settled position of law, merely the suit has been filed after 19 years, after death of the father, it cannot be said that the defendant has perfected title. The family arrangement has been pleaded on the side of the defence without any details as to the date and month etc., and further particulars as to the well-wishers' name, who are present, are also not pleaded in the written statement. Only for the first time, it was introduced in evidence as if one of the attesting witnesses was present and another person was present.

23. As already discussed above, the evidence of D.W.1 and D.W.2 as to the date of family arrangement creates serious doubt. D.W.1 in his evidence stated that family arrangement reached in the month of March, whereas, D.W.2 has stated that family arrangement reached on the first year ceremony of Marimuthu Pillai. Admittedly, Marimuthu Pillai died as per Ex.D.3 on 03.01.1979, that means family arrangement ought to have been taken place in the month of January, whereas D.W.1 claims to be present in the family arrangement has stated that family arrangement took place only in the month of March, 1980. As already discussed, it is highly improbable to believe such contention. D.W.1 himself stated that there are disputes arose between two brothers as to the settlement deed. In such view of the matter, the human conduct demands some arrangement and some acknowledgment by the sisters, who are said to have been present at the relevant point of time. This fact clearly indicates



that family arrangement has not been established. Therefore, mere long possession without any overt act would not become adverse to other co-owners. Similarly, co-owners, who are in possession, had obtained revenue records and paying taxes in their names, cannot constitute their possession as adverse possession. Except revenue kist receipts, no other documents have been filed to show that the possession was open and the properties were independently dealt with. No overt act has been established by the defendants to constitute their possession to adverse to the interest of the other co-owners. Therefore, mere long possession cannot render their possession adverse to the other co-owner merely by any secret, hostile animus on his own part in derogation of the other co-owner's title.

24. On perusal of the entire evidence, this Court is of the view that the plea of ouster or adverse possession has not been established. Merely because the suit has been filed after 19 years after the death of the father, the Court cannot presume the adverse possession in favour of the defendants. It is the plea of the plaintiff that the mother was given life interest and it is agreed that only after death of the mother, the properties are agreed to be divided. The mother of the parties died in the year 1998, after the death of the mother, legal notice has been immediately issued under Ex.A.1 on 27.07.1998, which has not been disputed by both sides. The ignorance of the partition deed by P.W.1 in her evidence itself would not lead to inference that partition deed was executed in pursuant to the family arrangement whereas, she has totally denied the suggestion put by the defendants.

25. In view of the above, all the points are answered. The judgment of the trial Court, dismissing the suit, is hereby set aside. The suit is decreed and the preliminary decree is passed for dividing the suit properties to 6 equal shares and allotting 3 shares to the plaintiffs together and defendants, who are the legal heirs of one Gurunathan and Ramasamy and Mennakshi together entitled to 3/6 shares on payment of proper court fee by them. Accordingly, the preliminary decree is passed.

26. In the result, this Appeal Suit is allowed. Considering the relationship between the parties, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



To

1.The Additional District and Sessions Judge,
Fast Track Court,
Dindigul.

WEB COPY

Copy to:

The Section Officer, (2 copies)
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.SURIYANARAYANAN, Advocate (SR-1601[F]

+1 CC to M/s.R.NANDAKUMAR, Advocate (SR-1794[F] dated 13/01/2020)

Judgment made in
A.S. (MD) No.89 of 2013
13.01.2020

SMA/31/01/2020/11P/6C