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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.10.2021

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.NO.254 OF 2007

AND

M.P.NO.2.OF 2007

- 1.Vijayaraghavan
- 2.Vijayaboopathy
- 3.Kalyani
- 4.Jayaraman
- 5.Sarangan
- 6.Kuppayee
- 7.Srinivasan
- 8.Ramachandiraman
- 9.Thangasamy
- 10.Rajakumari
- 11.Dhanalakshmi

...Appellants / Defendants

Vs.

- 1.Radhakrishnan
- 2.Minor Munusamy (major)
- Rep. by his father and guardian respondent

...Respondents / Plaintiffs 2 & 3

R2 declared as major and discharge his guardianship vide order of court dated 26.02.2021 made in CMP No.6840/2020 in S.A.No.254 of 2007.

Prayer : Second Appeal filed under Section 100 of CPC, 1908 against the decree and judgment dated 24.12.2003 passed in A.S. No.2 of 2003, on the file of the Additional District Judge (Fast Track III), Vridhachalam, reversing the decree and judgment dated 23.11.2001 passed in O.S. No.222 of 1993, on the file of the Principal Sub Court, Vridhachalam.



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For Appellants : Ms.Nilaphar
for Mrs.R.Meenal

Respondents : M/s.Abirami Radhakrishnan
for Mr.V. Raghavachari.

JUDGMENT

The appellants are the defendants in O.S.No.222 of 1993 on the file of the Subordinate Judge, Vridhachalam.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their ranking in the present appeal would also be indicated.

3. The first plaintiff Kasiammal filed the suit in O.S.No.222 of 1993 against the defendants 1 to 11 for partition of the suit properties in to four equal shares and to allot one such share to her.

4. The case of the first plaintiff is that the suit properties are the self acquired properties of her father late Ramasamy and that though her brothers and thereafter their children were giving share to the first plaintiff from the income derived from the suit properties till the year 1991, subsequently stopped sharing the income. All the efforts of the first plaintiff for partition of the suit properties went in vain and therefore, she issued a legal notice dated 13.08.1992, a copy of which is marked as Ex.A8, which also did not evoke any response from the defendants. During the pendency of the suit the first plaintiff Kasiammal died and thereafter her legal heirs were impleaded as plaintiffs 2 and 3 in the suit. The plaintiff 2 and 3 amended the plaint by contending that the first plaintiff executed two registered Wills on 06.12.1990 and 03.03.1993 in favour of the plaintiffs 2 & 3 respectively bequeathing her 1/4th share in the suit properties. It is further contended by them that the properties (Item Nos. 44 to 53) in Survey No.314/4C to 314/14 in Seppainatham Village, are the exclusive properties of Janakiammal, the mother of the first plaintiff. Their further contention is that Janakiammal purchased the said properties through a registered sale deed dated 10.07.1920, a copy of which is marked as Ex.A14.



5. The suit was resisted by the defendants on the following grounds:

- i. The suit filed by the plaintiffs is not maintainable.
- ii. The suit properties were in joint possession of three brothers namely Boorasamy, Govindasamy and Kumarasamy.
- iii. Subsequent to the demise of Ramasamy the first plaintiff was ousted from the suit properties.
- iv. Though the properties in Survey No.314/4C to 314/14 (suit Item Nos. 44 to 53) stood in the name of Janakiammal, the plaintiffs cannot claim any right over the same.

6. The trial Court after framing appropriate issues and after full contest, dismissed the suit filed by the plaintiffs vide its decree and judgment dated 23.11.2001 on the following grounds:

- i. The plaintiffs did not establish that the suit properties were the self acquired properties of late Ramasamy.
- ii. The suit properties are the joint family properties of three brothers Boorasamy, Govindasamy and Kumarasamy and that the plaintiffs can only claim 1/4 shares in respect of her father's share in the said properties.
- iii. Since the first plaintiff got married prior to 1989 and was ousted, she cannot claim any right over the suit properties.

7. Aggrieved over the same, the plaintiff 2 & 3 filed an appeal in A.S.No.2 of 2003 before the Additional District Judge, Fast Track Court No.III, Vridhachalam. The learned Additional District Judge, after analysing the evidence on record, reversed the findings recorded by the trial court vide his judgment dated 24.12.2003 and decreed the suit in favour of the plaintiffs and a preliminary decree for partition of the suit properties into four equal shares and to allot one such share was passed by the first appellate court.

8. Now, the present second appeal is filed on the following Substantial Questions of Law :

- (1) Whether in law the lower appellate court was right in failing to see that Kasiyammal's right to a share, even assuming that it existed, got extinguished by ouster and that the respondents could not resuscitate a dead cause?



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(2) Whether in law the lower appellate court was right in holding that the properties were the self acquisitions of the plaintiff's father without any oral or documentary evidence?

9. Ms. Nilaphar, learned counsel appearing for the appellants contended that since the plaintiffs did not prove that the suit properties were the self acquired properties of late Ramasamy and Janakiammal, the plaintiffs cannot claim any right over the suit properties. she would also contend that the first plaintiff got married in the year 1979 and no amount was paid to her from the income derived from the suit properties and that she has also been ousted from the suit properties.

10. A perusal of the written statements filed by the defendants shows that nowhere in the written statements the defendants have denied the contention of the plaintiffs that the suit Item Nos. 1 to 43 are not the self acquired properties of late Ramasamy. They have not also denied that Item Nos. 44 to 53 absolutely belonged to Janakiammal. In fact the defendants in their written statements did not specifically state that Item Nos. 1 to 43 are ancestral properties of late Ramasamy. As per Order VIII Rule 5 of Code of Civil Procedure, where there is no denial of specific allegations made in the plaint it is deemed to be admitted. Therefore, the observation of the trial Court that suit Item Nos. 1 to 43 absolutely belonged to late Ramasamy and Item Nos. 44 to 53 absolutely belonged to Janakiammal cannot be assailed. Moreover, the defendants by pleading ouster had admitted the right of the plaintiffs in the suit properties. In fact an attempt was made by the defendants during the course of trial to appear as if late Ramasamy died prior to the advent of the Hindu Succession Act, 1956. This is also without any pleadings. However, the first appellate court found that late Ramasamy died only after the advent of the Hindu Succession Act, 1956. This observation of the first appellate court is purely based on the evidence adduced on both sides.

11. The first plaintiff Kasiammal, during her lifetime filed another suit in O.S.No.609 of 1990 before the Principal District Munsif, Cuddalore, against one of her brothers Govindasamy and the present defendants 4 to 11 for partition of the properties belonging to her mother Janakiammal into four equal shares and to allot one such share to her. The suit was



decreed by the Principal District Munsif, Cuddalore, on 26.09.1991 and a final decree for partition was passed on 29.09.2000 by the Additional District Munsif, Cuddalore in I.A.No.73 of 1998. It is pertinent to point out that neither Govindasamy Padayachi nor the present defendants did not contest the suit. The properties mentioned in the said suit have not been included in the present suit and since there is nothing to upset the earlier decree passed in O.S.No.609 of 1990, the subsequent suit filed by the plaintiff is maintainable.

12. The evidence on record shows that late Ramasamy did not inherit any properties from his father or his ancestors and in the absence of specific pleading by the defendants in the written statements that the suit properties are the ancestral properties of late Ramasamy, the plaintiff's case that the properties belonged to her father and mother and after their death all the children are equally entitled to a share therein stands proved. This is precisely the conclusion arrived at by the first appellate court and the said finding does not call for any interference. It is further contended by the defendants that no share of profits from the suit properties was given to the first plaintiff after her marriage in the year 1979 and therefore even if the first plaintiff is entitled to a share, it got extinguished by ouster.

13. The Limitation Act, 1963 prescribes no time limit for filing a suit for partition by a co-sharer or co-owner. However, under Article 110 of the Limitation Act, 12 years is the period prescribed for filing a suit by a person who is excluded from joint family property to enforce a right to the share and the starting point for limitation is when the exclusion becomes known to the plaintiff. Thus, Article 110 requires for its application,

- i. the existence of joint family,
- ii. joint family properties,
- iii. the person excluded being one of the members of the joint family, and
- iv. exclusion of such member from a joint family.

14. It is also settled that possession of one co-sharer is the possession of all co-sharers. In the instant case, the defendants had merely contended that since the first plaintiff got married in the year 1979, she has been ousted from the suit



properties. They have not even prescribed title by adverse possession .

15. In P. Lakshmi Reddy v. L. Lakshmi Reddy reported in AIR 1957 S.C. page 314 it is held as under:

"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 coheir 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 coheirs. 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 of his own part in derogation of the other co-heir title. 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. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and excluded heir takes no steps to vindicate his title. It is well settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

In Shambu Prasad Singh v. Most. Phool Kumari reported in (1971) 2 SCC 28 : AIR 1971 S.C. page 1337 it is held at para 17 as under:

"On the question of adverse possession by a co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. As between co-sharers, the possession of one co-sharer is in law the possession of all



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co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other."

In *Karbalai Begum v. Mohd. Sayeed* reported in (1980) 4 SCC 396 : AIR 1981 S.C. 77 at para. 7 following proposition is laid down:

"It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact is admitted, then the legal position would be that the co-sharers in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees. The possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff."

In *Darshan Singh v. Gujjar Singh (dead) by LRs.* reported in (2002) 2 SCC 62 : [2002 (1) ICC (S.C.) 578] at para 9 it is held as under:

"In our view, the correct legal position is that possession of a property belonging to several co-sharers by one cosharer shall be deemed that he possesses the property on behalf of the other cosharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one cosharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

The Apex Court in *Binapani Paul v. Pratima Ghosh* reported in (2007) 6 SCC 100 : [2007(2) HLR (S.C.) 234] at para. 39 has held as under:

"Interestingly, Amal pleaded ouster. If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster is not



established, a fortiori the title of other co-sharers must be held to have been accepted."

The Apex Court in Jai Singh v. Gurmej Singh reported in 2009 AIR SCW page 3652 : [2009 (1) ICC (S.C.) 512] after referring to several earlier judgments, has laid down the following principles at para. 7 which reads as under:

"The principles relating to the inter se rights and liabilities of co-sharers are as follows:

1. A co-owner has an interest in the whole property and also in every parcel of it.
2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.
5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.
6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.
7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition."

16. It is settled that the plea of adverse possession raises a mixed question of law and fact. Where a person wants to base his title on it, he should specifically set up the plea.



Unless the plea is raised, it cannot be entertained. A plea must be raised and it must be shown when possession became adverse, so that the starting point of limitation against the party affected can be found. Therefore, a person who claims adverse possession should show:

- (a) on what date he came into possession,
- (b) what was the nature of his possession,
- (c) whether the factum of possession was known to the other party,
- (d) how long his possession has continued, and
- (e) his possession was open, continuous and undisturbed."

17. It is also 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. It is also seen from the above decisions cited supra, ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out and if ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material.

18. In the instant case, as already observed, the defendants did not contest the earlier suit filed by the plaintiff in the year 1990 and therefore it has to be held that the plea of ouster is not established. It is also to be noted that 'ouster' does not mean actual driving out of the co-sharer from the property and mere non participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. In fact the possession of co-sharer has to be construed as holding the properties as a constructive trustee on behalf of the other co-sharer who is not in possession and mere passage of time does not extinguish the right of the co-owner who has been out of possession of the joint family property. The first appellate court, in fact, had gone into all the above aspects and had rightly decreed the suit filed by the plaintiffs.

19. As regards items 44 to 53 of suit properties, the first appellate Court had observed in his judgment thus;



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"If any property stands in the name of a female Hindu the legal presumption which would arise is that properties absolutely belongs to that female and contrary has to be proved only by the persons who challenge it. The respondents/defendants have miserably failed to prove that suit items of properties 44 to 53 were not purchased by Janaki Ammal. In view of Ex.A14 a clear legal presumption existed in favour of Janakiammal and accordingly Kasiyammal being the daughter of Janakiammal is entitled to 1/4th share in the suit properties. The lower court has miserably failed to see that first plaintiff/appellant did not at all claim entire suit items of properties namely 44 to 53 as of her own but she claims only 1/4th share in respect of those properties. This vital and factual aspects have not been considered by the lower Court. The failure on the part of the lower Court in not considering the aforesaid aspects had resulted in the dismissal of the suit. Hence, decree and judgment passed by the lower Court dismissing the suit in entirety is not sustainable under law and accordingly this point is answered in favour of plaintiffs/appellants."

In fact the first appellate court had analysed the evidence in a thread bare manner and it is not necessary to reproduce the same here in the second appeal. Suffice to say that all the observations made by the first appellate court are based on well laid principles of law and hence the substantial questions of law are answered against the appellants.

20. In the result,

- i. the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.
- ii. the decree and judgment 24.12.2003 passed the learned Additional District Judge (Fast Track III), Vridhachalam, in A.S. No.2 of 2003, are upheld.



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iii.the decree and judgment dated 23.11.2001 passed by the learned Principal Subordinate Judge, Vridhachalam, in O.S. No.222 of 1993, are set aside.

Sd/-
Deputy Registrar (CS)

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Sub Assistant Registrar

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To

1.The Additional District Judge
(Fast Track III),
Vridhachalam.

2.The Principal Subordinate Judge,
Vridhachalam.

Copy To

The Section Officer,
VR Section,
High Court, Madras

+1cc to Mrs.R.Meenal, Advocate SR.No.51956

+1cc to Mr.V.Raghavachari, Advocate SR.No.51794

S.A.No.254 of 2007

SSI(CO)
RVM(08/11/2021)