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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AS.No.528/2018 and CMP.No.13350/2018

[Hybrid Mode]

1.Alamathal @ Alamelu Ammal
2.Rajammal @ Rajamani
3.P.Velusamy
4.M.Shanmugam
5.S.Saraswathy
6.S.Premkumar ... Appellants/Defendants 1 to 3 & 6 to 8

Vs.

1.Karppathal ... 1st Respondent/Plaintiff
2.Gokilavani
3.Valliammal ... Respondents 2 and 3/
Defendants 4 and 5

Prayer:- Appeal Suit filed under Section 96 of CPC read with Order 41 Rule 3(A) of CPC, to set aside the decree and the judgment dated 28.07.2017 rendered in O.S.No.528 of 2015, on the file of the learned I Additional District Judge, Coimbatore.

For Appellants	:	M/s.Elizabeth Ravi
For R1	:	Mr.K.Sudhakar
For R2	:	No appearance
For R3	:	Mr.M.Mariappan

JUDGMENT

- (1) This Appeal Suit is preferred against the judgment and decree dated 28.07.2017 rendered in O.S.No.528/2015 by the learned I Additional District Judge, Coimbatore.
- (2) The appellants are defendants 1 to 3 and 6 to 8 in the Suit in O.S.No.528/2015. The Suit in O.S.No.528/2015 is for



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partition and separate possession of plaintiff 's 1/3rd share in the Suit property. The Suit property is an extent of 2.51 acres of land comprised in Survey Nos.740/2 and 743/3 in Chettipalayam Village, presently Madukkarai Taluk, (Coimbatore South Taluk), Coimbatore District.

- (3) It is the case of the 1st respondent/plaintiff that the Suit property originally belonged to one Mrs.Ramakkal @ Varuthakkaal wife of Krishna Konar, the mother of plaintiff, by virtue of a Sale Deed dated 06.12.1948 registered as Document No.1410/1948. It is stated in the plaint that the husband of Mrs.Ramakkal @ Varuthakkaal predeceased her and the mother of plaintiff also died intestate in the year, 1981, living behind her son by name Palanisammy and two daughters namely Karupathal, the plaintiff herein and Valliammal, the 5th defendant in the Suit.
- (4) The 1st defendant is the wife of Palanisamy the only son of Mr.Krishna Konar. Defendants 2 to 4 are the children of 1st defendant through Thiru.Palanisamy. The 5th defendant is the other daughter of Mrs.Ramakkal @ Varuthakkaal. It is stated that the 6th defendant is the father in law of the 3rd defendant, the son of Palanisamy. It is admitted that based on the Power of Attorney document executed by defendants 1 to 4, the 6th defendant executed a Sale Deed in favour of defendants 7 and 8 before filing of the Suit. Stating that the plaintiff is entitled to 1/3rd share as daughter of Mrs.Ramakkal @ Varuthakkaal, the Suit is filed.
- (5) Written Statement filed by the 3rd defendant was also adopted by 1st defendant. From the Written Statement, it is seen that the main defence which was taken by the 3rd defendant is that the plaintiff is not in joint possession and the Suit is barred by limitation. Since, the plaintiff kept quite all these years after the death of Mrs.Ramakkal @ Varuthakkaal, it is contended that the Suit is hopelessly barred by limitation and lacks bona fides. It was suggested that the plaintiff ought to have filed the Suit for a declaration, challenging the Sale Deed in favour of defendants 7 and 8 within time as prescribed by the law of limitation. The 6th defendant filed the Written Statement stating that defendants 7 and 8 are the purchasers of the property and they are entitled to the Suit property.
- (6) The 8th defendant filed the Written Statement on the ground that defendants 7 and 8 are in possession and occupation of the Suit property from the date of purchase. It is to be



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noted that defendants 7 and 8 also raised a plea of limitation. Stating that possession of property is with the defendants 7 and 8 under the Sale Deed which was executed in its favour in 2006 through the Power of Attorney agent of defendants 1 to 4, they prayed for dismissal of the Suit as against them.

- (7) The Trial Court framed a specific issue and found that the Sale Deed in favour of defendants 7 and 8, is not valid and not binding on the plaintiff so far as the 1/3rd share of plaintiff and the 1/3rd share of 5th defendant in concerned as defendants 1 to 4 have no exclusive right. Though a plea of limitation was raised, no issue was framed by the Trial Court. However, it was considered by the Trial Court and found that the plaintiff had no knowledge of execution of Sale Deed under Ex.A10 in favour of defendants 7 and 8 and that she came to know about the alienation only after obtaining the Encumbrance Certificate just before filing the of the Suit in 2015. Since, there was no evidence available to show that the plaintiff had prior knowledge regarding the execution of Sale Deed, the Trial Court held that the Suit cannot be dismissed as barred by limitation. Aggrieved by the judgment and decree the appeal is preferred by the defendants 1 to 3 and 6 to 8.
- (8) Learned counsel appearing for the appellants submitted that the plaintiff who is aware of the Sale Deed and the exclusive possession of the defendants did not raise her little finger till she filed the Suit in 2015. Therefore, it was contended that the Suit instituted 35 years after the death of Mrs.Ramakkal @ Varuthakkal in 1981 is hopelessly barred by ouster.
- (9) Learned counsel during argument submitted that the Suit is not filed within the limitation of 12 years and that the 1st respondent/plaintiff had lost her right by reason of ouster. It is also contended by the learned counsel that the property is not in joint possession and enjoyment of the plaintiff and defendants 1 to 4.
- (10) Learned counsel then submitted that one of the sister namely, Valliammal/5th defendant in the Suit did not file any Written Statement claiming any share and therefore, the finding that the Power of Attorney Deed and Sale Deed of the year, 2006 are not binding on plaintiff and 5th defendant is not warranted. According to the learned counsel a declaration of share in favour of respondents 1 and 5 is unsustainable.



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(11) This Court and the Hon'ble Supreme Court of India has time and again distinguished the plea of ouster from the plea of adverse possession. The pleading in the Written Statement is that the Suit is barred by limitation. The plea of ouster should be specific. It is settled that every co owner is presumed to be in joint possession of the property. Any co owner claiming ouster against other co owners must show an intention to exclude others from possession. Such intention can be expressed by assertion of exclusive title by denial of title of other co owners. For establishing plea of ouster in the case of co owner, the possession must be hostile in denial of title of other co owners and such exclusive possession should be to the knowledge of other co owners. In this case there is neither specific plea nor any overt act is established. The possession of defendants 7 and 8 may be adverse. However, the Sale Deed was only in 2006, the Suit filed in 2015 cannot be dismissed on the ground of limitation or ouster.

(12) In the present case, it is the specific case of plaintiff that she came to know about her exclusion of possession by sale in favour of third parties only in the year, 2015. When there is nothing on record to show that the plaintiff had knowledge about the enjoyment of property by defendants 1 to 4 in denial of her right or that the alienation in favour of defendants 7 and 8 was to her knowledge, no instance of ouster can be taken to have been pleaded by the defendant. In such circumstances, the plaintiff along with defendants 1 to 5 are co owners of the property as it is admitted that the property originally belonged to the mother of plaintiff by name Mrs.Ramakkaal @ Varuthakkaal. After the death of Mrs.Ramakkaal @ Varuthakkaal in 1981, the property is devolved on her son and two daughters. Under Section 12 of Hindu Succession Act, both son and daughters have equal share and therefore, the entitlement of plaintiff 's 1/3rd share cannot be disputed. Since, there is no plea the contention that the Suit is barred by limitation is insufficient to consider or to deny relief to the plaintiff on the ground of ouster.

(13) Learned counsel appearing for the appellants submitted that the 5th respondent did not file Written Statement claiming any share in the property and that granting 1/3rd share in favour of 5th respondent is not required. In a Suit for partition it is well settled that every defendant is also a plaintiff but it is necessary that everyone should pay Court fee for the purpose of declaring their share. A



Preliminary decree by declaring the share of each co owner may be made on payment of Court fee.

(14) However the right to get a share in the Joint Family Property cannot be deprived on the ground that she had not paid Court fee. Still, it is open to the 5th defendant to come forward to get her share declared and get an allotment even at the final decree stage. Therefore, this Court is unable to appreciate any of the grounds raised in this appeal or the arguments of the learned counsel appearing for the appellants.

(15) Accordingly, the Appeal Suit is dismissed confirming the judgment and decree dated 28.07.2017 rendered in O.S.No.528 of 2015, by the learned I Additional District Judge, Coimbatore. No costs. Consequently connected Civil Miscellaneous Petition is closed.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

cda
To

1.The I Additional District Judge,
Coimbatore.

2.The Section Officer,
VR Section, High Court,
Chennai-600 104.

+1cc to M/s.Elizabeth Ravi, Advocate Sr.67862

AS.No.528/2018

sj[co]
srg 25/01/2022