



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.1175 of 2006

WEB COPY

Thirumalai Ammal ... Plaintiff / Appellant / Appellant

-Vs-

1.Sivasubramaniam (died)
2.KalyaniAmmal ... Defendants / Respondents / Respondents
3.Subbiah (died)
4.Annammal
5.Gangamuthu @ Selvam
6.Venkatachalam
7.Muthiah @ Kannan
8.Arumugam
9.Sailappan
10.Mariappan
(Respondents 3 to 10 are brought on record as
Lrs of the deceased 1st respondent as per
order dated 29.09.2015)
11.Peratchi
12.Thirumalai Selvi
13.Minor Sivasubramanian
(R11 to R13 are brought on record as Lrs of the deceased 3rd
respondent vide order dated 18.03.2020)
(Minor is represented by his mother and natural guardian)

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.43 of 2005, dated 31.10.2005, on the file of the Principal District Judge, Tirunelveli, confirming the judgment and decree passed in O.S.No.70 of 2000, dated 17.06.2005 on the file of the Sub Court, Ambasamudram.

For Appellants	: Mr.R.Vijaya Kumar for Mr.G.Mohan Kumar
For R1 & R3	: Died
For R2 & R4 to R10	: Mr.S.Meenakshisundaram Senior Counsel for Mr.R.J.Arivu Kumar
For R11 to R13	: Mr.N.GA.Nataraj

**JUDGMENT**

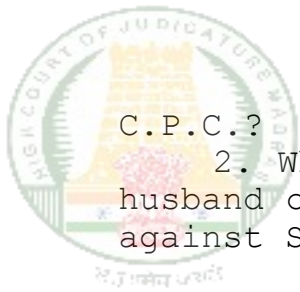
The plaintiff in O.S No.70 of 2000 on the file of the Sub Court, Ambasamudram is the appellant in this second appeal. The suit was filed seeking the relief of partition. The suit schedule is divided into two namely the first schedule and the second schedule. In the first schedule, there are four items.

2.The case of the plaintiff is that the first schedule properties were purchased by Subbiah Chettiar out of his own earnings. The second schedule measures an extent of 63 cents. The property was purchased in the year 1971 vide Ex.A3 in the joint names of Subbiah Chettiar and the palintiff Thirumalai Ammal. Subbiah Chettiar passed away in the year 1980. The mother Muthammal passed away in the year 1991. Both Subbiah Chettiar as well as the mother died intestate. They left behind the plaintiff and the defendants as the surviving legal heirs.

3.The case of the plaintiff is that even though notice was issued seeking partition of the suit items, the first defendant/brother declined to come forward for an amicable settlement. Therefore, she filed the present partition suit in the year 1997. The suit claim was opposed by the first defendant. According to him, following the demise of the mother, the sisters namely the plaintiff and the second defendant relinquished their share in lieu of the jewelry which was given to them. The first defendant further pleaded that he had been in possession and enjoyment of the suit properties exclusively and openly and that he had perfected his title by adverse possession. The second defendant Kalyani Ammal supported the stand of D1 and she had categorically stated that there is no need for partition of the suit properties. Based on the divergent pleadings, the trial Court framed the necessary issues. On behalf of the plaintiff, her husband was examined as P.W.1. Ex.A1 to Ex.A9 were marked. The defendants entered the witness box and examined themselves as D.W.1 and D.W.2. Ex.B1 to Ex.B11 were marked. After consideration of the evidence on record, by judgment and decree dated 17.06.2005, the trial Court dismissed the suit. Aggrieved by the same, the plaintiff filed A.S No.43 of 2005 before the Principal District Court, Tirunelveli. By the impugned judgment and decree dated 31.10.2005, the decision of the trial Court was confirmed and the appeal was dismissed. Challenging the same, this second appeal came to be filed.

4. The second appeal was admitted on the following substantial questions of law:-

1.Whether the acceptance by the Courts below, the plea of oral relinquishment made by D.W.2, an interested witness of D.W.1, who adopted the written statement filed by D.W.1, is perverse and hence, warrants interference under Section 100



C.P.C.?

2. Whether the findings of the Courts below that P.W.1 being husband of the plaintiff, is not entitled to let in evidence, are against Section 120 of Indian Evidence Act, 1872?

3. Whether the Courts below have committed wrong in dismissing the claim of the appellant in respect of the suit 2nd schedule property which has been admittedly purchased under a joint sale deed, namely, Ex.A3, by the appellant and her father and whether the finding to that effect is perverse, warranting interference by this Court?

4. Whether the finding of the Courts below, accepting the plea of ouster made by D.W.1. against the appellant without sufficient material as laid down by the judgment of the Apex Court and as well as this Court is perverse and warrants interference?

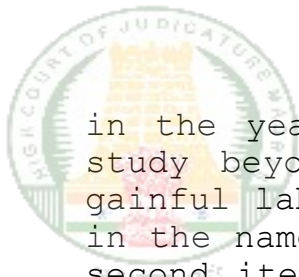
5. Heard the learned counsel on either side.

6. The learned counsel appearing for the appellant reiterated the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellant and grant preliminary decree as prayed for.

7. Per contra, the learned senior counsel appearing for the respondents submitted that the impugned judgment and decree do not call for any interference. The learned senior counsel took me through the deposition of P.W.1. P.W.1 had admitted that following the demise of his father-in-law / father of the plaintiff, a demand was made that the first defendant should give the share in the properties. The first defendant declined to do so and challenged P.W.1 that he would not part with any share.

8. The learned senior counsel laid considerable emphasis on this admission made by P.W.1. There is a consensus that Subbiah Chettiar passed away either in 1980 or in 1981. Since the relationship between the parties suffered break down, the possession of the suit properties by Sivasubramaniam/D1 became adverse to the plaintiff ever since. The suit was filed only in the year 1997. That was clearly beyond the period of 12 years. That is why, the Courts below after framing an issue as regards adverse possession, gave a finding in favour of the first defendant.

9. Since the Courts below have concurrently found that the possession of the first defendant over the suit properties was adverse to the plaintiff for more than the prescribed period of limitation, he called upon this Court not to interfere with the same in exercise of jurisdiction under Section 100 of C.P.C. He would further point out that Sivasubramaniam/D1 was born some time



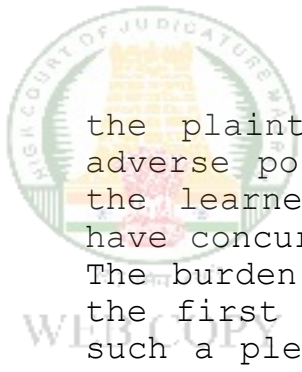
in the year 1939 and that P.W.1 himself admitted that D1 did not study beyond fifth standard and that he was engaging himself in gainful labour. The third item in the first schedule was purchased in the name of D1 as evident from Ex.A1. On the very same day, the second item was purchased in the name of Subbiah Chettiar. That two separate items were purchased in the individual names of Subbiah Chettiar and Sivasubramainam on the same day would clearly show that the fund for purchasing the third item came only from the first defendant.

10.The learned Senior Counsel also pointed out that the claim of joint possession was a rank falsehood. Ex.B3 to Ex.B11 marked on the side of the defendants would show that the first defendant was in exclusive and separate possession of the suit properties all along. He also pointed out that it was the first defendant who by his gainful labour had taken care of the family. That is why, the other sister Kalyani Ammal also deposed in favour of the first defendant. The learned Senior Counsel called upon this Court to dismiss the second appeal by confirming the impugned judgment and decree.

11.I carefully considered the rival contentions and went through the evidence on record. Let me take up item No.3 of the first schedule first. There is no dispute that this property stands in the exclusive name of the first defendant namely Sivasubramanian. Ex.A1-sale deed stands in his name. In the year 1979, Sivasubramanian was 40 years old. P.W.1 himself had fairly conceded that Sivasubramanian was engaging himself in gainful employment right from his young age. On the same day, the very same vendor Sivaraman had sold item No.2 in the name of Subbiah Chettiar. If on the same day, two purchases were made, one in the name of son and other in the name of father, then, I have to necessarily hold that item No.3 of the first schedule is the separate self-acquired property of the first defendant. The plaintiff cannot claim any partition in respect of the third item in the first schedule. As regards Item Nos.1 and 2, it is admitted in the written statement itself that they are joint family properties. Item No.4 is also admitted to be a joint family property.

12.The second schedule is covered by Ex.A3, dated 01.07.1971. It is in the joint names of Subbiah Chettiar and the plaintiff. It is fairly conceded in the written statement that the reason for including the plaintiff in the second schedule was that she contributed purchase money for 23 cents of land. The second schedule totally measures 63 cents of land. Therefore, even according to the defendants, 40 cents of land in the second schedule is a joint family property. The third substantial question of law is answered in favour of the appellant.

13.Now the question that arises for consideration is whether



the plaintiff's claim can be defeated by upholding the plea of adverse possession put forth by the defendant. As pointed out by the learned Senior Counsel for the respondents, the Courts below have concurrently found this issue in favour of the first defendant. The burden to prove the plea of adverse possession lay squarely on the first defendant. In Paragraph No.6 of the written statement, such a plea has been put forth. A careful reading of the entire paragraph would show that it was more a plea of relinquishment by the plaintiff than hostile possession by the first defendant. The mother Muthammal passed away only in the year 1991. The suit was admittedly filed in the year 1997, that is within six years from the date of the mother's demise. If the defendant wanted to succeed on the plea of adverse possession, he must have clearly spelt out the details. He must have stated as to when his possession became hostile and adverse to the plaintiff. Those details are woefully absent in the written statement.

14.I went through the judgments of the Courts below. The finding in favour of the first defendant has been arrived at without proper basis. The Courts below have not set out as to when the first defendant's possession became adverse to the claim of the plaintiff. Without marking the starting point, it is not possible to calculate the period of twelve years. Only if the defendant has been enjoying the suit property by fulfilling all the ingredients of adverse possession, he will perfect his title. Therefore, a clear finding must be given as to when the title was prescribed by adverse possession. To render such a finding, starting point must be identified. In this case, it has not been done. Therefore, I hold that the finding of adverse possession in favour of the first defendant is perverse.

15.The plea of ouster also cannot be accepted. The Hon'ble Apex Court in the decision reported in **(2009) 15 SCC 747 (Jai Singh Vs. Gurmej Singh)** held as follows:-

"The principles relating to the inter-se rights and liabilities of co-sharers are set out in the following terms:-

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.

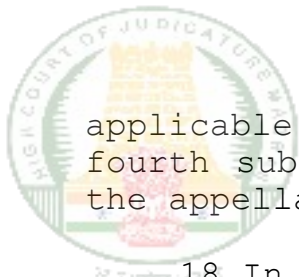
6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

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 any body to disturb the arrange without the consent of others except by filing a suit for partition."

Applying the principles set out above, even though the first defendant was in possession of the suit properties, it must be deemed to be possessed on behalf of the plaintiff also. It is true that the plaintiff got married long time prior to the filing of the suit and was living in some other village. There is no doubt that the first defendant was in occupation and enjoyment of the suit property. But that would not mean that the plaintiff lost her right by ouster. The plaintiff must be deemed to have been in joint possession of the suit properties.

16. As per Section 120 of the Indian Evidence Act, 1872, in all civil proceedings, the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. Therefore, PW.1 was entitled to depose on behalf of the plaintiff. The finding of the courts below that he could not have let in evidence is contrary to the statutory provision. The second substantial question of law is answered in favour of the appellant.

17. The stand of the first defendant was supported by the second defendant who also entered the witness box as DW.2. The second defendant is the same position as that of the plaintiff. She is a party to the suit. Therefore, she was entitled to depose as witness. Her testimony cannot be rejected as that of an interested person. In fact, her testimony is contrary to her interest. At the same time, the courts below could not have accepted the plea of oral relinquishment. The Hon'ble Supreme Court in Vineeta Sharma vs. Rakesh Sharma (2020) 9 SCC 1, had observed that to defeat the right of the daughter as coparcener, the false defence of oral partition is projected. The court cautioned that such defences should not set at naught. When such defence is taken, the court has to be very extremely careful in accepting the same and only if very cogent, impeccable and contemporaneous documentary evidence in shape of public documents in support are available, such a plea may be entertained and not otherwise. The observations of the Hon'ble Supreme Court made in the context of oral partition are equally



applicable to the defence of oral relinquishment. The first and fourth substantial questions of law are also answered in favour of the appellant.

18. In the light of the fair stand taken in the written statement itself as regards the joint family character of items 1, 2, 4 and 40 cents in second schedule, I hold that the plaintiff is entitled to $1/3^{\text{rd}}$ share. Preliminary decree allotting $1/3^{\text{rd}}$ share in favour of the plaintiff is granted as regards item 1 and 2 and 4 in the first schedule. Her claim as regards item 3 in the first schedule is rejected. It is patently brought out on record that it was the first defendant who had contributed for constructing the houses thereon. That is evident from the assessment receipts which stand in the name of the first defendant.

19. Therefore, the plaintiff can only claim share in the land. Of-course, in view of the fact that there are dwelling houses standing on the fourth item, the plaintiff will be entitled to only owelty in respect of $1/3^{\text{rd}}$ share in the land in the fourth item. The plaintiff is entitled to 23 cents of land in the second schedule in her own right. That apart, she is entitled to $1/3^{\text{rd}}$ share in the remaining 40 cents. Thus, the plaintiff is entitled to 36 cents in the second schedule. Since the second defendant had deposed in support of the plaintiff that she had categorically relinquished her share in the suit items, the benefit of relinquishment will enure in favour of the first defendant. Therefore, the first defendant is entitled to the remaining $2/3^{\text{rd}}$ share in item No.1 and 2. He will also be entitled to $2/3^{\text{rd}}$ share in the land. He will be entitled to 27 cents in the second schedule. Preliminary decree is accordingly passed. The first defendant will have to pay separate Court fee. The second appeal is partly allowed. No costs.

Sd/-

Assistant Registrar (CS-III)

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/ /2021

Sub Assistant Registrar(CS)

skm

To

1.The Principal District Judge, Tirunelveli.

2.The Subordinate Judge, Ambasamudram.

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