



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.02.2022

PRONOUNCED ON : 22.02.2022

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CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

APPEAL SUIT NO.251 OF 2011

1.Puniyavathi,
W/o.T.Kaliaperumal,

2.Poorani,
W/o.N.R.Dakshinamurthi,

...Appellants / Plaintiffs

/versus/

1.Pachaiammal,
2.Balasubramanian,
3.Palani @ Narayanasamy,
4.Ranganthan,
5.Sivaraj,
6.Pushpa,
7.Paulraj,
8.Bhavani,
9.Santhi @ Prabavathi,
10.Sudha,

...Respondents / Defendants

Prayer :- This Appeal Suit is filed under Section 96 of the Code of Civil Procedure, against the Judgment and decree dated 06.12.2010 and made in O.S.No.106 of 2009 on the file of the Additional District Judge-cum-Fast Track Court No.2, Cuddalore.

For Appellants : Mr.D.Nandagopal

For R1, R4 to R6 : Mr.D.Baskar

For R2, R7, R9 & R10 : No appearance

For R3 : Died

For R8 : Not ready notice

J U D G M E N T

The unsuccessful plaintiffs in their suit for partition are the appellants herein. For the sake of convenience, the parties are described as per their status and ranking before the Trial Court.



2. The plaintiffs are daughters of one Mr. Balakrishnan Padayachi, who died interstate in the year 1978. Their mother Valliammai died in the year 2004. Mr. Balakrishnan Padayachi and Valliammai had four sons and three daughters. While two daughters had joined together and filed suit for partition, alleging that they were in joint possession and enjoyment of the suit property after the demise of Balakrishnan Padayachi, the other daughters and sons have contested the suit for partition alleging that, the plaintiffs have no interest in the estate of their father's property. According to the defendants the properties which are left by Mr. Balakrishnan Padayachi was divided among the male members as per the partition deed dated 25.07.1991 and same has been acted upon. Further alienation of the suit properties has been effected 18 years prior to the suit and the plaintiffs were aware of all those facts, had filed the suit for partition with ulterior motive though they have no rights in the properties.

3. The Trial Court, after considering the pleadings held that the plaintiffs are not entitled for any share in the properties left by Mr. Balakrishnan Padayachi, who died in the year 1978 as interstate. Even if the plaintiffs have any right, same has been extinguished.

4. The brief summary of the pleadings before the Trial Court are as below:-

Balakrishnan Padayachi and his wife Valliammai had three daughters and four sons. Balakrishnan Padayachi acquired the suit properties through his hard earning by cultivating lands taken on lease. He had no ancestral property worth mentioning. Balakrishnan Padayachi died interstate in the year 1978 and his wife Valliammai died in the year 2004. Till then, the relationship between the sons and daughters of Balakrishnan Padayachi and Valliammai was cordial and the plaintiffs use to visit the parents home whenever occasion requires. One of the daughter of Balakrishnan Padayachi namely Pachiammal, who is the 1st defendant in the suit had given her daughter married to Ganesan, who is one of the sons of Balakrishnan Padayachi. The suit properties were treated and enjoyed as joint family properties and behind their back, the sons of Balakrishnan Padayachi had secretly registered the partition deed dated 25.07.1991 excluding the plaintiffs and the 1st defendant, who are the daughters of Balakrishnan Padayachi. The said partition will not bind them and the question of acquiescence will arise since they were not put to notice about the partition. After the demise of her mother, the relationship got strained and when the plaintiffs sought financial assistance from their bothers and division of properties to meet out the family expense, they refuse to share the father's property with them and hence,



notice was issued on 15.04.2006 to come forward and give their share. They denied to give their share by causing reply notice. Hence the present suit has been filed.

5. The 1st defendant/Pachaiammal, who is one of the daughters of Mr.Balakrishnan Padayachi had supported the partition deed dated 25.07.1991 entered between the sons of Balakrishnan Padayachi. According to her written statement she along with her two sisters have given up their right and abandoned their right in favour of the male members of the family and with their knowledge, the partition was effected on 25.07.1991.

6. The 3rd defendant/Palani @ Narayanasami has filed written statement contending that the suit for partition is barred by limitation and the suit suffers without any cause of action with invented facts. The plaintiffs have no right or interest in the suit properties as alleged. Even if they have any right, that has been extinguished and been ousted out from the property. The 3rd defendant is in possession and enjoyment of the share given to him under the partition deed dated 25.07.1991 and he is in continuous enjoyment uninterruptedly. The plaintiffs were never in possession of the suit properties at any point of time and were not in joint enjoyment of the same with the defendants at any point of time. Hence, he is not entitled to claim any share.

7. The 4th defendant, who is the grand son of Balakrishnan Padayachi born through his son Paramanathan had filed written statement claiming that, Balakrishnan Padayachi owned ancestral properties and from the income derived from the ancestral properties, Balakrishnan Padayachi along with four sons had improved the assets and they were jointly enjoying the suit properties till the partition between the male members was effected in the year 1991. The partition deed got registered and acted upon. Hence, the plaintiffs have no right or claim in the suit properties.

8. The claim of the plaintiffs that they were in visiting terms will not give them any right in the properties. With the knowledge and consent of the plaintiffs, the partition was effected and acted upon. Therefore, the suit for partition which is filed after lapse of 18 years is barred by limitation under Section 27 of the Limitation Act. Further, one of the brother Paramanathan has effected partition among his children in respect of the share allotted to him. The said partition deed was registered on 20.02.2008 and same has also been acted upon. Therefore, the properties were never in joint possession as alleged by the plaintiffs. Hence, the suit filed claiming that the properties was in joint possession and Court fees paid under



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25.07.1991; advocate notice dated 15.04.2008 issued by the plaintiffs to the defendants; reply notice dated 19.04.2008 issued by the defendants 4 & 5 through their Advocate; reply notice dated .05.2008 issued by the 3rd defendant.

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12. On behalf of the defendants, 5th defendant/Sivaraj were examined as D.W.1. 9 Exhibits were marked which are the copies of the partition deed dated 25.07.1991. The partition deed between the wife and sons of late Paramanathan son of Balakrishnan Padayachi; Patta issued in the name of defendants 4 to 6 and "A" Register issued in their name were marked as Ex.B.1 to Ex.B.9.

13. The Trial Court had dismissed the suit holding that from the evidence, it is proved that the plaintiffs were given married after providing sufficient seer and streedhan, during the life time of Balakrishnan Padayachi. His son Paramanathan and Ganesan were employed in government and from their income, the properties were purchased in the name of Balakrishnan Padayachi. After the demise of Balakrishnan Padayachi, brothers were jointly enjoying the properties and in the year 1991, with the knowledge of the plaintiffs, they have effected partition and enjoying the properties separately and substantially for the past 17 years. The registered partition deed followed by mutation of revenue records and "A" Register which are relied by the plaintiffs were considered by High Court as a proof for possession in exclusion of the other share for continuous period of more than 12 years, whereby perfecting the title by adverse possession. The admission of the plaintiffs that her brothers Paramanathan and Ganesan were employed in government and her ignorance when the property was purchased were taken note by the Trial Court to hold that the plaintiffs had knowledge about the partition and acquiescence to the exclusive possession of the properties by their brothers excluding and ousting them.

14. Regarding the devolution of interest in the coparcenary property Section 6 of Hindu Succession Act, 1956. The Trial Court has taken note of the fact that, the division of property has been effected in the year 1991 itself under Ex.A.1. The benefit of Section 6 of Hindu Succession Act, 1956, will not inure on the plaintiffs. In the result, based on acquiescence and limitation, the claim of the plaintiffs was rejected.

Point for consideration:-

Whether the female members of the family can be ousted and excluded from sharing the properties left by her father, who died interstate?

15. Heard the learned counsels. Records perused.



16. In the appeal, the appellants have stated that the trial Court has erred in dismissing the suit for partition unmindful of the fact that the suit properties are self acquired property of a Hindu male who died interstate and even if the properties are ancestral properties, they will be entitled for a share in the properties as per the amended provisions of Hindu Succession Act, 1956. While so, in the suit properties which is the self acquired property of Mr. Balakrishnan Padayachi all the first class heirs are entitled for a share. It cannot be divided among the male members alone excluding the female members of the family. The Trial Judge has misapplied Section 6 of Hindu Succession Act, to the facts of the case and accepted the alleged partition of the year 1998 among the male members in respect of the self acquired property of Balakrishnan Padayachi as valid, though such partition is per se, illegal and non-est.

17. It is further contended that the Trial Court erred in holding that the suit is barred by limitation. Being the co-sharer in the properties, one co-sharer cannot oust the other co-sharer as long as they have animus over the properties. Hence, the partition deed Ex.A.1 dated 25.07.1991 is non-est in law.

18. Section 6 of Hindu Succession Act, 1956, which deals with devolution of interest in coparcenary property:

"6. Devolution of interest in coparcenary property:-

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.



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(2) Any property to which a female Hindu becomes entitled by virtue of sub-section(1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu Family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great grandfather solely on the ground of the pious obligation under the Hindu law, or such son, grandson or great-



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grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall effect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation:— For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.—For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court."

19. Section 8 of Hindu Succession Act, 1956, which deals with succession in case of male:—

8. General rules of succession in the case of males:—

The property of a male Hindu dying intestate shall devolve according to the provisions of this CHAPTER—

(a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;

(b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;



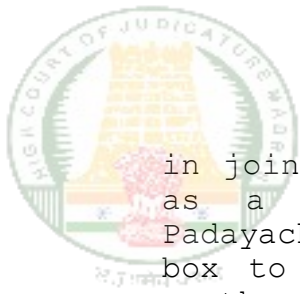
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- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.

20. As far as the present suit is concern, the plaintiffs claims that the properties were purchased by Balakrishnan Padayachi from and out of his self earning. Whereas, some of the defendants have pleaded that Balakrishnan Padayachi had substantial ancestral property. It is not the case of the plaintiffs that Balakrishnan Padayachi had no family property. Plaintiffs case is that, Balakrishnan Padayachi, had very little extent of ancestral property, not worth mentioning. In any event, the suit for partition has been filed on the premise that the suit property is a self acquired property of Balakrishnan Padayachi. However, the evidence let in by the defendants as well as the admission of the plaintiffs, it is clear that the properties were not only purchased from out of the self earning of Balakrishnan Padayachi. The properties were acquired from the income derived from ancestral property and in addition, the earnings of his two sons, who were employed in Government. Further, the plaintiffs admits that, they were married long before the demise of their father and had not denied the averment that they were provided with sufficient Seer and Streedhan, at the time of marriage. Though this by itself will not exclude the claim, share in the father's self acquired property, if he had died interstate, the other circumstances which may extinguish their right to claim share has to be determined from the pleadings and evidence.

21. Strangely, in this case, the suit for partition filed by two daughters 31 years after the demise of their father, when succession open. No material placed by the plaintiffs to show that they were in joint enjoyment, along with their four brothers and sister either before the father's demise or after that. The plaintiffs visit to the brother's house or parents house only indicates the cordial relationship with the brothers and not their animus over the father's property. Having allowed the brothers to enjoy the property exclusively without any protest or claim for more than 12 years, the conduct of the plaintiff gains significance. The partition deed dated 25.07.1991, among the brothers was effected under Ex.A.1 nearly 13 years after the demise of the father in the year 1978. Thereafter, the present suit is filed 18 years after the partition. Meanwhile, one of the son has divided the property among his legal heirs under Ex.B.2, dated 20.02.2008.

22. P.W.1/Puniyavathi, who is the 1st plaintiff in this suit has not explained or produced any evidence to show how she was



in joint enjoyment of the suit property along with her brothers as a co-sharer. Out of three daughters of Balakrishnan Padayachi, the second plaintiff had not even mounted the witness box to depose against the interest of their brothers and yet another daughter has filed the written statement supporting the brothers and the partition deed. The first plaintiff alone plead that the suit properties were in joint possession and enjoyment, but without any evidence to support her plea.

23. In Vidya Devi @ Vidya Vati (Dead) vs Prem Prakash & Others reported in (1995 AIR 1789), the Hon'ble Supreme Court has observed:-

"The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature and, therefore, in this Act also a period of limitation, so far as suits for partition are concerned, has not been prescribed. This, however, does not mean that a co-sharer who is arrayed as a defendant in the suit cannot raise the plea of adverse possession against the co-sharer who has come before the Court as a plaintiff seeking partition of his share in the joint property.

Normally, where the property is joint, co-sharers are the representatives of each another. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of others joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by



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adverse possession and can plead such title in defence to the claim for partition.

"Adverse possession" means hostile possession, that is, a possession which is expressly in denial of the title of the true owner. (See: / Gaya Parshad Dikshit Vs. Nirmal Chander and another (AIR 1984 SC 930). The denial of title of the true owner is a sign of adverse possession. In Ezaz Ali Vs. Special Manager, Court of Wards (AIR 1935 PC 53), it was observed:

"The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

Dr. Markby in his treatise "Elements of Law" (Second Edition) has observed that possession "to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. (See also: AIR 1947 PC 15).

It is a matter of fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co-owners. (See: Maharajadhiraj of Burdwan, Udaychand Mahatab Chand Vs. Subodh Gopal Bose and others AIR 1971 SC 376; P. Lakshmi Reddy Vs. L. Lakshmi Reddy AIR 1957 SC 314; Mohammad Baqar and others Vs. Naim-un-Nisa Bibi & Others AIR 1956 SC 548).

In Karbali Begum Vs. Mohd Sayeed (AIR 1981 SC 77), it was held that a co-sharer in possession of the property would be a constructive trustee on behalf of other co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustee co-sharer.



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Certain observations of the Privy Council in Coera Vs. Appuhamy (AIR 1914 PC 243, 245-246) may be quoted below:-

"Entering into possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title as all. His title must have ensured for the benefit of his co-proprietors. The principle recognised by Wood, V.C. in Thomas Vs. Thomas (1856) 25 LJ Ch 159 (161): 110 RR 107 holds good: 'Possession is never considered adverse if it can be referred to a lawful title'"

His possession was, in law, the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

From the underlined portion extracted above, it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in P.Lakshmi Reddy's case (supra) which has since been followed in Mohd. Mohd. Zainulabudeen Vs. Syed Ahmad Mohiddin (AIR 1990 SC 507).

"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."



24. Applying the above principles to the instant case, this court finds that the conduct of the plaintiffs approaching the Court 31 years after opening of succession and 18 years after the division of properties among the brothers naturally leads to an inference that they have been ousted and with their knowledge the defendants were in enjoyment of the property exclusively adverse to the plaintiffs for more than the period prescribed under Article 65 of the Limitation Act which prescribes 12 years period as limitation for possession of immovable property or any interest therein based on title. The time from which the period begins to run, is when the possession of the defendant becomes adverse to the plaintiff. Therefore, their right gets extinguished under Section 27 of the Limitation Act, 1963, which reads as below:-

27. Extinguishment of right to property:-

At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

25. The plaintiffs as co-sharer had not produced any evidence to show that they had animus to possess the property and it is highly improbable to believe that they had no knowledge about the partition effected between the brothers in the year 1991 and the subsequent partition among one of the sharer in the year 2008. Therefore, this Court finds no error in the conclusion of the trial Court judgment in dismissing the partition suit filed by the plaintiffs, the appeal suit is dismissed. Taking into consideration the relationship between the parties, there shall be no order as to costs.

Sd/-
Assistant Registrar (CS-II)

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Sub Assistant Registrar

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To

1. The Additional District Judge,
The Additional District Court,
Fast Track Court No.2,
Cuddalore.



2.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to M/s.D.Nandagopal, Advocate Sr.No.11923

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Appeal Suit No.251 of 2011

AJB (CO)
RVM(31/05/2022)