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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.07.2022

Coram

The Hon'ble Mr. Justice **C.V.KARTHIKEYAN**

S.A.No.826 of 1994

- 1.Sokkalinga Konar (died)
- 2.Mangalam
- 3.Ravi
- 4.Rukmani
- 5.Malar Kodi
- 6.Viswanathan
- 7.Jothivel
- 8.Andal
- 9.Arumbu
- 10.Thangarasu
- 11.Srinivasan
- 12.Anbalagan
- 13.Chandra
- 14.Gowri

...Appellants

Appellants 9 to 14 brought on record as
LRs of the deceased 1st appellant vide
order of Court dated 27.10.2020 made in
CMP.Nos.17936, 17938, 17491 and
17492 of 2003 in S.A.No.826/1994
(GKIJ)

Vs

- 1.Rajammal (died)
- 2.Kuppusamy



- 3.Lakshmi (died)
- 4.Gurunathan
- 5.Tamilvanan
- 6.Anbzhagan
- 7.Sanroaja
- 8.Savithri
- 9.Kalyanasundaram
- 10.Kaliyamoorthy

...Respondents

RR4 to 6 brought on record as LR's of the deceased 3rd respondent vide order of Court dated 29.01.1998 made in CMP.Nos.305 to 307 of 1996 in S.A.No.826 of 1994 (PSJ)

RR7 to 10 brought on record as LR's of the deceased 1st respondent vide order of Court dated 27.01.2020 made in CMP.Nos.17491 and 17492 of 2003 in S.A.No.826 of 1994 (GKIJ)

The Second Appeal filed under Section 100 of CPC, against the judgment and decree made in A.S.No.49 of 1985 dated 27.04.1993 on the file of the Sub Court, Ariyalur, reversing the judgment and decree made in O.S.No.81 of 1981 dated 21.10.1983 on the file of the District Munsif Court, Jayankondam.

For Appellants	: Mr.J.Kamaraj
For Respondents	: Ms.V.Srimathy
R1 and R3	: Died

**JUDGMENT**

WEB COPY The 5th defendant, Sokkalinga Konar, and the legal representatives of the 10th defendant, Kaliaperumal Konar and the 14th defendant, Arumuga Konar, in O.S.No.81 of 1981 on the file of the District Munsif Court, Jayankondam are the appellants herein.

2.O.S.No.81 of 1981 had been filed by Kannammal and Rajammal, two sisters against their brother Gurunathan, shown as the 1st defendant and also against his two sons, Thamizhvanan and Anbazhagan, who was minor at the time of institution of the suit, seeking partition of the suit property into six shares and to allot one such share to each of the two plaintiffs separately and also for consequential relief to passing a final decree consequent to the preliminary decree being passed. The other defendants in the suit were alienees of the suit property / legal representatives.

3.By judgment dated 21.10.1983, the learned District Munsif, Jayankondam had dismissed the suit.



4.Subsequently, the legal representatives of the 1st plaintiff and also the 2nd plaintiff filed A.S.No.49 of 1985 which came up for consideration on 27.04.1993 before the Sub Court, Ariyalur. By judgment of even date, the appeal suit was allowed and the dismissal of O.S.No.81 of 1981 was set aside and the suit was decreed as prayed for. In effect the suit was decreed holding that the suit schedule properties have to be divided into six equal shares and that the two plaintiffs / legal representatives of the two plaintiffs should be granted on such share each.

5.Questioning that particular judgment, the 5th defendant, Sokkalinga Konar, the legal representatives of the 10th defendant, Kaliaperumal Konar and the 14th defendant, Arumuga Konar, had filed the present Second Appeal.

6.The Second Appeal had been admitted on 15.02.1995, on the following three substantial questions of law:-

“i).Whether female members of a family married prior to the year 1956 can claim to be the members of Hindu undivided family?



ii).What is the period of limitation to file a suit for

partition by the plaintiffs who have been excluded and ousted allowing the defendants to assert hostile title?

iii).Whether a suit for partial partition without including all the properties and without impleading all the persons interested is maintainable?”

O.S.No.81 of 1981 (District Munsif Court, Jayankondam):-

7.It had been claimed in the plaint that the properties mentioned in the schedule originally belonged to Perumal Padayachi, who was the father of the plaintiffs and the 1st defendant. He died intestate on 15.11.1956. The plaintiffs and the 1st defendant were his only legal representatives. It was claimed that the family possessed considerable immovable properties. However, the 1st defendant had become indebted to various creditors and was also alleged to lead an immoral life. He also married the daughter of the 1st plaintiff. Claiming that the plaintiffs are entitled to a share in the property and on failure of the 1st defendant to actually partition the said property as demanded and claiming that there have been various alienations over the



suit properties, the suit was filed for partition and separate possession, to divide the properties into six equal parts and to allot one such part to each one of the two plaintiffs.

8. The 1st defendant remained *exparte* in the suit. A written statement had been filed by the 3rd defendant, who admitted that after the death of the father of the plaintiffs, the 1st plaintiff was in possession of the suit properties as owner. Independently, written statements were also filed by the 8th and 9th defendant. They denied and disputed the claim of the plaintiffs for partition and separate possession of the suit properties. They claimed that the properties were ancestral property of the 1st defendant and that the 1st defendant and his father constituted a joint Hindu family. It was claimed that the sisters in a joint family and the daughter has no right and cannot claim title in the joint family property and that therefore, the suit for partition is not maintainable and should be dismissed. It had been claimed that the defendants are bonafide purchasers. It had also been stated that the suit was barred by limitation. In effect, it was claimed that the suit should be dismissed.



9. On the basis of the aforementioned pleadings, the learned Trial

Judge, had framed the following issues for consideration:-

“i). Whether the plaintiff is entitled for partition and separate possession?

ii). Whether the suit is barred for non-joinder of necessary parties?

iii). Whether the suit is barred by the law of limitation?

iv). Whether the sale deeds executed are null and void?

v). Whether the defendants 5, 10 and 14 are entitled for any relief?

vi). To what other reliefs?”

10. There was also a further issue which has been re-casted with respect to *the alleged immoral life lead by the 1st defendant, and whether the suit was instituted at the instigation of the 1st defendant to defeat the right of the purchasers of the properties who had purchased the same for adequate consideration and were bonafide purchasers.*

11. During the course of trial, the 1st plaintiff, Kannammal was examined as PW-1. The 2nd defendant, Thamizhvanan / son of the 1st defendant was examined as DW-1. Among the purchasers, the 5th defendant,



Sokkalinga Konar was examined as DW-2. The 9th defendant, Maruthasi was examined as DW-3. The 11th defendant, Jaganatha Padayachi was examined as DW-4. The 14th defendant, Arumuga Konar, who also filed the present Second Appeal was examined as DW-5. The 17th defendant, Mangalam was examined as DW-6 and the 25th defendant, Kaliyaperumal was examined as DW-7.

12. In effect the suit was resisted by the purchasers / alienees of the suit schedule property.

13. The plaintiffs marked only one document namely, the death certificate of their father dated 15.11.1956.

14. The defendants marked exhibits B1 to B59. Ex.B1 dated 11.04.1956 was the sale deed in favour of the 5th defendant, Sokkalinga Konar. Ex.B2 was the patta in favour of the 1st defendant and in favour of the alienees. The other exhibits primarily related to payment of land tax. The sale deed dated 22.06.1970 in favour of Rangasamy Padayachi who was the 8th defendant was marked as Ex.B16. The purchase by the 9th



defendant Maruthakasi by sale deed dated 15.05.1972 was marked as Ex.B24. The sale deed dated 02.07.1962 in favour of Amsavalliammal was marked as Ex.B33 and the sale deed dated 05.08.1972 was marked as Ex.B34. The sale deed in favour of Jayanatha Padayachi was marked as Ex.B35. The sale deed dated 29.12.1971 in favour of Arumuga Konar was marked as Ex.B41. The sale deed dated 27.05.1972 in favour of Kaliaperumal Konar was marked as Ex.46. The sale deed dated 19.07.1972 in favour of Veeramuthu Padayachi was marked as Ex.55 and another sale deed dated 16.08.1972 was marked as Ex.B56.

15.The Court also marked as Exs.C1, C2 and C3, the report and rough sketch of the Advocate Commissioner.

16.The learned Trial Judge on the basis of the pleadings and the evidence adduced, held that the alienees had perfected title and that such perfection of title was hostile to the interest of the true owners. It was found as a fact that the alienees were in possession for more than the prescribed period and had perfected title. The plaintiffs were found fault that they had did not institute the suit within the period of limitation as is required to



question the sale deed in favour of the purchasers of the property. The relief of partition and separate possession was therefore negated and the suit was dismissed.

A.S.No.49 of 1985 (Sub Court Ariyalur):-

17.Questioning this particular finding, A.S.No.49 of 1985 had been filed before the Sub Court, Ariyalur. The learned First Appellate Judge, in the course of his judgment had framed points for consideration under Order 41 Rule 31 of CPC. Among various points which were taken up for consideration, one was whether the appellants / plaintiffs had relinquished their right over the said properties and whether the alienations over the suit properties were for the benefit of the family and were borne out of necessity and also whether the purchasers / alienees had perfected title by adverse possession. A further point which was framed was whether the 1st defendant had any right to execute such sale deeds. Finally, the last point taken up for consideration was whether the appellants could be granted the relief of partition as sought in the plaint.



18.The First Appellate Court once again re-examined the issues and found as a fact that after the death of Perumal Padayachi / father of the plaintiffs and the 1st defendant, there was a family arrangement, but that such family arrangement was not reduced in writing. It was therefore stated that an oral relinquishment over a right to immovable property cannot withstand judicial scrutiny. It was stated that except for interested witness who had spoken about the right of the 1st defendant to exclusively deal with the properties, independent witnesses had not been examined to speak about such family arrangement. It was therefore stated that the 1st defendant had not granted any right under any family arrangement to deal exclusively with the properties.

19.The fall out of this particular finding would have an effect on the sale deeds executed by the 1st defendant on his behalf and on behalf of his two sons. In those two sale deeds, the plaintiffs were not parties and were also not joined as parties.

20.The First Appellate Court thereafter examined whether the sale deeds executed by the 1st defendant in the suit on his behalf and on behalf of



his minor sons would affect the joint family properties and whether title in entirety can be conveyed by the 1st defendant to the purchasers.

21.It was found that the properties were left behind by Perumal Padayachi who died intestate subsequent to the introduction of the Hindu Succession Act in 1956. He had actually died on 15.11.1956. It is admitted that the two plaintiffs and the 1st defendant were his only legal representatives. The First Appellate Court fell back to the law of intestate succession, namely, that on the death of a male who dies intestate his class-I legal representatives would be only his wife, his son and also his daughter. Taking resort to that basic principle of law, it was held that the 1st defendant had no right to independently deal with the properties and if he had done so, it would not affect the right of the daughters / plaintiffs to claim a share in such properties.

22.Thereafter, the First Appellate Court examined the right of the alienees. After examining the various sale deeds by which alienees had purchased the properties, it was found that the suit was instituted on 30.04.1977 in O.S.No.131 of 1977 before the Munsif Court, Ariyalur and



thereafter on constitution of the Court at Jayankondam, it was transferred and re-numbered as O.S.No.81 of 1981.

23.It had been held that Exs.B1 and B33 sale deeds were alone executed prior to 12 years from the date of institution of the suit, and that the other 33 sale deeds were executed within the 12 years prior to the institution of the sale deeds. It was specifically found that the defendants cannot claim a right towards adverse possession and it had also been stated that the contesting defendants / alienees had not prescribed their title for the necessary period of 12 years to claim adverse possession except the alienees under Exs.B1 and B33. In view of the points for consideration having been addressed as aforesaid, the First Appellate Court proceeded to allow the appeal and therefore decreed the suit as prayed for.

S.A.No.826 of 1994:-

24.Among the various defendants, the 5th, 10th and 14th defendants / their legal representatives alone was filed the present Second Appeal. The Second Appeal had been admitted on the following substantial questions of law:-



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“i).Whether female members of a family married prior to the year 1956 can claim to be the members of Hindu undivided family?

ii).What is the period of limitation to file a suit for partition by the plaintiffs who have been excluded and ousted allowing the defendants to assert hostile title?

iii).Whether a suit for partial partition without including all the properties and without impleading all the persons interested is maintainable?”

25.Heard the learned counsel for the appellants and the learned counsel for the respondents.

26.The first substantial question of law is whether the female members of a family married prior to the year 1956 can claim to be members of Hindu undivided family.

27.This substantial question of law actually pales into insignificance particularly because it has to be first examined whether the properties



belonged to a Hindu Undivided Family. Evidence points that the properties belonged to Perumal Padayachi and he died intestate. The only aspect which is urged on behalf of the appellants herein is that in the panchayat, a family arrangement had been entered into and in that particular panchayat, the sisters had relinquished their rights and recognized the rights of the 1st defendant / brother to be entitled to the entire properties. But the First Appellate Court has found as a fact that there was no evidence with respect to the said panchayat or family arrangement and that the said family arrangement had not been recorded in writing and that no independent witness was examined to speak about such family arrangement.

28. In the absence of evidence that there was a family arrangement the said stand will have to be straight away rejected.

29. The issue whether a female member of a joint Hindu family married prior to 1956, can claim a right in the joint family properties, has to be examined in the light of the amendment of the Hindu Succession Act in the year 2005.



30. *Vineeta Sharma v. Rakesh Sharma*, (2020) 9 SCC 1, the Hon'ble

Supreme Court held as follows:-

“137. Resultantly, we answer the reference as under:

137.1. The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after the amendment in the same manner as son with same rights and liabilities.

137.2. The rights can be claimed by the daughter born earlier with effect from 9-9-2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before the 20th day of December, 2004.

137.3. Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9-9-2005.

137.4. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition



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or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the 1956 Act or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

137.5. In view of the rigour of provisions of the Explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected (sic effected) by a decree of a court, it may be accepted. A plea of partition



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based on oral evidence alone cannot be accepted and to be rejected outrightly.

138. We understand that on this question, suits/appeals are pending before different High Courts and subordinate courts. The matters have already been delayed due to legal imbroglio caused by conflicting decisions. The daughters cannot be deprived of their right of equality conferred upon them by Section 6. Hence, we request that the pending matters be decided, as far as possible, within six months.”

31. In the instant case, the assertion is that the property belonged to Perumal Padayachi in his own name. If that be the case, there cannot be and need not be any discussion whether the properties belonged or formed part of a joint Hindu family. Even if it is to be taken as joint Hindu family, the only coparceners were Perumal Padayachi and the 1st defendant. On the death of Perumal Padayachi, his 1/2 share would devolve on to the two plaintiffs and it is for that reason that they claimed 1/6th undivided share. Either way they are entitled to a share. Either way they cannot be denied any share.



32. The alienation done within 12 years from the date of institution of the suit would not rescue the alienees, since they cannot claim adverse possession for a period of 12 years as is required under law. Further, once it has been established that the plaintiffs have a share over the properties as daughters born to Perumal Padayachi, then claiming of adverse possession against co-sharers can be only on very narrow grounds. In the first place, the ouster of co-sharers must be proved. That has not been established in the instant case. They are still members of the family. They have asserted their right by instituting the suit in the year 1977 which means that they have every interest over the properties and have not been ousted.

33. Therefore, with respect to the first substantial question of law, I hold that the right of the female members to claim share in the property can never be subject to either the properties being joint family properties, in which case, they would get share as co-parceners and if the properties are self acquired properties of the father then, they would get share on the death of the father as class I heirs.



34. The second substantial question of law is with respect to the issue of limitation. It has been framed on the presumption that the plaintiffs have been ousted and excluded from claiming any right. The defendants / alienees to prove defendants' adverse possession will have to establish adverse possession to the knowledge of the co-sharers and hostile to the co-sharers. Mere payment of a few tax receipts would not give rise to claim for adverse possession.

35. In ***Kurella Naga Druva Vudaya Bhaskara Rao v. Galla Jani Kamma***, (2008) 15 SCC 150, it was held that payment of tax and mere possession for some years were insufficient to claim adverse possession. It was held as follows:

“19. The defendant claimed that he had perfected his title by adverse possession by being in open, continuous and hostile possession of the suit property from 1957. He also produced some tax receipts showing that he has paid the taxes in regard to the suit land. Some tax receipts also showed that he paid the tax on behalf of someone else. After considering the oral and documentary evidence, both the courts have entered a concurrent finding that the defendant did not establish adverse possession, and that mere



possession for some years was not sufficient to claim adverse possession, unless such possession was hostile possession, denying the title of the true owner. The courts have pointed out that if according to the defendant, the plaintiff was not the true owner, his possession hostile to the plaintiff's title will not be sufficient and he had to show that his possession was also hostile to the title and possession of the true owner. After detailed analysis of the oral and documentary evidence, the trial court and the High Court also held that the appellant was only managing the properties on behalf of the plaintiff and his occupation was not hostile possession.

20. We find that both the courts have considered these two issues of fact in detail with reference to the evidence and recorded concurrent findings against the defendant. This Court will not convert itself into a third court of facts and re-examine the facts or disturb concurrent findings of facts. Neither any perversity nor omission to consider evidence nor any error of law has been pointed out with reference to consideration and appreciation of evidence by the trial court and the High Court. We do not therefore find any reason to re-examine the facts.”

36. It is also necessary that clear ouster of the co-sharer must be proved. That fact has not been proved. As a matter of fact, the issue of



adverse possession will never arise because the alienees have not been in possession for the prescribed period of 12 years and more and therefore, I would answer the second substantial question of law that the plaintiffs cannot be non-suited on the issue of limitation.

37. The third substantial question of law is with respect to partial partition. This issue could have been addressed only by the 1st defendant who is one of the co-sharers of the properties. The 1st defendant remained ex parte. The suit had been filed by the two sisters. Their brother was impleaded as the 1st defendant. If all the joint family properties have not been included in the suit, it is only the 1st defendant who should have pointed out that fact. It does not lie in the mouth of the other alienees who had purchased the properties to point out that there were further properties available and were not included in the suit seeking partition and separate possession. The 1st defendant had remained ex-parte. There is no admissible and acceptable evidence adduced with respect to availability of other properties for partition.



38.This substantial question of law is therefore answered that if at all there are properties which have been left out, the only competent person to point out that fact is the 1st defendant and the 1st defendant had taken a conscious decision to remain exparte. Therefore, the issue of partial partition does not arise in this case.

39.In view of the reasons stated above, I would affirm the Judgment of the First Appellate Court and dismissed the Second Appeal. No costs.

40.In view of the fact that three of the defendants / alienees, 5th, 10th and 14th defendants / legal representatives had approached this Court, if ever a final decree application is passed, they may urge the particular Court where the final decree application is agitated to apply equity and allot the properties purchased by them as their shares, since they step into the shoes of the 1st defendant. They may be directed to pay necessary compensation to the plaintiffs to maintain balance in the shares.

20.07.2022

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- 1.The District Munsif Court, Jayankondam.
- 2.The Sub Court, Ariyalur.
- 3.The Section Officer, VR Section, Madras High Court.



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C.V.KARTHIKEYAN,J.

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