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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 31.01.2022

JUDGMENT DELIVERED ON: 22.02.2022

CORAM:

THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

S.A.No.1068 of 2021

and

C.M.P.No.20180 of 2021

1. Natarajan

S/o, Rathinasabapathy

2. Datshayani

W/o, Sivalingam

... Appellants/Defendants

Vs.

Balammal

W/o, Thulasi

... Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 r/w Order XLI of C.P.C., against the judgment and decree dated 21.02.2020 passed in A.S.No.17 of 2015 on the file of the Principal Subordinate Judge, Kancheepuram, confirming the decree and judgment in O.S.No.1165 of 2008 dated 14.08.2014 on the file of the District Munsif cum Judicial Magistrate, Sriperumbudur.

For Appellants : M/s.Nathan and Associates

J U D G M E N T

Challenge is to the concurrent judgment of the Courts below in A.S.No.17 of 2015 on the file of the Subordinate Court, Kanchipuram, confirming the judgment in O.S.No.1165 of 2008 on the file of the District Munsif-cum- Judicial Magistrate at Sriperumpudur.

2. The respondent/plaintiff filed the abovesaid suit for partition in O.S.No.1165 of 2008 to divide the suit property into three equal shares and to allot one share to her and for permanent injunction restraining the appellants from alienating the respondent's 1/3rd share and for costs.



3. The case of the respondent/plaintiff is that the first defendant Rathinasabapathy is her father and the appellants are her brother and sister respectively. The suit property originally belonged to one Rani alias Sivagamiammal by purchase through a registered sale deed on 23.09.1930. She executed a maintenance settlement deed in favour of the respondent/plaintiff's mother Ganammal in respect of the suit property in the year 1942. After the execution of settlement, the plaintiff's mother was in possession and enjoyment of the suit property and house tax receipt was transferred in her name and she was paying house tax. Her title and possession were upheld by the Additional District Munsif Court, Poonamallee in O.S.No.40 of 1976, in which, the first defendant was a party. Ganammal died leaving her husband, appellants and the respondent as her legal heirs to succeed to her estate. After her death, all of them are in joint possession and enjoyment of the suit property. The respondent/plaintiff is entitled to 1/4 share in the suit property. She is away from the suit property. Taking advantage of the same, the appellants tried to grab the entire suit property. They were not amenable for an amicable partition. A notice dated 27.12.1999 was issued to the appellants and their father. Another notice dated 31.01.2000 was also issued. In spite of oral requests and notices demanding partition, the appellants have not come forward to effect partition. Hence the plaintiff filed the present suit.

4. It is seen from the written statement filed by the first appellant/second defendant that he admitted the relationship between the parties. It is denied that, after the death of Ganammal, the appellants and the respondent were enjoying the property jointly as co-owners. The respondent is not at all in joint possession and enjoyment of the suit property. She got married 20 years back and separated from the alleged joint family. The first appellant during his young age, with his hard earned money, performed the marriage of the second appellant and the respondent. The second appellant and the respondent relinquished their right in the suit property. The suit property was enjoyed by the first appellant independently and all the records had been changed in his name. The first appellant spent huge amount for the second appellant and the respondent, more than the value of the shares belong to them. The respondent was not in joint possession and enjoyment of the suit property and therefore, Court fee paid under Section 37(2) of Tamil Nadu Court Fees and Suit Valuation Act, 1955 is not correct. She was ousted from joint family from the date of her marriage and she was not in joint possession. The suit has no cause of action and it is liable to be dismissed.



5. It is seen from the written statement of the second appellant/ 3rd defendant that the first appellant took care of the welfare of the family consisting of the appellants and the respondent. The respondent got married at the costs of the first appellant. There was no understanding between the respondent and the appellants. In the later stage, the suit property had gone to the first appellant. As per the agreement, the entire suit property is in possession and enjoyment of the first appellant as sole owner. The respondent is not entitled to claim any share in the suit property.

6. The trial court framed the following issues and additional issues for consideration:

i. Whether the plaintiff is entitled for the one fourth of the share in the suit property?

ii. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for? and

iii. To what other relief?

Additional Issues:

i. Whether the suit property belongs to the plaintiff's mother by virtue of maintenance settlement deed?

ii. Whether the plaintiff has relinquished her share in the suit property to the second defendant at the time of her marriage?

iii. Whether the plaintiff has been ousted from from the suit property after her marriage?

iv. Whether the suit is barred by partial partition of the suit property?

v. Whether the defendants are attempting to alienate the suit property?

7. During trial, on the side of the respondent/plaintiff, P.W.1 was examined. Exs.A1 to A7 were marked. D.Ws.1 and 2 were examined and Exs.B1 to B11 were marked on the side of the appellants/defendants.

8. On considering the oral and documentary evidence, the Trial Court found that the first appellant was aged 16 years at the time of marriage of the respondent and therefore, he could not have spent money for the marriage of the respondent and the claim of the first appellant that the second appellant and the respondent relinquished their shares in the suit property is unsustainable. The right to sue arises for the respondent on the death of her mother in 1989. The suit filed in the year



2008 is within the period of limitation and the plea of ouster raised by the appellants is not sustainable. The respondent is the co-owner of the suit property. Therefore, the Court fee paid under Section 37(2) of Tamil Nadu Court Fees and Suits Valuation Act, is correct. The plea of partial partition without sufficient pleadings, could not be entertained. On the basis of these reasons, the Trial Court found that the respondent is entitled to 1/3 share in the suit property. During the pendency of the suit, the first defendant and the father of the appellants and respondent, namely Rathinasabapathy died.

9. Challenging the same, the appellants filed First Appeal in A.S.No.17 of 2015. The First Appellate Court had also found that the suit property belonged to Ganammal. The parties to the suit are entitled to their respective shares and thereby confirmed the judgment and decree of the Trial Court and dismissed the First Appeal. Challenging the said dismissal, this Second Appeal is filed by the appellants/defendants.

10. The learned counsel for the appellants/defendants submitted that the first(lower) Appellate Court overlooked the principle of equity and that the respondent had not come to the Court with clean hands, as she relinquished her right over the suit property 34 years back and even acknowledged the same before the Government authorities in 1994 and 1995. The first appellant has been paying taxes for more than 40 years. P.W.1 admitted that her mother died 25 years before and she did not know, in whose name the house tax was assessed for the property after the death of the mother. The suit is barred by limitation and that is not considered by the Courts below. Therefore, the learned counsel for the appellants prayed to set aside the judgment and decree of the Courts below and to dismiss the suit by allowing this Appeal.

11. Heard the learned Counsel for the respondent/plaintiff and perused the materials available on record.

12. There is no dispute with regard to the fact that the suit property originally belonged to Rani @ Sivagamiammal. She is alleged to have executed a maintenance settlement deed in favour of Ganammal in 1942. Ganammal is the mother of the appellants and the respondent. Admittedly, this maintenance settlement deed is not produced before the Court. It is the claim of the respondent that Ganammal's title and possession were upheld in O.S.No.40 of 1996 by the learned Additional District Munsif, Poonamallee. Her husband and the father of



appellants and respondent, namely Rathinasabapathy, was a party to the said suit. The copy of the judgment in O.S.No.90 of 1976 is filed as Ex.A2. Both the Courts below, considering the oral and documentary evidence, concurrently found that though the maintenance settlement deed was not produced, it was upheld in Ex.A2 judgment. D.W.2, during the course of his evidence, admitted the execution of maintenance settlement deed by Rani @ Sivagammiammal in favour of Ganammal. Therefore, as per the maintenance deed executed by Rani @ Sivagammiammal, which was confirmed in the judgment/Ex.A2, there is no doubt with regard to the fact that Ganammal was the owner of the suit property. As legal heirs of Ganammal, her husband and children are entitled to equal shares in the suit property.

13. The respondent/plaintiff filed the suit against her father, brother and sister. During the pendency of the suit, her father died. No Death Certificate is produced before the Court to show the date of death of Ganammal. D.W.1 admitted during the course of his cross examination that Ganammal died during the year 1985. The respondent claimed in the plaint that Ganammal died in or about 1989. This suit was filed in the year 2008. Though a submission was made by the appellants that the suit is barred by limitation, reading of written statement shows that there is no specific plea raised with regard to the limitation aspect. The claim made in the plaint that Ganammal died in or about 1989, was not specifically denied in the written statement.

14. The case of the first appellant is that, during his young age, he only conducted the marriage of the respondent and second appellant with his hard earned income. His sisters relinquished their right in the suit property and therefore, he is in possession and enjoyment of the suit property as an independent owner. His evidence shows that he was only 16 years old at the time of marriage of the respondent/plaintiff. Therefore, his claim that he conducted/performed the marriage of the respondent and the second appellant, can not be accepted. The claim that the respondent and the second appellant relinquished their respective share in the suit property, though supported by the 2nd appellant, can not be accepted for the reason that there is no proper pleading and independent evidence to support their claim.

15. Admittedly, the respondent is not in possession and enjoyment of the suit property. But, she is a co-owner of the suit property. The possession of one co-owner is deemed to be the possession of other co-owner. There is no specific pleading



in the written statement as to whether the first appellant claims exclusive right in the suit property on the basis of ouster. It was just pleaded that the respondent was ousted from the joint family from her date of marriage. There must be a specific pleading of ouster to claim independent right in a joint family property. To attract the principle of ouster, there must be:-

- i. Declaration of hostile animus
- ii. Long and uninterrupted possession of the person pleading ouster.

- iii. Exercise of right of exclusive ownership openly and to the knowledge of the co-owner.

However, as stated earlier, there is no specific pleading with regard to the claim of independent title on the basis of principle of ouster in the written statement.

16. In the above context, It is useful to refer a judgment of the Hon'ble Supreme Court in Civil Appeal No.1858-1859 of 2016 dated 26.02.2016 [Nagabhushanammal (D) by Lrs Vs. C.Chandikeswaralingam] reported in 2016 (4) SCC 434 and the relevant portion of the same reads as as follows:

20. "....The Other main defence in the suit is ouster and limitation. Ouster is a weak defense in a suit for partition of family property and it is strong if the defendant is able to establish consistent and open assertion of denial of title, long and uninterrupted possession and exercise of right of exclusive ownership openly and to the knowledge of the other co-owner.

21. This Court in Syed Shah Ghulam Ghouse Mohiuddin and others Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri and Others held that possession of one co-owner is presumed to be on behalf of all co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. It was further held that there has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

22. A three judge bench of this Court in P.Lakshmi Reddy Vs. R.Lakshmi Reddy, while



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examining the necessary conditions for applicability of doctrine of ouster to the shares of co-owners, held as follows:

"4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario. (See Secretary of State for India V. Debendra Lal Khan [(1933) LR 61 IA 78, 82]. The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See Radhamoni Debi v. Collector of Khulna [(1900) LR 27 IA 136, 140]). But 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 co-heir 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 co-heirs. 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 on his own part in derogation of the other co-heir's title. (See Cores v. Appuhamy [(1912) AC 230]). 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.

23. The Court in Vidya Devi v. Prem Prakash held that:

"28. '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)



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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 rescribed by law."

17. In the absence of establishing the claim and proof of independent title on the basis of the principles of ouster, the appellants and the respondent each are entitled to claim 1/3 share in the suit property. As already found, there is no proper pleading with regard to the claim of 'ouster' in the written statement and therefore, the first appellant cannot claim independent right in the suit property on the principle of 'ouster'. Both the Courts below have rightly found that the appellants and the respondent each are entitled to 1/3 share in the suit property. This Court finds no reason to interfere with the findings of the Courts below. No substantial question of law arises for consideration in the Second appeal.

18. In fine, this Court confirms the judgment and decree dated 21.02.2020 passed in A.S.No.17 of 2015 on the file of the Principal Subordinate Judge, Kancheepuram, confirming the judgment and decree in O.S.No.1165 of 2008 dated 14.08.2014 on the file of the District Munsif cum Judicial Magistrate, Sriperumbudur.

19. Accordingly the Second Appeal is dismissed. Considering the relationship between the parties, the parties are directed to bear their own costs. Consequently, connected miscellaneous petition is closed.

SD/-

ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

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To

1. The Principal Subordinate Judge,
Principal Subordinate Court,
Kancheepuram.



2.The District Munsif cum Judicial Magistrate,
District Munsif cum Judicial Magistrate Court,
Sriperumbudur.

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+1cc to M/s.Nathan & Associates, Advocate Sr.11510

S.A.No.1068 of 2021
and
C.M.P.No.20180 of 2021

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srg 06/04/2022