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AS.No.892/2018.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AS.No.892/2018.

[Virtual Mode]

N.Pream Prasad [Died]

1.Durgamba

2.Kanaga Mahalakshmi

3.Mrs.Dheja

4.Mrs.Lakshmi

5.Mrs.Banupriya

6.Balaji

.. Appellants

Vs.

Jagadeeswari

.. Respondent

Prayer:- Appeal Suit filed under Order 41 Rule 1 read with Section 96 of CPC against the judgment and decree in OS.No.5718/2013 dated 12.01.2018 passed by the learned XVI Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.P.Satheesh Kumar

For Respondent : Mr.K.V.Muthu Visakan



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JUDGMENT

- (1) This Appeal Suit is preferred by the defendants in the suit in OS.No.5718/2013 on the file of the learned XIV Assistant Judge, City Civil Court, Chennai, granting a decree for partition in favour of the respondent/plaintiff.
- (2) The respondent/plaintiff filed the suit in OS.No.5718/2013 for partition of her half share in the suit property which is described as the property bearing Door No3./33, Plot No.1669, Anandan Street, GKM Colony, Chennai-82.
- (3) The respondent/plaintiff is the sister of the 1st defendant who died during the pendency of the suit. The plaintiff and the 1st defendant were the children of one Venkat Rathinam @ Rathinam who died intestate on 24.02.1996 leaving behind him, his wife Suryakantham, the plaintiff and the 1st defendant as his legal heirs. It is admitted that the mother Suryakantham died on 21.11.2012.
- (4) It is the case of the plaintiff that on the death of her father Venkat Rathinam, his wife Suryakantham, plaintiff and the 1st defendant are entitled to equal share in her father's property. It is further



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stated that the plaintiff is entitled to one half share after the death of her mother Suryakantham in the year 2012. Stating that the 1st defendant did not agree for an amicable partition, the suit came to be filed after issuing notice and receiving reply from the 1st defendant denying the averments in the notice.

- (5) The suit was contested mainly on the basis that the father during his lifetime, had executed a Will dated 22.02.1994. However, the Will was not allowed to be marked as a document as the same is not probated as required in law. However, a further defence was taken in the written statement that the plaintiff is not entitled to file a suit for partition when she was ousted from the suit property for more than the statutory period. Stating that the plaintiff was never in physical possession of the suit property and that she had left the parental home even before the date of purchase of the suit property, it is stated that she cannot be considered to be in constructive possession of the property. A further defence was also taken in the written statement that the suit itself was not properly valued and ad valorem Court fee was not paid. Since the plaintiff is not in possession, it is stated that the suit is liable to be dismissed on the



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- ground that the proper court fee is not paid.
- (6) The Trial Court framed necessary issues and found that the Will is not admissible in evidence for want of probate. The Trial Court after holding that the father of the plaintiff is the owner of the property, held that the plaintiff is entitled to half share after the death of her parents. Even though the issue regarding ouster was not specifically framed, the Trial Court held that the plaintiff is deemed to be in joint possession as a co-owner and that, therefore the plea of ouster is not sustainable.
- (7) Relying upon the judgment of this Court in *Arabia Bibi V. Sarbunissa*, the Trial Court followed the legal principle that the plaintiff being a lady, who is expected to live in her husband's house after marriage, should not be deprived of her legitimate share in the joint property by presuming that she got her connection to the suit property snapped once for all. After holding the issues in favour of the plaintiff, the suit was decreed as prayed for. Aggrieved by the same, the present Appeal Suit is preferred by the defendants.



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The learned counsel for the appellants submitted that the plaintiff herself has admitted during the course of evidence that she was out of possession for more than the statutory period and no proper court fee is paid. It is further contended that the Trial Court did not consider the evidence of plaintiff herself with regard to her exclusion of possession. Learned counsel relied upon the evidence of PW1 wherein a suggestion was put to her that she was evicted from the suit property after the death of her father. She has also admitted that thereafter she was not in enjoyment of the property. The learned counsel then submitted that the plea regarding proper valuation and Court fee to non-suit the plaintiff was not even framed by the Trial Court. Learned counsel pointed out that an application was filed by the appellants/defendants before the Lower Court under Order 7 Rule 11 of CPC in IA.No.573/2017 to reject the plaint on the ground that the suit is filed without payment of proper Court fee. It was alleged that the plaintiff who is not in possession, cannot file a suit for partition by paying fixed Court fee. Therefore, it was contended that the plaint should be rejected on the ground of undervaluing the suit and failure to pay the



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correct court fee. Though the Interlocutory Application was dismissed, it was pointed out that the appellants/defendants have preferred a revision petition in CRP.PD.No.2322/2017. Though the Revision Petition was also dismissed by this Court on 13.09.2017, the learned counsel pointed out that the Trial Court was directed to consider the issue of valuation while deciding the suit on merits. Referring to the issues framed by the Trial Court, the learned counsel for the appellants submitted that the Trial Court did not frame an issue regarding valuation. Hence, it is submitted by the learned counsel that the judgment of the Trial Court is vitiated warranting interference of this Court.

(9) The learned counsel for the appellants further submitted that the plea of ouster though specifically raised by the defendants and the plaintiff admitted that she was not in enjoyment of the suit property for more than the statutory period, the judgment and decree of the Trial Court cannot be sustained.

(10) **Per contra**, the learned counsel appearing for the respondent/plaintiff, referring to the evidence, pointed out that there are two properties belonging to the father of the plaintiff and



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that, there is no admission by the plaintiff about her dispossession after the death of her father. From the reading of the evidence, the suggestion put to the plaintiff was that she has not produced evidence to show her possession from the year 1971 to 2012. Further suggestion would only indicate that the documents filed by the plaintiff would not show her possession in respect of the suit property. Though the plaintiff has admitted that she is not in possession of the property, this Court finds that not even a suggestion was put to the witness that she was ousted from the suit property with hostility and that the 1st defendant was in possession and enjoyment of the property claiming exclusive ownership by an overt act to the knowledge of the plaintiff.

- (11) The Hon'ble Supreme Court and this Court had occasions to deal with requirement of a plea and proof of ouster. From the pleadings and the grounds, this Court is able to see that the appellants have asserted their possession and pleaded that the plaintiff is not in physical possession of the property. That alone is not sufficient to prove the plea of ouster. As pointed out by the learned counsel for the respondent/plaintiff, there is absolutely no evidence indicating



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any overt act by the appellants denying the right of the plaintiff as co-owner at any point of time. In the course of evidence, the 1st defendant has categorically admitted that the revenue records relating to the suit property stands in the name of his grandfather and that no attempt was made to transfer the revenue records in favour of the 1st defendant or in favour of the appellants.

- (12) As it has been held by this Court in several judgments, the plea of ouster cannot be decided merely because one of the co-owner is in physical possession of the property. The plaintiff is the sister of the 1st defendant. She was given in marriage and therefore, she is not expected to live in her parental home. Merely because the plaintiff is not in physical possession, it cannot be presumed that she was not in joint possession. When the property still stands in the name of the father of the plaintiff, it cannot be presumed that she was kept away from co-ownership. In the factual background, this Court is unable to find any irregularity in the judgment of the Trial Court regarding ouster.



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(13) The plea in the written statement that the plaint ought to have been valued by paying ad valorem court fee under Section 37[1] of the Court Fees Act is on the basis that the plaintiff is not in physical possession of the property. When the plaintiff is presumed to be in constructive possession, merely by saying that she was not in physical possession, the defendants cannot plead that the suit for partition ought to have been filed by paying ad valorem Court fee under Section 37[1] of the Act.

(14) In view of the discussion above, this Court finds no merit in the Appeal Suit and it is liable to be dismissed.

(15) In the result, the Appeal Suit stands **dismissed** confirming the judgment and decree in OS.No.5718/2013 dated 12.01.2018 passed by the learned XVI Additional Judge, City Civil Court, Chennai.

No costs.

04.02.2022

AP

Internet : Yes

To

- 1.XVI Additional Judge, City Civil Court, Chennai.
- 2.Section Officer, VR Section, High Court, Chennai.



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S.S.SUNDAR, J.,

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