



A.S.(MD)No.125 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 11.10.2022

PRONOUNCED ON:13.12.2022

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

A.S.(MD)No.125 of 2014

K.Kalaiyarasu Sylvaster : Appellant / 1st Defendant

Vs.

1.Vadivammal
2.A.Murugan : Respondents 1 & 2 / Plaintiffs

3.V.Maharajan
4.S.Thiruvengkatanathan
5.Peratchi
6.K.Rajammal
7.Sheela Samraj
8.S.Robert Solomon
9.Jeyaseelan
10.Josephin Srithar
11.A.Andrew
12.Pandara Nadar
13.Puthiyaval
14.Puthiyavan
15.Eswaran
16.Santhanam
17.Gopalakrishnan
18.Saroja
19.chandra

: Respondents 3 to 19/Defendants 2 to 18



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PRAYER:- Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree, passed in O.S.No.37 of 2009, on the file of II Additional District Court, Thoothukudi, dated 28.02.2014.

For Appellant : Mr.S.Meenakshi Sundaram
Senior Counsel
for Mr.R.Manimaran

For Respondents :Mr.H.Arumugam
for R.1, R.2 and R.13

: No Appearance for R.4

: R.3, R.5 to R.12 and
R.14 to R.19 - Exparte

JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.37 of 2009, dated 28.02.2014, on the file of II Additional District Court, Thoothukudi.



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2. The gist of the plaint is as follows:

(a) One Periya Yeman Kudumban purchased the suit properties vide two sale deeds dated 15.02.1900 and 06.01.1910 and since then he had been in possession and enjoyment of the same. He died intestate leaving behind his two sons viz., Periya Sudalaimadan and Perumal and both of them inherited all the properties. Periya Sudalaimadan died leaving behind his only son Santhana Kudumban and whereas his brother Perumal died leaving behind his only son Andi and both of them have become the owners of the suit properties. Santha Kudumban died leaving behind his only son Arunachalam, whereas Andi had died in or about 1954 leaving behind his three sons viz., Pandaram, Arumugam and Puthiyavan as his legal heirs. All the three sons of Andi remained in possession and enjoyment of the suit properties along with the successors of Periya Sudalaimadan without any partition or division having 1/6th share therein.

(b) The first plaintiff is the only daughter of Pandaram and the second plaintiff is the only son of Arumugam. Pandaram died in 1969 leaving behind his wife Puthiyaval and daughter Vadivammal and subsequently, Arumugam had also died intestate on 24.02.2006 leaving



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behind the second plaintiff as his sole heir. Hence both the plaintiffs are entitled to 2/6th shares in the suit properties.

(c) While so, the first defendant has purchased the suit property from one R.Vijayakumar and A.Suresh, vide sale deed dated 14.10.2008, who in turn purchased the same from Easwaran, vide sale deed dated 19.11.2007. Since the plaintiffs are co-owners of the suit properties, the alleged sale deeds dated 19.11.2007 and 14.10.2008 executed with respect to the suit properties do not and cannot affect the plaintiff's undivided interest in the suit properties.

(d) Since the first defendant has been taking expeditious steps to dispose of the plots, the plaintiffs sent a legal notice dated 31.05.2009, calling upon the first defendant to partition the suit properties and allot their 2/6 share therein. The first defendant having received the said notice on 05.06.2009, has neither chosen to send any reply nor complied with the notice demand. Hence, the suit.

(e) Pending suit, since the first defendant, after the purchase of the suit properties, converted the same into house plots and alienated the



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same to the defendants 2 to 11, they were also impleaded as additional defendants. The twelfth defendant is the mother of the plaintiffs. Even though, she is entitled to get share in the suit properties, she is not claiming any share/right in the suit properties. Since the defendants 13 to 18 are also claiming shares and right in the suit properties, they have been impleaded as parties to the suit.

3. The defence of the first defendant is as follows:

(a) One Nallamadan had four sons viz., Periya Yeman, Chinna Yeman, Maadan and Subban. Periya Yeman purchased a part of the suit properties vide sale deed dated 15.02.1900 and another portion of the suit properties on 06.01.1910. Periya Yeman died leaving behind his two sons viz., Sudalaimadan and Perumal. Sudalaimadan died leaving behind his only son Santhanam, whereas Perumal died leaving behind his only son Andi. The above said Santhanam had died leaving behind his son Arunachalam, whereas Andi died leaving his three sons viz., Pandaram, Armugam and Puthiyavan. After the death of Pandaram, his wife Puthiyaval had married her husband's brother Arumugam.



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(b) During the life time of Arunachalam, he executed a gift deed, dated 20.08.1986 in favour of his son Eswaran, giving his share in the suit properties. The said Eswaran purchased the remaining $\frac{1}{2}$ share in the suit properties from Arumugam and Puthiyavan, vide sale deeds dated 10.03.1981 and 20.08.1986. Subsequently, the said Eswaran has sold the suit properties in favour of R.Viajayakumr and A.Suresh, vide sale deed dated 19.11.2007, who in turn sold the suit properties to the first defendant on 14.10.2008.

(c) The plaintiffs are not having any right in the suit properties. Even assuming that they are having some rights, they had lost the same by ouster. The first defendant, after forming layout, had sold the plots to various parties. Hence, the suit is liable to be dismissed.

4. The third defendant has filed a separate written statement reiterating the contentions of the first defendant.

5. The stand taken by the twelfth defendant is as follows:

The twelfth defendant never claimed any share in the suit properties and whatever share, she has inherited the properties from her



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husband Pandaram, after his death and as per the provisions of Hindu Law, she relinquished her share in favour of the first plaintiff, who is the only daughter of the twelfth defendant through her first husband Pandaram and the second plaintiff, who is her only son through her second husband Arumugam. The first plaintiff is the daughter of the twelfth defendant through her first husband Pandaram and the second plaintiff is the son of twelfth defendant through her second husband Arumugam. When Pandaram died, the first plaintiff, daughter of the twelfth defendant through Pandaram was aged about 9 years and the first plaintiff was brought up by the twelfth defendant in the house of Arumugam – second husband of the twelfth defendant.

6. The additional defence taken by the first defendant is as follows:

(a) After cross-examination of P.W.1, the plaintiffs have impleaded the defendants 12 to 18 as parties without claiming title and share over the suit properties and that therefore, the suit itself is not maintainable.

(b) The first defendant has filed another additional written statement reiterating the earlier contentions.



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7. The second plaintiff had filed reply statement denying the averments raised in the additional written statement of the first defendant and reiterated the plaint contentions.

8. On the basis of the pleadings, the trial Court has framed the following issues:

(1) Whether the plaintiffs are entitled to for 2/6 share in the suit schedule properties?

(2) To what reliefs the plaintiffs are entitled?

9. During trial, the plaintiffs have examined the second plaintiff as P.W.1 and two other witnesses viz., Thiru.Paulsami and Thiru.Kanthan as P.W.2 and P.W.3 respectively and exhibited ten documents as Exs.A.1 to A.10. The defendants 13 to 18 remained exparte before the trial Court. On the defendants' side, the defendants 1 and 3 have been examined as D.W.1 and D.W.2 respectively and 12 documents have been exhibited as Exs.B.1 to B.12.



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10. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the impugned Judgment dated 28.02.2014 granting preliminary decree in favour of the second plaintiff for partition of 1/4th share in the suit properties and dismissing the suit with respect to the first plaintiff. Aggrieved by the impugned judgment and decree, the first defendant has come forward with the present Appeal Suit.

11. In the Appeal Suit, the appellant/first defendant has raised the following main grounds:

(1) The Judgment of the trial Court is against law, weight of evidence and probabilities of the case.

(2) The trial Court erred in believing Ex.A.7, since the legal heir certificate issued by the Tahsildar cannot be a conclusive proof and also the versions in Ex.A.10 are contrary regarding the legal heirship of the first plaintiff.

(3) The trial Court has failed to draw an adverse inference as against the first plaintiff, since neither herself nor her mother have been



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examined to prove the legal heirship of the first plaintiff and also failed to draw adverse inference against the second plaintiff, since the twelfth defendant had not been examined to prove the case of the second plaintiff that he is the son born out of the wedlock between 12th defendant and Arumugam.

(4) The trial Court erred in rendering the finding that the sale deeds executed by Arumugam and Puthiyavan under Exs.B.5 and B.12 are valid.

(5) The trial Court has failed to note that the gift deed under Ex.B.6, dated 20.08.1986 executed in favour of Eswaran is not questioned either by Santhanam or Gopalakrishnan who are the defendants 15 and 16 and the plaintiffs have not produced any documents to prove their alleged joint possession.

(6) The trial Court has failed to consider that Ex.A.10 dated 31.05.2009 and Ex.B.2 proceedings had come to an end only on 12.07.2010 and the plaintiffs have not whispered anything in Ex.A.10.

(7) The trial Court erred in deciding that Arumugam and Puthiyavan have no right to sell their undivided interest and on that basis, the conclusion arrived at by the trial Court on the validity of Exs.B.5 and B.12 are incorrect. Hence, the appeal is liable to be allowed and the



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judgment and decree dated 28.02.2014 made in O.S.No.37 of 2009 are liable to be set aside.

12. The points that arise for consideration are

(1) Whether the trial Court erred in deciding that the first plaintiff is the daughter of Pandaram and the second plaintiff is the son of Arumugam, when the plaintiffs have miserably failed to produce any legal and acceptable evidence to substantiate their claim?

(2) Whether the trial Court erred in deciding that the gift deed under Ex.B.6 dated 20.08.1986 executed by Arunachalam in favour of his son Eswaran is invalid, despite the fact that the said document was not at all questioned by the other two son of Arunachalam and that the plaintiffs have no locus standi to question the same, which occurred in the other branch of the family?

(3) Whether the trial Court erred in rendering the finding that the sale deeds executed by Arumugam and Puthiyavan dated 10.03.1981 and 20.08.1986 in favour of Eswaran are not valid, despite showing that Puthiyavan had no legal heirs and as such, he is entitled to alienate the property as if it is his separate property and that the share of Pandaram was inherited by the two brothers on the basis of survivorship?



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(4) Whether the trial Court erred in deciding that the sale deeds in favour of the first defendant and in favour of his vendors are invalid, despite showing that Eswaran who was owning the entire suit property, had every right to alienate the same?

(5) Whether the plaintiffs have lost their right by ouster?

(6) Whether the judgment and decree passed in O.S.No.37 of 2009, dated 28.02.2014 is liable to be set aside?

Points 1 to 6:

13. The factual aspects not in dispute are;

(i) Periya Yeman Kudumban purchased the suit properties vide two sale deeds dated 15.02.1900 and 06.01.1910 under Exs.A.1 and A.2 respectively;

(ii) Periya Yeman Kudumban died intestate leaving behind his two sons viz., Periya Sudalaimadan and Perumal;

(iii) Periya Sudalaimadan had died intestate leaving behind his only son Santhana Kudumban, whereas Perumal had also died intestate leaving behind his only son Andi;



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(iv) Santhana Kudumban and Andi have become the owners of the suit properties and they had been in possession and enjoyment of the same;

(v) Santhana Kudumban had died leaving behind his son Arunachalam and Andi had died leaving behind his three sons viz., Pandaram, Arumugam and Puthiyavan (13th defendant);

(vi) Arunachalam had died leaving behind his three sons viz., Easwaran, Santhanam and Gopal;

(vii) Pandaram had married Puthiyaval (12th defendant) and after the death of Pandaram, Puthiyaval had married Pandaram's brother Arumugam.

14. It is the specific case of the plaintiffs that the first plaintiff Vadivammal is the daughter of Pandaram and his wife Puthiyaval and that the second plaintiff is the son of Arumugam and Puthiyaval (12th defendant). But according to the contesting defendants, the plaintiffs have failed to prove that the first plaintiff is the daughter of Pandaram and the second plaintiff is the son of Arumugam. It is pertinent to note that the contesting defendants have specifically admitted that the twelfth



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defendant had married Pandaram and after the death of Pandaram, she had married Pandaram's brother Arumugam.

15. It is evident from the records that though originally the suit was laid against the first defendant, subsequently, the subsequent purchasers have been impleaded as defendants 2 to 11 and thereafter, the other sharers have been impleaded as defendants 12 to 18. After the impleadment of the twelfth defendant, she has filed a written statement and wherein she has specifically stated that the first plaintiff is her daughter through her first husband Pandaram and the second plaintiff is her son through her second husband Arumugam. No doubt, in the legal heir certificate of Arumugam issued by the Tahsildar, it has been shown that the plaintiffs 1 and 2 are the children of Arumugam. But, according to the plaintiffs and the twelfth defendant, after marrying Arumugam, she was residing with him along with the first plaintiff and that therefore, the first plaintiff's name has also been included.

16. As rightly pointed out by the learned Counsel for the plaintiffs, the contesting defendants in their written statement have referred two earlier proceedings in O.S.No.86 of 2008 and O.S.No.91 of 2009, on the



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file of the District Munsif Court, Srivaikundam for taking a plea that the present suit was barred by the doctrine of *res judicata*. No doubt, the defendants have produced the certified copy of the decree in O.S.No.86 of 2008 and the copies of the judgment and decree in O.S.No.91 of 2009 under Exs. B.1 to B.3 and wherein it is evident that the suit in O.S.No.86 of 2008 was ordered to be dismissed as not pressed and the suit in O.S.No.91 of 2009 was ordered to be dismissed for default. Moreover, the above suits were not filed by the plaintiffs, but they were added as defendants and the trial Court has rightly held that since those two suits were not decided on merits, the question of invoking doctrine of *res judicata* does not arise at all. Whatever it is, it is evident from Exs.B.1 to B.3 that the plaintiffs 1 and 2 were added as defendants and that the first plaintiff has been described as the daughter of Pandaram and the second plaintiff has been described as the son of Arumugam. As rightly pointed out by the learned Counsel for the plaintiffs, the first defendant in his written statement has indirectly admitted that the second plaintiff is the son of Arumugam and the relevant portion in paragraph No.9 of the first written statement is extracted hereunder:



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“ வழக்கில் 2 – வது வாதியின் தகப்பனாரான ஆறுமுகம் முன்பு
கிரையம் செய்து கொடுத்துவிட்ட சொத்தினுள் தனக்கு உரிமை
நேப்பதாக உகாபிரகாபத்து சட்டப்படி செல்லத்தக்கதல்ல.”

17. More importantly, the first defendant as D.W.1, in his cross-examination would admit categorically that the second plaintiff is the son of Arumugam, but denied that the first plaintiff is the daughter of Pandaram. P.W.3, belonging to the same locality, would say that he had seen Pandaram, S/o Andi, that he had married Puthiyaval and that he is having a legal heir Vadivammal. But in the cross-examination, he would say that he had not seen any documents to show that the first plaintiff is the daughter of Pandaram. As rightly pointed out by the learned Counsel for the plaintiffs, P.W.3 was not at all cross-examined with the plea that he was not belonging to that locality and that Vadivammal is not the daughter of Pandaram. Moreover, not even a suggestion was made to P.W.3 in this regard. Generally, no one can expect from a person belonging to particular locality or even neighbour would have seen the legal heir certificate of a person residing in that locality. On considering the evidence available on record, the finding of the trial Court that the first plaintiff is the daughter of Pandaram and the second plaintiff is the



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son of Arumugam, cannot be found fault with.

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18. Admittedly, the suit properties are the ancestral properties of Arunachalam and Pandaram and his brothers. It is the admitted case of both the parties that Arunachalam, who inherited his undivided $\frac{1}{2}$ share in the suit properties, had executed a gift deed in favour of his son Eswaran under Ex.B.6 dated 20.08.1986. The main contention of the plaintiffs is that the suit properties being the ancestral properties, Arunachalam has no right to gift away the entire $\frac{1}{2}$ share in the suit properties belonging to their branch, in favour of one son Eswaran and as such, the gift deed under Ex.B.6 itself is legally invalid.

19. Admittedly, it is not the case of the plaintiffs that the other two sons of Arunachalam had challenged the gift deed executed by their father in favour of their brother Easwaran. Even if any such challenge is made, it is for that branch to decide among themselves or to sort it out legally and the plaintiffs cannot have any say and that they have no *locus standi* to challenge the gift deed. Moreover, the brothers of Arunachalam were impleaded as defendants 15 and 16 and even after their impleadment, they have not chosen to contest the suit nor claimed any



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share in the suit properties alleging that Ex.B.6 gift deed is invalid. In that scenerio, the finding of the trial Court that since the sons of Arunachalam – defendants 14 to 16 had rights in the suit properties by birth, giving $\frac{1}{2}$ share in the suit properties in favour of first son Easwaran by father Arunachalam is not in accordance with law and the same is liable to be set aside, is not only improper but also not warranted in the facts and circumstances of the case.

20. It is not in dispute that since Andi had died intestate, his three sons had acquired right by birth and were entitled to get $\frac{1}{6}$ th share in the suit properties. It is the specific case of the contesting defendants that since Pandaram had died intestate without leaving any male heirs, Pandaram's share came to be inherited by his brother Arumugham and Puthiyavan on the basis of survivialship and as such Arumugham and Puthiyavan were entitled to $\frac{1}{4}$ th share each.

21. The first plaintiff has claimed her share through her father Pandaram, invoking Section 6 of the Hindu Succession (Amendment) Act 2005. The learned Counsel for the plaintiffs have



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relied on the judgment of the Hon'ble Supreme Court in ***Vineeta Sharma Vs Rakesh Sharma and others*** reported in **(2020)9 SCC**, wherein the Hon'ble Supreme Court has answered the reference in categorical terms that the provision in substituted Section 6 of the Hindu Succession Act confers status of coparcener on daughter born before or after the amendment in the same manner as son and that the right under Section 6 can be claimed by daughter born prior to the amendment with effect from date of amendment (09.09.2005) with saving of past transactions as provided in proviso to Section 6(1) r/w Section 6(5) of the Hindu Succession Act.

22. But the newly inserted Section 6 of the Amendment Act and the above decision of the Hon'ble Supreme Court have no application to the case on hand for the simple reason that there was no property available to be inherited by the first plaintiff on 09.09.2005, since her paternal uncles had already sold their shares in the suit properties to 14th defendant – Easwaran. But at the same time, Section 6 of the Hindu Succession Act, prior to the Amendment Act deals with the question of coparcener in a Mitakshara coparcenary dying without making any testamentary disposition of his undivided share in the joint family



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property and old Section 6 is read as follows:

“Section 6.Devolution of interest in coparcenary property:

When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left surviving a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation I – For the purpose of this 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



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claim partition or not.

Explanation 2. - Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.”

23. The Proviso to the Section 6 confers new rights upon the specified female heirs and the pre-deceased daughter's son of a deceased coparcener and superimposes upon the integrated structure of the law relating to Mitakshara coparcenary. The proviso contemplates that the interest of the deceased coparcener if he died without making a testamentary disposition of the same, devolves by intestate succession upon the persons who are among the twelve preferential heirs in Class I of the Schedule.

24. Coming to the case on hand, since this Court has already decided that the first plaintiff is the daughter of Pandaram, on the date of death of Pandaram, the first plaintiff, as per the proviso to Section 6 of



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the Act, has inherited the share of Pandaram by intestate succession. But the first plaintiff has not challenged the judgment and decree with regard to the dismissal of the suit against her.

25. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in *Azgar Barid (dead) by legal representatives and others Vs. Mazambi alias Pyaremabi and others* reported in *(2022)5 SCC 334*, wherein the Hon'ble Supreme Court, invoking Order 41 Rule 4 r/w Order 41 Rule 33 of the Code of Civil Procedure has held that though the first plaintiff has not filed any appeal even then the Court could grant the relief and the relevant passages are extracted hereunder:

“12. We will first deal with the objection of the appellant that since plaintiff Nos.4 to 8, whose claim was denied by the trial court and who had not challenged the same by way of appeal, are not entitled to relief in the second appeal. This Court in the cases of Bhagwan Swaroop and Others v. Mool Chand and Others1 and Dr. P. Nalla Thampy Thera v. B.L. Shanker and Others2, has held that in a suit for partition, the position of the plaintiff and the defendant can be interchangeable. Each party adopts the same position with the other parties. It has *been further held that so long as the suit is pending, a defendant can ask the Court to transpose*



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him as a plaintiff and a plaintiff can ask for being transposed as a defendant.

13. This Court in the case of *Chandramohan Ramchandra Patil and Others v. Bapu Koyappa Patil (Dead) Through LRs and Others*³, has held thus:

“14. Order 41 Rule 4 of the Code enables reversal of the decree by the court in appeal at the instance of one or some of the plaintiffs appealing and it can do so in favour of even non-appealing plaintiffs. As a necessary consequence such reversal of the decree can be against the interest of the defendants visà vis non-appealing plaintiffs. Order 41 Rule 4 has to be read with Order 41 Rule 33. Order 41 Rule 33 empowers the appellate court to do complete justice between the parties by passing such order or decree which ought to have been passed or made although not all the parties affected by the decree had appealed.

15. In our opinion, therefore, the appellate court by invoking Order 41 Rule 4 read with Order 41 Rule 33 of the Code could grant relief even to the non-appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs. In such a situation, it is not open to urge on behalf of the defendants that the decree of dismissal of suit passed by the trial court had become final inter se between the non-appealing plaintiffs and the defendants.”



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14. In that view of the matter, we find that the contention raised on behalf of the appellant with regard to plaintiff Nos. 4 to 8 being not entitled to relief in the second appeal on the ground that they have not challenged the judgment and decree of the trial court before the First Appellate Court, is not sustainable. As held by this Court in the case of Chandramohan Ramchandra Patil (supra), the trial court could grant relief even to the non-appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs. Merely because the trial court had not granted relief in favour of plaintiff Nos.4 to 8, would not come in their way in the High Court allowing their claim.

26. The above decision is squarely applicable to the case on hand. Considering the above, the brothers Pandaram, Arumugam and Puthiyavan were having 1/6th share in the suit property and that since the first plaintiff being Class-I heir and her mother - 13th respondent has not claimed any share, this Court has no hesitation to hold that the first plaintiff is entitled to get 1/6th share in the suit property

27. Now turning to the sales made by Arumugam and Puthiyavan, it is evident from the records that Arumugam had executed a sale deed in



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respect of his $\frac{1}{4}$ share in the suit property in favour of Easwaran vide sale deed dated 10.03.1981 under Ex.B.12 and that Puthiyavan had executed a sale deed in respect of $\frac{1}{4}$ th share in the suit property in favour of Easwaran on 20.08.1986 under Ex.B.5. Admittedly Puthiyavan had no legal heirs and as such, he being the sole surviving coparcener in respect of his branch, he is certainly entitled to dispose of the coparcenary property as if it was his separate property. Though Puthiyavan was owning $\frac{1}{6}$ th share, he sold $\frac{1}{4}$ th share in the suit properties. But whatever it is, the plaintiffs cannot challenge or question the sale made by Puthiyavan. Hence, the finding of the trial Court that Puthiyavan had no right to sell his undivided interest over the suit property, as the property remained joint family property and hence, the sale deed executed by him under Ex.B.12 is not valid, is very much against the settled position of law and the same is liable to be set aside.

28. Now turning to the sale made by Arumugam, the second plaintiff, son of Arumugam was very much alive on 10.03.1981, when the sale deed was executed by Arumugam in favour of Easwaran. As per the settled legal position, the property being the ancestral property, the second plaintiff being the son, is entitled to get a share by birth and as



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such, he was entitled to 1/12th share. No doubt, a Hindu father has special powers of alienating coparcener property, but on condition that the alienation is for legal necessity or for the benefit of the family. It is necessary to refer the following passage in Mulla's Hindu Law(21st Edition 2010):

“S.254. Alienation by father: - A Hindu father as such has special powers of alienating coparcenary property, which no other coparcener has. In the exercise of these powers he may:

(1) make a gift of ancestral movable property, to the extent mentioned in S.223, and even of ancestral immovable property to the extent mentioned in S.224;

(2) sell or mortgage ancestral property, whether movable or immovable, including the interest of his sons, grandsons and great-grandsons therein, for the payment of his own debt, provided the debt was an antecedent debt, and was not incurred for immoral or illegal purposes(S.294).

Except as aforesaid, a father has no greater power over coparcenary property than any other manager, ie., he cannot alienate coparcenary property except for legal necessity or for the benefit of the family(S.240). This Section must be read with what is stated under S.211-15.”



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29. But in the case on hand, it is not the case of the contesting defendants that the sale under Ex.B.12 was made for legal necessity or for the benefit of the family of Arumugam. Admittedly, the defendants have neither raised any pleadings nor adduced any evidence in this regard. No doubt, a coparcener can alienate his undivided interest in the coparcener property for value, without consent of other coparceners. Considering the above, Ex.B.12 sale made by the said Arumugam can be held to be valid in respect of his share in the suit property ie. 1/12th share in the suit properties.

30. The learned Counsel for the contesting defendants would mainly contend that even assuming for arguments sake, that the plaintiffs were having share in the suit properties, the first defendant's predecessors by their long and uninterrupted possession have perfected their title by adverse possession and that the plaintiffs have lost their rights by ouster.

31. Before entering into further discussion, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Nagabhushanammal (dead) by legal representatives Vs. C.Chandikeswaralingam*** reported in



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(2016)4 Supreme Court Cases 434 relied on by the learned Counsel for the plaintiffs and the relevant passages are extracted hereunder:

“21. The other main defense 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.

22. This court in [Syed Shah Ghulam Ghouse Mohiuddin and others v. Syed Shah Ahmed Mohiuddin Kamisul Quadri and Ors](#) 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.

23. A three judge bench of this court in [P.Lakshmi Reddy v. R.Lakshmi Reddy](#), while 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.



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(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 *Coresv. 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.”



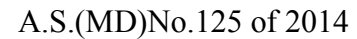
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24. This Court in *Vidya Devi v. Prem Prakash*[7] held that:

“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) 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.”

32. Bearing the above legal position in mind, let us consider the case on hand. As rightly contended by the learned Counsel for the plaintiffs, the suit property was sold to third party, ie., outside their family on 19.11.2007 by 14th defendant in favour of R.Vijayakumar and A.Suresh under Ex.B.7, who in turn sold the suit property to the first defendant on 14.10.2008. Admittedly, the suit was filed in the year 2009. It is pertinent to note that even according to the contesting defendants, the suit property was in the hands of the 14th defendant. But according to



33. It is pertinent to note that though the 14th defendant had failed to appear in person, he was represented by his Counsel, subsequently he has not filed any written statement and hence, he was set as exparte. The contesting defendants have not taken any steps to examine the 14th defendant, who is the competent person to depose about his long, continuous and uninterrupted possession and that too in hostility to counter the plea of ouster by exclusion of them. The defendants have also not examined any person to prove the alleged adverse possession. Considering the facts and circumstances of the case, this Court has no hesitation to hold that the contesting defendants miserably failed to prove the plea of ouster.



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34. The trial Court, without considering the evidence in proper perspective and without applying the correct legal position, has given a finding that the second plaintiff alone is entitled to $1/4^{\text{th}}$ share and that the first plaintiff is not entitled to any share in the suit properties. Considering the above, this Court concludes that the second plaintiff is entitled to get $1/12^{\text{th}}$ share in the suit properties.

35. In the result, the Appeal Suit is partly allowed and the preliminary decree passed by the trial Court in O.S.No.37 of 2009, on the file of II Additional District Court, Thoothukudi, dated 28.02.2014, declaring that the second plaintiff is entitled to $1/4^{\text{th}}$ share in the suit properties is set aside. Preliminary decree is passed declaring that the plaintiffs 1 and 2 are entitled to $1/6^{\text{th}}$ and $1/12$ shares respectively in the suit properties. The parties are directed to bear their own costs.

13.12.2022

Index : Yes : No

Internet : Yes : No

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To

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1. II Additional District Court,
Thoothukudi.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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