



S.A.No.742 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.12.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.742 of 2021

1. Muthulakshmi Ammal
2. Rani @ Selvarani
3. Chandra
4. Andal

...Appellants

Vs

1. Kannaian
2. The Sub Registrar,
Kurinjipadi,
Kurinjipadi Sub Registrar Office,
Kurinjipadi.
3. The District Registrar,
District Registrar Office,
Thirupapuliyur,
Cuddalore

...Respondents

Prayer: Appeal Suit is filed under Section 100 of C.P.C against the Judgement and Decree dated 24.06.2019 made in A.S.No.14 of 2016 on the file of the Principal District Judge, Cuddalore, confirming the



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judgment and decree dated 01.12.2015 made in O.S.No.165 of 2013 on the file of the Principal Subordinate Judge, Cuddalore.

For Appellants : Mr.P.Dinesh Kumar

For Respondent-1:Ms.R.Meenal

For Respondents

2 and 3 : Ms.B.Tamilnidhi,
Additional Government Pleader

JUDGMENT

The plaintiffs are the appellants before this Court. The facts are set out herein below with the parties being referred to in the same ranking as before the trial Court.

2. The plaintiffs had filed the suit O.S.No.165 of 2013 on the file of the Subordinate Judge, Cuddalore seeking partition and separate possession of their 4/5th share in the suit properties and for mesne profits and also for a permanent injunction restraining the first defendant from alienating or encumbering the suit properties in any



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manner and defendants 2 and 3 from registering any document that is executed by the first defendant without including the plaintiffs in respect of the suit properties.

3. It is the case of the plaintiffs that the first defendant and themselves are brother and sisters and children of one Ramanujam and Thulasi Ammal, who died in 1966 and 2004 respectively. The first defendant is the only son and the eldest member of the family. After the death of the parents, the plaintiffs had married and were living in their matrimonial homes. The suit properties and another site measuring 600 sq.ft in Old. S.No.379/4 corresponding to new S.No.497 /2 and 9 belonged to their father, Ramanujam. On his death, it devolved on their mother, the plaintiffs and the first defendant. The second plaintiff had lost her husband at a very young age and had therefore returned to her parental home. The mother Thulasi Ammal, with the consent of the other children, had settled an extent of 600 sq.ft



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in favour of the second plaintiff under a settlement deed dated 30.11.1982 and on the same day, the possession was also handed over to the second plaintiff, who in turn had sold the same to one Abbas under a Sale deed dated 22.10.2013. Thereafter, the first defendant has filed O.S.No.133 of 2013 before the I Additional Subordinate Court, Cuddalore, in respect of this property and the same is pending. The other properties of Ramanujam devolved upon Thulasi Ammal, the plaintiffs and the first defendant with each of them enjoying a 1/6th share. On the death of Thulasi Ammal, her 1/6th share devolved on her children, the plaintiffs and the first defendant equally.

4. The plaintiffs would submit that since they were living in their matrimonial home, the first defendant being the eldest member of the family was in possession of the properties as a co-owner for himself and on behalf of the plaintiffs. It is therefore deemed that the plaintiffs are in joint possession of the properties. The plaintiffs would submit



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that they have been demanding partition, but the first defendant has been evading the same. The first defendant had attempted to sell a portion of the suit properties on 01.12.2013 without the knowledge and consent of the plaintiffs and therefore, the suit has been filed.

5. A written statement has been filed by the first defendant *inter-alia* contending that Ramanujam, the father, was an agriculturist and was also running a hotel business at Kurinjipadi Village. When he died, the first defendant was aged about 18 years, the said Ramanujam had borrowed money, as a result of which the properties had to be brought to sale. The first defendant would submit that he had joined N.L.C. Ltd, Neyveli in 1965. Later, he joined the Railways where he served till 1969. Subsequently, he worked at Kurinjipadi Panchayat Union in 1969. Thereafter, he was permanently employed with the Tamilnadu Electricity Department from where he retired from the service in the year 2005. The first defendant would submit that when his father died,



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all his siblings were young and he alone had taken care of the entire family. The first defendant had performed the marriage of the plaintiffs and had ensured that they were given due jewels and the customary seer articles. The first defendant would submit that since the plaintiffs had got married prior to 1989, they were not entitled to any share in the properties. The first defendant had also pleaded limitation since it is his contention that the partition had opened in the year 1966 and the suit for partition has come to be filed only in the year 2013. He would further submit that it was he who had settled the debts borrowed by his father in respect of which suits filed by his father's creditors were pending and in which decrees had been obtained. He would also submit that he had got an employment for the second plaintiff and after the death of her husband (within five months of marriage) it was the first defendant who had taken care of her. He would also submit that in order to safeguard the second plaintiff, the mother had executed a settlement deed in her favour and possession of the property was



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handed over to her. However, the survey number was wrongly mentioned. Thereafter, the second plaintiff had got re-married. In the year 1984, one Mohammed Yousuf Sahib had filed a suit against the second plaintiff in O.S.No.733 of 1984 on the file of the District Munsif, Cuddalore and it was this first defendant who had conducted the case on behalf of the second plaintiff. The suit was ultimately dismissed on 30.09.1986 and the appeal preferred by Mohammed Yousuf Sahib in A.S.No.220 of 1988 was also dismissed by judgment and decree dated 19.04.1989.

6. Thereafter, the second plaintiff had written a letter dated 01.11.2012 to her mother stating that she has no right over the property and asked her mother to hand over the original settlement deed to the first defendant, who was already in possession of the property. Since the second plaintiff had attempted to alienate the property, the first defendant had filed O.S.No.133 of 2013 on the file of the Additional



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Subordinate Judge, Cuddalore. On the date of the institution of the said suit, the second plaintiff had created a sale deed in favour of Abbas on 22.10.2013. The defendant had also pleaded that the suit is bad for partial partition, as several properties which have been sold by him, describing him as the absolute owner has not been questioned by the plaintiffs and have also not been included in the suit for partition. Therefore, he sought for dismissal of the suit.

7. Thereafter, an additional written statement was filed, in which the first defendant had come forward with the case that, in the presence of his mother, his father Ramanujam had orally gifted the properties to him. He had repaid the loans, performed the marriages of the plaintiffs and was enjoying the suit property as the absolute owner. He would submit that the marriage of the first plaintiff was performed by borrowing huge loans and the same was repaid by mortgaging one of the properties which was thereafter redeemed by the first defendant by



selling some of the properties as its absolute owner.

8. The trial Court had framed the following the issues.

“1. Whether the plaintiffs are entitled for a preliminary decree for partition and separate possession of plaintiff’s 4/5th share in the suit properties?

2. Whether the plaintiffs are entitled for mesne profits from the 1st defendant as prayed for?

3. Whether the plaintiffs are entitled for a permanent injunction against the 1st defendant as prayed for?

4. Whether the plaintiffs are entitled for a permanent injunction against D2 and D3 as prayed for?

5. Whether the suit is barred by limitation?

6. Whether the plaintiffs are entitled for a decree as prayed for

7. To what reliefs the parties are entitled?



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After the additional written statement was filed, the Court had framed the following additional issue:

“Whether the 1st defendant had become absolute owner of the suit properties through the oral gift of his father?

6. The first plaintiff has examined herself as P.W1 and marked Exs.A1 to A6. The first defendant had examined himself as D.W1, one Ramalingam and Durairaj as D.W2 and D.W3 respectively and marked Exs.B1 to B3.

7. The learned trial Judge, on considering the evidence on record, both oral as well as the documentary held that the suit was not barred by limitation since the first defendant is in possession of the property as a co-owner for and on behalf of other sharers being the eldest member of the family. However, the learned Judge has dismissed the suit on the ground that the suit is bad for partial partition since several properties which belonged to the father, Ramanujan had been alienated by the first

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defendant in his individual capacity which has not been contested by the plaintiffs and these properties not included in the suit for partition. Aggrieved by the said judgment and decree, the plaintiffs had filed A.S.No.14 of 2016 on the file of the Principal District Cuddalore, The learned Principal District Judge was also pleased to dismiss the appeal on the ground of ouster and also on the ground of partial partition. Aggrieved by this concurrent judgment and decree, the appellants are before this Court.

8. After hearing the arguments of both learned counsels and based on their arguments, the following substantial questions of law have been framed. The learned counsels had addressed arguments on these questions of law.

i. Whether the Courts below are correct in law



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in dismissing the suit on the ground of partial partition?

ii. Whether the lower appellate Court is correct in law in dismissing the appeal by holding that the first defendant has proved ouster, especially when there is no pleading to this effect?

9. The learned counsel for the appellants would submit that nowhere in the written statement or the additional written statement has the first defendant raised a plea of ouster. The first defendant had raised a plea of limitation and partial partition, and in the additional written statement, he had raised the plea that there was an oral settlement by the father in his favour. As regards the limitation, the trial Court has clearly observed that the suit is well within the time since the possession of the property by the first defendant is construed to be in his capacity as a co-owner for and on behalf of other sharers as well. With reference to the issue of partial partition, the learned counsel



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would rely upon the judgment of the Hon'ble Supreme Court reported in **2022 SCC Online SC 240 [B.R.Patil vs. Tulsya Y.Sawkar and Others]**, where the Hon'ble Supreme Court, while considering the issue as to whether the suit should fail on account of non-inclusion of certain properties of non-joinder, had observed that the principle that every suit for partition should include all the properties is not an inelastic rule, where the properties are not available for partition on account of a sale towards the stranger who has no interest in the family partition then if such properties are not included, the suit is not hit by partial partition. He would also rely upon the same judgment in support of his contention that the plaintiffs have not pleaded ouster, and as this argument has been advanced only in the lower appellate Court. The learned judge has totally overlooked the fact that there is no pleading relating to ouster but he has dismissed the appeal on the ground of ouster.



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10. Per contra, Mr.Hema Sampath, learned senior counsel appearing on behalf of the first respondent would submit that the plaintiffs have kept quiet since 1966 and by not including the properties which have been alienated by the first defendant they have tacitly admitted that the first defendant is in enjoyment and possession of the properties in his individual capacity. The learned counsel would further submit that the plaintiffs have not stated anything about taking a share in the liability, namely, the loans that have been discharged by the first defendant. She would submit that the question of law should be answered against the defendant and therefore, the second appeal should be dismissed.

11. Heard the learned counsel on either side and perused the materials available on record.

12. The admitted case of both the parties is that the property in



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question belonged to their father, Ramanujam and that Ramanujam had died intestate. Therefore, under Section 8 of the Hindu Succession Act, the plaintiffs and the first defendant would be equally entitled to a share in the properties. The first defendant is setting up an exclusive right to the properties on the ground that it was he who had arranged the marriages of his sisters and had settled all the debts taken by his father and that he has been in exclusive possession and enjoyment of the properties exercising rights as its exclusive owner. He would submit that the father had passed away in the year 1966 and therefore, the partition had opened in the year 1966. However, the plaintiffs have approached the Court only in the year 2013 and therefore, the suit is barred by limitation. The plea of partial partition was also put forward by contending that the first defendant had alienated the properties to settle the debts of the father and these alienations had been done in his individual capacity and the same has not been questioned by his sisters, the plaintiffs herein. That apart, these properties have not been



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included in the suit for partition. Therefore, the first defendant has put forward the case that the suit is bad for partial partition. Admittedly, some of the properties according to the first defendant have been alienated to settle the debts taken by the father and that the alienation has been effected for settling the debts of the father is evident from the statement made in the written statement wherein the defendant has stated as follows in paragraph 10:

“10. The defendant submits that after the death of Ramanujam many suits filed for recovery of the money borrowed by him and for mortgaged by him such as O.S.253/1965, O.S.575/1965, O.S.39/1967, O.S.617/1968 and many other suits were contested by this defendant and the loans were settled by this defendant through his hard earned income and by selling many of the properties.”

This statement is also reiterated in the additional written statement where the first defendant has stated in paragraph 4 as follows:



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"This defendant submits at the time of death Ramanuja Chettiyar the father of the plaintiffs and the 1st defendant, in the presence of their mother Thulasi Ammal orally gave all the properties to this defendant and requested him to repay all the loans, get married the plaintiffs and enjoy all the properties as the absolute owner. In pursuance of the oral gift made by the father, the defendant who was at the tender age took possession all the properties. And subsequently borrowing huge loans and by his hard earned income got married the 1st plaintiff and also pledged and mortgage all the properties and repaid some loans, then redeeming the mortgage properties by selling some of the properties as the absolute owner repaid loans. This defendant also married the remaining 3 plaintiffs and enjoying the suit property as the absolute owner. The patta, House Tax, Water Tax and Electricity Bill to the property stands in the name of this defendant and hence this defendant is the absolute owner of the property. And the plaintiffs have no share in the property. The plaintiffs are very well aware of the facts as per the oral desire of the father that the properties had been given to this defendant and hence they did not claim any share of the property at any point of time. The suit has



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been filed at the instigation of Abbas, S/o.Liyakath Ali who is the defendant in the suit O.S.133 of 2013."

Therefore, from the very statement of the first defendant, it is clear that the properties have been alienated only to settle the debts borrowed by the original owner, namely the father of the plaintiff and the first defendant. It is needless to state that the properties of the father which come into the hands of the plaintiffs and the first defendant as the estate of their deceased father can be attached and sold to settle the borrowings of the father. Therefore, the sale of these properties by the first defendant would not give him an independent right or title and neither does it deprive the plaintiffs of their right to the said properties for not including the properties. The plaintiffs have only acknowledged and accepted the fact that the debt of the father was settled from out of income derived from the properties belonging to him. That apart, in the judgment which has been cited by the learned counsel for appellants reported in **2022 SCC OnLine SC 240 [B.R. Patil v. Tulsa Y. Sawkar]**, the Hon'ble Supreme Court has stated as



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follows:

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"10. This is the state of the pleading and evidence in support of the existence of the property other than what has been scheduled by the plaintiffs and for which partition is sought. It is true that the law looks with disfavor upon properties being partitioned partially. The principle that there cannot be a partial partition is not an absolute one. It admits of exceptions. In Mayne's 'Treatise on Hindu Law & Usage' 17th Edition, Paragraph 487, reads as follows:

"487. Partition suit should embrace all property – Every suit for a partition should ordinarily embrace all joint properties. But this is not an inelastic rule which admits circumstances of a particular case or the interests of justice so require. Such a suit, however, may be confined to a division of property which is available at the time for an actual division and not merely for a division of status. Ordinarily a suit for partial partition does not lie. But, a suit for partial partition will lie when the portion omitted is not in the possession of coparceners and may



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consequently be deemed not to be really available for partition, as for instance, where part of the family property is in the possession of a mortgagee or lessee, or is an impartible Zamindari, or held jointly with strangers to the family who have no interest in the family partition. So also, partial partition by suit is allowed where different portions of property lie in different jurisdictions, or are out of British India. When an item of property is not admitted by all the parties to the suit to be their joint property and it is contended by some of them that it belongs to an outsider, then a suit for partition of joint property excluding such item does not become legally incompetent of any rule against partial partition.”

Therefore, the suit filed for the remaining properties of late Ramanajam is not hit by partial partition. Therefore, the first substantial question of law has to be answered in favour of the plaintiffs.



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13. As regards the second substantial question of law regarding ouster, the first defendant has not pleaded ouster. The possession of a co-owner, however long it is, can only be constituted as a possession for and on behalf of the other co-owners. In order to prove otherwise, the person setting up a plea of ouster has to plead ouster and should also plead as to the date from which his possession has become adverse/hostile to that of the other co-owners. It has been held time and again that to establish the plea of ouster in the case of the co-owner, the following ingredients should be established:

(i) There must be a declaration that a person in occupation in his own right is hostile to that of the other co owners and the other co-owner has knowledge of the same.

(ii) There must be a long and interrupted possession of the person pleading ouster.



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(iii) *Such exercise should be open and to the knowledge of the co-owners.*

14. The Hon'ble Supreme Court in ***B.R.Patil's case*** has observed in paragraph 27 as follows regarding the plea of ouster.

"24. The possession of a co-owner however long it may be, hardly by itself, will constitute ouster. In the case of a co-owner, it is presumed that he possesses the property on behalf of the entire body of co-owners. Even non-participation of rent and profits by itself need not amount to ouster. The proof of the ingredients of adverse possession are undoubtedly indispensable even in a plea of ouster. However, there is the additional requirement in the case of ouster that the elements of adverse possession must be shown to have been made known to the co-owner. This is apparently for the reason that the possession of a co-owner is treated as possession of other co-owners. While it may be true that it may not be necessary to actually drive out the co-owner from the property as noticed



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in Mohd. Zainulabudeen (since deceased) by lrs. v. Sayed Ahmed Mohideen and Others⁴, mere continuance in the possession of a co-owner does not suffice to set up a plea of ouster. The possession of the co-owner will also be referable to lawful title. The possession of the appellant even of the ground floor of the building on the land in question, was entirely in accord with his right as a co-owner.
"

Therefore in order to claim title by ouster there must be a plea of ouster and the ingredients of ouster must be clearly pleaded, proved and established.

15. In Ex.B11, which is the Sale Deed executed by the first defendant, the property has been described as an ancestral property. Further, in the suit O.S.No.133 of 2013 filed by the first defendant, the first defendant has described the property therein as the joint property of the plaintiffs and himself and his mother where each were entitled to 1/5th share. He has also mentioned that his father had not made any



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arrangements in respect of the property prior to his death. Therefore, even as late as in the year 2013, the first defendant has admitted that he is enjoying the properties as a co owner. Therefore, the first defendant's plea of a long, continuous and hostile possession fails even according to his plea in the other suit. The lower appellate Court has totally lost sight the fact that the plea of ouster has not even been made by the first defendant but raised only as an argument before the lower appellate Court. The appellate Court has clearly erred in dismissing the appeal on this ground. Therefore, the substantial question of law No.(2) is also answered in favour of the plaintiffs and consequently, the second appeal is allowed and the judgment and decree of both the Courts below are set aside. The suit is decreed as prayed for. However, considering the relationship between the parties, there shall be no order as to costs.

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Index : Yes/No
Speaking order/non-speaking order
srn

To

1. The Principal District Judge, Cuddalore,
2. The Principal Subordinate Judge, Cuddalore.
3. The Section Officer, V.R.Section, High Court, Madras



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