



AS.No.382/2014

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.B.BALAJI

AS.No.382/2014 & CMP.No.1/2014 & CMP.No.6903/2021

1.D.Mani
2.D.Susila

.. Appellants /
Plaintiffs

Vs.

1.Nithiyananthan
2.Jayasri
3.Pangajam

.. Respondents
/ Defendants

Prayer:- Appeal Suit filed under Section 96 of CPC against the fair and decretal order of the learned II Additional District Judge, Erode in OS.No.219/2011 dated 21.03.2014.

For Petitioner	:	Mr.A.K.Kumaraswamy Senior counsel for Mr.A.Kaithamalai Kumaran
For Respondents	:	Mr.N.Manokaran



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JUDGMENT

[Judgment of the Court was delivered by S.S.SUNDAR, J.,]

- (1) Plaintiffs in the suit in OS.No.219/2011 are the appellants in this Appeal Suit.
- (2) Appellants have filed the suit for partition of their 6/8th share in all the suit properties and for consequential reliefs on the basis that they are the son and daughter of late Thiru.M.P.Deivasigamani Gounder [hereinafter referred to 'M.P.Deivasigamani'].
- (3) It is the case of appellants that they are the children of first wife of late Thiru.M.P.Deivasigamani, by name, Unnayammal.
- (4) Brief facts that are set out in the plaint are as follows:
- (5) The appellants' mother by name Unnayammal, belonged to Mudaliar community and she was from the village Thingalur. Unnayammal and Thiru. M.P.Deivasigamani loved each other and the marriage between them was performed in the year 1948 by tying thali in Angalamman Koil in Thingalur. Since the family of late Thiru.M.P.Deivasigamani did not accept the marriage as Unnayammal belonged to different community, the parents of



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M.P.Deivasigamani arranged for a second marriage with the mother of defendants 1 and 2, the 3rd defendant/3rd respondent herein by name Pangajam. Referring to various instances by which the plaintiffs were always living with M.P.Deivasigamani and the fact that M.P.Deivasigamani was treating the plaintiffs as his own children, the appellants filed the suit for partition claiming that they are the children of late Thiru. M.P.Deivasigamani through his 1st wife Unnayammal and that the properties are the joint family properties of M.P.Deivasigamani. It is contended that the 3rd defendant has no right in the properties of M.P.Deivasigamani.

- (6) It is admitted by the parties that M.P.Deivasigamani died in the year 1988.
- (7) The suit was resisted by the 1st defendant by filing a written statement and the said written statement was adopted by defendants 2 and 3. In the written statement, the defendants raised the following contentions:-

- M.P.Deivasigamani did not marry the mother of plaintiffs by name Unnayammal at any point of time and that the



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said Unnyammal was living with some other person named Deivasigamani and therefore, the entire case of plaintiffs is false.

- M.P.Deivasigamani married only the 3rd defendant and that was the only marriage contracted by M.P.Deivasigamani, father of defendants 1 and 2. The mother of plaintiffs never married anyone as she dedicated herself to God as per her community and customs. She used to serve men who needed her and out of such men, she had close intimacy with a person by name Deivasigamani who is the father of plaintiffs and not M.P.Deivasigamani Gounder, father of defendants 1 and 2.
- Referring to several alienations and conveyances executed by M.P.Deivasigamani Gounder during his life time, it is contended that defendants 2 and 3 are in exclusive possession and enjoyment of the suit properties as actual owners for all these years. Therefore, the defendants perfected their title by ouster.



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- M.P.Deivasigamani during his lifetime, in a sound and disposal state of mind, executed a registered Will dated 28.06.1988 bequeathing all his properties which he got in the registered Partition Deed dated 26.03.1975 and that the said Will came into effect on the death of M.P.Deivasigamani on 16.07.1988.
- Defendants have made lot of improvements in the suit properties. The plaintiffs who have not questioned any of the alienations made by defendants and M.P.Deivasigamani during his life time, are estopped from claiming any share in the suit properties.

(8) Before the Trial Court, the following issues were framed:-

1. *Whether the plaintiffs are entitled to get preliminary decree for partition as prayed for?*
2. *Whether it is correct to say as the 3rd defendant has no right of inheritance since she was married by M.P.Deivasigamani during the life time of the 1st wife Unnayammal?*



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3. *Whether it is correct to say as 1st and 2nd defendants are illegitimate children of M.P.Deivasigamani born through the 2nd wife?*
4. *Whether it is correct to say as the 2nd item of the suit property was already sold by the 1st defendant?*
5. *Whether it is correct to say as the 3rd defendant became an absolute owner of the properties belonged to M.P.Deivasigamani by the Will dated 28.06.1988?*
6. *Whether the suit is not properly valued?*
7. *What other reliefs if any, the plaintiffs are entitled to?*

- (9) On behalf of plaintiffs, 1st plaintiff examined himself as PW1. PW2 and PW3 were examined on behalf of plaintiffs and Exs.A1 to A16 were marked. The 1st defendant examined himself as DW1 and defendants 2 to 4 were examined on behalf of defendants and Exs.B1 to B27 were marked on the side of defendants.



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(10) The Trial Court, on the specific issue as to the status of appellants held that the marriage of plaintiffs' mother with M.P.Deivasigamani was not proved as PW2 and PW3 are not the eyewitness who witnessed the marriage. However, the Trial Court accepted that M.P.Deivasigamani and Unnayammal were living together as husband and wife. The Trial Court further held that the 3rd defendant is the only legally wedded wife of M.P.Deivasigamani Gounder and that the plaintiffs have not proved that they are the children of M.P.Deivasigamani Gounder, by referring to Sale Deed – Ex.A7 where 1st plaintiff/purchaser was described as son of Deivasigamani whereas 1st defendant/vendor was described as son of M.P.Deivasigamani. Further, having regard to the birth dates of plaintiffs, the Trial Court proceeded to hold that the alleged marriage between M.P.Deivasigamani and Unnayammal is not true. The Trial Court also held that M.P.Deivasigamani Gounder executed the Will dated 28.06.1988 and that by virtue of the said Will, the 3rd defendant became the absolute owner of the properties belonged to M.P.Deivasigamani. All other issues were also held



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against plaintiffs and the suit in toto was dismissed by the Trial Court. Aggrieved by the same, the plaintiffs have preferred the above Appeal Suit.

- (11) Mr.A.K.Kumaraswamy, learned Senior counsel appearing for appellants/plaintiffs submitted that the Trial Court disbelieved the case of plaintiffs with regard to their status as well as the marriage between plaintiffs' mother Unnayammal with M.P.Deivasigamani without considering the material evidence and the admission of DW4. Learned Senior counsel further submitted that the suit properties are the joint family properties of M.P.Deivasigamani and plaintiffs 1 and 2 and therefore, M.P.Deivasigamani is not entitled to execute the Will in respect of whole properties in favour of the 3rd defendant. The learned Senior counsel who has no quarrel with the findings of the Trial Court as regards the truth and genuineness and due execution of the Will by M.P.Deivasigamani, submitted that the father had only 1/2 right in all the properties and therefore, the Will assuming it to be true, cannot be valid and binding on plaintiffs in respect of their 2/3rd share in all the suit properties.



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Learned Senior counsel relied upon several documents and the findings of the Trial Court to demonstrate how the Trial Court has given findings mutually contradictory without reference to the material evidence and the admission while deciding the issue regarding the status of plaintiffs, whether they are the children of M.P.Deivasigamani.

- (12) ***Per contra***, Mr.N.Manokaran, learned counsel appearing for respondents/defendants submitted that the entire evidence adduced on both sides would only lead to the conclusion that M.P.Deivasigamani, father of defendants 1 and 2 is not the husband of plaintiffs' mother Unnayammal. He also referred to several documents to show that the properties have been dealt with by M.P.Deivasigamani and that the appellants have not questioned any of the alienations by M.P.Deivasigamani during his life time. It is further stated that plaintiffs/appellants who knew that M.P.Deivasigamani executed a Will under Ex.B27 dated 28.06.1988, did not file a suit for partition questioning the Will. Since the 3rd defendant is in possession on the basis of the Will and



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her possession was absolute, the appellants who have not even pleaded about their joint possession, have lost their right by ouster.

(13) This Court considered the submissions made on either side and also perused the materials placed.

(14) Having regard to the rival contentions of the learned counsels appearing on either side and the pleadings, this Court is of the view that following issues arise for consideration:-

A) Whether the marriage between appellants' mother Unnayammal and M.P.Deivasigamani is proved and the appellants are the children of M.P.Deivasigamani through his first wife Unnayammal?

B) Whether the properties are joint family properties or self-acquired properties of M.P.Deivasigamani?

C) Whether the Will dated 28.06.1988 executed by M.P.Deivasigamani in favour of 3rd defendant/3rd respondent is proved and valid and whether by virtue of the Will, the 3rd respondent herein/3rd defendant is the absolute owner of all the properties belonged to M.P.Deivasigamani under the Will?



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D) Whether the appellants have lost their right to seek partition by ouster?

POINT [A]:-

- (15) On the first issue, the Trial Court has not even referred to the relevant documents and the evidence. A conscious attempt was made before the Trial Court by the defendants to establish that the mother of appellants by name Unnayammal was living as a Devadasi as if she was serving every men who needed her. This character assassination is done by the 1st defendant not only in the written statement but during evidence as DW1 even though he only heard from others without examining anyone who gave him that story. It is further stated by many of the witnesses examined on behalf of defendants that one Deivasigamani who was the father of appellants/plaintiffs and who was living with Unnayammal, is not M.P.Deivasigamani, father of defendants 1 and 2. Though several documents executed by M.P.Deivasigamani were produced to show that M.P.Deivasigamani did not recognise the plaintiffs/appellants as his legal heirs/children, this Court consciously considered several



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documents produced by plaintiffs. The appellants / plaintiffs produced the Transfer Certificate of plaintiffs, marriage invitation of plaintiffs and several other documents to show that they are the children of M.P.Deivasigamani.

- (16) In the evidence, PW2 has deposed to the effect that plaintiffs are the children of M.P.Deivasigamani. PW1 is aged about 70 years and his evidence would show that plaintiffs are the children of M.P.Deivasigamani. His evidence cannot be ignored insofar as the relationship. He has alleged that he knew the marriage between Unnayammal and M.P.Deivasigamani in 1948. This may not be true as he was just 5 years old in 1948. No suggestion was put to the witness regarding identity of M.P.Deivasigamani who according to the witnesses, married Unnayammal. The evidence is believable to the extent that Unnayammal and M.P.Deivasigamani were living together as husband and wife for a long number of years. PW3 is an 83 years old lady and she had also given evidence about the marriage as well as the fact that Unnayammal was living with M.P.Deivasigamani for a long time. Though PW3 is an



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illiterate, her evidence also cannot be discarded as no motive or reason can be attributed merely because some suggestions were put to the witness to discredit her evidence.

- (17) DW1/1st defendant/1st respondent herein in his evidence, denied the factum of marriage between Unnayammal and M.P.Deivasigamani. The 1st defendant specifically admit that he knows about Unnayammal only from others. Though he is unable to admit that he knows personally about his statement that plaintiffs are the children of another Deivasigamani, in the cross-examination, his evidence is not convincing as he says that he has only heard about the other person namely Deivasigamani from others. The evidence of the 1st defendant as DW1 would only show that he is not competent to speak about the marriage of M.P.Deivasigamani with Unnayammal or the legal status of plaintiffs.
- (18) DW2 is a person who is just a daily labourer and therefore, his evidence cannot be believed especially his assertion in the proof affidavit does not go well with the statement during cross-examination. During cross examination, DW2 admits that he does



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not know anything about the marriage between Unnayammal and M.P.Deivasigamani and he did not know whether marriage was solemnised between M.P.Deivasigamani and Unnayammal. Therefore, he appears to have signed the proof affidavit without knowing the contents.

- (19) DW3 is only an attester of the Will stated to have been executed by M.P.Deivasigamani in favour of 3rd defendant. His evidence regarding relationship is not relevant. However, DW4 is one Saminathan who is aged about 70 years and he is the son of paternal uncle of M.P.Deivasigamani. Therefore, he is like a brother of M.P.Deivasigamani and a family member of M.P.Deivasigamani. In the course of his evidence, DW3 has staed as follows:-

"..... எனது பெரியப்பா மகன்
தெய்வசிகாமணியும், மனைவிதான்
உண்ணாயம்மாள் என்றும், அவர்கள் இருவருக்கும்
திருமணம் நடந்து ஒன்றாக இருந்து வந்தார்கள்
என்றும், வாதிகள் இருவரும் அவர்களது மக்கள்
என்று சொன்னால் சரிதான்....."

- (20) Though his earlier evidence is contradictory to the statement above



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referred to, the oral evidence only suggest that other witnesses examined by defendants have not spoken the truth and they have not produced any material evidence to corroborate their statements during evidence. The portion of evidence of DW4 admitting the relationship and marriage of M.P.Deivasigamani with Unnayammal is not explained either by re-examination or by other documents. On appreciation of overall evidence, this Court has no hesitation to hold that M.P.Deivasigamani has married Unnayammal, the mother of plaintiffs/appellants.

- (21) The learned counsel for the respondents would submit that plaintiffs are born only after the birth of defendants 1 and 2 and therefore, the marriage of Unnayammal and M.P.Deivasigamani would not have happened prior to the marriage of M.P.Deivasigamani with the 3rd defendant. This argument is not supported by any pleading. Merely from the dates of birth of plaintiffs the marriage of M.P.Deivasigamani with Unnayammal cannot be presumed to be performed at a later point of time, especially, when none of the witnesses who have been examined,



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have suggested the case now argued by the learned counsel for the respondents. The evidence of plaintiffs' witnesses, particularly, PW3 cannot be discarded. The conscious attempt made by defendants to put forth the case by depicting Unnayammal as a Devadasi would show that the conduct of 1st defendant. It is seen that the entire family of M.P.Deivasigamani were against the marriage of Unnayammal with M.P.Deivasigamani and therefore, the family of M.P.Deivasigamani as such did not accept her as the wife of M.P.Deivasigamani. On the preponderance of probability, this Court would conclude that M.P.Deivasigamani, father of defendants 1 and 2 had married plaintiffs' mother Unnayammal, prior to the marriage of M.P.Deivasigamani with the 3rd defendant, Pangajam. **Hence, Point [A] is answered in favour of appellants / plaintiffs.**

POINT [B]:-

- (22) The appellants have specifically stated that the properties are all joint family properties of M.P.Deivasigamani as he got them only in the family partition of the year 1955. The specific contentions of



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the appellants / plaintiffs as regards character of suit properties are not denied by the defendants in the written statement. From the pleadings and evidence, this Court finds no difficulty in holding that the suit properties are the joint family properties of M.P.Deivasigamani. **Hence, the suit properties are joint family properties of M.P.Deivasigamani and Point [B] is answered accordingly.**

POINT [C]:-

- (23) The Will alleged to have been executed by M.P.Deivasigamani is marked as Ex.B27 and it is dated 28.06.1988. The attesor of the Will, namely, DW3 is examined to prove the due execution of the Will. There is no pleading by way of reply statement disputing the genuineness of the Will under Ex.B27, even though the defendants have stated in their written statement about the execution of Will and the enjoyment of the 3rd defendant as the sole legator under the Will as absolute owner. This Court has perused several documents executed by M.P.Deivasigamani during his life time and in all the documents of conveyance and other dispositions.



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M.P.Deivasigamani while describing defendants 1 and 2 as his children and the 3rd defendant as his wife, did not refer to the plaintiffs as his children and Unnayammal as his wife. M.P.Deivasigamani appears to be a respectable man having vast extent of properties at his disposal as absolute owner. He was hale and healthy and was in a sound disposing state of mind at the time of execution of Will and it is not an issue. The findings of the Trial Court regarding genuineness and the validity of the Will is supported by reasons. Learned Senior counsel has not seriously disputed the said findings of the Trial Court and therefore, this Court also holds that Will dated 28.06.1988 stated to have been executed by M.P.Deivasigamani in favour of the 3rd defendant under Ex.B27 is proved in accordance with law. **Point [C] is answered accordingly.**

POINT [D]:-

- (24) In the written statement filed by the 1st defendant adopted by defendants 2 and 3, it is stated in paragraph No.12 as follows:-

"12.This defendant states that he and the defendants



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2 and 3 have been in exclusive possession and enjoyment of the entire suit properties as absolute owners for all these years openly, continuously to the exclusion of the plaintiffs as of right for several decades more than the statutory period and perfected their right and title to the suit properties by adverse possession also. In any event the plaintiffs have been ousted and their right if any without admitting the same, is extinguished. Hence, the plaintiffs are not entitled to any of the reliefs claimed in the suit."

- (25) Though the Trial Court has not framed any issue, defendants have produced several documents to show that the properties were dealt with by M.P.Deivasigamani during his life time and thereafter, by the 3rd defendant by executing several documents as absolute owner of the suit properties. Ex.B7 is the Partition Deed dated 26.03.1975 between M.P.Deivasigamani and the 1st defendant. The properties which were allotted to M.P.Deivasigamani earlier under Ex.B6-Partition dated 26.05.1955 are the subject matter of partition between M.P.Deivasigamani and the 1st defendant under Ex.B7. Based on the partition, both M.P.Deivasigamani as well as the 1st



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defendant have executed several Sale Deeds by referring to partition and as absolute owners of the suit properties.

- (26) It is admitted that there was a Partition Deed under Ex.A1 dated 26.05.1955 [also marked as Ex.B6] in respect of the entire family properties among the sons of A.Palanisamy Gounder who is the father of M.P.Deivasigamani. The partition under Ex.A1 and the allotment of properties as per Ex.A1 is amply proved by several alienations by M.P.Deivasigamani and his brothers who got allotment in the family partition under Ex.A1. The subsequent Partition Deed between M.P.Deivasigamani and the 1st defendant was also acted upon. It is unfortunate to note that plaintiffs have not challenged either the partition between M.P.Deivasigamani and the 1st defendant or the alienations made by the 1st defendant on the basis of allotment under Ex.B27 dated 26.03.1975. The documents produced by defendants would lead to the inference that the plaintiffs never bothered to claim any right over vast extent of properties being dealt with by 1st defendant as well as his father M.P.Deivasigamani during his life time. The plaintiffs have not



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sought for partition in respect of those properties which were allotted to 1st defendant in the 1975 Partition. They have now chosen to include only the properties that were dealt with by their father M.P.Deivasigamani under the Will Ex.B27. The Will was executed by M.P.Deivasigamani in the year 1988 dated 28.06.1988 and came into effect on the death of M.P.Deivasigamani on 16.07.1988. The legal heirship certificate under Ex.B5 shows only the names of defendants 1 to 3 as wife and children of M.P.Deivasigamani.

- (27) It is the specific case of defendants that 3rd defendant is in exclusive possession of all the properties bequeathed in her favour under the Will Ex.B27. This Court has no reason to interfere with the findings of the Trial Court as regards the Will. When the Will was acted upon and the allotment as per the Will is not an issue, the plaintiffs are expected to prove their joint possession. No document or evidence is let in by the plaintiffs to prove that they even claimed joint enjoyment along with the 3rd defendant. Execution of Will and alienations as exclusive owners acts in hostility against the interest



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of plaintiffs. When a co-owner claim title by adverse possession, he must establish ouster. There must be proper pleading. A person who claims title by ouster should establish [a]proclamation or declaration of hostile animus; [b] long and uninterrupted possession ; and [c]exercise of right of exclusion ownership openly and to the knowledge of other co-owner. Sri.M.P.Deivasigamani got several properties under Ex.A1-Partition Deed dated 26.05.1955. Ex.B7 is the partition of joint family properties between M.P.Deivasigamani and 1st defendant. The plaintiffs are not made parties and they never questioned such partition during the life time of M.P.Deivasigamani. There were several alienations in respect of joint family properties by father and 1st defendant under Ex.B8 dated 07.07.1975 and Ex.B9 dated 12.03.1984. The Will under Ex.B27 executed by father which came into effect in 1988 is not challenged even though defendants produced kist receipts, E.B. service connection etc., in favour of 3rd defendant to prove that she was in possession as exclusive owner under the Will. Several other alienations in favour of third parties are not questioned. The



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plaintiffs have not claimed any share during the life time of M.P.Deivasigamani.

(28) This Court, having regard to the nature of evidence and the documents filed by defendants is unable to agree with the plaintiffs that they are in joint possession as co-owners. The plaintiffs as a whole, were ousted from the family as seen from the materials and documents. The case of the defendants that they have ousted the plaintiffs from the properties is supported by several documents. As against voluminous documents and material evidence, the plaintiffs have not proved or established their joint possession by exercising their right of co-ownership at any point of time at least by making a claim before revenue department for mutation. This Court finds from specific pleading and evidence to substantiate the case of defendants that the 3rd defendant has prescribed title by ouster. **Hence, Point [D] is answered in favour of defendants.**

(29) This Court finds no merit in the Appeal Suit and accordingly, the same is **dismissed** confirming the judgment and decree dated 21.03.2014 made in OS.No.219/2011 on the file of the learned II



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connected miscellaneous petitions are closed.

[SSSRJ] [PBBJ]

14.02.2023

AP

Internet : Yes

To

1.The II Additional District Judge
Erode.

2.The Section Officer
VR Section, High Court
Madras.



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S.S.SUNDAR, J.,

AND

P.B.BALAJI, J.,

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