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A.S.No.189 of 2

THE HIGH COURT OF JUD ICATURE AT MADRAS

DATED: 21.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR

A.S.No.189 of 2017
and
C.M.P.No.7926 of 2017

R.Rayappan (Died)

1.R.Ayyasamy

2.Rojamani

3.Manonmani

4.Rajammal

...Appellants

Vs.

1.Rajammal (Died)

V.Lalitha (Died)

2.V.Padmavathy

3.R.Velusamy

4.V.Moorthy

5.B.Senthil

6.S.Sivakumar

1/24



7.P.Rajan

8.Raji

9.Rajendran

A.S.No.189 of 2



...Respondents

(R1 Died, R8 & R9 are brought on record as LR's of deceased 1st respondent viz., Rajammal vide order of Court dated 14.02.2023 made in CMP.No.19318/2021 in A.S.No.189/2017)

Prayer: First Appeal filed under Order 41, Rule 1 and 2 r/w. Section 96 of Civil Procedure Code, against the judgment and decree dated 24.08.2016 made in O.S.No.66 of 2012 on the file of the I-Additional District and Sessions Judge, Coimbatore.

For Appellants : Mr.T.L.Thirumalaisamy

For Respondents : Mr.C.Veeraraghavan for R2 & R4, R8 & R9

R5 to R7 - served - No appearance

R1 - Died

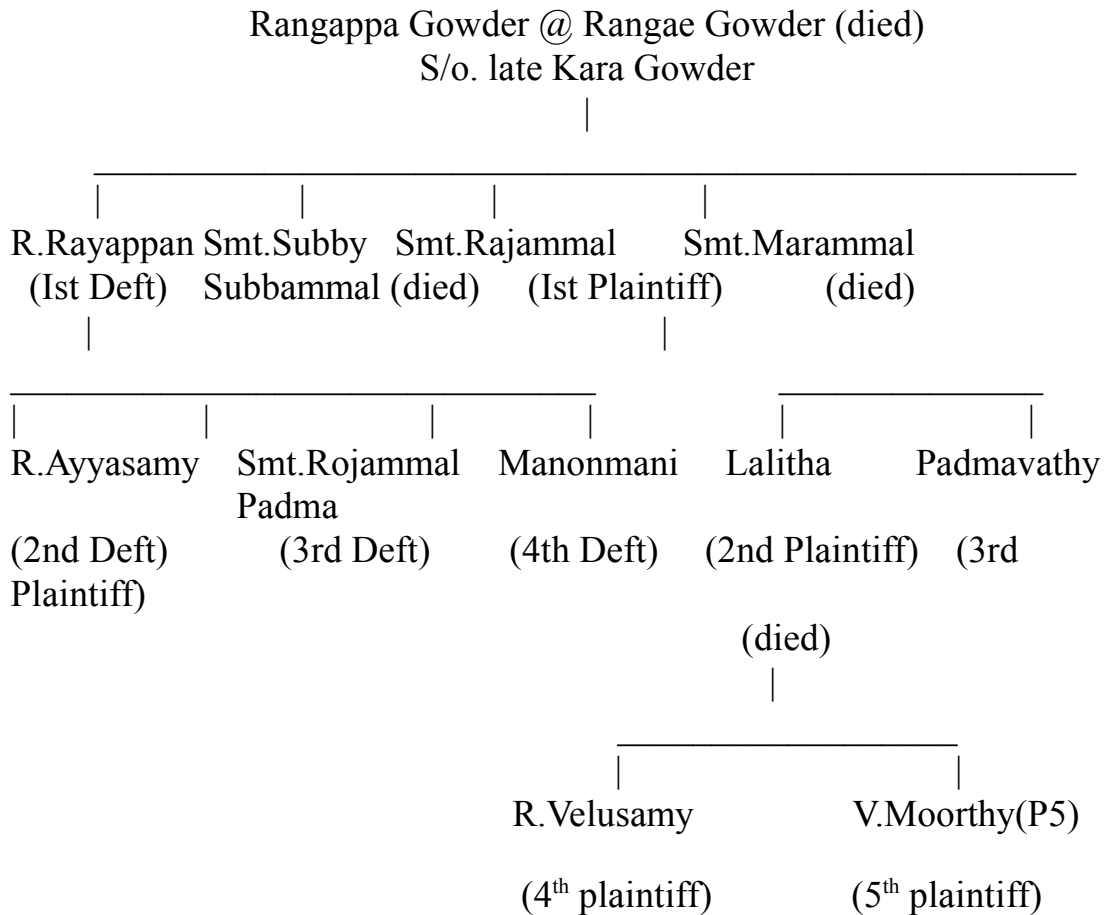
J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

The defendants in O.S.No.66 of 2012, who had suffered a decree for partition and separate possession of the plaintiffs' 2/3rd share in the suit properties are on appeal.



2.Originally, the suit was laid by the three plaintiffs, who are daughters and grand daughters of Rangaiya Gowder @ Rangappa Gowder against his only son, his children and the tenants. The geneology is as follows:-



3.Upon the death of the 2nd plaintiff / Lalitha, her heirs were impleaded as plaintiffs 4 and 5. The plaintiffs would claim that the suit properties originally belonged to one Rangappa Gowder @ Rangae Gowder, son of Kara Gowder, who died before 1955 leaving behind his only son



Rangaiya Gowder @ Rangappa Gowder, who also died some time in early 1970s. The said Rangaiya Gowder died leaving behind one son namely, Rayappan / 1st defendant in the suit, three daughters namely, Subby Subbammal, Rajammal and Marammal. The Subby Subbammal is stated to have died without issues. Marammal had died leaving behind the plaintiffs 2 and 3 during the pendency of the suit. Since the 2nd plaintiff / Lalitha died pending suit, her husband and son were brought on record as plaintiffs 4 and 5. Contending that the suit properties belonged to Rangaiya Gowder, who died some time in early 1970s, the plaintiffs as daughters and the children of Marammal, another daughter, claimed 2/3rd share in the properties.

4..The suit was resisted by the defendants 1 to 4, who are son of Rangaiya Gowder @ Rangappa Gowder and his children, contending that the plaintiffs are not entitled to any share in the suit properties in as much as the defendants have prescribed their title by ouster. It was contended that the father of the 1st defendant, Rangaiya @ Rangappa Gowder died even in the year 1955 and hence, the 1st defendant alone is entitled to the entire suit properties and his daughters will not get any right over the properties. It



was also contended that the defendants have been in open hostile exclusive possession of the properties for over 57 years and they have also effected improvements by constructing several houses in the suit properties and they have been enjoying the same by letting out the same to the exclusion of the plaintiffs. It was also contended that they had entered into a partition on 15.02.1995 effecting a division of some other properties that were left behind by Rangappa @ Rangae Gowder and therefore, this action of entering into a partition as between the defendants themselves would demonstrate that the plaintiffs were excluded from enjoyment of the properties and the same would constitute ouster.

5. On the above contentions, the defendants sought for dismissal of the suit. The 1st defendant died pending suit and the other defendants, who are his legal heirs were already on record. His wife, Rajammal was impleaded as 8th defendant. On the above pleadings, the learned Trial Judge framed the following issues:-

- i) Whether the plaintiffs are entitled to any right in the suit properties.*
- ii) Whether the plaintiffs are in joint possession and enjoyment of the properties.*
- iii) Whether the Court fee paid in the suit is correct.*



6. At trial, P.W.1 and P.W.2 were examined on the side of the plaintiffs. P.W.1 is the 1st plaintiff and the P.W.2 is the 3rd plaintiff and Exs.A1 to A19 were marked. On the side of the defendants, D.W.1 to D.W.3 were examined and Exs.B1 to B15 were marked. The 2nd defendant was examined as D.W.1 and one Tmt.Manonmani / 4th defendant, daughter of Rayappan was examined as D.W.2. One Senthil was examined as D.W.3. Though there was specific plea regarding ouster, the learned Trial Judge did not frame the issue regarding ouster. He however, considered the same while considering the 2nd issue relating to joint possession.

Issue No.1:-

7. As far as the Issue No.1 is concerned, the learned Trial Judge concluded that since the relationship is admitted and ownership of Rangaiya Gowder @ Rangappa Gowder is admitted, the plaintiffs, being the daughters and children of one of the daughters would be entitled to claim a share in the suit properties. The learned Trial Judge also concluded that since the plaintiffs co-sharers, they are deemed to be in joint possession. The learned Trial Judge however, held that the properties being the ancestral properties, Rayappan / 1st defendant would be entitled to 1/2 share and the



plaintiffs 3 to 5 would be entitled to 1/3rd share each in the half share of their father, as per the provisions of unamended Section 6 of the Hindu Succession Act.

8.On the question of Court fee, the learned Trial Judge found that the plaintiffs are found to be in joint possession, the Court fee paid under Sub-section 2 of Section 37 would be sufficient. Aggrieved, the defendants 2, 3, 4 and 8 are on appeal. Pending appeal, the 1st respondent / Rajammal died and her legal heirs have been brought on record as respondents 8 and 9.

9.We have heard Mr.T.L.Thirumalaisamy, learned counsel appearing for the appellants and Mr.C.Veeraraghavan, learned counsel appearing for R2 to R4, R8 & R9. Though served, respondents 5 to 7 are not appearing either through counsel or in person.

10.Mr.T.L.Thirumalaisamy, learned counsel appearing for the appellants would vehemently contend that the learned Trial Judge ought to have framed an issue of ouster, since there was a specific plea regarding the ouster. He would also submit that the suit is barred by limitation in view of



Article 110 of the Limitation Act. To buttress his submission,

Mr.T.L.Thirumalaisamy would submit that on the death of Rangaiya @

Rangappa Gowder, the revenue records were mutated in the name of his son, Rayappan and they continued in his name and in 1995 Rayappan effected a partition between himself and his children thereby, exercising rights of absolute ownership. The said partition was evidenced by a registered instrument namely, Ex.A5. According to the learned counsel, the fact that Ex.A5 was registered with the jurisdictional Sub-Registrar would amount to notice of exclusion of the plaintiffs from the enjoyment of the properties in terms of Explanation 1 of Section 3 of the Transfer of Property Act. Therefore, according to the learned counsel, the Trial Court miserably failed to consider these aspects when it came to the conclusion that the plaintiffs were in joint possession with the defendants.

11.Arguing further, the learned counsel for the appellants would submit that the plaintiffs have pleaded that they were being given a share in the income from the property till a few years prior to the filing of the suit. There is no shred of evidence in support of such a plea. He would also draw our attention to Ex.B3 to B5, the patta passbooks issued in early 1970s,



which shows that revenue records stood in the name of Rayappan even during the early 1970s. He would also draw our attention to the Adangal extracts that had been filed as Ex.B7 for Fasli year 1404 dated 11.05.2012 equivalent to 1994, which would go to show that the lands stood in the name of Rayappan. He would also draw our attention to Ex.B12, 'A' Register extract, which stands in the name of defendants 1 and 2, Ex.B10 / Patta, which stands in the name of defendants 1 and 2 and Ex.B11, another patta in respect of Survey Nos. 28-A and 29-A, which stands in the name of the Rayappan, his wife and children.

12.Relying the above documentary evidence, the learned counsel for the appellants would submit that the properties were in exclusive possession of Rayappan, the 1st defendant and his children ever since the death of Rangaiya @ Rangappa Gowder. The Trial Court has come to the conclusion that Rangaiya @ Rangappa Gowder should have died some time in 1966. The suit for partition came to be filed in the year 2012 i.e., nearly after 46 years after the death of the Rangaiya @ Rangappa Gowder.



13.The learned counsel for the appellants would also invite our attention to Article 110 of the Limitation Act, which reads as follows:

<i>Description of appeal</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
110. By a person excluded from a joint family property to enforce a right to share therein	Twelve years	When the exclusion becomes known to the plaintiff.

14.The learned counsel for the appellant would submit that though no issue was framed on the question of limitation under Section 3 of the Limitation Act, the Court is obliged to consider the question of limitation. The learned counsel would point out that the very fact that the defendants had entered into a registered deed of partition amongst themselves excluding the daughters of Rangaiya @ Rangappa Gowder even in the year 1995 would show that the plaintiffs were excluded from enjoyment of the properties to their knowledge. Referring to Section 3 of the Transfer of Property Act, which defines the phrase "person is said to have notice" the learned counsel would submit that factum of registration of the document would itself amount to notice and a person who wilfully abstained from enquiry or a search will be deemed to have notice.



15.Drawing our attention, in particular, to Explanation 1 of Section 3,

which reads as follows:-

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"a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation 1.--Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or; 7[where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:"]

The learned counsel would submit that registration of the partition deed with a jurisdictional Sub-Registrar would amount to notice to the plaintiffs of their exclusion from the enjoyment of the property and therefore, the suit filed 22 years after such registration is barred by limitation.

16.Contending contra, Mr.C.Veeraraghavan, learned counsel appearing for the respondents / plaintiffs would submit that there is a specific plea in the plaint that the plaintiffs were being paid their share in the income till a few years prior to the institution of the suit and therefore,

11/24



theory of exclusion has no legs to stand. He would also submit that D.W.2 has admitted that Rangaiya @ Rangappa Gowder only died after her birth and therefore, the theory that is put forward by the defendants that Rangaiya @ Rangappa Gowder died prior to the enactment of Hindu Succession Act and therefore, the daughters will not have right over the property cannot hold water. The learned counsel would also submit P.W.1 and P.W.2 have deposed that they have been receiving share of the income from the property. We have considered the rival submissions.

17.From the arguments of the learned counsel appearing for the parties, the following points arise for determination:-

i) Whether the plaintiffs have been ousted from enjoyment of the property for over a long period so as to deny them the right to seek partition.

ii) Whether the suit cannot be said to be barred by limitation under Article 110 of the Limitation Act.

18.There is no specific evidence to show that date of the death of Rangaiya @ Rangappa Gowder. From the evidence of D.W.2, the Trial Court has approximately arrived at the time of his death as some time in



1966 or 1967. The plaintiffs base their claim as legal heirs of Rangaiya @ Rangappa Gowder. The suit has been filed in 2012 nearly 40 to 45 years after the death of Rangaiya @ Rangappa Gowder therefore, unless the plaintiffs are able to establish that they were in possession or that they had received their share of the income from the suit properties, till a few years prior to the suit, as claimed by them the plaintiffs cannot be said to have been in joint possession of the property.

19. In deciding the question of ouster, it has been held by this Court and the Hon'ble Supreme Court that mere exclusion from possession will not be sufficient, there must be something more than mere exclusion from possession. In ***Ibramsa V. S.K. Meerasa*** reported in ***AIR 1972 Madras 467***, a Division Bench of this Court had extensively considered, the distinction between adverse possession as between strangers and ouster as between co-owners. After referring to various decisions on the question, the Division Bench had summarized the law as follows:-

“In a case of ouster of a co-owner, the position is entirely different. The possession of one co-owner is presumed to be on behalf of all the co-owners in view of the unity of title



and possession. Because of this presumption of joint ownership in the case of co-owners the law requires to constitute ouster, proof of something more than mere exclusive possession and exclusive receipt of income. Along with exclusive possession there must be an ouster, a hostile, open denial and an open repudiation of the other co-owner's right to the latter's knowledge. The co-owner in exclusive possession cannot render his possession adverse to the other co-owner merely by any secret, hostile animus on his own part in derogation of other co-owner's title. Vide the observations in [P. Lakshmi Reddy v. L. Lakshmi Reddy](#), ; [Sinnaraj Pillai v. Ramayee Ammal](#), and [Shambhu Prasad v. Phool Kumari](#), . But, this does not mean that the co-owner who has been ousted or excluded should be expressly informed as such by the other co-owner. If other circumstances concur the Courts, in proper cases, may legitimately infer, from exclusive possession for a considerable length of time, that the other co-owner has been excluded to his knowledge and that title has been denied and repudiated by the hostile assertion of the co-owner in possession. The theory of lost grant is applicable to support long continued possession for a considerable length of time and the most important element in presuming ouster is the time factor or the length of time of sole and exclusive possession by one co-owner. If a co-owner does not assert his rights for a considerable length of time with the result that the other side is handicapped, by lapse of time and disappearance of evidence,



from proving that his exclusive possession was coupled with open denial and open repudiation of the title of the other co-owner either at the inception or subsequently, the co-owner who has been inactive must take the consequence for the long delay in bringing the suit which has prejudiced the other side and occasioned the loss of evidence by lapse of time.”

20.From the above, it could be gathered that what is required is that the co-owner, who is excluded must have knowledge that his or her title has been denied or repudiated by the hostile assertion of the co-owner in possession. It has also been reiterated that the co-owner in possession need not expressly inform the co-owner, who is not in possession that he claims a hostile title. If he is able to show that by actions, he had committed such overt acts, which would indicate that he is asserting his title to the exclusion of the other co-owner, the same would be sufficient to prove ouster. The very same question was considered by this Court in ***Valliammal (late) and 2 Others Vs. Pachiammal*** reported in ***1996 1 LW 310*** wherein, it was held that once it is shown that the defendants have effected improvements over the property and had transferred the share of one co-owner to the other amongst themselves for over a period of 35 years, the same would amount

15/24



to ouster. The very same position was reiterated by this Court in *Venkatrama and others Vs. N.Munuswamy Naidu and Others* reported in **2010 (4) CTC 640** by another learned Single Judge of this Court.

21. Having set out the principles, let us now advert to the evidence on record in the case on hand. On the side of the plaintiffs, except the oral evidence of the plaintiffs 1 and 3, there is nothing more to show that they were in enjoyment of the property or that they were paid their share in the income from the properties either during the life time of the 1st defendant or thereafter. Admittedly, the father Rangaiya @ Rangappa Gowder died some time in late 1960s or early 1970s. The revenue records were mutated in the name of the 1st defendant even as early as in the year 1974 as is evident from Exs.B3 to B5. The 1st defendant and his children have entered into a partition with reference to some of the properties under Ex.B6 dated 15.02.1995. Ex.B6 is a registered instrument. As we had already point out, a registration of a partition deed in the Office of the Sub-Registrar concerned would amount to notice, to all concerned, of an assertion of title under Explanation 1 to Section 3 of the Transfer of Property Act.



22.The Hon'ble Supreme Court considered this question in ***Janardhan Prasad Vs. Ramdas*** reported in ***(2007) 3 MLJ 721 (SC)*** and concluded that the registration of an instrument would amount to notice and their failure to act even after that to make enquiries would result in losing their right to sue. The Hon'ble Supreme Court considered the scope of Section 3 and the definition of the term "a person is said to have notice" under Section 3 of the Transfer of Property Act and held that registration of an instrument in the manner prescribed in the Registration Act and the rules made there under would amount to notice of assertion of hostile title.

23.It is also in evident that the defendants had put up construction in the property, improved the property vastly and such activities were not objected to by the plaintiffs, who claimed to be a co-owners. A full bench of this Court in ***B.Suresh Chand Vs. State of Tamil Nadu*** reported in ***2006 (4) CTC 805*** has also considered the question of knowledge or notice under Section 3 of the Transfer of Property Act. In doing so, the Bench observed as follows:-

“25. A reading of Section 3 of the Transfer of Property Act, 1882 leads to the conclusion that, not only a wilful



abstention from an enquiry which a person ought to have made, but the gross negligence to make enquiry also would amount to notice of a fact to him. When the prudence of a person requires him to make an enquiry, but due to his own negligence he failed to make enquiry, he falls in the category of a person, with notice. A purchaser of the property who claims the transaction to be bona fide without notice, the yardstick to be applied for the "notice" is given in Section 3 of the Transfer of Property Act, 1882 and only by the application of this provision, a purchaser who seeks protection is to be identified, whether he is a purchaser for value without notice. The necessity of the purchase, the intention of the transfer, the relationship between the vendee and vendor are all vital factors to find out the reasonableness of the person in purchasing the property. Sometimes unexplained secrecy or the haste in the transactions may also throw some light on the bona fides or mala fides. To decide whether a transaction was genuine or bona fide or mala fide, all facts relating to the conduct of the parties to the transaction have to be weighed as a whole.

26. The plaintiffs in this case have not disputed the liability of their vendors to pay the sales tax, even at the time of the sales, but claim protection under the exception clause, for which the parameters of Section 3 of the Transfer of Property Act 1882 have to be applied. Every purchaser from the assessee is naturally interested to protect the property and



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A.S.No.189 of 2



will claim to be a bonafide purchaser. For the sake of their claim, the Court cannot approve the transaction as a bonafide sale.”

24.We have also adverted to the fact that the revenue records were mutated in the name of Rayappan / 1st defendant even in the year 1974. Rayappan had entered into a partition deed with his children treating the entire property as his own as early as in 1995 and effected large scale improvements over the property. The plaintiffs have not moved their little finger till 2012, when they filed the present suit.

25.It is not shown that the suit was proceeded by a pre-suit notice also. As pointed out by the Division Bench in ***Ibramsa Vs. S.K.Meerasa*** referred to supra, while it is necessary that the co-owner in possession should assert his hostile title to the knowledge of the other co-owner, it is not necessary that he should expressly inform the co-owner, who is out of possession as to such assertion. We are of the considered opinion that the registration of the partition deed, Ex.B6 on 15.02.1995 would satisfy the requirement of assertion of hostile title by the co-owner in possession so as to put the other co-owner of notice of such assertion of title. The suit has been filed 17 years thereafter. Even before the execution of the partition,

19/24



soon after the death of Rangaiya @ Rangappa Gowder, mutation of the revenue records has been effected in the name of his son, the 1st defendant in the suit. There is nothing on record to show that the plaintiffs had at any point of time made any claim over the properties prior to the filing of the suit in 2012.

26.We are therefore, of the considered opinion that the Trial Court was not right in concluding that the plaintiffs were in joint possession. They were actually excluded from possession for a considerable length of time from which, we can conveniently presume ouster. We therefore, answer the 1st point in favour of the appellants.

Issue No.2

27.On the question of limitation, what assumes importance is Article 110, more particularly the 3rd column of Article 110 that is, the date of knowledge of exclusion in order to hold that a suit for partition is barred by limitation. The exclusion must be total and absolute, there is a long line of decisions of this Court, which deal with the term “*knowledge of exclusion*” appearing in Article 110. All of them have been referred to by the Hon'ble



Mr.Justice Palanivelu in *Venkatramana and Others Vs. N.Munuswamy*

Naidu and Others reported in **2010 (4) CTC 640**. In order to infer exclusion, it must be shown that the plaintiffs were excluded from enjoyment of the property for quite a long time and the defendants had in fact asserted open hostile title to the knowledge of the plaintiffs.

28.The Trial Court has fixed the death of the Rangaiya @ Rangappa Gowder some time in 1966. The suit came to be filed 46 years thereafter. In the interregnum, the revenue records were mutated in the name of son of Rangaiya @ Rangappa Gowder, the 1st defendant. The 1st defendant had effected several improvements and put up several constructions in the suit property. He had also entered into a partition deed with his children asserting title to the entire property, except Item 2. These facts would definitely amount to exclusion. The requirement of Article 110 does not stop there because the limitation starts from the date on which the plaintiffs had knowledge of such exclusion.

29.In the case on hand, the knowledge of exclusion can be readily inferred from the fact that Ex.B6, partition deed has been registered. It is



dated 15.02.1995. We have also referred to the judgment of the Hon'ble Supreme Court in ***Janardhan Prasad Vs. Ramdas*** reported in (2007) 3 ***MLJ 721 (SC)***. The Hon'ble Supreme Court had held that under Explanation 1 to Section 3, the act of registration of a document would amount to notice of exclusion and the limitation will trigger from the date of such registration.

30.The law is well settled on the position that limitation once started running cannot be arrested. The full Bench of this Court in ***B.Suresh Chand Vs. State of Tamil Nadu, supra***, has also referred to notice of exclusion with reference to Section 3 of the Transfer of Property Act. So at least from the date of Ex.B6 namely, 15.02.1995, the plaintiffs must be deemed to have been aware of their exclusion from the enjoyment of the properties. The suit was filed on 23.02.2012, well over the period of 12 years allowed under Article 110. We therefore, conclude that the exclusion by the defendants of the plaintiffs was absolute and to the knowledge of the plaintiffs and therefore, the suit is barred by limitation. Therefore, the 2nd question is also answered in favour of the appellants.



A.S.No.189 of 2

31.In fine, this Appeal is **allowed**, the suit in O.S.No.66 of 2012 will stand dismissed. Considering the relationship between the parties, we do not impose costs.

(R.S.M., J.) (N.S., J.)
21.12.2023

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To:-

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A.S.No.189 of 2

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