



S.A.No.626 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.11.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No. 626 of 2017

and

C.M.P.No.15552 of 2017

V.Thangavelu(died)

- 1.Mrs.Bhuneswari
- 2.Mrs.Sabineeswari
- 3.Mr.Jaganmohan
- 4.Mrs.Amudha

...Appellants

Vs.

- 1.Mrs.Ramamirtham
- 2.Mrs.Bhavani
- 3.Mrs.Kasthuri
- 4.Mr.R.K.P.Viswanathan
- 5.Mrs.Panimalar

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 06.04.2017 in A.S.No.24 of 2015 on the file of the District and Sessions Court, Thiruvarur reversing in O.S.No.44 of 2009 on the file of the Sub-Court, Manargudi, dated 29.04.2015.

For Appellants

: Mr.K.M.Subrahmaniam



S.A.No.626 of 2017

For Respondent 1 : Mr.B.Ramamoorthy

For Respondent 2 & 3 : Mr.M.Mohamed Hasain

For Respondent 4 &5 : No appearance

JUDGEMENT

The unsuccessful defendants 4, 5, 6 (children of deceased 1st defendant) and one of the legal representatives of the deceased 1st defendant are the appellants. The 1st respondent herein/plaintiff filed a suit for partition claiming 1/4th share. The suit was dismissed by the Trial Court. The appeal filed by the 1st respondent/plaintiff was allowed by the First Appellate Court and the preliminary decree for partition of 1/4th share was granted. Aggrieved by the same, the appellants have come before this Court by way of second appeal.

2. According to the 1st respondent/plaintiff, the suit properties originally belonged to her father namely Veerappan. The defendants 1 to 3 in the suit are her brothers and sisters. The defendants 4 to 6 are children of 1st defendant who died subsequently. The defendants 7 and 8 are purchasers of the portion of the suit property from deceased 1st defendant. The 1st defendant died pending first



S.A.No.626 of 2017

appeal and hence, his wife one Amudha was brought on record as 9th respondent in the first appeal. According to the 1st respondent/plaintiff, her father Veerappan died 20 years back and his wife Kunjammal died on 10.12.2004. After the death of Veerappan and Kunjammal, the plaintiff and defendants 1 to 3 are entitled to 1/4th share each in the suit property. The plaintiff issued a pre-suit notice calling for partition and the 1st defendant failed to respond favourably and hence, she was constrained to file a suit for partition.

3. The defendants 2 and 3 filed a written statement submitting to the decree. The 1st defendant, brother of plaintiff alone contested the suit by raising plea of ouster. It was his specific case that after the death of Veerappan in the year 1979, he had been in possession and enjoyment of the suit property exclusively and hence, the plaintiff and defendants 2 and 3 were ousted from enjoyment of the suit property for more than statutory period. He further claimed that the items 11 and 14 are leasehold properties in his name and the plaintiff was not entitled to any share in the said properties. It was also claimed that item 8, 10, 12 and 13 were assigned in the name of 1st defendant and hence, plaintiff was not entitled to claim any share. On this pleadings, the 1st defendant sought for dismissal of the suit.



S.A.No.626 of 2017

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4. Before the Trial Court, the plaintiff was examined as P.W.1 and 13 documents were marked on her side as Ex.A1 to Ex.A13. The defendants 1, 4, 7 and 8 were examined as D.W.1 to D.W.4 and 14 documents were marked on behalf of 1st defendant as Ex.B1 to Ex.B14. A notice issued by the plaintiff to 7th and 8th defendants was marked as Ex.C1.

5. The Trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that 1st defendant succeeded in proving his plea of ouster and consequently dismissed the suit. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.24 of 2015 on the file of District and Sessions Court, Thiruvavarur. The First Appellate Court, on pre-appreciation of evidence available on record, came to the conclusion that 1st defendant failed to prove his plea of ouster and the plaintiff was entitled to 1/4th share in suit item 1 to 5, 7 and 9. Aggrieved by the said judgment and decree, the legal heirs of deceased 1st defendant have before this Court by way of second appeal.

6. At the time of admission, this Court formulated the following substantial questions of law vide order dated 26.10.2017 and the same reads as



S.A.No.626 of 2017

follows:-

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1. Whether in law the Lower Appellate Court was right in holding that the father of the plaintiff died in the year 1979 and after lapse of 30 years the plaintiff is entitled for partition rights under the ouster of claim is proved by the defendants No.1?

2. Whether the first Appellate Court was right that the plaintiff is holding the joint possession by virtue of the mother of the plaintiff died in the year 2004 as per the partition act?

7. The learned counsel for the appellants submitted that P.W.1 during the course of cross-examination clearly admitted that 1st defendant has been paying kist to the suit property and she had no knowledge about four boundaries of the suit property. Therefore, it is the contention of the learned counsel that plaintiff never enjoyed the suit properties subsequent to the death of father Veerappan and hence, she is deemed to be ousted from enjoyment of the suit properties on the death of her father. The learned counsel further submitted that plaintiff failed to produce any evidence to show that she contributed for cultivation of the suit properties and she exercised any right over the suit properties for the past 30 years. Therefore, in the light of admission made by P.W.1, the Trial Court rightly came to the conclusion that plea of ouster was established by 1st defendant and the same has been reversed by the First Appellate Court without any justifiable reason. Therefore, the learned counsel requested the Court to set aside the



S.A.No.626 of 2017

findings of the First Appellate Court and allow the second appeal.

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8. The learned counsel for the 1st respondent/plaintiff submitted that merely because a co-owner is in possession of the suit properties, it cannot be presumed that the other co-owners are ousted from the property. The learned counsel submitted that the possession of one of the co-sharers is also for the benefit of other co-sharers. Therefore, unless the hostile possession was established by the person who pleaded ouster, the First Appellate Court is justified in granting a decree for partition. In support of his contentions, the learned counsel for the 1st respondent relied upon the judgment of this Court in the case of *Chenniappan Vs Valliammal and others* reported in **CDJ 2019 MHC 5698**.

9. From the evidence available on record, it is clear that the father of the parties namely Veerappan died in the year 1979 and his wife died in the year 2004. It is also not in dispute that after death of father, the 1st defendant has been in possession and enjoyment of the suit property. In fact, in his written statement itself the 1st defendant admitted that after death of his father in the year 1979, he was compelled to look after the family affairs in his capacity as a senior most



S.A.No.626 of 2017

member of the family. Therefore, it is clear even from the pleadings of 1st defendant that after death of father, he looked after the family and the suit property has been in his enjoyment in his capacity as a senior most member of the family. Merely because one of the co-owners, being a senior most male member, is in possession of the family properties, the Court cannot come to the conclusion that his possession is exclusive and to the detriment of other co-sharers. In this regard, it would be appropriate to quote the observations of this Court in the case law cited above ***Chenniappan Vs Valliammal and others*** reported in ***CDJ 2019 MHC 5698***. The relevant observation reads as follows:-

“24. On the question of applicability of Article 110 of the Limitation Act, I find that the said Article will not apply to the case on hand. It would apply only to the suit for partition filed by a member who has been excluded from possession or enjoyment of the joint family property and Article 110 of Limitation Act reads as follows:

S.No(Article)	Description of Suit	Period of Limitation	Time from which period begins to run
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



WEB COPY



S.A.No.626 of 2017

25. A reading of the said Article would show that the commencement of period of limitation is when the exclusion becomes known to the suing coparcener/the plaintiff. Therefore, when the defendant seeks protection under Article 110 of Limitation Act, he has to establish that the suing co-sharer was excluded from the enjoyment of the properties to his knowledge. It is settled law that possession of one co-sharer is on behalf of the other Co-sharers. If the Co-sharer in possession, raises the plea ouster or the bar under Article 110 of the Limitation Act, it is incumbent on such co-sharer to prove that the exclusion was to the knowledge of the other co-sharers. Unfortunately, I find total lack of evidence on the side of the defendant in this regard. Further, Mr.N.Manokaran, learned counsel for the appellant would contend that the very fact that the appellant/1st defendant had made improvements would show that the plaintiffs were not in possession of the properties atleast from 1969 to 2003. It would also demonstrate that they were aware of exclusion. I am unable to agree with the said submission of the learned counsel, since inference of the exclusion is not possible. Exclusion should be proved by tangible evidence. One cannot infer exclusion from enjoyment of the co-sharers in as much as the law is well settled to the effect that one co-sharer's possession is referable to all



WEB COPY



S.A.No.626 of 2017

the co-sharers. If the Co-sharer had done certain improvements in the property with or without knowledge of all the co-sharers, that by itself, will not enable the court to infer knowledge of exclusion on the plaintiff.

26. Unfortunately, the attention of the learned trial Judge was not drawn to the earlier judgments of this Court, which deal with ouster. As regards ouster, however long the possession may be, the same will not confer absolute right on the co-sharer in possession. Strong evidence is required to show the exclusion".(emphasis supplied)

10. A reading of the above judgment would make it clear that possession of one of the co-sharers is not only for himself but also for the benefit of other co-sharers. In case, where a co-sharer pleads his possession is exclusive and to the detriment of other co-sharers, he has to lead concrete and cogent evidence to show his hostile possession for more than statutory period. In the case on hand, the 1st defendant even in his pleading admitted that after death of father, the responsibility of looking after the family fell on his shoulders and in that capacity, he had enjoyed the property. Therefore, it cannot be presumed his continuous enjoyment of the suit property after death of father would amount to



S.A.No.626 of 2017

hostile enjoyment with an intention to exclude the other co-sharers. Therefore, I do not find anything to interfere with the findings rendered by the First Appellate Court that the deceased 1st defendant failed to prove his plea of ouster by any cogent evidence.

11. In view of the discussion made earlier earlier, the substantial question of laws framed at the time of admission are answered against the appellants.

12. Accordingly, the second appeal stands dismissed.

a) by affirming the judgment and decree dated 06.04.2017 in A.S.No.24 of 2015 on the file of the District and Sessions Court, Thiruvarur reversing the judgment and decree dated 29.04.2015 in O.S.No.44 of 2009 on the file of the Sub-Court, Manargudi.

b) In the above facts and circumstances of the case, there will be no order as to costs.

c) Consequently, connected miscellaneous petition is closed.

23.11.2023

Index : Yes
Internet : Yes



S.A.No.626 of 2017

Neutral Citation Case : Yes
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To

1. The District and Sessions Court, Thiruvavur
2. The Sub-Court, Manargudi,



WEB COPY



S.A.No.626 of 2017

S.SOUNTHAR, J.

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S.A.No. 626 of 2017
and C.M.P.No. 15552 of 2017



WEB COPY



S.A.No.626 of 2017

23.11.2023