

S.A.NO.438 OF 2018**IN THE HIGH COURT OF JUDICATURE AT MADRAS****DATED : 01.10.2024**

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**CORAM:****THE HON'BLE MR.JUSTICE R.SAKTHIVEL**

**S.A.NO.438 OF 2018**  
**AND CMP NO.12032 OF 2018**

1.Gomathi @ Govindammal  
 2.Jayasree

... Appellants /  
 Appellants /  
 Defendants

***Versus***

Ramayal

... Respondent /  
 Respondent /  
 Plaintiff

**PRAYER:** Second Appeal filed under Section 100 of Civil Procedure Code, 1908 praying to set aside the Judgment and Decree made in A.S.No.22 of 2016 on the file of the 3<sup>rd</sup> Additional District & Sessions Judge, Gobichettipalayam, Erode District, dated 25.07.2017 confirming the Judgment and Decree passed in O.S.No.51 of 2012 on the file of the Subordinate Judge, Gobichettipalayam, Erode District, dated 09.06.2016.

For Appellants : Mr.K.Myilsamy  
 for M/s.VA VU SI Vazhakagam

For Respondent : Mr.C.Ramaraj  
 for M/s.M.Guruprasad

**J U D G M E N T**



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This Second Appeal is directed against the Judgment and Decree dated July 25, 2017 passed in A.S.No.22 of 2016 by the 'learned 3<sup>rd</sup> Additional District and Sessions Judge, Gobichettipalayam, Erode District' [henceforth 'First Appellate Court' for brevity and convenience] confirming the Judgment and Decree dated June 9, 2016 passed in O.S.No.51 of 2012 by the 'learned Subordinate Judge, Gobichettipalayam, Erode District' [henceforth 'Trial Court' for brevity and convenience].

2.For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit.

**Plaintiff's case:**

3.The plaintiff - Ramayal is the wife of one Nanjappa Gounder. They have two sons from their marriage, namely N.Chandrasekaran and N.Moorthy. The 1<sup>st</sup> defendant is none other than the wife of N.Moorthy. The 2<sup>nd</sup> defendant - Jayashree @ Govindammal is the daughter born to the couple, N.Moorthy and 1<sup>st</sup> defendant.



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4.The case of the plaintiff is that the Suit Properties are originally ancestral properties allotted to N.Moorthy through Partition Deed dated March 12, 1997. N.Moorthy died intestate on August 14, 1998 leaving behind the defendants and plaintiff as his legal heirs. Till date the plaintiff is residing in a House Property which forms a part of the 2<sup>nd</sup> item of the Suit Properties. After the demise of N.Moorthy, the defendants filed a Suit in 'O.S.No.388 of 2006' (henceforth 'earlier Suit') against the plaintiff, plaintiff's husband and plaintiff's another son - N.Chandrasekaran, suppressing material facts, seeking permanent injunction with respect to Suit Properties herein, and obtained permanent injunction in their favour. The same would not affect the rights of the plaintiff in the Suit Properties since the plaintiff as a co-owner is entitled to 1/3 share in the Suit Properties as per Section 8 of the Hindu Succession Act, 1956 ['H.S.Act' for short]. The plaintiff caused a legal notice dated March 31, 2012 to the defendants seeking partition of her share. In turn, the first defendant caused a legal notice dated April 12, 2012, calling upon the plaintiff and her another son – N.Chandrasekaran to handover vacant possession of the aforementioned House Property. Hence, the plaintiff filed the Original Suit seeking 1/3 share in the Suit properties.

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**Defendants' case:**

5.The 1<sup>st</sup> defendant filed a written statement for herself and on behalf of then minor 2<sup>nd</sup> defendant wherein she admitted that the Suit Properties are ancestral properties allotted to N.Moorthy vide Partition Deed dated March 12, 1997.

6.The case of the defendants is that after the demise of N.Moorthy, the 1<sup>st</sup> defendant filed the earlier Suit against the plaintiff, plaintiff's husband and plaintiff's first son – N.Chandrasekaran seeking permanent injunction. After full trial, the said Suit was decreed, and the plaintiff herein was thereby enjoined from entering the Suit properties. Further stated that, in the Judgment and Decree passed in the earlier Suit, a finding has been specifically recorded that the defendants are alone in possession and enjoyment of the Suit Properties since the demise of N.Moorthy. Further, the plaintiff has been ousted from the Suit Properties after the demise of N.Moorthy. Hence, the plaintiff is not entitled to seek partition and/or other reliefs. Further, the Suit is barred by limitation.

**Trial Court and First Appellate Court:**

7.The Trial Court as well as the First Appellate Court, concurrently held that the Suit properties were ancestral properties in the



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hands of N.Moorthy. Hence, the 2<sup>nd</sup> defendant as a co-parcener by birth is entitled to 1/2 share as per Section 6 of H.S.Act. After the demise of N.Moorthy, the plaintiff is entitled to 1/6 share in the Suit Properties as per Section 8 of H.S.Act. The Trial Court, accordingly passed a preliminary decree declaring that the plaintiff is entitled to 1/6 share in the Suit Properties. The First Appellate Court, after hearing both sides, concurred with the findings of the Trial Court and dismissed the appeal.

8. Feeling aggrieved with the said concurrent findings, the defendants preferred this Second Appeal.

**Substantial Questions of Law:**

9. The Second Appeal was filed on March 27, 2018 and was admitted on November 12, 2018 on the following substantial questions of law:

*“a) Whether the Courts below are right in allowing the claim of the Respondent / Plaintiff over the Suit properties, which she already relinquished in O.S.No.388 of 2006 with respect to the Suit Properties.*

*b) Whether the Courts below are right in allowing the claim of the Respondent / Plaintiff over the Suit properties after*

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*the expiry of more than 12 years from the date of Notional Partition of the Suit Properties between the Parties i.e., on 14.08.1998 when Moorthy died.*

*c) Whether the claim of the Respondent / Plaintiff is barred by Article 110 of the Limitation Act, 1963 or not.”*

**Arguments:**

10.Mr.K.Myilsamy, learned Counsel for the appellants/defendants has submitted that the Trial Court as well as the First Appellate Court, failed to appreciate the evidence in right perspective; that both the Courts did not consider the Judgment and Decree passed in the earlier Suit (Ex-B.2 and Ex-B.3 respectively). Further he submitted that the Trial Court as well as the First Appellate Court did not appreciate the revenue records, namely, Patta and Chitta which stands in the name of 1<sup>st</sup> defendant in the right perspective. Further submitted that in the Judgment and Decree passed in the earlier Suit, a finding has been specifically recorded that the defendants herein are alone the absolute owners who are in possession and enjoyment of the Suit Properties since the demise of N.Moorthy. Further submitted that the plaintiff was ousted from the Suit Properties and that the defendants had perfected title by adverse possession. Further submitted that the Trial Court as



well as the First Appellate Court failed to consider the fact that the plaintiff is not in joint possession and enjoyment of the Suit Properties and hence, the Court Fee paid under Section 37 (2) of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955 is incorrect. Accordingly, he prayed to allow the Second Appeal.

10.1.He would rely on the following authorities for his submission regarding the Court Fees:

(i) ***Neelvathi and Others v. Natarajan and Others***, reported in ***AIR 1980 SC 691***.

(ii) ***Minor Subha and Another v. Ramu and Others***, reported in ***2005 (5) CTC 444***.

(iii) ***S. Ekambaram v. K. Nallathambi***, reported in ***2024 (2) CTC 273***.

11.Per contra, Mr.C.Ramaraj, learned Counsel on record for the sole respondent/plaintiff submitted that in the earlier Suit, the defendants herein as plaintiffs therein, have pleaded that on August 10, 2006, the plaintiff herein, her husband and her son – N.Chandrasekaran intervened in their peaceful possession and enjoyment of the Suit Properties. Hence, the cause of action for the earlier Suit arose on August 10, 2006. The earlier Suit was



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decreed, and permanent injunction was granted on June 23, 2008 against the plaintiff herein. The Original Suit has been filed within 12 years from the date of the cause of action for filing the earlier Suit.

11.1.Further, the plaintiff is in possession and enjoyment of the House Property which forms a part of the 2<sup>nd</sup> item of the Suit Properties till date. Hence, law presumes that the plaintiff as a co-owner is deemed to be in joint possession and enjoyment of the Suit Properties. The Court Fee paid under Section 37(2) of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955 is correct.

11.2.Further submitted that the burden is upon the defendant to plead and prove the 'plea of ouster' and the defendants have miserably failed to discharge the said burden. The plaintiff claims right in the Suit Properties under Section 8 of the H.S.Act. The Trial Court as well as the First Appellate Court concurrently held that the plaintiff is entitled to 1/6 share in the Suit Properties. There is no warrant to interfere with the said findings of the Courts below. Accordingly, he prayed to dismiss the Second Appeal.

**Discussion:**

12.This Court has considered the submissions made on either





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side and perused the materials available on record.

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13. There is neither a plea of release or relinquishment in the Original Suit nor is there any such plea in the earlier Suit. The earlier Suit is one filed by the defendants herein, against the plaintiff herein as well as the plaintiff herein's husband and son, for the relief of injunction. In the judgment passed therein, the Court concerned has observed that the defendants herein are absolute owners. This Court is of the view that the aforesaid is a mere observation and not a finding as such which is binding on the plaintiff herein. Hence, the first substantial question of law pertaining to relinquishment or release does not arise at all in this case.

14. This Court has perused the Partition Deed dated March 12, 1997. Admittedly, Nanjappa Gounder and his two sons namely N.Chandrasekaran and N.Moorthy partitioned their ancestral entitlements vide the Partition Deed dated March 12, 1997. In other words, the properties allotted to N.Moorthy are ancestral properties in his hand and hence, the 2<sup>nd</sup> defendant Jayashree born on January 18, 1999, as a co-parcener by birth, is entitled to 1/2 share in the Suit Properties. N.Moorthy passed away on August 14, 1998, leaving behind the defendants and the plaintiff as his legal heirs.



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The Death Certificate has been marked as Ex-A.1. Hence, as per Section 8 of the H.S.Act, the plaintiff and the defendants are co-owners, each entitled to 1/6 share in N.Moorthy's 1/2 share in the Suit Properties. The moment N.Moorthy passed away, the plaintiff and the defendants inherited the suit properties, i.e., the suit properties were vested in favour of the plaintiff and the defendants.

15.The case of the defendants is that the plaintiff is ousted from the Suit properties. If it is so, the burden is upon the defendants to plead and prove the same. In the earlier Suit, the defendants have pleaded that on August 10, 2006, the plaintiff herein, her husband and her son - Chandrasekaran intervened in their peaceful possession and enjoyment of the Suit Properties. Hence, law presumes that the plaintiff was in joint possession and enjoyment of the Suit Properties at least till August 10, 2006. Further, in Ex-A.6 - Notice caused by the defendants to the plaintiff dated April 12, 2012, it has been specifically admitted that the plaintiff is in possession and enjoyment of the House Property which forms a part of Suit Properties, however as a permissive occupant. D.W.1 (1<sup>st</sup> Defendant) has categorically admitted in her evidence that the plaintiff is residing in the House situated in



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the suit property, and that both the plaintiff and the defendants are entitled to share in it. Furthermore, the plaintiff has positively asserted in her evidence that she is in joint possession and enjoyment of the suit properties as a co-owner. The plaintiff's case is that she is in actual possession and enjoyment of the said House Property as a co-owner. It is trite law that there is no limitation prescribed for filing of a Suit for Partition by one co-owner against another / other co-owner(s). It is true that the Revenue Records pertaining to the Suit Properties have been mutated in favour of the defendants in the year 2002 (See Ex-B.2 - Judgment made in the earlier Suit). Mere mutation of Revenue Records, payment of land taxes (Kist), non-appropriation of income from the suit properties alone would not be sufficient to prove the plea of ouster.

16. With regard to the plea of ouster, in *Mitra's Co-Ownership & Partition, 8<sup>th</sup> Edition (Eastern Law House)* at Page No.2, it is observed as follows:

*“All Co-owners have equal rights and co-ordinate interest in the property. But their shares may be either fixed or*

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*indeterminate. If the sharers are known they need not be equal. But whether the shares are known or indeterminate and whether the shares are equal or unequal, every co-owner has a right of enjoyment and possession equal to that of the other co-owners. Each co-owner is in theory interested in every infinitesimal portion of the subject-matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with the others...*”

17.In regard to Adverse Possession by co-sharer, in “*Law relating to partition By M.N.Das, Seventh Edition, Eastern Law House*”, at page Nos.301 to 303, it is observed as follows:

**“Adverse Possession by co-sharer:-**

*The ordinary classical requirement of adverse possession is that it should be nec vi nec calm nec precario. The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. But, 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 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 burden of making out ouster is on the person*

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*claiming to displace the lawful title of the co-heir by his adverse possession. No hard and fast rule can be laid down from which it can be inferred that any co-owner/sharer has ousted his co-sharer. It depends upon the facts of each case. Long possession by itself is not a ground to oust a co-sharer but something more positive is required to be done. There must be a hostile open possession, and denial and repudiation of the rights of other co-owners must be brought home. Service of notice by one co-sharer, for partition and possession, and inaction thereunder or failure to promptly file a suit thereafter, was not enough to establish such co-sharers' ouster or adverse possession of the other co-owners. The onus to prove the adverse possession is on the person who raises the plea. A suit for possession based on title was filed by a person who had already proved his title in an earlier suit. In such circumstances, the onus to prove acquisition by adverse possession lies on the defendant. The defendant not having raised any plea of adverse possession, the suit is not time barred. In the absence of such a plea the possession of the defendant is devoid of the requisite animus so as to make his possession adverse for the purpose of commencement of the prescription period. Where a co-owner is claiming to have perfected his right on the basis of adverse possession, such a co-owner has to prove the ouster of other co-owner, to the knowledge of all concerned, only then he can claim to have perfected rights on the basis of adverse possession against a co-owner. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to substantiate his claim of*



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*adverse possession. The correct legal position, therefore, is that possession of a property, belonging to several co-sharers, by one co-sharer shall be deemed to be possession on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue record in the name of one co-sharer would not amount to ouster unless there is a clear declaration that the title of other co-sharers was denied. Ouster is a positive matter; and the hostile animus necessary to constitute ouster must also be a positive matter. It is a matter involving action; it cannot be mere inaction. If the co-owner in possession did not give a share of the income to the other co-owner out of possession merely because the latter did not ask for it, then such animus may only be a negative animus. On the other hand, if the evidence shows that even if the co-owner out of possession demanded his share, the co-owner in possession would not have given him a share, then the animus is positive, in the sense that it is indicative of an animus to exclude.*

*There must be a clear refusal to allow the other co-owner to participate in the enjoyment of the property. Where there is neither an open denial of title nor any ouster to the knowledge of the co-owner intended to be ousted, it cannot be said that the possession of the co-owner claiming adverse possession creates a title by prescription. An act of mortgage of a piece of land by one co-sharer would not amount to an act of ouster of the other co-sharers. There is no complete prohibition if a co-sharer in exclusive possession sells or mortgages a part of the joint land because that share can be adjusted at the time of partition against the share of the alienating party. No secret hostile animus*



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*can create adverse possession in favour of a co-sharer in possession. Again, where some co-sharers in possession of joint property effect a partition of the same by a registered deed without knowledge of the other co-sharers who came to know about it when they were denied the income of those properties, the persons in possession of those properties cannot claim title by adverse possession against the non-participating co-sharers. Exclusive possession of a co-sharer does not amount to adverse possession against other co-sharers unless such possession is exercised by ousting the other co-sharers. ...*

*... Therefore, in order to perfect a title by adverse possession two ingredients are inseparable, i.e. corpus possidendi and animus possidendi. In other words, the physical possession on the one hand and the intention to exclude an adversary from possession overtly and without attempt at any concealment and it must be adequate incontinuity.”*

18.This Court in *D.V.Jegannathan and 5 others -vs- P.R.Srinivasan and 5 others [(1999) 3 LW 742]*, has held as follows:

*“Mutation of the Revenue records, payment of taxes, long possession of the property, management of the property, appropriation of income, the other sharers being out of possession of the property etc., each of such acts by a co-owner by itself may not be sufficient to establish ouster or open assertion of adverse title as against another co-owner”.*

19.The Hon’ble Supreme Court in *P.Lakshmi Reddy vs L.Lakshmi Reddy [AIR 1957 SC 314]*, has held as follows:





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“4.Now, the ordinary classical requirement of the adverse possession is that it should be *nec vi nec clam precario*. (See *Secretary of State for India V Debendra Lal Khan*. 61 Ind App 78 at p 82: (AIR 1934 PC 23 at p.25) (A). 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*, 27 Ind APP 136 at p. 140 (PC)(B). But it is well-settled that in order to establish adverse possession of one co-heir as against another it is 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 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 coheir’s title. (See *Corea v. Appuhamy*, 1912 AC 230(C). 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”.

20.The Hon’ble Supreme Court in *Vidya Devi alias Vidyavati -vs- Ram Prakash and others* [(1995) 4 SCC 496] has held as follows:

“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-owners. Thus 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”.*

21.In view of the foregoing discussion and the authorities cited *supra*, this Court is of the considered view that the defendants have failed to establish the plea of ouster and adverse possession. Hence, the second substantial question of law is answered against the appellants and in favour of the respondent.

22.As far as the third substantial questions of law is concerned Article 110 of the Limitation Act, 1963 would not be applicable to this case. Article 110 of Limitation Act, 1963 provides a period of limitation of 12 years for a suit by a person excluded from joint family property to enforce a right to share therein. Time begins to run when the exclusion becomes known to the



plaintiff. In other words, for the purpose of Article 110, there has to be a positive act or conduct by which the exclusion from joint family property becomes known to the plaintiff. In this case the property is not a joint family property. The plaintiff claims partition as a heir of N.Moorthy under Section 8 of HS Act. Hence, Article 110 of the Limitation Act, 1963 would not apply to this case. The question of law is answered in favour of the plaintiff and against the defendants.

23.The plaintiff and the defendants are the Class – I legal heirs of N.Moorthy. Hence, law presumes that the plaintiff and the defendants are co-owners. The moment N.Moorthy passed away, 1/6 share in the Suit properties is vested with the plaintiff as per Section 8 of the HS Act. As stated *supra*, the plaintiff is residing in the House Property which forms a part of Item No.2 of Suit properties. As stated *supra*, the first defendant has admitted the same in Ex-A.6-Notice as well as in her evidence as D.W.1.

23.1.The learned counsel for the defendants has relied on Neelavathi's case (*Supra*). In the said decision, the Hon'ble Supreme Court in paragraph No.8 held as follows:-

*“The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless*



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*ouster exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession. Before the plaintiffs could be called upon to pay court fee under Sec. 37(1) of the Act on the ground that they had been excluded from joint possession, it is necessary that on a reading of the plaint that they had been “excluded” from joint possession to which they are entitled to in law. The averments in the plaint that the plaintiff could not remain in joint possession as he was not given any income from the joint family property would not amount to his exclusion from possession.*

23.2.*Ratio decidendi* of Neelavathi's case is in favour of the plaintiff. In fact, the *ratio decidendi* of the other two cases relied on by the defendants' side also support the case of the plaintiff.

23.3.In view of the above, this Court is of the view that the Court Fee paid under Section 37(2) of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955, is correct.

24.Resultantly, the Second Appeal is dismissed. The concurrent decision of the Trial Court and the First Appellate Court that the plaintiff is

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entitled to 1/6 share in the Suit properties is confirmed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

**01.10.2024**

Index : Yes  
Internet : Yes  
Neutral Citation : Yes  
Speaking Order  
TK



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To

1.The 3<sup>rd</sup> Additional District & Sessions Judge  
Gobichettipalayam,  
Erode District.

2.The Subordinate Judge  
Gobichettipalayam,  
Erode District.



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**R.SAKTHIVEL, J.**

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