



AS No.526 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 23.04.2024	Delivered on 30.04.2024
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CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and
THE HONOURABLE MR.JUSTICE **R.SAKTHIVEL**

A.S.No.526 of 2018

1. N.Subramaniam

2. S.Jayalakshmi

... 7th & 8th Defendants/
Appellants

Vs

1. Ranganayaki

... Plaintiff / 1st Respondent

2. Saraswathi @ Palaniammal

3. Siva Shanmugam

4. S.N.Velumani

5. S.N.Selvarathinam

6. S.N.Gopalakrishnan

7. M.Therkathiyan

... Defendants 1 to 6/
Respondents 2 to 7



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WEB COPY This appeal is filed under 41 Rule 1 read with Section 96 of the Code of Civil Procedure, to set aside the decree and judgment dated 13.04.2018 passed in O.S.No.681 of 2012 on the file of the III Additional District & Sessions Court, Coimbatore.

For Appellants : Mr.T.R.Rajagopalan, Senior Counsel
for Mr.K.Govi Ganesan

For Respondents : Mrs. Hema Sampath, Senior Counsel
for Mr.S.Arjun,, for R1

Ms.J.Prithivi, for RR 4 to 6

J U D G E M E N T

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

Defendants 7 and 8 in OS No.681 of 2012 are on Appeal aggrieved by the preliminary decree for partition granted in the said suit at the instance of the first respondent in this Appeal declaring her 1/4th share in the suit property. The parties will be referred to as per the ranks in the suit for convenience.

2. The plaintiff launched the suit seeking 1/4th share in the suit

<https://www.mhc.tn.gov.in/judis> property contending that it belonged to her father S.K.Subanna Gounder,



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who died on 29.01.1995 leaving behind the plaintiff, the first defendant and one Kaliasammal, daughters and the second defendant son. The said Kaliasammal died subsequently leaving behind the defendants 3 to 5 as the legal representatives. According to the plaintiff, agricultural land of an extent of 2 acres and 77 cents in Survey No.634/8 was purchased by Subanna Gounder under two Registered Sale Deeds dated 10.01.1947 and 01.03.1948. Even during his life-time, Subanna Gounder sold half of the said properties leaving behind the suit property which measures about 1 acre and 38½ cents. According to the plaintiff, on the death of Subanna Gounder, the plaintiff and the defendants were in joint possession. As the son and the sole male member of the family, the second defendant was in possession and management of the property.

3. Claiming that the second defendant had without authority sold an extent of about 1 acre and 12 cents under a Sale Deed dated 11.09.1995 to the sixth defendant and one Balasubramaniam. One of the vendees viz. Balasubramaniam executed a Release Deed dated 10.08.1998 releasing his share in favour of the sixth defendant, thus the sixth defendant became the owner of the entirety of the property measuring 1 acre and 12 cents. The sixth defendant had in turn sold the



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property to defendants 7 and 8 under a Sale Deed dated 26.12.2006.

Claiming that the Sale by the second defendant dated 11.09.1995 will not be binding on her 1/4th share in the suit property as the daughter of Subanna Gounder, the plaintiff sought for a preliminary decree declaring her 1/4th share.

4. The second defendant filed a written statement contending that though the sale documents of the year 1947 and 1948 were stood in the name of Subanna Gounder, he was not the absolute owner of the property. According to him, Subanna Gounder's brother one Sankarappa Gounder had also contributed for the purchase of the properties in the name of Subanna Gounder. Therefore, half of the properties viz. 1 acre and 38½ cents belonging to the said Sankarappa Gounder. As admitted by the plaintiff, Subanna Gounder had sold his half share even during his lifetime and the remaining half share viz. the suit property was always in possession of Thiripurammal wife of Sankarappa Gounder. Soon after the death of Subanna Gounder, Thiripurammal wanted to sell away the property and since the Title Deeds stood in the name of Subanna Gounder, she had required the plaintiff, the second defendant and the other two sisters viz. the first defendant and Kaliasammal to execute the



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Sale Deed in favour of the purchaser. At a meeting held in the presence of one of the brothers of Subanna Gounder, viz. Palaniappa Gounder and Thiripurammal, the plaintiff and the other sisters authorized the second defendant to sign the documents of sale as he is the only son of Subanna Gounder.

5. Pursuant to the said consents reached between the parties, the second defendant executed the Sale Deed dated 11.09.1995 on behalf of Thiripurammal and the entire sale proceeds were paid over to Thiripurammal. Therefore, according to the second defendant, neither the second defendant nor the other heirs of Subanna Gounder have any right over the suit property. He would also contend that it is because of the fact that the suit property belonged to Sankarappa Gounder, the plaintiff who sued for partition of the properties of Subanna Gounder in OS No.336 of 2006 did not choose to include the suit property in the said suit.

6. It was also contended that the suit itself is a vexatious suit, inasmuch as the plaintiff had launched two suits before this Court, one in OS No.336 of 2006 seeking partition of the properties of Subanna



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Gounder and the other in OS No.658 of 2006 seeking partition of the properties of Maruthammal wife of Subanna Gounder. He would also point out that both the suits were dismissed. The second defendant would also further plea that the fact that the Sale Deed dated 11.09.1995 in favour of the sixth defendant and Balasubramaniam was executed by him pursuant to the arrangement reached in the family would be evident from the fact that the third defendant Velumani son of Kaliammal had attested the sale document. Therefore, according to the second defendant, the property always belonged to Sankarappa Gounder and not Subanna Gounder.

7. As an alternative plea, the second defendant would also raise a plea of ouster even point out that Subanna Gounder died in the year 1995 and the plaintiff chose to launch the present suit for partition only in the year 2012, a plea of the bar under Order II Rule 2 of the Code of Civil Procedure, was also raised since this property was not made subject matter of the earlier partition suit that was launched at the instance of the present plaintiff.

<https://www.mhc.tn.gov.in/judis> 8. The seventh and eighth defendants, the purchasers filed a



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separate statement, they have also claimed that the suit is barred under Order II Rule 2 of the Code of Civil Procedure. It was also pleaded that the plaintiff was ousted from the enjoyment of the property for well over a statutory period and therefore, she is not entitled to relief of partition. A plea of non-joinder of necessary parties was also raised, since the defendants 7 and 8 had purchased only 98 cents of the property and the remaining extent of about 40½ cents was in possession of third parties. The seventh defendant and the eighth defendants also contended that the suit property is in possession of cultivating tenants and they are necessary parties to the suit. On the above pleadings the defendants sought for dismissal of the suit.

9. On the above pleadings, about six issues were framed at the first instance on 19.08.2014 and thereafter additional issues were framed on 13.11.2015 and at the time of pronouncing judgment all the issues were rearranged are as follows:

1. *Whether the suit is hit under Order II Rule 2 of CPC;*
2. *Whether the suit is hit by operation of law of ouster;*
3. *Whether Sangarappagounder was entitled to ½ share*
in the suit property is true or not;



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4. *Whether the sale deed executed by 2nd defendant in regard to the suit property in the year 1995 is true or not;*
5. *Whether the consent of the plaintiff was obtained by the 2nd defendant at the time of executing the sale deed by the 2nd defendant is true or not;*
6. *Whether the sale deed executed by the 2nd defendant is binding on the plaintiff is true or not;*
7. *Whether the description of property itself is incorrect;*
8. *Whether the suit is bad for non joinder of necessary parties;*
9. *Whether the suit is barred by limitation;*
10. *Whether the 7th and 8th defendants are bonafide purchasers, for value, as claimed by them;*
11. *Whether the plaintiff is entitled for partition; and*
12. *To what other relief the plaintiff is entitled to?*



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10. At trial, the plaintiff's husband one Arumugham, was examined as P.W.1 and Exhibits A1 to A12 were marked. The second defendant was examined as D.W.1 and the seventh defendant was examined as D.W.2 and Exhibits B1 to B21 were marked.

11. Upon the consideration of the evidence on record and the arguments advanced by the counsel for the parties, the learned Additional District and Sessions Judge, Coimbatore, concluded that the suit is not hit by Order II Rule 2 of the Code of Civil Procedure, inasmuch as the cause of action for both the suits were completely different. The learned District Judge found that while the suit in OS No.336 of 2006 related to the properties that were allotted to Subanna Gounder at a partition between himself and the second defendant that took place on 19.05.1972, the present suit related to property that was purchased by Subanna Gounder which was not the subject matter of the Partition Deed dated 19.05.1972.

11.1. Therefore, the learned District Judge found that the cause of action for both the suits being completely different, the bar under Order II Rule 2 of the Code of Civil Procedure will not be attractive. On the 9/26



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second issue viz. ouster, the learned District Judge found that in view of the defence taken by the second defendant as well as defendants 7 and 8 that Subanna Gounder was not the owner of the property. The defendants are estopped from raising the plea of ouster. The learned District Judge applied the well-established principle of law that a person who denies the title of the common ancestor without admitting the title cannot plead adverse possession or ouster.

11.2. On the third issue relating to the right of Sankarappa Gounder over the suit property, the learned District Judge found that the said claim has not been supported by any evidence on record. The learned District Judge took into account the fact that the Revenue Records stood in the name of Subanna Gounder till the sale in favour of the sixth defendant in the year 1995. Neither Sankarappa Gounder nor Thiripurammal and her children had at any point of time made any claim over the suit properties. Even though Subanna Gounder and his brothers Palanisamy, Sankarappa Gounder and Ammasaiakkal, the junior wife of father of Subanna Gounder had entered into a Panchayat Muchalika on 05.04.1960 under Ex.A11, the subject property was not even included in the said partition and the arrangement was restricted to the properties that



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belonged to them jointly.

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11.3. The learned District Judge also concluded that the claim that the property belonged to Sankarappa Gounder is a claim of convenience made by the defendants to defeat the claims of the plaintiff. The learned District Judge took up issues 4, 5 and 6 together and found that though the Sale Deed Ex.A5 dated 11.09.1995 is true, it will not bind the share of the plaintiff. The claim that the plaintiff and her sisters had consented for the sale was also not accepted. On the said findings, the learned District Judge answered those three issues against the defendants. Issue No.7 which related to the description of property was also decided in favour of the defendants. The learned District Judge found that the description of the property and the actual division will have to be decided only at the time of final decree proceedings.

11.4. On issue No.8 relating to joinder of parties, the learned District Judge found that what was sold to the sixth defendant and Balasubramaniam was about 1 acre 12 cents, out of that 98 cents was sold by the sixth defendant to defendants 7 and 8. The very description in Ex A5 Sale Deed dated 11.09.1995 shows that the remaining extent of



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26½ cents is situate on the south of the property that is sold under Ex.A5.

In the absence of any evidence to show that 26½ cents and the 14 cents have been sold to anybody else, either by the sixth defendant or by the other defendant, the suit cannot be said to be bad for non-joinder of parties, inasmuch as all the owners of the property were before the Court.

11.5. On the question of limitation, the learned District Judge found that in the absence of any evidence to impugn knowledge of execution of the Sale Deed dated 11.09.1995 on the plaintiff on a particular date, the suit cannot be said to be barred by limitation. The learned District Judge rightly found that the mutation of Revenue Records in the name of the sixth defendant and Balasubramaniam in the year 1998 cannot offer a ground for the defendants to contend that the suit is barred by limitation. On the above findings, the learned District Judge found that the suit cannot be said to be barred by limitation.

11.6. On the claim of defendants 7 and 8 that whether they are *bona fide* purchasers for value, the learned District Judge found that the claim is hollow, he took note of the evidence of the seventh defendant, a practicing advocate, where he had deposed that he purchased the



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property based on the statement made by the vendors that the property belonged to Subanna Gounder. Admission by D.W.2, the seventh defendant to the effect that he did not perused any document before purchasing the property was also taken note off by the learned District Judge in coming to the conclusion that defendants 7 and 8 cannot be said to be *bona fide* purchasers.

11.7. Finally on the above conclusions, the learned District Judge having answered all the issues against the defendants concluded on the issue No.11 that the plaintiff would be entitled to partition. On the said findings, the learned District Judge granted a preliminary decree for partition of the plaintiff's 1/4th share in the suit property. Aggrieved the defendants 7 and 8, the purchasers are on appeal.

12. We have heard Mr.T.R.Rajagopalan, learned Senior Counsel instructed by Mr.K.Govi Ganesan, for the appellants and Mrs.Hema Sampath, learned Senior Counsel assisted by Mr.S.Arjun, for the first respondent/plaintiff and Ms.J.Prithivi, learned counsel appearing for respondents 4 to 6. The second and third respondents though served are



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13. Mr.T.R.Rajagopalan, learned Senior Counsel appearing for the appellants would contend that the Trial Court completely erred in not accepting the claim of the defendants that the property belonged to Sankarappa Gounder. The learned Senior Counsel would point out the following circumstances in support of his contention that Sankarappa Gounder was the owner of the suit property:

(i) The sale by Subanna Gounder of 1 acre 38½cents alone;

(ii) The suggestion made by the counsel for the plaintiff to the witness D.W.1 viz. the second defendant to the effect that the sale deed under which Subanna Gounder had sold the property of 1 acre 38½ cents to third parties recited that the remaining half share belonged to Sankarappa Gounder and Sankarappa Gounder's property was also shown as the boundary for the properties sold by Subanna Gounder in 1959; and

(iii) The non-inclusion of this property either in the Panchayat Muchalika dated 05.04.1960 marked as



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Ex.A11 or in the Partition Deed dated 19.05.1972 marked as Ex.B5 between Subanna Gounder and the second defendant. The fact that the third defendant son of one of the daughters of Subanna Gounder having attested the Sale Deed dated 11.09.1995 executed by the second defendant in favour of the sixth defendant and Balasubramaniam.

13.1. According to the learned Senior Counsel the above circumstances would conclusively establish the fact that Sankarappa Gounder had half share in the suit properties. The learned Senior Counsel would also submit that the suit is barred by limitation, inasmuch as on and from the date of the Sale under Ex.A5 dated 11.09.1995, the sixth defendant and Balasubramaniam had been in possession of the property till 1998 and after the release by Balasubramaniam in favour of the sixth defendant in 1998, the sixth defendant had been in possession of the property till 2006 when he sold the property to defendants 7 and 8, who had been in possession of the property till the date of filing of the suit in 2005. Therefore, according to the learned Senior Counsel, since the defendants 6, 7 and 8 have been in possession of the property for more



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than 17 years from the date of the sale under Ex.A5, the plaintiff's suit is hopelessly barred by limitation. The learned Senior Counsel would also submit that the plaintiff has been ousted from enjoyment of the property for well over the statutory period, therefore she is not entitled to claim a share in the suit property.

14. Contending contra Mrs.Hema Sampath, learned counsel appearing for the first respondent/plaintiff would submit that the claim that the property belonged to Sankarappa Gounder has not been substantiated by any evidence. She would point out that the Panchayat Muchalika dated 05.04.1960 related to the joint properties that belonged to Subanna Gounder and his brothers and the step mother and therefore non-inclusion of this properties which was purchased by Subanna Gounder in the year 1947 and 1948 cannot be made a ground to contend that the entire property did not belong to Subanna Gounder.

14.1. Addressing the claim based on Ex.B5, the Partition Deed dated 19.05.1972 between Subanna Gounder and the second defendant, the learned Senior Counsel would submit that again related to the property that were allotted to Subanna Gounder in the partition dated



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05.04.1960 evidenced by Ex.A11. Therefore, according to the learned Senior Counsel the non-inclusion of separate property of Subanna Gounder in the Panchayat Muchalika of the year 1960 marked as Ex.A11 or the Partition Deed of the year 1972 marked as Ex.B5, cannot be a ground to conclude that Subanna Gounder's brother Sankarappa Gounder had a right over this property. She would also draw our attention to Ex.A12 dated 25.11.1959 under which Subanna Gounder had sold half of the property purchased by him under the two Sale Deeds of the year 1947 and 1948 which were marked as Exs. A3 and A4, to contend that there is no indication therein that the remaining property belonged to Sankarappa Gounder.

14.2. Drawing our attention to the boundary recitals in the said instrument which shows that one of the boundaries is shown as the remaining property of Subanna Gounder, the learned Senior Counsel would submit that the claim that a portion of the property belonged to Sankarappa Gounder is a plea that has been projected only to defeat the claim of the plaintiff. On the question of limitation, the learned Senior Counsel would point out that Article 110 of the Limitation Act, would not apply since it governs a suit by a coparcener who excluded from the



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enjoyment of the coparcenary property. According to her, the suit on hand is a suit for division of a property left by a male Hindu under Section 8 which would devolve under Section 8 of the Hindu Succession Act, Article 110 of the Limitation Act, would not govern this suit. Therefore, the only plea that could be available to the defendants is either ouster or adverse possession.

14.3. The learned Senior Counsel would also point out that even in this Court, the defendants have not given up their claim that the property did not belong to Subanna Gounder and therefore, they had no right to claim either adverse possession or ouster. It is a fundamental principle of law that if a party rests its claim or adverse possession, he or she must admit the title of the ancestor or the opposite party. Having denied the title of Subanna Gounder and having set up the title of Sankarappa Gunder, it was not open to the defendants to claim adverse possession against the plaintiff, who claims under Subanna Gounder. She would also submit that the same analogy that applies for adverse possession would apply for ouster also. Ms.J.Prithvi, learned counsel appearing for respondents 4 to 6 would adopt the arguments of Mrs.Hema Sampath, learned Senior Counsel appearing for the first respondent.



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15. We have considered the rival submissions.

16. On the above contentions of the learned Senior Counsel on either side, the following points emerge for determination in the suit:

- 1. Whether the defendants have established their claim that half of the property purchased by Subanna Gounder under Exs. A3 and A4 belonged to Sankarappa Gounder;*
- 2. Whether the suit could be said to be barred by limitation;*
- 3. Whether the defendants had ousted the plaintiff from enjoyment of the property for well over a statute period.*

Point No.1:

17. The Sale Deeds under which Subanna Gounder had purchased the property on 10.01.1947 and 01.03.1948 have been marked as Exs. A3 and A4. There is no indication in those two documents that a part of the consideration was paid by Sankarappa Gounder. The earliest



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document after those two documents is the sale by Subanna Gounder where he sells 1 acre and 38½ cents which is half of the property purchased by him. The said document has been produced as Ex.A12 and it is dated 25.11.1959. The boundary description in the said document reveals that the remaining property belongs to Subanna Gounder, therefore Subanna Gounder has not conceded the title of Sankarappa Gounder at any point of time.

17.1. The non-inclusion of this property in Panchayat Muchalika dated 05.04.1960 marked as Ex.A11 and the Partition Deed dated 19.05.1972 marked as Ex.B5 would only strengthen the fact that Subanna Gounder had treated the property to be his and his alone. Therefore, the contention that Sankarappa Gounder had half share in the property and it was in possession of Thiripurammal after the death of Sankarappa Gounder, cannot be accepted. We also find that there is absolutely no evidence in support of the said claim except the oral evidence of D.W.1, the second defendant. The fact that the third defendant/son of one of the sisters had attested the Sale Deed dated 11.09.1995 marked as Ex.A5 cannot by itself be proof of knowledge of the contents of the document by the other heirs of Subanna Gounder,



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especially the plaintiff. Even knowledge of the contents of the attesting witness should be proved. The third defendant has remained *ex-parte* before the Trial Court and neither of the parties have chosen to examine him. Therefore, it has not been demonstrated that the third defendant had knowledge of the contents of Ex.A5 dated 11.09.1995.

17.2. Though Mr.T.R.Rajagopalan, the learned Senior Counsel appearing for the appellant would draw our attention to certain admissions made by P.W.1 to the effect that the documents for the purposes of filing the suit were given to him by the third defendant and contend that the plaintiff has been propped up by the defendants 3 to 5, who had knowledge of the contents of Ex.A5, the same would not be sufficient to conclude that the plaintiff had knowledge of the contents of it. Even assuming that the plaintiff had knowledge of contents of Ex.A5 that by itself will not show that the property belonged to Sankarappa Gounder. We are therefore unable to accept the submission of the learned Senior Counsel for the appellant that what was sold under Ex.A5 was the share of Sankarappa Gounder and the same was sold with the consent of the plaintiff and the other heirs of Subanna Gounder.



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17.3. The defendants have not chosen to examine the other attestor of Ex.A5 to show that the consideration was not paid to the second defendant but was paid to the wife of Sankarappa Gounder viz. Thiripurammal. We find that the second defendant has repeatedly stressed both in his pleadings and in his evidence that Thiripurammal was present at the time of execution of the Sale. The best evidence possible is the evidence of the other attesting witness even assuming that the third defendant had colluded with the plaintiff, unfortunately the defendants have not chosen to examine him also. We therefore conclude that the defendants have not established the claim that the property belonged to Sankarappa Gounder.

Point Nos.2 and 3:

18. Both these points are dealt with together since they are interlinked.

18.1. On the question of Limitation, as rightly contended by the learned counsel for the respondent/plaintiff, Article 110 of the Limitation Act, would not apply as it governs a suit between coparceners. The



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under Section 8 of the Hindu Succession Act. Therefore, unless it is shown that the plaintiff is ousted, the suit cannot be dismissed. As it is well known, ouster requires something more than mere adverse possession. It requires assertion of hostile title to the knowledge of the co-owner.

18.2. We have already concluded that the plaintiff was not aware of the execution of Sale Deed dated 11.09.1995. No material has been placed before the Court to impute knowledge of the Sale Deed dated 11.09.1995 on the plaintiff. P.W.1 in his evidence had stated that they came to know about the very Sale Deed only at the time of issuing the suit notice. It is very difficult to impute knowledge of a sale transaction on a co-owner on surmises and conjunctures. Merely because P.W.1 has admitted that it was the third defendant who gave him the documents to file the suit, it cannot be concluded that the plaintiff had knowledge of Ex.A5 even earlier. Even the third defendant cannot be imputed with knowledge of the contents of Ex.A5, since he was only an attesting witness.

<https://www.mhc.tn.gov.in/judis> **18.3.** No doubt the plaintiff has been excluded from possession for



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a long time. But that by itself will not constitute ouster. Moreover, the defendants have taken a plea that Subanna Gounder himself was not the owner of the property and that plea had not been given up either at the time of trial or even at the time of arguing this Appeal. Therefore, as rightly pointed out by the Trial Court, unless there is an admission of title, a plea of adverse possession or ouster cannot be even recognized. We therefore conclude that the suit cannot be said to be barred by limitation and the plaintiff cannot be said to have been ousted from enjoyment of the property for well over the statutory period in order to deny her the relief of partition.

19. In view of the above conclusions, the Appeal will have to necessarily fail and it is accordingly dismissed. In view of the relationship between the parties, we direct the parties to bear their own costs.

(R.SUBRAMANIAN, J .) (R.SAKTHIVEL, J.)
30.04.2024

jv

Index : No

Internet : Yes

Speaking order

Neutral Citation: No



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To

1. The III Additional District & Sessions Court,
Coimbatore.
2. The Section Officer,
V.R. Section,
Madras High Court, Chennai 104.



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and

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