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S.A.(MD).No.199 of 2023

THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.03.2024

CORAM:

THE HONOURABLE **MRS.JUSTICE S.SRIMATHY**

S.A.(MD).No.199 of 2023

and

C.M.P.(MD)No.3686 of 2024

1.Sangili
2.Dharmaraj
3.Packiyam

... Appellants

/Vs./

Jeyakodi

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree dated 29.06.2022 passed in A.S.No.1 of 2020 on the file of the Principal District and Sessions Judge, Virudhunagar and partly reversing the Judgment and Decree, dated 13.08.2019, passed in O.S.No.155 of 2013 on the file of the Additional Sub-Court, Srivilliputhur.

For Appellants : Mr.B.Rajesh Saravanan
For Respondent : Mr.M.Thirunavukkarasu

JUDGMENT

The defendants are the appellants herein and the plaintiff is the respondent in the present second appeal. For the sake of convenience, the ranking in the suit



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is referred in the present second appeal.

2. The suit is filed to declare the plaintiff as the legal heir of the first defendant, then to divide the suit schedule properties and grant $\frac{1}{4}$ share, to appoint Advocate Commissioner to divide the properties in metes and bounds and to grant permanent injunction restraining the defendants from encumbering the suit schedule properties until the final decree is passed in the partition application. After considering the evidence and the deposition of the parties, the Trial Court had allowed the suit as far as the prayer of declaration to declare the plaintiff as the legal heir of the first defendant. However, dismissed the suit as far as prayer of partition and to grant $\frac{1}{4}$ share in the suit schedule property and aggrieved over the same the plaintiff had preferred the first appeal. The defendants had suffered a decree as far as the plea of legal heir is concerned, but has not preferred any appeal. The First Appellate Court had allowed the appeal filed by the plaintiff. Aggrieved over the same, the defendants had preferred the present second appeal. Since the defendants had not preferred any appeal against the finding that the plaintiff is the legal heir of the first defendant, the finding that the plaintiff is the legal heir of the first defendant had attained finality. Now the



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defendants have preferred this appeal against the judgment of the First Appellate Court for granting of partition of one fourth share in the suit schedule property.

3. The present second appeal was admitted on the following substantial question of law:

“Whether the lower appellate Court erred in its appreciation of Article 110 of Limitation Act and whether the suit ought to have been filed within a period of twelve years?”

4. It is an admitted fact that the plaintiff had issued a legal notice on 23.08.1999 which is marked as Ex.A8. On receipt of the same the first defendant had issued reply notice dated 27.08.1999 which is marked as Ex.A10. The only contention by the defendant is that the plaintiff had filed the present suit after a lapse of 14 years and the same is hit by limitation.

5. The reason stated by the plaintiff for filing the suit belatedly is that after the exchange of notices, the first defendant being the father of the plaintiff had promised to give properties as and when the properties are partitioned between the



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first defendant and the other two defendants. Hence by believing the words, the plaintiff had not filed any suit. However, in the year 2011 the 1st defendant took steps to sell the properties to his brother namely Palpandi and due to certain disputes, the said Palpandi had filed a suit in O.S.No.32 of 2011. When the filing of such suit was informed to the plaintiff, then only it came to the knowledge of the plaintiff that the first defendant is dealing with the property in order to avoid giving share to the plaintiff. Hence thereafter the plaintiff had filed suit on 12.08.2013.

6. The contention of the defendants / appellants herein is that the defendants are holding the share of the plaintiff in adverse possession and hence under Article 65 of Limitation Act, the period of limitation of 12 years had lapsed, hence the suit is barred by limitation. Article 65 of the Limitation Act states that

“For possession of immovable property or any interest therein based on title - when the possession of the defendant becomes adverse to the plaintiff, the period of 12 years is prescribed”.

The contention of the defendants / appellants herein is that the Article 65 states, if a party is seeking relief under adverse possession, then the party ought to file suit



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within a period of 12 years. This contention of the defendants cannot be accepted.

Under the Article 65 the interest is based on title to the property. But in the present case when the first defendant denies the paternity, then the plaintiff would acquire title only after the paternity issue is decided. If the paternity issue is decided against the plaintiff, then the plaintiff would not get any right over the property. If the paternity issue is decided in favour of the plaintiff, then only the plaintiff would acquire right over the property. Hence until the paternity issue is decided, the count down for limitation would not start and the limitation issue cannot be considered at all. Hence the said Article 65 of Limitation Act cannot be applied in the present case.

7. The next contention of the defendants is that the plaintiff has sought to divide the $\frac{1}{4}$ share from the joint family property through the suit notice, when the same was declined the plaintiff should be considered as excluded from the joint family property and to enforce her right the plaintiff ought to have filed the suit within a period of 12 years as per Article 110 of the Limitation Act. The Article 110 of the Limitation Act is extracted hereunder:



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“110. By a person excluded from a joint family property to enforce a right to share therein - When the exclusion becomes known to the plaintiff, twelve years.”

The said contention of the defendants cannot be accepted since the plaintiff cannot be considered as excluded from the joint family. In fact, the first defendant had declined the paternity and the plaintiff was never ever included in the joint family at any point of time. Further for claiming paternity there is no limitation at all. Once the plaintiff had claimed paternity in the suit and the issue is decided in favour of the plaintiff, then only the plaintiff is entitled to seek partition. The limitation starts from the date when the issue of paternity is decided. And the same was decided in judgment and decree dated 13.08.2019 of the Trial Court, which had attained finality and hence the limitation starts from 13.08.2019. Therefore, this Court is of the considered opinion that the First Appellate Court is right in rendering the finding that the plaintiff is entitled to claim partition of $\frac{1}{4}$ share in the properties.

8. The Learned Counsel appearing for the appellants herein / defendants relied on the judgment rendered in the case of ***Emperuman and others Vs.***



Rangarajan reported in **2017-1-LW-562**, wherein it is held that right to sue accrues from the date of denial of partition in the notice. But the said judgment is not applicable to the present case, since the facts in the present case is different. In the present case, the paternity is denied. As stated supra, if the paternity issue is decided against the plaintiff, then the plaintiff would not get any right over the property. If the paternity issue is decided in favour of the plaintiff, then the plaintiff would acquire right over the property. When the paternity is decided in favour of the plaintiff, then the right to sue accrues from the date when the plaintiff succeeded in the issue of paternity. Hence the above case is not applicable to the present case.

9. The Learned Counsel appearing for the plaintiff had relied on the judgment rendered by the Hon'ble Supreme Court in the case of **Govindammal Vs. R. Perumal Chettiar** reported in **AIR 2007 SC 204** wherein it is held as under:

“7...Unfortunately, the plea of the defendants succeeded before the High Court that the notice, Ex.B 3 was given in 1955 and no suit was filed till 1979. Therefore, the High Court took the view that her right in the properties got extinguished because of adverse possession as she gave notice in 1955 and did not take possession of the properties till 1979.



Therefore, it was apparent that the possession by Defendant No.3 was hostile to her interest. We regret to say that this finding arrived at does not appear to be correct one. In fact after filing of the suit the notice, Ex.B 3 which she did not pursue any further; her right cannot be extinguished. Though she has denied issuance of such notice through Advocate but that is not sufficient to defeat the claim of the widow. This was only an infructuous circumstance that when she was thrown out of the house she could not pursue her legal remedy by filing the suit but when she found that the properties were being sold by the step sons, and it came to her knowledge, therefore, she woke up to file the suit for asserting her claim. There is no denial that she was the legally married wife of the deceased. This has been proved, established and accepted by all the three courts despite the fact that the plea of falsity of the marriage was raised by the step sons. Once it is established that she was the legally married wife of Raju Naidu she automatically she claims her share in the property from the estate of Raju Naidu by way of survivorship. Just because a notice was issued and she did not pursue the same that does not extinguish the claim of the plaintiff thereby giving a handle in the hands of the step sons by way of adverse possession. In order to prove adverse possession something more is required. Once it is accepted that she was the legally married wife of Raju Naidu then her right to claim partition and share in the property stands out and that cannot be defeated by the plea of ouster or adverse possession. In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case. In the present case, it is the widow who has been thrown out and



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she has been moving from pillar to post. The relief cannot be denied to her just because she sent notice claiming partition of the properties and she did not file any suit thereafter and the steps sons where holding the properties adversely and hostile to her knowledge. It was the joint property of Raju Naidu and it shall devolve by way of survivorship i.e. two sons and his wife as the daughter has already given up her share in the property. Therefore, in order to oust one of the co-sharers only on the basis of the so called notice cannot be deemed to be sufficient to come to a conclusion of adverse possession or extinguishing her rights....”

Following the aforesaid judgment, this Court is of the considered opinion that in the present case, the plaintiff had issued notice but did not pursue any further, but her right cannot be extinguished when the paternity issue was not decided. Mere issue of notice is not sufficient to defeat the claim of the plaintiff for partition. In the present case as stated supra until the plaintiff is successful in the issue of paternity, the question of right to sue for partition would not arise.

10. The Learned Counsel for the plaintiff also relied on the judgment, dated 04.10.2021, rendered in S.A.No.254 of 2007 in ***Vijayaraghavan and others Vs. Radhakrishnan and others*** wherein the Hon’ble Court had held that mere passage of time does not extinguish the right of the co-owner and hence Article



110 is not applicable. The relevant portion of the judgment is extracted hereunder:

“13. The Limitation Act, 1963 prescribes no time limit for filing a suit for partition by a co-sharer or co-owner. However, under Article 110 of the Limitation Act, 12 years is the period prescribed for filing a suit by a person who is excluded from joint family property to enforce a right to the share and the starting point for limitation is when the exclusion becomes known to the plaintiff. Thus, Article 110 requires for its application,

- i. the existence of joint family,*
- ii. joint family properties,*
- iii. the person excluded being one of the members of the joint family,*

and

- iv. exclusion of such member from a joint family.*

14. It is also settled that possession of one co-sharer is the possession of all co-sharers. In the instant case, the defendants had merely contended that since the first plaintiff got married in the year 1979, she has been ousted from the suit properties. They have not even prescribed title by adverse possession.

15...

18. In the instant case, as already observed, the defendants did not contest the earlier suit filed by the plaintiff in the year 1990 and therefore it



has to be held that the plea of ouster is not established. It is also to be noted that 'ouster' does not mean actual driving out of the co- sharer from the property and mere non participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. In fact the possession of co-sharer has to be construed as holding the properties as a constructive trustee on behalf of the other co-sharer who is not in possession and mere passage of time does not extinguish the right of the co-owner who has been out of possession of the joint family property...”

The aforesaid judgment had categorically held that the possession of co-sharer is holding the properties as constructive trustee on behalf of the other co-sharer. In the present case the defendants had not partitioned the suit properties among themselves and the defendants were holding the property as constructive trustee. In such circumstances, this Court is of the considered opinion the question of limitation would not arise at all and hence the limitation plea of the defendants fails and the second appeal is liable to be dismissed.

11. For the reasons stated in the above discussion, the substantial question of law is answered against the appellants herein / defendants and hence the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is



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closed.

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Index : Yes / No

NCC : Yes / No

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TO:

1. Principal District and Sessions Judge,
Virudhunagar.
2. Additional Sub-Court, Srivilliputhur.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

Tmg

Judgment made in
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