

Mayava Koundar and ors. Vs. Subbaraya Koundar and ors.

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Court : Chennai

Decided On : Mar-09-1976

Reported in : (1977)1MLJ113

Appellant : Mayava Koundar and ors.

Respondent : Subbaraya Koundar and ors.

Judgement :

M. M. Ismail, J.

1. Defendants 1, 3 and 4 in O.S. No. 135 of 1968 on the file of the Court of the District Munsif of Villupuram who succeeded before the trial Court but lost before the first appellate Court are the appellants herein. They are the legal representatives of one Duraisami Kounder while the plaintiffs are the legal representatives of Rangasami Kounder. Rangasami Kounder and Duraisami Kounder were brothers, Duraisami Kounder being the elder. They had a sister by name Sowbagiammal. The suit property was purchased in her name under Ex. B-5 dated 27th September, 1937. It has been found and it is not disputed that Sowbagiammal died on. 30th July, 1946 leaving no issue, having become a widow at a young age. Equally, there is no controversy that on the death of Sowbagiammal leaving no issue, the two brothers Rangasamy Kounder and Duraisami Kounder would be her heirs entitled to get the property in equal moieties. When the plaintiffs instituted the suit for partition and separate

possession of their half share in the suit property, various defences were raised by the appellants herein which included the defence that they had acquired title to the entire property by adverse possession and ouster. Certain other defences were raised before the Courts below, namely, that the suit property itself was purchased by Duraisami Kounder benami in the name of Sowbagiammal and the property belonged to Duraisami Kounder and, therefore, there was no question of Rangasami Kounder succeeding to the said property. But the same was found against and was not persisted in before me.

2. The trial Court accepted the plea of the appellants that they had acquired title to the entirety of the property by adverse possession and dismissed the suit instituted by the respondents herein. On appeal preferred by the respondents, the learned II Additional Subordinate Judge held that the appellants had not made out their claim that they had acquired title to the entire suit property by adverse possession and, therefore, decreed the suit for partition instituted by the respondents herein. It is as against this judgment and decree that the present second appeal has been filed.

3. I may mention immediately that the only point that was urged before me is in relation to the finding of the learned Subordinate Judge that the appellants had not established ouster and, therefore, I am considering only that point in the present second appeal. It has been well-settled as to what would constitute ouster as between co-sharers.

4. The Supreme Court has pointed out in *P. Lakshmi Reddy v. L. Lakshmi Reddy* : 1995(5)SCALE509 .:

The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. But it is well-settled that 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 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 all 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 part' in derogation of the other co-heir's title. 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. The burden of making out ouster is on the person, claiming to displace the lawful title of a co-heir by his adverse possession.

5. This Court in *Godavari Lakshminarasamma v. Godavari Rama Brahman and Ors.* : AIR1950 Mad680 , observed:. Possession is never considered adverse if it can be referred to a lawful title. Mere non-participation in the profits of the property by one co-owner and exclusive possession by the other will not be sufficient to constitute adverse possession by the latter. To constitute ouster by the co-owner, there must be an open and unequivocal denial of the title of the other coparcener to the knowledge of the latter. Uninterrupted sole occupation of common property without more must be referred to the lawful title possessed by the joint holder to use the joint estate and cannot be regarded as an assertion of right to hold it as separate....

6. The Kerala High Court in *Velliyettummel Soopi and Ors. v. Nadukandy Moosa and Ors.* : AIR1969 Ker222 . observed:.When one co-owner takes possession and continues in possession for a long time enjoying the income of the property without sharing it with the other co-owners, it is a strong circumstance indicative of, or from which an inference can be drawn, that there was ouster of the co-owners not in possession; and if other circumstances also exist in support of this, Courts will be justified in inferring ouster or exclusion. 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 co-owner out of possession merely because the latter did not ask for it, then, such animus may be only a negative animus. On the other hand, if the evidence shows that even after 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....

7. Thus, it will be seen that the basic principle involved in those decisions is drawn from the fundamental position that a co-owner is entitled to remain in possession of the entirety of the property and such possession will not be considered to be adverse to the other co-owners not in possession. Therefore, in order to enable one co-owner to acquire title to the entirety of the property to the exclusion of the other co-owners by prescription, the co-owner in possession must assert hostile title to the knowledge of the co-owners out of possession. In the absence of assertion of hostile title to the knowledge of the co-owners out of possession, there cannot be any acquisition of title by prescription by the co-owner in possession. Therefore, the question that has to be considered in the present case is whether all the facts found by the Courts below can lead to the inference that there has been assertion of hostile title on the part of Duraisami Kounder or his sons to the knowledge of Rangasami Kounder or his sons in respect of the entirety of the property. I am clearly of the opinion that there is no such fact established in this case from which such assertion of hostile title can be inferred.... Admittedly, Duraisami Kounder had not dealt with the suit property either by mortgaging it or by selling the whole of it or part of it to the knowledge of Rangasami Kounder or his sons. As a matter of fact, no evidence whatever has been placed before the Courts below to show that Duraisami Kounder has dealt with the property in this manner. All that has been established in this case is: (1) that Duraisami Kounder alone had been cultivating the land in question ever since 1946 when Sowbagiammal died and he has been enjoying the income without sharing the same with Rangasami Kounder and his children; (2) that he alone had been paying the kist in respect of the suit property ever since the death of Sowbagiammal; and (3) that there was a suit by the legal representatives of Rangasami Kounder against Duraisami Kounder, namely, O.S. No. 99 of 1964 on the file of the District Munsif's Court, Villupuram, dealing with the partition of the other properties belonging to the brothers and in that suit, there was no claim with regard to the suit property. Apart from these three facts, no other fact has been found which will be indicative of any adverse claim that Duraisami Rounder put forward in respect of the suit property.

8. As far as the first two are concerned; it is the normal act of any co-owner in possession of the property belonging to the other co-owners. The only inference

that can be drawn from the two facts is that Duraisami Kounder was in possession of the property and he was not giving any share of income from the properties to Rangasami Kounder or his sons. There is no evidence to show that this denial of sharing of the income with Rangasami Kounder and his sons was made even after Rangasami Kounder claimed a share in the income. In view of this, these two facts alone cannot constitute an assertion of hostile title to the knowledge of Rangasami Kounder and his sons. As far as the third is concerned, it is admitted that the suit dealt with some other property and it has nothing whatever to do with the estate of Sowbagiammal and the inheritance to that estate. Therefore, the non-inclusion of the suit property in that suit is not of significance whatever.

9. Lastly, it was urged before me that the above facts have to be appreciated against the background of the position that the relationship between Rangasami Kounder and Duraisami Kounder was strained and if so, from these facts, an inference of assertion, of hostile title should, be drawn. I am unable to accept this argument either for the simple reason that there is no satisfactory and uniform evidence to show that the relationship between the two was strained. As a matter of fact, one of the witnesses examined on behalf of the appellants themselves, namely, D.W.1 stated that there existed cordial relationship between the two brothers. Therefore, this point urged on behalf of the appellants also fails. In these circumstances, I cannot say that the conclusion of the learned Subordinate Judge that the appellants had not made out their case that they had acquired title to the entire property by ouster, is erroneous in law. However, that does not dispose of the matter finally. The plaintiffs prayed for mesne profits also when they claimed a share in the properties. But since the trial Court dismissed the Suit, it did not provide for the determination of the mesne profits, while the first appellate Court, though reversed the decision of the trial Court and passed a preliminary decree for partition also did not provide for mesne profits. Consequently, the only direction I have to give in this judgment while dismissing the second appeal is that the question of mesne profits really accounting, will be considered in separate proceedings under Order 20, Rule 18 of the First Schedule to the Code of Civil Procedure.

10. Subject to the above observations, the second appeal fails and is dismissed.
No costs. No leave.

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