SUPREME COURT OF INDIA

Govindammal

Vs

R. Perumal Chettiar and Others

Appeal (Civil) 4357-4358 of 2000

(A. K. Mathur and Altamas Kabir, JJ)

19.10.2006

JUDGMENT

A. K. MATHUR, J.

These appeals are directed against the judgment and order dated 30.12.1998 passed by learned Single Judge of the Madras High Court in Second Appeal No.2253 of 1986 and Second Appeal Nos.145 & 146 of 1988.

Brief facts giving rise to the present appeals are that the plaintiff filed a suit being O.S.No.409 of 1981 for partition and separate possession and also claimed for rendition of accounts. The plaintiff is the second wife of Raju Naidu. Raju Naidu married Rajakanthammal as his first wife and she died in or about 1946 leaving behind the defendant Nos. 1 & 2 as their sons and one daughter by name Saraswathi. After the death of his wife, Raju Naidu married second time to the plaintiff as the second wife. There was no issue from the second wife. Raju Naidu died intestate in 1954 and on his death the plaintiff and defendant Nos. 1 & 2 were the legal heirs to inherit the properties of Raju Naidu. 'B' schedule properties are the separate and self acquired properties of Raju Naidu. It is alleged that the plaintiff and Defendant Nos.1 & 2 lived amicably for sometime. Afterwards, the plaintiff started living separately and Defendant Nos.1 & 2 were giving her share of income from the properties. She demanded partition of the properties. It was promised by both the sons of Raju Naidu and step sons of the plaintiff but without any result. One year before filing of the present suit, Defendant Nos.1 & 2 started acting against the interest of the plaintiff and they stopped giving the

income to the plaintiff. Then they alienated item Nos. 3 to 8 of the scheduled properties to Defendant No.3 and further to Defendant No.4 the entire 'B' & 'C' schedule properties under the pretext of the decree in O.S.No.101 of 1967 and O.S.No.247 of 1970 against Defendant Nos.1 & 2. The plaintiff was not a party to these two suits and therefore that decree was not binding on her. It is alleged that a notice was sent for the first time for partition of the properties sometime in 1979 which was replied by the defendants. It is alleged that a reply was sent by the defendant No.1 to the plaintiff wherein it was stated that the allegations are false and item No.2 has been purchased recently by the defendant No.1 out of the sale proceeds got by him by selling item Nos.3 to 8 in favour of Defendant No.3. Item No.2 also belonged to the joint family. It was also alleged that at the time of marriage, Raju Naidu had already executed a registered settlement deed dated 17.4.1947 and in that 38 cents were given to the plaintiff and the plaintiff remained in peaceful possession of the 'C' schedule properties. Thereafter, when the suit was filed the defendant No.1 filed a written statement and in that it was alleged that the plaintiff does not have any share in the property and 'C' schedule property was already settled in her favour. A panchayat was also convened and arrangement was made that 'C' scheduled property would remain with her and she would not claim any share in the property. It is also alleged that Defendant No.1 maintained the defendant No.2 and their sister and gave her in marriage. After the death of her husband, she and her minor son are still maintained. It is also alleged that sale deed in favour of defendant No.3 was executed by defendant No.1 to meet the debts to the extent of Rs.40, 000 by way of promissory notes and simple mortgages. As such, the suit filed by the plaintiff was barred by law. Defendant No.;2 also contested the suit and even challenged the marriage of the plaintiff with Raju Naidu. It is alleged that after the death of Raju Naidu only two sons became the sole owners by way of survivorship. It is alleged that he has sold undivided half of the properties for valid consideration. Defendant No.3 was a purchaser and he contested the suit and submitted that the suit was not maintainable without the prayer for cancellation of the two sale deeds and he also took the plea of limitation. Defendant No.4 being another purchaser of the property, took the plea that the plaintiff only lived with the deceased Raju Naidu for few months and she left on her own and went to her parents' house. It was also alleged that his son Mahendran has purchased Door No.8-A and 8- B in Kutchery Road for a valid consideration of Rs.26, 000/- from defendant No.2. It is also alleged that he has also filed a suit being OS No.416 of 1981 for allotment of share.

So far as 'A' schedule properties are concerned, only partial relief has been given to plaintiff with regard to 'A' schedule properties. We are primarily concerned with 'B' scheduled properties. The trial court initially framed 10 issues and 7 additional issues were framed in OS 409 of 1981 and 11 issues were framed with regard to OS 416 of 1981. Both the suits were tried together as there was common evidence in both the suits. Large number of documents were filed by both the sides. The trial court after hearing the parties, dismissed OS No.409 of 1981 and passed a preliminary decree for partition and separate possession of plaintiff's half share in the suit 'A' schedule property in OS No.416 of 1981. Aggrieved against this order defendant No.1 preferred an appeal being AS No.55 of 1984 and the plaintiff also preferred an appeal being AS No.244 of 1984 on the file of the District Judge. The appeal of the plaintiff with regard to OSNo.409 of 1981 was allowed and the judgment and decree was set aside and a preliminary decree was passed for partition and separate possession of plaintiff's 1/3rd share in the properties mentioned in 'B' schedule and further directed defendant Nos. 1 to 3 to render accounts in respect of items 3 to 8 of plaint 'B' schedule properties and directed defendant Nos. 1 and 2 to render accounts in respect of the income from items 1 and 2 of the plaint 'B' schedule properties from the date of the suit and further directed Defendant No.4 to render accounts in respect of the income from the portion of item 1 of 'B' schedule property from the date of

purchase. Defendant No.1's appeal being AS No.55 of 1984 was also allowed and the judgement and decree in OS 416 of 1981 was modified to the effect that the plaintiff was entitled to the share of Thambaiyan the 2nd defendant in the plaint 'A' schedule property and that the suit for partition was dismissed in view of the suit for general partition in OS No.409 of 1981was decreed. Aggrieved against these two orders, three second appeals were preferred before the High Court. In Second Appeal No.2253 of 1986 the following substantial questions of law was framed.

"Whether the plaintiff's claim was not barred by limitation by exclusion and ouster and defendants 1 and 2 in the suit had not acquired title to the suit properties by adverse possession?"

In Second Appeal Nos. 145 and 146 of 1988, the following substantial questions of law were framed.

"(1) Whether the Lower Appellate Court is right in negativing the claim of the defendants that they had acquired title by adverse possession ?

(2) Whether the Lower Appellate Court was right in overlooking that the plaintiff had been excluded even before the coming into force of Act 30 of 1956 and had thereby lost her right by exclusion and ouster ?

(3) Whether the Lower Appellate Court was right in omitting to note the suit instituted 12 years after the issue of notice under Ex.B 3 dated 2.11.1955 admitting ouster and dispossession is barred by limitation and the relief of partition would not be available ?"

In fact, the basic question for our consideration in the present appeals is whether the plaintiff is entitled to 1/3rd share in the properties or not ? In this connection, the question with regard to the adverse possession which was specifically argued has to be dealt with and whether the plaintiff lost her right for 1/3rd share in the properties of Raju Naidu because of adverse possession or not ? In case, the plea of the defendants succeeds and that she has lost her right to claim 1/3rd share in the properties of Raju Naidu because of adverse possession then in that case, nothing survives in the present appeals before us.

Many pleas were taken like the marriage of the plaintiff with deceased Raju Naidu was not valid and it was rejected outright. The plain case is that the plaintiff filed a suit for separate possession and rendition of accounts of the properties being the wife of deceased Raju Naidu. The plea of the defendants was that they are the only legal heirs of the deceased Raju Naidu and they have dealt with the properties subsequently by mortgaging the same and they have enjoyed the properties to the knowledge of the plaintiff openly for more than the statutory period and whatever right she had stood extinguished. In order to settle the issue, 38 cents of land was settled in her favour way back in 1947 and a panchayat was also convened and she felt satisfied and did not claim any right in 'B' schedule properties from 1955. It was also pointed out that on 2.11.1955 through a counsel the plaintiff got a notice issued demanding partition and her share but she did not take any steps.

Therefore, they are enjoying the properties hostile to the interest of the plaintiff. Therefore, they took the plea of adverse possession also.

So far as 'B' schedule properties is concerned, the findings of the courts below are that the suit properties are the self acquired properties of Raju Naidu and it is not ancestral property. Therefore, the plaintiff was entitled to her 1/3rd share in all the properties. The plaintiff in order to substantiate her claim made oral as well as documentary evidence. At the same time, the defendants also led evidence to prove that the plaintiff's right in the properties stood extinguished on account of adverse possession.

The defendants in order to oust the claim of the plaintiff took definite plea of adverse possession hostile to the interest of the plaintiff to her knowledge and led evidence to show that a notice was sent by the plaintiff on 2.11.1955 in which she claimed that she was not given any income from the properties of Raju Naidu. Though the plaintiff appeared in the witness box as P.W.1, she denied to have sent any such notice. It is alleged that the notice was sent through the Advocate but no such advocate was produced by the defendants. However, the defendants sent a reply to that notice. But the original notice alleged to have been sent by the plaintiff was produced as Ex.B 3 but no advocate was produced to prove that notice. P.W.1 has categorically denied to have sent any such notice and she also deposed that after the death of her husband, Raju Naidu, she was thrown out of the house. Though after the death of her husband, for some time she was given income from the properties but thereafter the defendants stopped payment of the income arising out of the properties. She also admitted that some of the properties were usufructuary mortgage. After some time she came to know that certain properties were being sold. Therefore, she woke up in 1979 and filed the present suit. 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 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. In this connection, our attention has been invited to an earliest decision in the case of Hardit Singh & Ors. V. Gurmukh Singh & Ors. [1918 AIR(PC) 1 wherein it has been held as under :

" If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such 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 a right to hold it as separate, so as to assert an adverse claim against other interested members. If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. The evidence of actual user is not sufficient to establish abandonment or exclusion."

Similarly, our attention was invited to a decision in the case of Varada Pillai & Anr. V. Jeevarathnammal [ILR Madras (Vol.43) 244]. In that case, their Lordships quoted the earlier decision referring to English rule with regard to possession of several co-parceners, joint tenants or tenants-in-common with the possession of others so as to prevent limitation affecting them. In the case of Cully v. Deo [(1840) 11 ad. & E.1008] their Lordships observed as follows :

“Generally speaking, one tenant-in- common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant- in-common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant-in- common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster:

"and , if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for an entirety."

In the case of Mohaideen Abdul Kadir & Ors. V. Mohammad Mahaideen Umma & Ors. reported in 1970 (2) ILR(Mad) 636 their Lordships held that no hard and fast rule can be laid down. But the following relevant factors may be taken into consideration : (i) exclusive possession and perception of profits for well over the period prescribed by the law of limitation ; (ii) dealings by the party in possession treating the properties as exclusively belonging to him; (iii) the means of the excluded co-sharer of knowing that his title has been denied by the co-owner in possession. There may be cases, where, owing to long lapse of time, it may not be possible for the co- owner in possession to adduce evidence as to when the ouster commenced and how it was brought home to the knowledge of the excluded co-owner. In such a case the law will presume ouster as an explanation of the long peaceful possession of the co-owner in possession. In order to maintain the person in such

possession the law presumes a lawful origin of the possession. Therefore, no hard and fast rule can be laid down from which it can be inferred that any co-sharer has ousted his co-sharer. That will depend upon facts of each case. Simply long possession is not a factor to oust a co-sharer but something more positive is required to be done. There must be a hostile open possession denial and repudiation of the rights of other co-owners and this denial or repudiation must brought home to the co-owners. Simply because a co-sharer gave notice claiming partition of the suit properties and possession and did not pursue the matter further, that will not be sufficient to show that the co-sharer has lost his/her right. In the present case, it is only when 'B' schedule property was being sold by two brothers then alone the plaintiff woke up to realise that the step sons were not interested to give her share in the property and she rushed to file the suit. Therefore, by no stretch of imagination it can be inferred in the present case that the plaintiff had lost her right to claim partition and share in the property.

In the case of Vidya Devi alias Vidya vati (dead) by LRs v. Prem Prakash & Ors. reported in 0 the question was whether the plea of acquisition of title by adverse possession was available to the co-bhumidhar or not. In that context, their Lordships held that when no period of limitation is fixed for filing a suit for partition by a co-bhumidhar against his other co-bhumidhars in respect of a joint holding, the question of the other co-bhumidhar acquiring his title to such holding by adverse possession for over 12 years can never arise. It was further observed that if that be so, such plea of perfection of title by adverse possession of a holding by a co-bhumidhar against his other co-bhumidhar as defence in the latter's suit for partition can be of no legal consequence.

In the case of Mohammad Baqar & Ors. V. Naim-un-Nisa Bibi & Ors. reported in it was observed that under the law possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession and exclusion and ouster following thereon for the statutory period. There can be no question of ouster, if there is participation in the profits to any degree.

In the case of Md. Mohammad Ali (dead) by LRs v. Jagadish Kalita & Ors. reported in this Court examined a series of decisions on the question of adverse possession and after extracting the legal propositions from various decisions, their Lordships concluded that long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a constructive trustee of other co-sharer and the right of a person or his predecessors-in-interest is deemed to have been protected by the trustees.

As against this, our attention was also invited to a decision in the case of T.P.R.Palania Pillai & Ors. V. Amjath Ibrahim Rowther & Anr. reported in 1942 AIR(Mad) 622, their Lordships observed that in order to constitute adverse possession, the possession must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. Therefore, in cases of adverse possession also their Lordships have said that the possession should be for longer period and it is known to the competitor that it is held adverse to his knowledge. Their Lordships further held that in cases of usufructuary mortgage granted by one of several co-sharers if a person remains in possession of the land and cultivates it for years, the requirement of continuity, publicity and extent for adverse possession are fully complied with. But that is not the case here.

In the case of Nirmal Chandra Das and Ors. V. Mohitosh Das & Ors. reported in 1936 AIR(Cal) 106 their Lordships observed that in order to succeed on the ground of ouster, the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of 12 years. Their Lordships further observed that there can be no adverse possession by one co-sharer as against others until there is an ouster or exclusion; and the possession of a co-sharer becomes adverse to the other co-sharer from the moment there is ouster. Therefore, what is ouster and what is adverse to the interest of the claimant depends upon each case. In this case, a plea was raised that certain properties were usufructuary mortgage. But that was not in a manner to show that these properties are adverse to the interest of the plaintiff. It was only when 'B' schedule properties were sought to be sold and it came to the knowledge of the plaintiff that her step sons were not interested in partition of the property and giving her share, she filed the suit in the year 1979. Therefore, for the first time in 1979 she came to know that adverse possession is being sought to be established and her interest in 'B' schedule properties is sought to be sold by her step sons. But in any case, just because she gave a notice and she did not pursue the same, on that basis no adverse inference can be drawn and she cannot be ousted on that count by way of adverse possession.

As a result of our above discussion, we are opinion that the view taken by the learned Single Judge of the High Court of Madras in dismissing the suit of the plaintiff (O.S.No.409 of 1981) is not correct and the said order is set aside. Hence, this appeal is allowed. The plaintiff is entitled to her 1/3rd share in the 'B' schedule properties being the widow of Raju Naidu and she is also entitled to rendition of accounts.

So far as O.S.No.416 of 1981 is concerned, we need not go into detail on the findings of fact recorded by the courts below. However, we make it clear that Govindammal being the second wife of late Raju Naidu will have her share in the 'A' schedule properties also. The appeal is accordingly disposed of. No order as to costs.