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High Court Of Kerala

Case No: A.S No. 185 of 1980

Sainaba Umma and another		APPELLANT
	Vs	
Moideenkutty and others		RESPONDENT

Date of Decision: June 10, 1987

Citation: (1987) KLJ 728

Hon'ble Judges: P. K. Shamsuddin, J; P. C. Balakrishna Menon, J

Bench: Division Bench

Advocate: P. N. K. Achan, K. Vijayan and N. N. Sugunapalan, for the Appellant; B. Sivaswamy, V.V. Asokan, K. P. Mayankutty Mather and Abraham Mathew, for the Respondent

Judgement

Balakrishana Menon, J.

This appeal by defendants 2 and 3 is against the preliminary decree for partition of the plaint B schedule items 1, 3 and 5 to 7. The appellants are concerned only with items 3, 4 and 5 and these, according to them, are not available for partition. The plaintiffs claim partition and separate allotment of 1/3 share in the B schedule items 1 to 7. The A schedule is the genealogy and she C schedule consists of moveable items wherein also the plaintiffs claimed a l/3rd share. The suit was dismissed in so far as it relates to item 2 of the B schedule and the C schedule moveables. The plaintiffs have filed a memorandum of cross-objections with a petition to condone the delay in filing the same.

2. According to the plaint items 1,4,5, and 6 belonged in tenancy slights to the plaintiffs'' grandfather Saidali Rowther and item 2 to his eldes on Hydrose. Saidali Rowther had four sons namely Hydrose, Abdu Rahiman, Moideenkutty and the 1st defendant and a daughter Ammu @ Ummeri Umma. Hydrose, Abdu Rahiman and Moideenkutty died issueless and the properties devolved on the 1st defendant and Ummeri Umma. Ummeri Umma died in 1974 The plaintiffs are the children entitled to the share due to Ummeri Umma. The 2nd defendant is the daughter of the 1st defendant and the 3rd defendant is her husband. Defendants 2 and 3 are impleaded

in the suit on the contentions raised by the 1st defendant. Except for the inclusion in the plaint there is no reference to the plaintiffs'' right to partition of items 3 and 7. Defendants 2 and 3 claim exclusive title to items 2 to 5 and the 1st defendant claimed title to items 1, 6 and 7. Since the appeal relates only to items 3, 4 and 5, it is not necessary to refer to the contentions of the defendants in regard to the other items According to the defendants item 3 is 2 paras seed area of land in Sy. No. 88/2 having a total extent of 3.33 acres. This item belonged to deceased Hydrose who bad granted a lease of the same to he 1st defendant on a ''munpattom'' of Rs. 300/- and rent Rs. 298/- and 368 paras of paddy. The 1st defendant had by Ext. B3 sale deed dated 16-5-1960 assigned his (sic) rights to the 2nd defendant. The 2nd defendant had applied for and obtained Ext. B52 order of the Land Tribunal, Sreekrishnapuram for assignment of the right, title and interest of the landlord and a certificate of purchase Ext. 351 was issued to her. On the strength of these documents the 2nd defendant claims absolute title to item 3. Item 4 is also claimed to be an acquisition of Hydrose and after his death his brother Moideenkutty and the 1st defendant had, as per the sale deed Ext. B1 dated 10-1-1955 assigned this item to the 3rd defendant. The 3rd defendant claim title under Ext. B1. The defendants also plead that the plaintiffs'' title, if any, is lost by adverse possession. Item 5, according to the defendants, belonged to Thiruvalayanattu Bhagavathi Devaswom under whom one Janardanan Thampan had kanom rights In partition among his children after this death, this item was allotted to his son Gopinatha Menon. He had granted a lease of this item to the 1st defendant and later assigned the same to the 2nd defendant as per Ext.B2 sale deed dated 5-3-1960. The 1st defendant surrendered the leasehold right to the 2nd defendant and she is in possession of the same in her own right.

3. The trial court decreed partition of a 1/3rd share in items 3 and 5 and a 1/5th share in item 4 to the plaintiffs.

4. The decree in regard to item 3 is on the basis of the Defendants admission that it was an a acquisition by Hydrose. Hydrose and Moideenkutty died issueless. Therefore the 1st defendant was entitled to 2/3rd shares and Ummeri Umma to l/3rd share. The plaintiffs as legal heirs of Ummeri Urn ma are held entitled to the 1/3rd share that belonged to their mother. The defendants'' case of a lease of this item by Hydrose to the 1st defendant was not accepted as true and Ext. B3 assignment of the leasehold right dated 16-5-1960 by the 1st defendant to the 2nd defendant did not, according to the court below, convey any title to the assignee. Exts. B51 and B52 are not seen adverted to by the court below.

5. We find it difficult to sustain the decree for partition of item 3. As adverted to earlier in this judgment the plaint does not disclose any specific case relating to item 3. The preliminary decree is based on the admission of the defendants in their written statements that it was an acquisition of Hydrose who had granted a lease of the same to the 1st defendant and the 1st defendant had assigned the same under

Ext. B3 to the 2nd defendant. It is well settled that an admission in the pleadings cannot be accepted in part rejecting the remaining part dependant on it The Privy Council in the decision in Motabhoy Mulla Essabhoy v. Mulj Haridas (42 lnd App 103) observed;

It is permissible for a tribunal to accept part and reject the rest of any witness''s testimony. But admission in pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at 11.

The same view is expressed in the decision of the Calcutta High Court in Fateh Chand Murlidhar Vs. Juggilal Kamlapat, Following these decisions a Division Bench of the Calcutta High Court in J. Mc. Gaffin and Another Vs. Life Insurance Corporation of India, :--

These decisions, in our opinion, indicate that when a statement on admission is made in pleading together with further statement centering round, depending and standing on and conditional upon that admission, all the statements are to be taken and considered together in respect of such pleading.

The Supreme Court in Hanumant Vs. The State of Madhya Pradesh, :

An admission must be used either as a whole or not at all.

This principle stilled by the Supreme Court in a criminal case is equally applicable to admissions in the pleadings in civil cases as well. The admission that item 3 was an acquisition of Hydrose is conditioned by the further statement that it was the subject of a lease by him to the 1st defendant who had later assigned the same to the 2nd defendant who had later assigned the same to the 2nd defendant as per Ext.B3. The plaintiffs are not therefore entitled to any share in the plaint B schedule item 3.

6. The plaintiffs have faded to prove their case that item 4 belonged to Saidali Rowther. The preliminary decree for partition of this item is also based on the admission of the defendants that it is an acquisition of Hydrose and that after his death his legal heirs Moideenkutty and the 1st defendant had sold the s me to the 3rd defendant under Ext.B1 sale deed dated 10-1-1955. On the admission that the property belonged to his death devolve not merely on his brothers Moideenkutty and the 1st defendant, but also on his sister Ummeri Umma. Ummeri Umma, under the Mohammedan law, was entitled to a 1/5th share. The assignment Ext. B1 by Moideenkutty and the 1st defendant to the 3rd defendant was purporting to convey absolute title in this item. The assignors had only 4/5 shares. The plaintiffs as the legal heirs of Ummeri Umma could therefore claim a 1/5th share but for the plea of adverse possession raised by the 3rd defendant. The defendant''s plea of adverse possession was rejected on the ground that the 3rd defendant on obtaining Ext. B1 was a co-owner of Ummeri Umma and his possession of the property cannot

therefore be treated as adverse to the plaintiffs'' title to a l/5th share. The plaintiffs have no case that Ummeri Umma had at any time shared the rents and profits of item 4. The court below finds that the plaintiffs were aware that defendants 2 and 3 were in possession of this item. The possession of the 3rd defendant assignee under Ext. B1 started from the date of assignment on the 10th of January. 1955. The present suit is filed in October 1978. more than 23 years after the assignment Ext. 31. The assignors Moideenkutty and the 1st defendant assert that they are the full owners of the property and they purport to convey absolute title to the 3rd defendant. The long possession of this item by the 3rd defendant is not in dispute. Counsel for the plaintiffs respondents, on the basis of the decision of a learned Judge of this Court reported in Para v. Chiruthai (1985 KLT 563) submits that in no case there can be adverse possession by one co-owner against another for he is in possession as a trustee on behalf also of the other co-owner. The learned Judge relying on the decision of the Supreme Court in Karbalai Begum Vs. Mohd. Sayeed and Another, has come to the following conclusion at page 565:-

Since a co-sharer in possession is a trustee for a co-sharer not in possession, there can be no question of any adverse possession, by any co-owner in possession.

We find it difficult to accept the proposition so widely stated by the learned Judge, The learned Judge relies on the following passage in Karbalai Begum''s case:

It is will settled that 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 tide by adverse possession to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that Mohd. Bashir and Mohd. Rashid, being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees. The learned counsel appearing for the respondent was unable to contest this position of law. In the present case, it is therefore manifest that the possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff.

This passage is preceded by an earlier passage at the end of paragraph 6 which reads:

Even if no share was given to the plaintiff by the defendants, as the defendants were co-shares, unless a clear ouster was pleaded or provided the possession of the defendants as co-shares would be deemed in law to be the possession of the plaintiff.

Thus the decision of the Supreme Court does not totally exclude adverse possession among co-owners, but affirms the requirement of a plea and proof of ouster. The learned Judge in Paru''s case extends the principle that a trustee cannot acquire a title by adverse possession of the trust property to the possession of co-owner and according to the learned Judge in no case can a co-owner being a trustee plead or

prove adverse possession against another co-owner even if his possession is adverse to the knowledge of the of her co-owner ousted from possession of the property. The Supreme Court in P. Lakshmi Reddy Vs. L. Lakshmi Reddy, states the law relating to adverse possession among co-owners at P. 317:

Now the ordinary classical requirement of adverse possession is that it should be nee vi nee clam nee precario. (See (1934) 66 MLJ 134 (Privy Council) . 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 Devi 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 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-her 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 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 co-heir''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. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider It is sufficient to notice that the Privy Council In N. Varada Pillai v. Jeevarathnammal AIR 1919 PC 44 at p.47(D) quotes, apparently with approval, a passage from Culley v. Deod Taylarson, (1840) 3 P & D 539: 52 RR 566(E) which indicates that such a situation may well lead to an inference of ouster "if other circumstances concur". (See also AIR 1931 48 (Privy Council) . It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession.

A Division Bench of this Court in Sooppi v. Moosa (1969 KLT 121) after considering the case law on the question of adverse possession among co-owners stated at page 127:-

When one co-owner takes possession and continues in possession for along time enjoying the income of the property without sharing it with the other co-owners, it is, our opinion, 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.

A Full Bench of this Court in Kunjamma Cicily v. Kasim Beevi (AIR 1969 Kerala 293) considering the question of adverse possession among co-owners stated at Page 296;

The legal position is now well settled that one co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile an mus on his own part in derogation of the other co-heir''s title, (See Corea v. Appuhamy, 1912 AC 230 and P. Lakshmi Reddy Vs. L. Lakshmi Reddy, . In order to establish adverse possession on the part of one co-heir as against another it is not sufficient to show that one of them is in sole possession and enjoyment of the profits of the property. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse should be made out. For this there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one co-heir to the knowledge of the other, the burden of making out such ouster being on the person claiming to displace the lawfull title of a co-heir by his adverse possession.

It is not, therefore, correct to say that in no circumstance there can be adverse possession by one co-owner against another. Even if a co-owner in possession is a constructive trustee of the co-owner not in possession, an open assertion of hostile title coupled with exclusive possession and enjoyment to the knowledge of the other co-owners constitute ouster and such ouster on assertion of hostile title openly to the knowledge of the other co-owners can betaken, as held by a learned Judge of this Court in Krishnan v. Raman (1986 KLT SN 63) as a renouncement of possession by the constructive trustee and a re-entry with an open and hostile animus to constitute adverse possession. It is true that the burden of proving ouster is on the co-owner who claims adverse possession.

7. The circumstances of the present case leave no room for doubt that the 3rd defendant has proved ouster and adverse possession against Ummeri Umma and the plaintiffs. The plaintiffs have no case that the Property belonged to Hydrose and their mother Ummeri Umma is entitled to a share as a legal heir of Hydrose. Their case of title of Saidali Rowther pleaded has not been proved. It is on the basis of the defendants'' admission that the property is an acquisition of Hydrose that the court below has granted a decree for partition of a l/5th share in favour of the plaintiffs. Ext. B1 executed as early as in 1955 is an open assertion of a hostile title and the assignee is in exclusive possession of the property for over 23 years prior to the institution of the suit. In the light of these facts we are clearly of the view that the plaintiffs'' title to a l/5th share in item 4 is lost by adverse possession of the 3rd defendant.

8. The plaintiffs'' case in regard to item 5 of B schedule that it is an acquisition of Saidali Rowther is not attempted to be proved in this case Ext. B2 dated 5-3-1960

clearly shows the title of the 2nd defendant to item 5. That document recites the prior possession of 1st defendant as a tenant under the assignor Gopinatha Menon. The burden is on the plaintiffs to prove their title and they have totally failed to discharge the burden. Any defect in the defendants'' title does not confer any right to the plaintiffs in the property. There is no reason to discredit the title deed Ext.B2 and recitals contained therein. The so called admission of the 3rd defendant examined as D.W.1 that the leasehold right belonged to Hydrose is not sufficient to confer title on the plaintiffs in derogation of the recitals in the title deed Ext.B2 relied on by the 2nd defendant. We therefore hold that item 5 in the B schedule in the plaint is also not available for partition.

9. In the result we allow the appeal in part and set aside the preliminary decree for partition passed by the lower court in so far as it relates to the B schedule items 3, 4 and 5. The plaintiffs-respondents have filed a memorandum of cross-objection against the decree dismissing the suit in so far as it relates to item 2 with a petition C.M.P. No.4579/1985 to condone the delay of over 4 years in filing the memorandum of cross-objections. We are not satisfied about the explanation for the long delay. We therefore dismiss C.M.P. No. 4579/1985 and also the memorandum of cross-objections as filed out of time.

The parties will bear their respective costs.