
(1972) 04 MAD CK 0062

In the Madras High Court

Case No : Appeal No. 273 of 1964

Ibramsa Rowther and Others

APPELLANT

Vs

Sk. Meerasa Rowther and Others

RESPONDENT

Date of Decision : 24-04-1972

Acts Referred:

Citation : AIR 1972 Mad 467 : (1972) 85 LW 596

Hon'ble Judges : Ramamurti, J; Maharajan, J

Bench : Division Bench

Judgement

Ramamurti, J.—This appeal arises out of a suit for partition. O.S. No. 90 of 1960. Sub Court, Tiruchy, and defendants 3, 4, 7 to 11 and 13 are the appellants, defendants 7 to 13 claiming under an alienation from the grandmother of the third defendant. Defendants 14 to 16 are the alienees through the plaintiff. The District Board of Madura, who was impleaded as the sixth defendant and subsequently exonerated is not concerned in this litigation. The plaintiff, Sheik Meerasa Rowther, filed the suit for partition claiming to be entitled to 287/720th shares in the estate left behind by his father. Sahib Sangheer Khan who died in 1931. The third defendant, who is the grandson (daughter's son) of one Appavoo Rowther, another son of Sangheer Khan, is the main contesting defendant, his defence being that, immediately after Sangheer Khan's death in 1931, there was a family arrangement, in pursuance of which there has been a complete partition by metes and bounds, in which the properties situate in Tamarapadi village in Dindigul taluk have been allotted to the share of Appavoo Rowther aforesaid and the suit for partition as though the estate of Sahib Sangheer Khan remained undivided, was incompetent and misconceived. The trial Court negatived the contentions raised by the defendant and decreed the suit for partition, allotting 287/720th shares to the plaintiff in the suit properties. It is against this judgment that Appeal No. 273 of 1964 has been preferred. The following genealogical tree shows the relationship between the parties. The ranks of the parties in the present suit are also mentioned as against their names. As frequent reference will have to be made to an earlier litigation between the

parties, O.S. No. 29 of 1952, District Munsif's Court, Kulithalai, their ranks in the earlier litigation also are mentioned in the tree.

GENEALOGICAL TREE

SAHIB SANGHEER KHAN (Died in 1931).

VELLAITHAYAMMAL (Died in 1953)

_____ |

| | | | |

Sheik Rowther Pillaiammal Amina Bibi Shiek Avvammal Bibi |

(Pre-deceased (Pre-deceased (Predeceased Meerasa Rowther (D-5 in O.S.29/52 |
his father) her father) her father) (D1 in O.S.29/52 & present D-1) |

| | | Present Plff.) = |

| | | Ponnayya Rowther |

Sheik Meerammal Sheik Meerammal (D.6 in O. S. 29/52) |

Mohammad Bibi Bibi |

(D-3 in O.S. (D.4 in O.S. |
29/52) & 29/52.) |

(Present D-5) |

Married Jamila Bibi |

(Present D-2.) _____ |

| |

Jamila Bibi Appavoo Rowther

(Present D-2) (Died in 1936)

= =

Married to Sheik Married to Rahima Bi

Mohammed Rowther (D-7 in O.S. 29/52)

(Present D-5) (Died in 1954)

_____ |

| |

Rafia Bibi Syed Meerammal Bibi

(Died in 1939) (D-8 in O.S. 29/52)

Died in 1957 Married to

Appavoo Rowther

(Present D-4 & D.W. 3)

|

Minor Ibramsa

Rowther

(Present 3rd Defendant &

1st Appellant)

2. The facts of the case are briefly as follows:

The ancestor of the parties, Sahib Sangheer Khan belonged to Ilankakurichi Village, Kulithalai taluk and died in the year 1931. His estate mainly consisted of dry lands in Chettiapatti Village, Kulithalai Taluk, house and shops in the native village of Ilankakurichi, nanja and punja lands situate in Thamarapadi Village, Dindigul Taluk and some outstanding, i.e., mortgage debts and promissory note debts, in favour of the deceased. His widow was Villaihayammal who died in the year 1953. Sangheer Khan's eldest son, Sheik Rowther, and two daughters, Pillai Ammal and Amina Bibi pre-deceased their father. The grandson of Sangheer Khan through his pre-deceased son Sheik Rowther is Sheik Mohammed Rowther, the fifth defendant in the suit. Avvammal Bibi, the surviving daughter of Sangheer Khan, is the first defendant, Avvammal's daughter, Jamila Bibi, is the second defendant. She has married her maternal uncle's son, Sheik Mohamed Rowther aforesaid, the 5th defendant in the action. The last son of Sangheer Khan was Appavoo Rowther who died in the year 1936, leaving behind him his widow Rahima Bibi. They had two daughters, Rafia Bibi who died in 1939 and Syed Meerammal Bibi who died in 1957. The third defendant, minor Ibramsa Rowther is the son of Syed Meerammal Bibi aforesaid, i.e. the grandson of Appavoo Rowther and Rahima Bibi, through their daughter Syed Meerammal Bibi aforesaid. The other defendants are alienees. Villaihayammal conveyed her 1/8th share to which she was entitled in her husband's estate, to the second defendant, her daughter's daughter, under a sale deed date 21-2-1953. The plaintiff's case is that the remaining 7/8th shares were taken by the plaintiff, his sister Avvammal Bibi (first defendant) and his other brother Appavoo Rowther, the maternal grandfather of the minor third defendant. The plaintiff claims 14/40 shares as the heir of his father and 14/160th shares in the estate of his deceased brother Appavoo, i.e. in all 70/160th shares.

3. Defendants 1, 2, 5 and 12 remained ex parte. The seventh defendant is an alienee of certain items of lands in Thamarapadi village (set out in Schedule B to the plaint) under the sale deed. Exhibit B-5 dated 31-5-1952, executed by Syed

Meerammal Bibi, the daughter of Appavoo Rowther and grand daughter of Sangheer Khan. Certain other items in the B Schedule in Thamarapadi village were sold by Rahima Bibi under Ex. B-4 dated 13-3-1939 in favour of one Velankanni Servai, the husband of the eighth defendant and father of defendants 9 to 12. Defendants 14 to 16 are alienees, from the plaintiff, of the shops in the village under a sale deed dated 14-8-1951. The case of defendants 3 and 4 and the alienees claiming title under them is that, after the death of Sangheer Khan in 1931, there was a family arrangement and a partition by metes and bounds, at which the lands in Chettiappatti village and the shops and the house in the native village were allotted to the plaintiff towards his share, that the entire lands in Thamarapadi Village were allotted to the plaintiff's brother, Appavoo Rowther, that some mortgage debts and promissory note debts due to Sangheer Khan were given to his widow, Vellaithyammal, that Appammal, the first defendant was given some lands in another village, variously called Chakkaram or Chakkalam, that there has been an outright partition by metes and bounds between the two sons, the surviving daughter and the widow of Sangheer Khan and that ever since that partition arrangement, the parties were in separate possession and enjoyment of the properties allotted to them and that Appavoo Rowther and after his death in 1936 his wife Rahima Bibi have been in separate and exclusive possession and enjoyment of the properties and that after Rahima Bibi's death in 1954, her daughter Syed Meerammal and her minor son, the third defendant, have been in separate and exclusive possession of the lands in Thamarapadi Village allotted to the share of Appavoo Rowther aforesaid.

Defendants 3 and 4 also contested the suit on the ground that the title of the other members of the family to Thamarapadi lands had been extinguished by adverse possession and enjoyment of Appavoo Rowther and the members of his branch and by ouster for nearly three decades, and the members of the other branches will have no right in respect of Thamarapadi lands. The present defendants 14 to 16 filed the earlier suit, O.S. No. 29 of 1952, District Munsif's Court. Kulithalai, to enforce their right under the sale deed dated 14-8-1951 executed by the plaintiff in respect of the shops (item 7 in the A schedule) and in that litigation, it was held that defendants 14 to 16 herein, i.e., the plaintiffs in that suit, were only entitled to a partition of 287/720 ths shares in the house and also a decree against the present plaintiff for damages for breach of covenant of title. Defendants 14 to 16 relied upon that judgment in O.S. No. 29 of 1952. Even though several points were raised in the trial Court, the main point that was stressed by counsel on both sides related to the question whether Appavoo Rowther and the members of his branch had become solely entitled to the lands in Thamarapadi Village either in pursuance of the partition arrangement immediately after the death of Sangheer Khan or by separate and exclusive possession and ouster for nearly three decades, with the result that the right and title, if any of the other members of the family of Sangheer Khan had become extinguished.

4. A perusal of the judgment of the learned Subordinate Judge shows that on the

crucial factual portion of the case he has accepted the case of the defendants, separate and exclusive possession of the Thamarapadi Lands with Appavoo Rowther and his wife, from 1931-32 alienating portion of Thamarapadi lands and the alienees being in possession of the properties since 1939. The Subordinate Judge also finds that for nearly three decades the plaintiff had no possession whatever of the lands in Thamarapady village. Equally, the Subordinate Judge finds that the plaintiff and his alienees alone have been in sole and exclusive possession of the lands in Chettiappatti village. The learned Judge has also found that in the prior litigation. O.S. No. 29 of 1952, the plaintiff has filed written statement and also given evidence (which have been marked respectively as Exhibits B-1 and B-2) completely supporting the case of the defendants 3 and 4 about the family arrangement and the partition at which Thamarapady lands were allotted exclusively to Appavoo Rowther. The Judge has also found that in respect of Thamarapady lands, the plaintiff's name is not found in the concerned patta. In other words, the learned Judge has found that, in the matter of separate and exclusive possession and enjoyment of the lands in Thamarapady village. Appavoo Rowther and the members of his family alone have been in sole and exclusive possession ever since Sangheer Khan's death in 1931 and the plaintiff and the members of the other branch had no possession whatever. Even so, the learned Judge has negatived the defence in the view that there is no partition deed. As regards the exclusive possession of the lands in Thamarapady village with Appavoo Rowther and the members of his branch, the learned Judge referred to some Judicial decisions and took the view that such exclusive possession by one co-owner, however long the period may be, would not constitute ouster.

5. On a careful scrutiny of the oral and documentary evidence, we are unable to agree with the ultimate conclusion and findings of the learned Subordinate Judge. In the first place, we are satisfied that the plaintiff had not been able to explain his prior admissions in the written statement (Exhibit B-1) in O.S. No. 29 of 1952 and his prior deposition (Exhibit B-2) therein. Secondly, the plaintiff's conduct in altogether suppressing the fact that for over two and half decades the plaintiff was in sole exclusive possession of Chettiapatti lands and the shops and the house in the village and that Appavoo and his branch had been in sole and exclusive possession of the Tamarapady lands, betrays the consciousness in the mind of the plaintiff that such separate possession was in pursuance of the prior family arrangement and partition. In paragraph (6) of the plaint the plaintiff has made a dubious, bold and cryptic statement that the heirs of Sangheer Khan are in joint enjoyment of the properties and that the plaintiff has filed the suit for partition because it is not possible for him to continue jointly hereafter. There is also the important fact that the second defendant, to whom the widow Vellaithayammal has purported to convey her 1/8th share, remained ex parte. D.W. 1, the scribe of the two sale deeds, Exhibits B-4 and B-5, and D.W. 2 who is a resident of a village two miles from Thamarapady and who is also the brother of Rahima Bibi, have given evidence. Besides this evidence, the admissions of

the plaintiff and his prevaricating answers lend considerable support to the defence of the defendants. The plaintiff has instituted the suit about thirty years after the death of his father when, as a result of the inordinate delay, other persons who were parties to the arrangement and who could have given evidence are dead. Even if there should be any gap or defect in the evidence, the adverse the plaintiff in view of the inordinate delay in his asserting his rights and the plaintiff must take the responsibility for the same. Vide the statement of the law in Sarkar on Evidence (Twelfth Edition). page 1011, to the effect, that if the plaintiff was in a position to sue before and the long delay in bringing the suit has prejudiced the defendant and has occasioned loss of evidence by death or otherwise, a strong presumption may arise against the plaintiff.

6. We shall first consider the evidence afforded by the proceedings in C.S. No. 29 of 1952, District Munsif's Court, Kulithalai. * * * * *

(Discussion of Evidence omitted--Ed.).

We have no hesitation, on a survey of the evidence, particularly in view of the uniform course of conduct and actings of the parties for over 2.1/2 decades, in holding that Thamarapadi lands had been allotted to Appavoo's branch at the family partition and that branch alone had been in separate and exclusive possession of those lands. When once the theory of separate enjoyment for the purpose of convenient management is ruled out altogether, the version of the defendant has to be accepted as highly probable and true. The evidence adduced on the side of the defendants amply supports their version. It is clear that in view of the change and the drift in the fortunes of this ancient family and in view of the recent rise in the value of the property, the plaintiff has indulged in this speculative litigation, to re-open a partition and arrangement which took place over 25 years ago and which has been given effect to and acted upon by all the parties during the entire period of about three decades.

7. Even if the evidence adduced on the side of the defendants to establish a partition is insufficient, the question still arises whether the plaintiff's title has been extinguished and the defendants have acquired title by ouster as a result of the hostile, exclusive possession and enjoyment of the Thamarapadi lands for over twelve years, in the instance case, for over three decades. Learned Counsel, Mr. Ahmed Meeran, for the plaintiff urged that the mere fact that the patta for the lands stood in the name of one co-owner or the other co-owner's non-participation in the income of the properties or his mere inaction for any length of time would not amount to ouster and that there should be further clear proof that acts of enjoyment were such as to constitute ouster to the knowledge of the co-owner, in the sense that there was an open denial and repudiation of the title of the plaintiff, by Appavoo Rowther and the members of his branch. Learned counsel urged that in this case, there is no such evidence of open assertion and open repudiation of the right and title of the plaintiff to his knowledge and all that is proved is mere exclusive possession for over thirty years and that, under those circumstances, possession of Thamarapadi lands by Appavoo Rowther and

his branch for any length of time, even if it be for three decades, will avail nothing as against the plaintiff.

Mr. Meeran invited our attention to some of the decisions in support of his contention, for instance the observations of Veeraswami, J. (as he then was) sitting with Ganapatia Pillai, J. in *Muhammad Kaliba Rowther Vs. Muhammad Abdullah Rowther*, where the learned Judge has observed:

"It is well settled law, and we think that no citation of authority is necessary that possession in the hands of a co-sharer of a property owned in common in possession on behalf of all the co-sharers. Implicit in this proposition is the further position in law that mere non-participation in the receipts from such immovable property or mere inaction in respect of it for any length of time on the part of one or more of the co-sharers is not regarded as amounting to ouster or as investing the possession in the hands of one of the co-sharers with an adverse character so as to enable him to prescribe against the other co-sharers. It is only when acts are clearly proved on the part of the co-sharer in possession which would be inconsistent with any other co-sharer being entitled to any possession or interest in any part of the property, it can be said that any question of ouster of the co-sharers not in possession can arise. In the absence of such ouster there will be no room for adverse possession or prescription in favour of the co-sharer in possession".

Learned counsel also placed reliance upon a recent decision of the Supreme Court reported in *Maharajadhiraj of Burdwan, Udaychand Mahatab Chand Vs. Subodh Gopal and Others*, where too, it was observed at p. 378, that once it is held that a co-owner is a co-owner of the lands in question, his possession, however long it might be, unless it is adverse to the other co-owners, cannot confer on him any right". Learned counsel urged that, to constitute ouster, there must be clear proof that the exclusive possession started with open repudiation and denial of the title of the plaintiff to his knowledge or that, at some point of time, the character of possession changed from mere exclusive possession to hostile possession in open repudiation and denial of the title of the plaintiff to his knowledge and continued as such for over twelve years. We are not inclined to accept this argument presented in this form as it is not a full and complete statement of the doctrine of ouster, and it will not be a correct statement in the abstract to say that exclusive possession for any length of time (regardless altogether of the time factor) is of no consequence. The decisions relied upon by Mr. Meeran do not lend support to this extreme contention.

In a recent Bench decision of this Court one of us sitting with Venkataraman, J., in *Abdul Kadir v. Umma*, ILR (1970) 2 Mad 636, the doctrine of ouster as between co-owners has been elaborately reviewed with special reference to the time factor of sole and exclusive possession of one co-owner in the background of the other co-owner's continuous and complete inaction and non-participation in the income for a considerable length of time. Vide: the discussion of Venkataraman, J. at pages 700 to 710 and discussion of the other learned Judge

(Ramamurti, J.) at pages 725 to 743. As this Bench decision has elaborately reviewed the entire case law, both in England and in India, it may not be necessary to refer in detail and at length to the wealth of case law. In the Bench decision in ILR (1970) Mad 636 referred to above the same argument was advanced that exclusive possession for any length of time would not constitute ouster, that time factor is not of much significance and, in that connection, reliance was placed upon the observations (observations in Muhammad Kaliba Rowther Vs. Muhammad Abdullah Rowther, extracted above) of Veeraswami, J. (as he then was) and the latter Bench had pointed out that the decision in Muhammad Kaliba Rowther Vs. Muhammad Abdullah Rowther, turned on the peculiar facts of the case, that, in that case, the question arose within a short period of 14 years and that the attention of the Bench was also not drawn to the uniform trend of judicial opinion, both in England and India, where the theory of lost grant was supplied and ouster was presumed from long lapse of years, other circumstances concurring.

8. We shall briefly summarise the legal position. There is a basic distinction between adverse possession as between strangers and ouster and exclusion of co-owners. In the case of adverse possession as against strangers, it is sufficient that adverse possession is overt and without any attempt at concealment so that the person, against whom time is running, ought, with the exercise of due vigilance, to be aware of what is happening. It is not necessary that adverse possession should be brought home to the knowledge of the owner. If his rights have been openly usurped (not secretly), he cannot be heard to complain that the fact of adverse possession was not brought to his knowledge. If the adverse possession is open, visible and notorious, even if the owner remains ignorant and indifferent, it is his own fault. The observations in some of the cases, in general, that in the case of adverse possession between strangers, knowledge of adverse possession on the part of the owner is an essential element of adverse possession are too widely expressed and do not represent the correct legal position. Vide: the following observations of Lord Macmillan in (1934) 66 MLJ 134 (Privy Council)

"The classical requirement is that the possession should be *Nec Vi Nec Clam Nec Precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown "but in their Lordship's opinion, there is no Authority for this Requirement." It is sufficient that the possession be overt and without any attempt at concealment so that the person, against whom time is running ought, if he exercises due vigilance, to be aware of what is happening".

In a case of ouster of a co-owner, the position is entirely different. The possession of one co-owner is presumed to be on behalf of all the co-owners in view of the unity of title and possession. Because of this presumption of joint ownership in the case of co-owners the law requires to constitute ouster, proof of something more than mere exclusive possession and exclusive receipt of income.

Along with exclusive possession there must be an ouster, a hostile, open denial and an open repudiation of the other co-owner's right to the latter's knowledge. The co-owner in exclusive possession cannot render his possession adverse to the other co-owner merely by any secret, hostile animus on his own part in derogation of other co-owner's title. Vide the observations in *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, ; *Sinnaraj Pillai and Others Vs. Ramayee Ammal and Another*, and *Shambhu Prasad Singh Vs. Mst. Phool Kumari and Others*, . But, this does not mean that the co-owner who has been ousted or excluded should be expressly informed as such by the other co-owner. If other circumstances concur the Courts, in proper cases, may legitimately infer, from exclusive possession for a considerable length of time, that the other co-owner has been excluded to his knowledge and that title has been denied and repudiated by the hostile assertion of the co-owner in possession. The theory of lost grant is applicable to support long continued possession for a considerable length of time and the most important element in presuming ouster is the time factor or the length of time of sole and exclusive possession by one co-owner. If a co-owner does not assert his rights for a considerable length of time with the result that the other side is handicapped, by lapse of time and disappearance of evidence, from proving that his exclusive possession was coupled with open denial and open repudiation of the title of the other co-owner either at the inception or subsequently, the co-owner who has been inactive must take the consequence for the long delay in bringing the suit which has prejudiced the other side and occasioned the loss of evidence by lapse of time.

As observed in *Broom's Legal Maxims* (Tenth Edition) page 645, "No greater obligation lies upon a Court of justice than that of supporting long-continued enjoyment by every legal means, and by every reasonable presumption; this "doctrine of presumption goes on the footing of validity, and upholds validity by supposing that everything was present which that validity required": *OMNIA PROESUMUNTUR RITE FUISSE ACTA* is the principle to be observed." Courts may presume ouster from exclusive possession for a considerable length of time. We may in this context, extract the following observations in *ILR (1970) Mad 636* (referred to above) at pp. 730 to 732:

"In evolving the aforesaid principles, the Indian Courts and the Privy Council have, from very early times, followed and applied the principles laid down in the decisions in England, that to constitute ouster, there should be proof of assertion of an exclusive hostile title and a denial or repudiation of the other co-owner's right brought home to the latter's knowledge and that mere exclusive possession would be insufficient. While the England Courts insisted upon this essential test of an actual ouster, they had, at the same time, to deal with the situation of exclusive possession, for a considerable length of time, taking back to a time, beyond living memory, when it was impossible to prove by direct evidence, as to when the adverse possession started and when knowledge of assertion of hostile title was brought home to the other co-owner. The other principle of law and justice equally well-established, that no greater obligation lies upon a court of

justice than that of supporting long-continued enjoyment by every means and by every legal presumption and the great reluctance of Courts to interfere with long established possession, had also to be taken note of. It is in this context of these two theories that eminent Judges in England, held, that ouster can well be presumed from exclusive possession of one co-owner and non-participation in the profits of the property by the other co-owner for a considerable length of time, for several decades or several generations, as, after such a length of time, hostile assertion and repudiation to the knowledge of the co-owner concerned cannot be proved but can only be inferred. English decisions, side by side, while insisting upon knowledge of ouster, have laid down, that an English jury can properly be directed to presume or infer an ouster from long-continued possession without any claim or demand by the other co-owner. A presumption analogous to the theory of a lost grant, was invoked in such cases and knowledge and ouster presumed, in the view that, it would be dangerous to disturb or defeat the party's long undisturbed possession for several decades. Courts in India have also uniformly applied the same principle and presumed ouster, taking into account the attendant circumstances of the case, and the long exclusive possession for a considerable length of time."

A reference to the decision of justice T. L. Venkatarama Ayyar (as he then was) reported in *Maddela Krishnayya Vs. Maddela Udayalakshamma and Others*, will show that that the time factor of exclusive possession is an important element in inferring ouster. The learned Judge has referred to the relevant decision in England and India, in which ouster was presumed on account of exclusive possession on the part of one co-owner for a considerable length of time, though, on the facts of that particular case, the learned Judge held that ouster was not established, nor could be presumed, as exclusive possession was not for a considerable length of time. We may also refer to the Bench decision of the Andhra Pradesh High Court in *Peeran Sahib v. Jamaluddin Sahib* AIR 1958 A P 48 in which Subba Rao, C. J., delivering the judgment on behalf of the Bench, has invoked the doctrine of lost grant and presumed ouster where the exclusive possession of one co-owner was for a considerable length of time. This is what the learned Chief Justice has observed at page 53:

"It is not necessary to multiply cases as the law is well-settled. The possession of one co-owner is the possession of all co-owners. A co-owner who pleads ouster must establish that there was a denial of the other co-owner's right to his knowledge and that he continued to enjoy the property exclusively for the statutory period after such unambiguous denial. Ouster in suitable cases can be presumed from non-participation in the profits of the land for a long period of time affecting different generations under such circumstances that denial could not be proved but could only be inferred." Again, in *Ramlakhan Singh Vs. Bhaia Chathu Sahi and Another*, , the Bench of the Patna High Court has observed that, if the claimant co-owner has not been in participation to draw that it was in pursuance of ouster.

The leading Indian decision in which it was laid down that it will be legitimate to presume ouster from sole continuous possession by a co-owner for a considerable length of time, is reported in *Gangadhar v. Parashram*. ILR (1905) 29 Bom 300. Jenkins, C. J. laid down the law that sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed. The learned Chief Justice followed the principle of law enunciated by Justice Ashhurst in the leading English decision in *Doe v. Prosser*, (1774) 1 Cowp 217 : 98 ER 1052 as well as in *Culley v. Doe*. (1849) 11 Ad & El 1008 : 113 ER 697. This decision of the Bombay High Court, which was rendered in the year 1905, has been uniformly followed in all the decisions of the High Courts for over 65 years. Indeed there has been no dissent. The same view was taken in the Rangoon High Court in *Hla Pe Maung v. Manika*, AIR 1940 Rang 141, in which it was observed that mere non-participation in rents and profits would not by itself, amount to ouster, but such non-participation may, in the circumstances of a particular case, amount to ouster and that the most important element is the length of time of such exclusive possession. In that case, it was held that ouster may rightly and legitimately be presumed from the co-owner's sole and exclusive possession for a period between 30 and 40 years, during which time one co-owner alone was in exclusive possession and enjoyment of the rents and profits while the other co-owner was inactive.

In taking this view, the Rangoon High Court has followed the uniform trend of opinion of the Calcutta High Court which was to the effect that the important element in inferring ouster is the considerable length of time of exclusive possession by one co-owner. In ILR (1970) Mad 636 (already referred to) there is a detailed reference to all the cases of all the High Courts, in which presumption of ouster was drawn from the length of exclusive possession and other circumstances concurring. We may also refer to the decision of Privy Council in *Varada Pillai v. Jeevarathan Ammal*, ILR 43 Mad 244 : AIR 1919 PC 44 (Observations of Viscount, J. at p. 252) in which the Privy Council has quoted with approval the statement of the law in the leading and oft-quoted English decision in (1840) 113 ER 697 that if a co-owner has been in exclusive possession and in receipt of the rents and income from the property for a considerable length of time and the other co-owner was, throughout, inactive, it will be legitimate for the court to raise the presumption of ouster and that the length of time is a relevant and important factor in coming to a conclusion one way or other on the question of ouster.

9. It only remains to refer to the two English decisions which have held the field for about two centuries, in which the importance of the time factor has been stressed as giving rise to the presumption of ouster. The first is the decision in (1774) 1 Cowp 217 : 98 ER 1052. In that case, a co-tenant was not in possession of the property, nor in reception of the rents or profits, for nearly forty years and, on his behalf, it was urged that mere exclusive reception of rents

and profits by the other co-owner for any length of time would not constitute ouster. But it was held that the jury may presume an actual ouster from such sole and uninterrupted possession by one co-tenant to the exclusion of the other for 36 years. Lord Mansfield observed:

"It is very true that I told the jury, they were warranted by the length of time in this case, to presume an adverse possession and ouster by one of the tenants in common, of his companion; and I continue still of the same opinion. Some ambiguity seems to have arisen from the term "actual ouster", as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster.

* * * * * Therefore, I am clearly of opinion, as I was at the trial, than an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster and that they did right in so doing."

Aston, J. explained the legal position thus:

"With respect to the second, if no actual ouster is proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. Now in this case, there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the un-interrupted receipt of the rents and profits without accounts for near 40 years is not?"

Willes. J., while stressing the necessity for actual ouster, made the following observations as to the significance of long continuous possession for a considerable length of time:

"However strict the notion of actual ouster may formerly have been, I think adverse possession is now evidence of actual ouster; and therefore, entirely agree that under the circumstances, which appeared at the trial, it was very properly left to the jury to presume an actual ouster in this case."

At page 1053, Justice Ashhurst put the matter thus:

"I am entirely of the same opinion. Here is a possession of near 40 years, without any claim by the lessors of the plaintiff to a share of the rents and profits, and without any acknowledgment of his right by the other tenant in common. After so long an acquiescence I think the jury were well warranted to presume anything in support of the defendant's title and they might presume, either an actual ouster or a conveyance.

* * * * * But here it was left to the jury, and the jury have presumed an actual ouster, and I think that after a quiet uninterrupted and undisturbed

possession of 40 years they were warranted in so doing."

The same rule of presumption of ouster was followed in the case in (1840) 11 Ad. & El. 1008 : 113 ER 697. In that case, the plaintiff-co-tenant was out of possession for over 35 years and Lord Deman, C. J., while referring to (1774) 1 Cowp 217 : 98 ER 1052 with approval, stated the law thus:

"Generally speaking, one tenant in common cannot maintain an ejectment against other 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 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: as to which see the cases of Doe v. Prosser, (1774) 98 ER 1052; Doe Dem Hellings v. Bird. (1809) 11 East 49 and Doe Dem White v. Cuff. 1 Campb 173."

It is unnecessary to multiply authorities.

10. As already observed, the principle enunciated by two leading English decisions has been applied in India from very early times by all the Courts, and in every one of those cases, it is to be noticed that ouster was presumed from the length of time and other circumstances concurring. Indeed, in P. Lakshmi Reddy Vs. L. Lakshmi Reddy, in the portions already referred to, has referred to with approval the cases in which the view has been taken that ouster can be inferred when one co-heir is in notorious exclusive possession and continues in such possession for a very considerable time and the excluded heir takes no steps to indicate his title. We have also adverted to the fact that in ILR 43 Mad 244 : AIR 1919 PC 44 the Privy Council referred to with approval the statement of the law in (1840) 11 Ad. & El. 1008. We are, therefore not inclined to take the view that either the earlier Bench decision of this Court in Muhammad Kaliba Rowther Vs. Muhammad Abdullah Rowther, or the recent decision of the Supreme Court in Maharajadhiraj of Burdwan, Udaychand Mahatab Chand Vs. Subodh Gopal and Others, had laid down any new principle contrary to the well-settled rule of law as emerging from the uniform course of decisions in England and of all the Courts in India particularly its own view in P. Lakshmi Reddy Vs. L. Lakshmi Reddy, . It is thus clear that it is not correct to take the mere use of the words "co-owners" exclusive possession for any length of time", divorced from their context and develop an argument that length of time is an irrelevant factor. In the instance case, besides length of time, there are abundant circumstances concurring, to support the theory of ouster. The plaintiff himself has admitted that Appavoo and his branch was in possession of the Thamarapady lands in pursuance of the partition arrangement. The plaintiff is the senior most member of the family and the would not have allowed Appavoo to be in sole possession of the property. Appavoo died in 1936, but even thereafter, the plaintiff, the senior most surviving male member of the family, did not take steps to obtain

possession of the Thamarpadi lands. But, Appavoo's widow Rahima Bibi alone took possession and the patta was transferred in her name in the place of Appavoo Rowther. Rahima Bibi herself was of unsound mind for a considerable period and even then, the plaintiff did not take any interest in resuming possession of Thamarapadi lands. Rahima Bibi's daughter, Syed Meerammal, died in 1957 and even then, the plaintiff was inactive. In the meanwhile, the plaintiff's mother, Vellaithayammal, died in 1953. As early as 1939, Rahima Bibi, the widow of Appavoo Rowther, sold a portion of Thamarpadi lands under Exhibit B-4. The plaintiff was aware of this sale as well as the sale by Syed Meerammal under Exhibit B-5 dated 31-5-1952 of some other portion of Thamarpadi lands. Even then, the plaintiff has been indifferent and inactive. These are undoubtedly other circumstances which support the presumption of ouster, taken along with exclusive possession for a considerable length of time. In such a situation, as observed by Venkataraman, J. in ILR (1970) Mad 636 (already referred to), it is obvious good sense and justice and courts should be reluctant to unsettle quiet and undisturbed possession for over three decades and, in order to maintain the person in such possession, the law presumes a lawful origin of possession which, in the context, must originate from ouster and continue to be such for the statutory period. For all these reasons, we have no hesitation in holding that, independently of the truth of the partition arrangement the plaintiff's rights have been extinguished by ouster. For the same reasons, we hold that the plaintiff is not entitled to claim any share as an heir to his brother Appavoo who died in 1936. For long twenty-four years, the plaintiff slept over, though, in the interim, there was a litigation and the parties were fighting. It cannot be pretended that the plaintiff was ignorant of his rights as an heir to the estate of his deceased brother Appavoo. If the plaintiff kept quiet for over two decades, it must be because he was quite content that his brother's widow and daughter might take Tamarpadi lands for themselves to the exclusion of the plaintiff. Every presumption has to be made to support the long possession in favour of the contesting defendants. If one can speculate, it may be that the plaintiff got a very much larger share in the properties of his father and therefore, was quite willing that Tamarpadi lands were to be taken by Appavoo, his widow and daughter for themselves. It is unnecessary to pursue the matter. We are satisfied that the plaintiff's rights, if any have been extinguished by ouster. For all these reasons, the appeal is allowed and the plaintiff's suit is dismissed with the costs of the contesting defendants Nos. 3, 4, 7 to 11 and 13, in both the Courts.

11. Appeal allowed.