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**(2014) 12 KL CK 0056**

**In the High Court Of Kerala**

**Case No :** Regular First Appeal Nos. 678, 685 and 688 of 2014

Joy Kuriakose

APPELLANT

Vs

Kuriakkose

RESPONDENT

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**Date of Decision :** 11-12-2014

**Acts Referred:**

**Citation :** (2015) 1 KLJ 217 : (2015) 1 KLT 324

**Hon'ble Judges :** P.N. Ravindran, J;P.B. Suresh Kumar, J

**Bench :** Division Bench

**Advocate :** Sumathi Dandapani, Sr. Advocate and Millu Dandapani, Advocate for the Appellant; K.I. Mayankutty Mather (Caveator) and V.V. Ashokan, Advocate for the Respondent

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## **Judgement**

P.B. Suresh Kumar, J.—The common judgment in O.S. Nos. 5 of 2011, 6 of 2011 and 7 of 2011 on the file of the Court of the Subordinate Judge, Moovattupuzha, is under challenge in these appeals.

2. The plaintiff in O.S. No. 5 of 2011 and the plaintiff in O.S. No. 7 of 2011 are one and the same. Likewise, the defendant in O.S. No. 5 of 2011 and the defendant in O.S. No. 6 of 2011 are also one and the same. The defendant in O.S. No. 7 of 2011 is the wife of the common defendant in the other suits.

3. All the suits were for partition of the one half right of the plaintiffs in the respective suits. The subject matter of O.S. No. 5 of 2011 is 2.75 acres of rubber plantation covered by Ext.A1 document in the joint names of the plaintiff and the defendant. The subject matter of O.S. No. 6 of 2011 is 7.31 acres of rubber plantation covered by Ext.A3 sale deed in the joint names of the plaintiff and defendant. Likewise, the subject matter of O.S. No. 7 of 2011 is 3.20 acres of rubber plantation covered by Ext.A2 sale deed in the joint names of the plaintiff and the defendant.

4. The common case of the plaintiffs in the suits is that the property has been acquired in the joint names of the plaintiff and the defendant and both of them

were managing the agricultural operations in the property and appropriating the yield therefrom. According to the plaintiffs, of late, the defendants lost interest in managing and protecting the agricultural operations in the plaint schedule properties and when the plaintiffs demanded partition of the property, the defendants evaded the request on lame excuses.

5. The contentions raised in the written statement filed in all the suits are common. According to the defendants, the plaint schedule properties are in the exclusive possession of the defendants from the date of execution of the documents itself and the plaintiffs never possessed the properties. It was also contended by the defendants that though the properties were acquired in the joint names of the plaintiffs and the defendants, since the defendants are enjoying the property continuously, openly and without any interruption whatsoever, from 1985 onwards, the ownership rights of the plaintiffs over the plaint schedule properties are lost. In other words, while the acquisition of the properties in the joint names of the plaintiffs and the defendants is admitted, the defendants contend that the right, title and interest of the plaintiffs over the plaint schedule properties are lost by adverse possession and limitation.

6. The court below found that parties being co-owners, the title of the plaintiffs will be lost only if the necessary ingredients to establish adverse possession and ouster are pleaded and established by the defendants and that there is no pleading in the written statement by the respective defendants for adverse possession and ouster. It was also found by the court below that the pleadings of the defendants are only that they have perfected title to the properties and that the plaintiffs have no right over the properties. According to the court below, the specific legal requirements for claiming adverse possession and ouster have not been pleaded by the defendants.

7. On the basis of the aforesaid findings, as per the common judgment impugned in these appeals, preliminary decrees were passed in favour of the plaintiffs in the respective suits, declaring their one half right over the properties. Hence, these appeals by the defendants in the suits.

8. When these appeals came up for admission, the plaintiffs who had lodged caveats appeared through counsel.

9. We heard the learned Senior Counsel Smt. Sumathy Dandapani for the appellants and the learned Senior Counsel Sri. V.V. Ashkan for the respondents.

10. The learned Senior Counsel for the appellants contended that the evidence on record would establish that the defendants in the suits are in exclusive physical, uninterrupted and hostile possession of the respective properties and therefore, the court below had erred in rejecting the plea of adverse possession raised by them. According to the learned Senior Counsel, sufficient pleadings for establishing adverse possession and ouster are available in the written statements and the contrary findings rendered by the court below are incorrect.

11. Per contra, the learned Senior Counsel for the respondents contended that in so far as the defendants admit that the plaintiffs are co-owners of the properties, it is obligatory for the defendants to plead the elements of ouster also in the written statements and establish ouster to succeed in the suits. According to him, there is no pleading for ouster in the written statements filed in the suits and there is no evidence also to establish ouster. As such, it was argued by the learned Senior Counsel that the impugned judgments do not call for interference, and the appeals are liable to be dismissed at the admission stage itself.

12. In the light of the submissions made at the Bar, the issue that arises for consideration in these appeals is whether the defendants in the suits have succeeded in establishing adverse possession and ouster. It is settled that 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 and ouster by the latter. To constitute ouster by a co-owner, there must be an open and unequivocal denial of the title of the other co-owner to the knowledge of the latter. Uninterrupted sole occupation of common property without anything 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. [See *Godavari Lakshminarasamma Vs. Godavari Rama Brahman and Others*, . In *Basanta Kumari v. Mohesh Chandra*, AIR 1914 Calcutta 283, it was held that "ouster" means "dispossession" of one co-sharer by another where a hostile title is set up by the latter, and where the occupation of the latter is not consistent with the joint ownership. Where a co-sharer is in sole occupation of a portion of the joint property, by carrying on cultivation in it, the other co-sharers are to that extent excluded from making any use of that particular portion, as it is difficult for two different co-sharers to carry on cultivation at the same time on one and the same piece of land. If it is held that the sole occupation of one co-owner in a matter like this constitutes ouster of the other co-owners, then in every case, the occupation by the co-owners of the lands in their respective possession would constitute ouster of each other and therefore, the said proposition cannot be accepted.

13. The High Court of Punjab, on an elaborate consideration of the law on the point, held in *Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and Others*, that mere occupation of the entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all and that in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive, but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title, he denies that of the other. It was also held in the said case that passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment. One of the very first decisions where the Apex Court had considered the right of one co-owner against the other is the decision in *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, . In

the said case, the Apex Court held as follows:

"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 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. 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 Court in *Karattil Ammad Koya Vs. Karattil Ayammad*, , relying on the decision of the Apex Court in *P. Lakshmi Reddy v. L. Lakshmi Reddy* (supra) held that as between co-owners, the law relating to adverse possession is more rigorous because one co-owner is rather in the position of a fiduciary akin to that of a trustee, so far as the other co-owners are concerned. It was held that exclusive possession of the claimant is not sufficient to constitute adverse possession and ouster, as the possession of one is presumed to be on behalf of other co-owners as well. In *Annakutty v. Xavier* ( 1991(1) KLT 342), this Court held that a positive overt act constituting ouster has to be proved by the co-owner, who claims prescriptive title and exclusive possession without the knowledge of ouster of the other co-owners cannot operate to bar the rights of the other co-owners and adverse possession must be in open denial of the rights of the other co-owners.

14. Coming to the case on hand, there is no pleading much less any evidence to establish that the defendants have openly and unequivocally denied the title of the plaintiffs over the plaint schedule properties to the knowledge of the plaintiffs. The pleadings in all the written statements are only to the effect that the defendants are enjoying the respective properties continuously, openly and without any objection from 1985 onwards. It is thus evident that what was attempted by the defendants was only to establish uninterrupted possession. Even the said attempt was feeble. The evidence adduced by the defendants would only show that they were carrying on agricultural operations in the properties. The witnesses examined on the side of the defendants had no idea whatsoever of the title of the properties.

In the aforesaid facts and circumstances, there is no merit in these appeals and the same are, accordingly, dismissed in limine.