

(1994) 11 MAD CK 0082
In the Madras High Court
Case No : Appeal No. 552 of 1983

Ramalingam @ Ramaswami and another	APPELLANT
Vs	
Shanmugaswami and 6 others	RESPONDENT

Date of Decision : 25-11-1994

Acts Referred:

General Clauses Act, 1897 — Section 13
Limitation Act, 1963 — Section 12

Citation : (1994) 11 MAD CK 0082

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : P. Venkatraman, for the Appellant; R. Thangavel and P. Venkatasubramanian, for the Respondent

Final Decision : Dismissed

Judgement

K. Ramamoorthy, J.—The plaintiffs in O.S. No. 624 of 1976 are the appellants on the dismissal of the suit by the learned I Additional Subordinate Judge, Coimbatore, by judgment dated 24.4.1980. I do not want to burden the judgment by reference to the pleadings of parties in detail. The matter lies in a very narrow compass and therefore, it will suffice to mention a few facts. One Kulanda Gounder had a son Arumugha Gounder. Arumugha Gounder had three sons, Ramaswamy Gounder, Kumaraswami Gounder and Kalikutti Gounder. The first son Ramaswamy's wife's name is Velakkal. Kumaraswami, the second son had three wives Pongiathal, Arumughathammal and Sinnammal. Apparently, the first wife had no issues. Through the 3rd wife Sinnammal, Kumaraswami had a son Shanmugaswami, who is the first defendant in the suit. Ist defendant's son is second defendant Palanikumar. Kalikutti Gounder is the third and youngest son of Arumugha Gounder. The first son Ramaswamy Gounder had two sons Kulande Gounder and Arukutti Gounder, who is the third defendant in the suit. This third defendant had two wives namely Periakkal and Subbathal (D7 in the suit). Through the first wife, he has Ramaswami alias Ramalingam who is 1st plaintiff in the suit, and Lakshmi, and through the second wife Subbathal, he has

Kaliammal, Kurundachalam and Saraswathi Kurundachala missed plaintiff in the suit.

2. Therefore, Arukutti Gounder who is acting behind the scene, had caused the suit to be instituted by his son Ramaswamy alias Ramaliangam through his first wife and the second plaintiff (Kurundachalam) through the second wife. The genealogy shows in short, the relationship of the parties. (Genealogical tree is shown as ""Annexure A").

3. The plaintiffs 1 and 2 have come forward with the case that items 1 to 6, and 7 to 10 in the suit properties are joint family properties and they remained joint on the date of suit and therefore, they are entitled to 1/9th share in the suit properties. Before the case of the plaintiffs is considered, we have to notice a few documents to consider the facts leading to the filing of the plaint. Under Ex. B7, dated 3.11.1928, there was a Muchalika executed by Ramaswamy Gounder and two others, i.e., a document by three brothers which refers to the fact that the parties had agreed to divide their properties as per the decision of the Panchayat dare. On 28.12.1928 under Ex. A3 Ramaswamy Gounder, the eldest son of Arumugha Gounder executed a sale deed with reference to his undivided share in favour of the second wife of Kumaraswami Gounder Arumughathammal, that is, with reference to items 1 to 6 in the plaint schedule. On 21.2.1929 under Ex. A4, a Trust deed is reported to have been executed by Ramaswami Gounder in favour of his elder son Kolanda Gounder covering items 7 to 9.

4. It appears in the evidence that the three brothers Ramaswamy, Kumaraswami and Kalikuni were living separately, and after 1929, they do not appear to have lived as members of joint family. Ramaswamy, eldest son of Arumugha Gounder died in 1932. Kalikutti Gounder, the third son died in 1935 and Kumaraswami Gounder, the 2nd son died on 16.5.1940. Items 7 to 10 in the properties are claimed by the plaintiffs to be available for partition on the ground that they belong to Kalikutti Gounder, the youngest son of Arumugha Gounder, who died issueless intestate and therefore, those items would come to Ramaswami and Kumaraswami not by survivorship but by succession.

5. Therefore, case of the plaintiffs avoiding all other facts, are:

No. 1: Items 1 to 6 belong to Ramaswamy Gounder under Ex. A3 dated 28.12.1928, was sham and nominal and therefore, available for partition

No. 2: Items 7 to 10 as stated above: the plaintiff's are entitled to partition as their father and Kumaraswami succeeded to the estate of Kalikutti.

6. The learned First Additional Subordinate Judge, though has come to the correct conclusion, has not appreciated the facts in the proper perspective and he has mixed-up things without any justification. The plaintiffs can succeed with reference to Items 1 to 6 only if they established that Ex. A3 sale-deed was sham and nominal. Ex. A3 is a sale-deed dt. 28.12.1928 as stated above. Assuming for the sake of argument that on the date of the execution of the document

Ramaswamy remained an undivided member of a co-parcenary, the sale-deed by him is not void. It is voidable, therefore, as an afterthought, it was contended by the plaintiffs that Ex. A3 is a sham and nominal document. It is pointed out by the learned I Additional Subordinate Judge that even in Ex. A6 notice dated 27.1.6, the plaintiffs have not put their case that Ex. A3 was a sham and nominal document. Therefore, one need not expatiate further on the question of the nature of the document. Ex. A3 is not a sham and nominal document. Therefore, Ex. A3 is a valid document and what happened subsequent to the execution of the sale-deed at the hands of the vendee, namely, the second wife of Kumaraswami is none of the concern of the plaintiffs, unless by any means known to law they can claim any right.

7. Therefore, the claim by the plaintiffs with reference to Items 7 to 10 is that on Kalikutti dying intestate, Ramaswamy and Kumaraswami became entitled to the properties and they were enjoying the properties in common and therefore, those items are available for partition. The plaint in the suit was presented on 30th day of August, 1976 long after Ex. A3 and long after the death of Kalikutti in 1935.

8. Assuming that the plaintiffs have produced some evidence to show that all the members were in joint family, there is absolutely no evidence at all to show the enjoyment of the properties. Therefore, the finding by the learned Subordinate Judge that there has been ouster and that the plaintiffs cannot claim right over the Items 1 to 6 and 7 to 10 is in accordance with law. In this connection, we have to notice Article 110 of the Limitation Act, 1963.

The Article reads as follows:

Art 110:

Description of Suit Period of Limitation Time from which period begins to run

By a person excluded from a joint family property to enforce right to share therein Twelve Years When the exclusion becomes known to the plaintiff

No argument was advanced in the lower court on the basis of Article 65 or any other Article under the Limitation Act, 1963, corresponding to Article 110 of Limitation Act 1963. Earlier, it was Article 127 under Limitation Act, 1908. Article 127 of the Limitation Act, 1908 read as follows:

Art 127:

Description or Suit Period of Limitation Time from which period begins to run

By a person excluded from joint family property to enforce right to share therein Twelve Years When the exclusion becomes known to the plaintiff

The Parliament while enacting the new Limitation Act has put in the First Column of Article 110 "a joint family property" instead of "joint family property". The learned Subordinate Judge has observed in the judgment that the introduction of

"a"" in the First Column has great significance and on that score, the learned Subordinate Judge came to the conclusion that the plaintiffs cannot rely upon Article 110 and also held that the suit is barred and the very Article 110 is relied upon by the plaintiffs. At first blush I thought that what the learned Subordinate Judge observed is really a matter of some importance. The observation provoked my thinking and I wanted to have a survey, as it were, of the relevant cases on the point and the views expressed by the various High Courts in India and by the Privy Council. The learned Subordinate Judge assumed erroneously that Article 110 is applicable to the facts of this case. The position under Limitation Act, 1877 and the Limitation Act, 1908 would also appear to be not very different.

In *Ram Lakhi v. Durga Charan Sen* (1885) ILR 11 Cal 680, Sir Richard Garth, Chief Justice, observed about the scope of Article 127 of Act XV of 1877:

I conceive that in Article 127 the legislature Judge intended to make an exception to the general rule of limitation in favour of Hindus and others to whom the law of joint family property more specifically applies in this country.

Those persons often leave their houses for long periods of time to seek employment in some distant place and their relatives may take steps to exclude them from their family property without their knowing it. It has, therefore, been considered right to allow them to bring a suit under such circumstances to enforce their right within 12 years from the time when they first know of their exclusion.

Therefore, the very purpose of the Article has been succinctly explained by the learned Chief Justice.

In *Amme Raham v. Zia Ahmed* - (1891) ILR 13 All 282 the Full Bench of Allahabad High Court had considered the scope of the Article under Act 15 of 1877. There the Full Bench of the Allahabad High Court construed the word "joint family property" to mean "the property of the joint family". The learned judges of the Full Bench noticed the language of Article 127 in the old Limitation Act IX of 1871; instead of "person" now found in Column 1, the word "Hindu" was there. Therefore, the learned judges were of the view that it will not apply to the case on hand before the Full Bench. The learned judge, Mr. Justice Mahmood on behalf of the Full Bench observed as follows:-

When the case was argued on behalf of the appellants I must confess that I felt, especially in view of the sudden change, (which certainly has to be considered seriously in statutory language) that this Art. 127 was intended to be applied to Muhammadans also. The change at least sounded as an amendment of a great verbal sound, but that sound was nothing other than *ex praeterea nihil* so far as the exigencies of this case are concerned, because upon full consideration of this matter it seems to me that the Legislature never intended to apply to Muhammadans in the Provinces within the jurisdiction of this Court, a rule unknown to the land, unknown to the Muhammadan Law, unknown to the people, by saying that upon the death of an ancestor or propositus his property

does not descend to the heirs in definite separate share, but acquires the nature of the joint property of the Hindu jurisprudence. On the contrary, the Muhammadan Law presumes that each share is separate and that each sharer is the separate owner of his separate share, and if such sharers wish to live together they may do so, but their separate ownership and relations are not changed.

Enough has been said by the learned Chief Justice and my brother Straight to show that for purposes of employing Art. 127 of Act 15 of 1877, certain things are necessary, that at least, there must be a joint family, and I will not go further than that because my brother Straight has already represented what the other three conditions are. Now in this part of the country the joint family system, as understood by Hindus, does not exist among Muhammadans, in the sense in which the law has employed it. Even if it did exist, I think I must say that the learned Pleader, Pandit Ajudhia Nath's argument before me when I made the Referring Order, was perfectly sound, that the law in these Provinces will not allow the recognition of any such family status because of S.27 of Act XII of 1887. I must also say what I felt when the learned Pandit then argued, and what I still feel, that the Bombay cases which on that occasion the Learned Counsel for the appellants referred to and insisted upon, have no application to this case, because it is governed by a totally different statute as to the application of the Muhammadan Law, I also agree with the argument of the learned Pandit, which the learned Pandit then addressed, that Regulation 4 of 1872, of the Bombay Code, must not be lost sight of in determining the importance to be attached to the rulings on this point cited from that Presidency.

The learned judge further observed that the statutes of limitation are Statutes of repose, and that, far from being construed in the sense of the strict construction of penal statutes against their application, they should be strictly enforced for security of titles. The learned Judge further observed.

I wish to add that whatever difficulty may arise over the interpretation of Art. 127 of the present Limitation Act (15 of 1877), that difficulty need not be enhanced in a case in which Muhammadan ladies, even when they are pardanashin, sue after the lapse of time. For this view I wish to refer to cases where I have before now pointed out the cogency of the doctrine *vigilantibus non dormienti* *bus jura sub-veniunt*.

In *Vishnu Ramachandra v. Ganesh Appaji Chaudhari* ILR (1895) 21 Bom 328 a Division Bench of Bombay High Court had occasion to consider again Article 127 of Act XV of 1877. In order to appreciate the ratio in the case, it is necessary to note a few facts therein. In 1890 the plaintiffs in that case brought the suit for partition, claiming a third share of certain Inam land (No.200) and of certain occupancy lands (Nos. 561 and 567) which they alleged to be ancestral property.

9. Defendants Nos. 1 to 4 denied the plaintiffs' right and as they were in exclusive possession for more than twelve years of lands, the suit by the

plaintiffs was barred by limitation. The learned Subordinate Judge in that case awarded to the plaintiffs a third share in all the lands in dispute. The learned Subordinate Judge in that case framed two issues, viz., (1) have the lands in question still remained joint between plaintiffs and defendants, (2) have the plaintiffs enjoyed their share in their profits within twelve years. The learned Subordinate Judge found that with reference to part of the land No. 200 the plaintiffs have not proved the case of joint possession, and with reference to Nos. 561 and 567, the learned Subordinate Judge upheld the plea of the plaintiffs. The reason of the learned Subordinate Judge as extracted in the judgment is as follows:-

On the whole, although plaintiffs might have had good claim to land No. 200 and that they might have been in possession thereof in years gone by, I do not think that there is any evidence to show that their possession continued after 1870 and I find that point accordingly. Their possession was totally denied in 1874 under an alleged adverse claim, and this indicates that defendants had adverse possession since 1874 at least, if not since before, and as this adverse possession was more than twelve years when this suit was instituted in 1890, plaintiffs' title, if any, to the land was extinguished at that time.

The learned Chief Justice Mr. Farran, while confirming the decree, observed as follows:-

The fact that the plaintiffs were not excluded from their share in other fields does not prevent, we think, the Statute from operating in respect of the field which they have been excluded to their knowledge.

Therefore, the inference is that if there are 4 or 5 items of joint family properties, if a member of the joint family excludes the other member of the joint family in possession and enjoyment of a joint family property, in respect of other properties the exclusion cannot be inferred. In other words, when the question of exclusion is to be considered in a given case, according to the judgment on the facts and circumstances of each case which has to be considered whether in respect of each of the properties claimed to be joint there has been exclusion by the member claiming exclusive ownership.

10. In the year 1918, in a Division Bench of this Court in *Kumarappa Chettiar v. Saminatha Chettiar* (I.L.R. 42 Mad 431) the judgment of the Division Bench of the Bombay High Court in (1897) ILR 21 Bom 825 was discussed. The plaintiff in that case purchased from defendants 1 and 2 properties described in Schedule of the plaint and they also obtained from them a security bond by way of assurance of title, on the same day of purchase, i.e. on 26th March, 1912 for Rs. 12,500/- affecting the properties described in Schedule B attached to the plaint. The plaintiff later on sued for possession of the properties purchased by him. The plaintiff and defendants contended that defendants 1 and 2 were divided in status from defendants 3 to 7 and defendants 1 and 2 were in exclusive possession of A and B schedule properties for more than the Statutory period

and therefore, the purchase by the plaintiff culled him with absolute right in A schedule property. Defendants 3 to 7, and 9 to 12 therein who were alienees from defendants 3 to 7 refuted the claim of the plaintiff contending that there was no division in the family that A and B schedule properties and several other properties belonging to the family were joint family properties and defendants 1 and 2 were entitled to only a fifth share in the properties sold by them and the plaintiff was entitled to only 2/5th share in A Schedule properties. The learned Subordinate Judge upheld the claim of the plaintiff and decreed the suit. Alternatively, the learned Subordinate Judge held that in case the plaintiff was not entitled to the whole of A Schedule properties, but only 2/ 5th of them, he was entitled to get Rs. 7,500/- as damages to be realized by the sale of the rights of defendants 1 and 2 in B Schedule properties given as security. Defendants 3 to 7 and 9 to 12 preferred the appeal before that Court.

11. It was contended on behalf of the appellants that though the members of the joint family were divided in status possession of a portion only of the family properties by some members did not oust all others, as the latter were in possession of other properties and it has always been a law in India. Reliance was placed on the following cases :-

- (i) Lakshman Dada Naik v. Ramachandra Dada Naik (1881) I.L.R.5 Bom 48 (P.C.);
- (ii) Govindan Pillai v. Chidambaram Pillai (1866) 3 Mad 99;
- (iii) Jaganatha v. Ramabhadra (1888) ILR 11 Madras 380);
- (iv) Sri Rajalakshmi Devi Garu v. Sri Raja Surya Narayana Dhatraju Bahadur Guru (1897) ILR 20 Mad 256 (Privy Council);
- (v) The Udayarpalaiyam case (1901) ILR 24 Mad 562;
- (vi) Sakho Narayan Khandalkar v. Narayan Bikkaji Khandekkar (1869) 6 Bombay High Court Reports 238);
- (vii) Corea v. Appunamy (1912) A.C.230;
- (viii) Kumar Saradindu Roy v. The Collector of Rangpur (1907) II CWN 1143).

It was contended further on behalf of the appellants that the judgment of the Bombay High Court in Vishnu Ramachandra v. Ganesh (1897) I.L.R.21 Bom 1897 was wrong. The argument on behalf of the Respondent Plaintiff in that case was, exclusive possession by one member of even a portion of the family properties extinguishes the right of other members in that portion, relying upon (1897) ILR 21 Bom 325. It was argued that Article 127 will not apply as it refers to the division of the joint family property and not to property owned as here by several people as tenants in common and in that case the portion of the family property was enjoyed by first and second defendants in assertion of a right of exclusive ownership and hence possession by others of some other portion does not avail them to save the bar of limitation.

Mr. Justice Seshagiri Ayyar analysed the entire law on the point and instead of trying to refer to the judgment, it is better to extract the relevant portions as hereunder:-

The point for decision is whether the possession of defendants Nos. 1 and 2 of a portion of the family properties was adverse to the other members of the family. In my opinion, the decision of the Subordinate judge is wrong. I shall shortly trace the history of the legislation regarding adverse possession by co-tenants in England and in India before dealing with the decided cases. In England, before the enactment of 3 and 4 Will, IV, Cap. 27, the law as to possession by co-tenants was this(vide the First Report of the Common Law Commissioners made in the year 1851 as to forms of action relating to enactment

In cases where by reason of the rule plaintiff and defendant being tenants in common, joint tenants or copartners, an actual ouster must be established in order to found an action of trespass, the rule is modified by requiring the substituted defendant to admit fictitious ouster only in case an actual ouster of the lessor of the plaintiff is proved

Then came the Statute of 3 and 4 Willi. IV. Cap 27, Section 12 which ran thus:-

That when any one or more of several persons entitled to any land or rent as co-partners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety or more, then his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefits, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

This section was apparently enacted to negative the presumption, that possession by one co-tenant is possession on behalf of all of them. As was pointed out in *Holmes v. Newlands* (1839) II Ad. & E., 44, and *Culley v. Doe* (1840) II Ad. & E., 1008, before the Statute of William IV, there was no adverse possession in such cases. The bare receipt of all rents and profits by a tenant in common was not adverse to his co-tenants *Reading v. Rawsterne* (1790) 2 Raym. Ld., 829 and *Farclain v. Shackietaon* (1770) 5. Burr. 2604. In *Peaceable v. Read and Others* (1800) I East, 568, it was held that where one tenant-in-common levied a fine and received all the rents for more than five years afterwards without any entry or claim made to avoid the fine no actual ouster of his co-tenant could be presumed. After the passing of the statute, as has been pointed out in *Halsbury's Laws of England*, Volume 19, Paragraph 247:

The possession of the joint tenants, tenants-in-common and co-partners is separate and is not the possession of the other joint tenants.

It was held in *Thornton v. Sranee* (1897) 2 Q. B, 143 that, if a person entitled to an undivided share in the land, is in exclusive possession of the whole land or

any part of it, the title of his co-owner to his undivided share would be extinguished by such possession. In *Glyn v. Howell* (1909), 1 Ch., 66) Eve, J., says:

Mr. Upjohn is right when he says the decisions have proceeded upon two lines, the one being those cases where the possession of the part has been treated as possession of the whole, because the Court has found, either by contract or according to conscience, that possession of the whole is what the person possessed of the part was intended to have, and the other being those cases in which the Court finding no just reason for inferring, in favour of a person relying solely on possession of a part, a constructive possession of the whole, has refused to make such inference.

This is the state of law under 3 and 4 Will, IV. Now we have to see how the law stands in India. Under Act 14 of 1859, Section 1, clause (13), enacted the general rule that suits to enforce the right to share in any property, movable or immovable, on the ground that it is the joint family property, must be brought within twelve years from the death of the person from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share. The Limitation Acts of 1871 and of 1877, although they fixed the starting point of limitation from demand and refusal in the one case, and from exclusion in the other, introduced no substantial changes in the First Column of the Schedule. Two things are clear from the history of the Indian Limitation Acts. One is that no distinction is made between movable and immovable property as in the case of 3 and 4 William IV. Secondly, there is no special provision regarding the hostile possession of tenants-in-common. The reason is not far to seek. In India co-parcenary and joint enjoyment are normal, whereas in England they are exceptions. The Legislature apparently considered that it would be dangerous to introduce the principle enunciated 3 and 4 Will. IV into this country, where managers and other members of the family are ordinarily in enjoyment of either the whole or portions of the property exclusively to avoid disruption of the family ties and the partition of family properties.

I am of opinion that the decisions passed u/s 1, clause (13) of the Act 14, of 1859 govern Article 127 in the later Acts. Under the Act of 1859 it was held in *Ranjeet Singh v. Koor Gujraj Singh* (1878) 1 LA. (2) that if one of the members of the family was in possession of only a portion of the property to the exclusion of the others, the presumption will be that the possession was for and on behalf of the other members of the family. This is what their Lordship say:

Their Lordships entertaining the view which they have expressed, there was no partition, but that the plaintiffs took the seen land as equivalent to a payment in respect of their shares by the defendant, are of opinion that the proceeds of those seen lands have been substantially payments by the defendant within the meaning of that Section, payments which have continued to the time of action

brought, and that, therefore the Statute of Limitation does not apply.

In *Sakho Narayan Khandalkar v. Narayan Bhikkaji Khandekkar*, (1869) 6 Bom H.C.R. 238), the learned judges say at page 241:

but in the class of cases similar to the one before us, where both parties are in possession of portions, we should require a definite finding as to whether there had or had not been partition between the parties. In this particular case we have a clear finding that no partition was made and that each party is in possession of a portion of the entire estate, either by mutual agreement, or accidental circumstances. In this view of the matter we consider the suit not barred.

In the *Udayarpalaiyam Case* (1901) ILR 24 Mad 562)- It was pointed out:

That although one member of the family was in sole possession of the estate the receipt of maintenance by the other member and his enjoyment of portions of property allotted to him for maintenance would be regarded as participation in the family income.

In *Sri Raja Lakshmi Devi Garu v. Sri Raja Surya Narayana Dhatraju Bahadur Garu* (1897) ILR 20 Mad 256 (P.C.) which related to the Belgaum Zamindari, one member of the family believing the estate to be impartible was in sole possession of the major portion of the Zamindari. The others were given a few villages for their maintenance. After the death of the last Zamindar the question arose whether the other members who were enjoying the villages for maintenance were not barred by limitation. On behalf of the widow the plea of limitation was raised on the ground that the other members, notwithstanding their possession of portions of property, were excluded from the Zamindari. Both the High Court and the Judicial Committee overruled this contention. They held that so long as there was no total exclusion of the claimants, there can be no adverse possession in favour of persons holding portions of the property. As against these decisions we were referred to *Vishnu Ramachandra v. Ganesh* (1897) I.L.R. 21 Bom 325) in which it was held that the possession of a part of the property exclusively by a member of the joint family would be hostile to the other members of the family. I am unable to agree with this decision. It is inconsistent with the decisions. I have quoted from the judgment of Lord Macnaghten in *Corea v. Appuhamy* (1912) A.C., 230), where it was pointed out that:

Before the Act 3 and 4, Will. IV was passed it was a settled rule of law that the possession of any one of such persons was the possession of the other or others of the co-proprietors. It was not disputed at the Bar that such is now the law in Ceylon.

I may add that this is the law in India as well. Having regard to the decisions I have referred to and to the observations of Lord Macnaghten it seems to me that the decision of *Vishnu Ramachandran v. Ganesh* (1897) ILR 21 Bom 325) is not right. There is only one other decision to which I shall refer and that is the

decision in *Lakshman Dada Naik v. Ramachandra Dada Naik* (1881)I.L.R. 5 Bom 48 (P.C.). That was a case in which the co-parcener wanted to establish his right to his own share as well as to a moiety of his father's interest to which he became entitled on the death of his father. It was held that Section 1, clause (13) of the Act of 1859 applied to such a case. As regards the plea of limitation, the Judicial Committee says at Page 59:

Now, as far as the immovable property of the family is concerned, there seems to be no ground for the application of the statute. Not only has the respondent all along been in the enjoyment of a part of that property, viz., the house of Shahappur, but is also entitled to conclude from the computation the period of limitation during which he had prosecuted the suit.

This decision is authority for the proposition that possession of part of the property would have limitation as regards the rest of the property. In the present case it is not denied that defendants Nos. 3 to 12 have been in possession of portions of the joint family property.

It was contended for the respondent that the expression "joint family property" in Article 127 does not apply to the case of persons who have become divided in status. Granting this contention as well founded, as to which I express no opinion, the cases referred to by me establish that, even if Article 144 applied to the case, the possession of the plaintiff's vendor would not be adverse to the other defendants. In any view, therefore, the decision of the Court below is wrong and its decree must be reversed."

Therefore, the ratio of this decision is clear that if members of a joint family though divided in status held different items of properties however, long the possession might be, that member cannot raise the plea of ouster against the other members of the family.

12. In (I.L.R. 45 Mad 648 = 15 L.W. 595 F.B.) *Yerukola alias Penta Jogulu v. Yerukola alias Penta Jogulu v. Yenukola alias Fenta Tatayya*, which was referred to a Full Bench by Chief Justice Wallis and Justice Oldfield, in the Order of Reference, it was observed that Article 127 is for a share of property which is the property of a joint family at the date of the suit and appears to be in terms inapplicable to property which by reason of a division prior to suit has ceased to be joint family property and held by the members of the family as tenants-in-common. The learned judges approved the judgment of the Division Bench in (1919) ILR 42 Mad 431 to be in accordance with language of the Article and with the decision of the other High Courts and the learned Judges had no reason to differ from it. Justice Kumaraswami Sastri in Full Bench dealt with the arguments on the basis of the language of Article 127. The discussion by the learned Judge is illuminating and therefore, it is worthwhile to extract the same:

It was argued for the appellant that Article 127 would apply to cases like the present. Article 127 provides a period of 12 years for a suit by a person excluded from joint family property to enforce a right to share therein, the period starting

from the date when the exclusion becomes known to the plaintiff. It is clear from the pleadings in the present case that at the date of the suit the members of the family were not members of a joint Hindu family in the ordinary sense of the term. The effect of the partial partition of certain properties, and the reference to arbitration as regards the properties undivided, as well as the conduct of the parties subsequently, show clearly that they had become divided in status.

At the date of the suit the plaintiff was not a member of a joint family. It is argued for the appellant that Article 127 would be read as if the words "joint family property" meant property which at one time was joint family property and ought not to be confined to cases where the property is joint family property at the date of the suit but to property in which the plaintiff has a share and which is not divided by metes, and bounds. No authority has been cited in support of such a construction of the plain terms of the Article. I agree with the learned referring Judges that Article 127 is inapplicable to cases where, at the date of the suit, the property has ceased to be joint family property and is held by the sharers as tenants-in-common. This view is in accordance with *Amme Rahm v. Zia Ahmad* (1891) ILR 13 All., 282 (F.B.), *Sultan Begam v. Debi Prasad* (1908) I.L.R. 80 All., 324 (F.B.), where it was held by a Full Bench that the word "joint" in Article 127 has settled and well-defined meaning and could not be used as descriptive of property held in common, *Pamoo Tewary v. Dooma Tewary* (1897) ILR 24 Cal 309, where the learned judges held that Article 127 presupposing the existence of some joint family and proceeding upon the hypothesis that there is a joint family, provides for the remedy of a member who is excluded, and has no application to cases where there was disruption of the status of jointness, and with *Bhavrao v. Rakhmin* (1899) I.L.R. 23 Bom 137 (F.B.). The only other Articles that could have any application are Article 62 and 120. Before dealing with the applicability of these Articles, I think, it is necessary to consider the position of Hindu Law of persons situated like the present plaintiff. Till the decision of the Privy Council in *Suraj Narain v. Iqbal Narain* (1913) I.L.R. 35 All 80 (P.C.), the current of authority was that in order to effect a separation of status there must be an agreement, express or implied, between all the co-parceners. *Sundaram Maistri v. Narasimhalu Maistri* (1902) ILR 25 Mad (149) deals with this question at great length. It has, however, now been settled by the decision of their Lordships of the Privy Council in *Suraj Narain v. Iqbal Narain* (1913) ILR 35 All 80 (P.C.) and *Girija Bai v. Sadashiv Dhundiraj* (1916) I.L.R. 43 Cal 1031 (P.C.) that a separation of status is created by a clear and unambiguous expression of the determination of one member to become divided. On such a declaration, the rights and liabilities of the parties are no longer those of a joint Hindu family but have to be determined on the footing that they are not joint tenants but tenants-in-common. This, however, does not by itself change the nature of the suit to be brought for the working out of the rights of such members. The rule of Hindu Law that a member of a joint family cannot, except in certain specific circumstances, sue for a partial partition is applicable to cases where the joint family has been disrupted by severance of status between the various members.

It is clear that if a member of a Hindu Joint Family seeks to recover his share of any particular item of property he will be met with the plea that the suit is bad; and that he ought to file a suit for partition of all the available properties, in order that all the equities may be adjusted between the various parties. Each member will have to bring into the hotchpots the properties in his possession, and an account will have to be taken, at least from the date when the joint family became divided in status, of the rents and profits of the joint family properties received by any member and which are liable to be brought into the hotchpots. Until the properties are actually divided, it cannot be predicated that any particular item of property would fall to any particular member of the joint family, nor can it be said that any particular member of the joint family has a right to insist that each item of property shall be broken up into as many shares as there are sharers and that he should get a particular share of each item. As far as possible, in suits for partition, entire items of family property will be allotted to the members if it can be done without any prejudice to the rights of the others. It may thus well be that where a co-sharer has received the whole or portion of the monies due on a debt due to the family that particular item might be allotted to the member who has so received, or in taking accounts it may well be that one co-parcener who lays claim to a particular item has overdrawn his share and is not entitled to any portion of the family property. Under these circumstances, if a co-parcener should file a suit for a specific share in an outstanding recovered, he will be met with the reply that not only is the suit for that share not maintainable but that the liability of the parties should be adjusted with reference to the taking of the general accounts.

The learned judge deals with the case reported in *Vaidyanatha Aiyar v. Aiyasamy Aiyar* (1909) ILR 32 Mad 191 in the following terms:

The only case which so far as I can see really touches the question is *Vaidyanatha Aiyar v. Aiyasamy Aiyar* (1909) I.L.R. 32 Mad 191 where there was a partial partition between the members of a Hindu family. The greater portion of the properties had been divided and the parties subsequently continued to live separately. It was held that in such a case, where the members of the joint family had become divided in status, no member had a right on behalf of the others to recover any debt due to the family and where it was so recovered, it was not joint family property so as to attract the provisions of Article 227 of the Limitation Act, the Article applicable in such cases being Article 62. It was also held that the principle that the possession of one tenant-in-common is to be deemed possession of all, and limitation begins to run only after the exclusion of any tenant-in-common or adverse possession is set up, would not apply in the case of joint families after a complete separation in status. The latter proposition can hardly be good law having regard to *Kumarappa Chettiar v. Saminatha Chettiar* (1912) I.L.R. 42 Mad (431). It is difficult to see how a mere separation in status could itself make possession by one member hostile to the other, or by itself amount to ouster.

The question referred to the Full Bench as stated by the learned Chief Justice Schwabe is:

What are the Articles of the Limitation Act of 1908 applicable to certain money and profits received by two brothers or their representatives under the following circumstances - Three brothers had been members of an undivided joint Hindu family. In 1905 they separated and appointed arbitrators to divide the ancestral property. Before division was complete, disputes arose and the properties remaining undivided were left in the hands of different members of the family, until in 1917 this suit was brought for partition and for account. It is found, and no doubt correctly, that the properties remaining undivided were held during the period in question under a tenancy-in-common. Money was received from debtors in respect of debts which were owned in common, and rents and profits, partly in money and partly in kind, were received in respect of land also owned in common. When asked to account for and pay the shares of the other co-owners, the defendants set up the Limitation Act in answer, and there being a conflict of judicial views on the subject, it is for us to decide which Article in the schedule of the Act applies.

The Articles relied upon by those who claim to keep what they have received were Articles 62 and 109, whereas plaintiff relied on Article 120 or 127.

I agree that Articles 109 and 127 have no application on the grounds stated in the Order of Reference.

Kumaraswami Sastri, J. answered the Reference in the following terms:

My answer to the Reference is that in a suit for partition where a claim is made for an account being taken of the moveable properties, outstanding and collections, made by the various members in respect of properties in which the parties were once joint but who subsequently became separate in status, the proper Article to apply is Article 120. The period of limitation will run from the demand of the share by the plaintiff or refusal by defendant. The receipt by the co-tenant is not wrongful and consequently, his possession cannot be wrongful till he refuses to deliver the share of the co-tenant he has received or set up a hostile title to the knowledge of the co-sharer. The observations I have referred to in *Marina Beeviammal v. Kadir Meera Sahib Taragan* (1915)29 I.C., (275), support this view. I may also refer to *Sarakki Abdul Rahiman Taragan and Another Vs. Muhaidin Pathumal Bivi and Another and Pathummal Bivi*, where *Marina Beeviammal v. Kadir Meera Sahib Taragan* (1915) 29 I.C.275) is approved of and followed.

Article 120 of the Limitation Act of 1908 would correspond to Article 132 of Limitation Act 1963.

13. The judgment of the Full Bench reported in *Yerukola alias Pentajogulu (dead) 2 Ors. Vs. Yerukola alias Penta Tatayya alias Purushottam and Others*, was approved by the Privy Council in (1940) L.R. 67 I.A. 406 (Privy Council) with the

following observations:

"Upon the proper application of Article 120 as between tenants-in-common it will be sufficient to refer to Yerukola alias Pentajogulu (dead) 2 Ors. Vs. Yerukola alias Penta Tatayya alias Purushottam and Others,).

14. In Harkesh Singh Vs. Mt. Hardevi and Others,) a Division Bench of the Allahabad High Court has held that Article 127 of the old Limitation Act (Present Article 110) would apply only to the case where the existence of the Joint family is admitted and there was exclusion of co-parcener from his joint family property.

15. In Govinda Rao v. Raja Bai 60 M.L.J. 386 = (AIR 1931 Mad.339) there was a money-lending business started by four brothers and which was managed by the eldest of the four brothers and it was stated that to start with it was a joint business. After the death of the 2nd and 3rd brothers the surviving brothers were separate and had separate businesses. The plaintiffs in that case sought to sustain their claim under Article 127 and their Lordships held that once there was a finding that the brothers had separated and the effect of that separation was that any immovable joint property which continued undivided was no longer joint family property so as to come under Article 127, and the proper Article applicable was Art. 124 (present Article 65).

16. In Narsing Das v. Gokalchand and others (A.I.R. 1931 Lahore 339) a Division Bench of the Lahore High Court followed the ratio laid down by this Court in I.L.R.42 Mad 431 with reference to the position about the exclusion. The Division Bench of the Lahore High Court observed as follows:

In Kumarappa Chettiar v. Saminatha Chettiar (1919) 42 Mad 431=52 I.C. (470), it was held that, though a member of a joint Hindu Family was divided in status, that is, was a tenant-in-common with the others, he was not in law excluded or ousted from those portions of the property which were enjoyed by the others, however long their enjoyment had been.

This decision in AIR 1931 339 (Lahore) was followed by a single judge of the Punjab High Court in Mange and Others Vs. Des Raj and Others, This decision of the single judge was reversed by the Punjab High Court in Mange and Others Vs. Des Raj and Others, on a different point following a decision of this Court in Valliamma Champaka Vs. Sivathanu Pillai and Others, . (In Mohaideen Abdul Khadir v. Mohammed Mohaideen Umma ILR (1970) 2 Mad 636), their Lordships Mr. Justice K.S. Venkataraman and Mr. Justice K.S. Ramamurthi have held as follows:

The question whether the evidence in a particular case is sufficient to infer ouster is a different matter and related to the branch of the law of evidence.

The learned judges have also observed that to constitute ouster, there should be proof of assertion of an exclusive hostile title and 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. This is without reference to Article

127 of the Limitation Act. In *Ibramsa Rowther and Others Vs. Sk. Meerasa Rowther and Others*, : the Bench consisting of Ramamurthi and Maharajan, JJ. followed the earlier Bench decision above referred to and stated the law clearly as follows:

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 the time factor of exclusive possession is an important element in inferring ouster. The learned judge has referred to the relevant decisions 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 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 of rents and profits for a considerable length of time, it will be a good presumption 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* (1905)ILR 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 at pp.219 at 220-93 = 98 ER 1052 as well as in *Cully v. Doe* (1849) 11 Ad & E 1008 = 113 E.R. 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 *Hia Pe Mating 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-owners' 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 was following 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) 2 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 the Privy Council in *Varada Pillai v. Jeevaratnam 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 of quoted English decision in (1840) 113 E.R. 697 that if a co-owner had been in exclusive possession and in respect 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 the other on the question of ouster.

So, in the light of the discussion adumbrated above, I asked myself a question, what is the purpose of the Parliament in stating in Article 110 in Column No. 1 "by a person excluded from a joint family property to enforce a right to share therein". The law is well settled that even though there has been a division in status among the members of the family, one cannot claim a particular property to be his own, unless as mentioned in column No. 3, of the article the member is excluded and that exclusion becomes known to the plaintiff. The Article, as now worded, gives right to a member excluded from possession, (sic) It is a joint family property. It does not mean a single item of joint family property, because when there are several items of joint family properties, any member cannot file a suit with reference to a single item of joint family property. The words "a joint family property.

would mean the entirety of the properties to be brought into the hotchpots. That was the position earlier to 1.1.1964 when the new Limitation Act came into force, and, in my view, that will continue to be same and the Parliament did not intend to alter the position as laid down by the Privy Council and other High Courts in India. The opinion expressed in U.N. Mitra's Law of Limitation, 10th Edition -1992 at page 1647 that

the language of the First Column of the present Article 110 reads differently from

what it was under Article 127 of the earlier Acts. It runs "from a joint family property". The pre-fixing of the Article "a" before the words "joint family property"" is significant and enlarges the scope of the Article by covering cases of exclusion from even an item of joint family property and giving a right to sue to the person excluded. In view of the change in the language much of the discussion supra has become academic.

does not appear to be an accurate statement of the law. In this connection, one has to bear in mind the provisions of Section 13 of the General Clauses Act, 1897, which reads as follows:

ANNEXURE - "A" GENELOGICAL TREE

Sec.13 Gender and Number:

In all Central Acts and Regulations, unless there is anything repugnant in the subject or context:

1. Words importing the masculine gender shall be taken to include females; and
2. Words in the singular shall include the plural, and vice versa.

In any event, on the facts and circumstances, the argument on behalf of the plaintiffs under Article 127 of the old Limitation Act was wholly misconceived. Coming to the merits of the case, the third defendant who is alive, the father of the plaintiff, who could throw light on the facts, did not examine himself, and his non examination is very vital to the case of the plaintiffs. The plaintiffs cannot give excuse on the ground that the 3rd defendant did not act in the interest and whatever be the allegations made by the plaintiffs against the 2nd and the 3rd defendants, they cannot disguise that it is the 3rd defendant who has set up the plaintiffs in an attempt to raise a claim which was hopelessly barred. The defendants have been in possession and enjoyment of the properties for more than nearly 40 years without any interruption. Therefore, ouster is established by the defendants.

For all these reasons, I find no justifications to interfere with the judgment of the learned First Additional Subordinate Judge. The Learned Counsel for the appellants, Mr. R. Venkatakrishnan argued the matter with ability and placed all the facts, after analysis, the pleadings and evidence on record and I found no difficulty in appreciating his arguments. Having regard to the fact the plaintiffs were advised to prosecute a claim which was totally frivolous and the Learned Counsel for the appellant had argued the matter with all fairness, I direct the parties to bear their respective costs in the appeal. Accordingly, the appeal is dismissed.