
(1963) 05 KL CK 0005
In the High Court Of Kerala
Case No : S. A. No. 276 of 1963

Velliyottummal Sooppi and others

APPELLANT

Vs

Nadukkandy Moosa and others

RESPONDENT

Date of Decision : 20-05-1963

Acts Referred:

Citation : (1968) KLJ 414

Hon'ble Judges : T.C. Raghavan, J;M.U. Isaac, J

Bench : Division Bench

Advocate : V.R. Krishna Iyer, K. Raghavan Nair and T.V. Ramakrishnan, for the Appellant; A. Achuthan Nambiar, T.P.Kelu Nambiar For Respondents 1 to 5, P.K. Shamsuddin, E. Ebrahim Kutty For Respondents 15to 19, for the Respondent

Final Decision : Dismissed

Judgement

T.C. Raghavan, J.—The second appeal has been placed before a Division Bench by Madhavan Nair J, as our learned brother felt that the case involved a question of adverse possession fresh for this Court and as such, the expression of opinion by a Division Bench on the question was essential. We shall state the essential facts to bring out the question. The nine items of properties involved in this litigation belonged, to a Mahomedan by name Pakkramar. He died in 1916 leaving his widow and children (defendants 1 to 4-the appellants being defendants 2 to 4, the children) and his father Sooppi and mother Kunhoma. The parents together were entitled to a third of his estate and his wife and children were entitled to the rest. But, the wife and children took possession of all the properties, Kunhoma died; and Sooppi also died in 1920 leaving two sons, Pokker and Mammad and four daughters, Ayissa, Beeyumma, the fifth defendant and the sixth defendant The plaintiffs, who sued for partition and separate possession of their 12th share in of Pokker; defendants the suit items as the heirs of Sooppi and. Kunhoma, are the widow and children. 7 to 12 are the widow and children of Mammad; defendants 13, 14, 20 and 21 are the children of Ayissa; defendants 15 to 19 are, the children of Beeyumma; and defendants

22 to 25 are the children of the fifth defendant. The: 26th defendant is a person claiming a share through Ayissa's husband. Some of the defendants died and their legal representatives have also been impleaded. Barring defendants 15 to 19, all the others supported the plaintiffs; and defendants 15 to 19 supported the contesting defendants, defendants 1 to 4.

2. The contesting defendants claimed that items 7 and 8 did not belong to Pakkrammar and were acquired by them after his death. This contention was found against by both the lower courts; and the same is reiterated in the second appeal. Defendants 1 to 4 also claimed that the decision in an earlier suit (O.S. No. 152 of 1935) was res judicata regarding items 1, 4 and 6, the judgments there in being Ex. B1 (the judgment of the trial court) and Ex. B2 (the judgment of the lower appellate court). The trial court rejected this claim, but the lower appellate court affirmed it. The memorandum of cross-objections is directed against this decision by the lower appellate court. Defendants 1 to 4 had yet another contention regarding all the items: they contended that they perfected full title by adverse possession by holding the properties adversely for about 36 or 37 years since the death of Pakkrammar to the filing of the suit in 1953. Both the lower courts rejected this. They have held that all the items excepting items 1, 4 and 6 are partible. The trial court has further held that items 1, 4 and 6 are also partible, while the lower appellants court has held that they are not partible since the decision in O.S. No. 152 of 1935 was res judicata.

3. We may observe, at the very outset, that some of the findings of the lower courts cannot be seriously disputed: and one of them is that since the death of Pakkrammar in 1916, defendants 1 to 4 had been in possession and enjoyment of the suit items till the filing of the suit in 1953 without sharing the income with any other sharer. The plaintiffs had a case that they received their share of the income till six years prior to the institution of the suit; but Pw. 1, the second plaintiff, admitted that nothing was received in cash and their share of the income was also utilized for the improvement of the properties. The Lower courts, as already stated, have held nothing was paid to anybody by defendants 1 to 4. In April 1952 the plaintiffs sent Ex. A3, the suit notice, claiming their share; defendants 1 to 4 sent Ex. A5, their reply, denying the plaintiffs' right to share; and the suit was instituted in 1953.

4. About items 7 and 8 also, though it is urged before us by Mr. Ramakrishnan, the counsel of the appellants, that the concurrent decision of the lower courts is erroneous, we are of opinion that these items belonged to Pakkrammar and the subsequent acquisition claimed by the appellants (Ex. B12) was only a renewal of the earlier one by Pakkrammar with the result that these items also are properties left by Pakkrammar.

5. Then about items 1, 4 and 6. O.S. No. 152 of 1935 was a suit filed by the sixth defendant for partition and separate possession of her share in the assets of her father, Sooppi. Items 5 to 7 in that suit were items 1, 4 and 6 in the present litigation. All the heirs of Sooppi were parties to that suit; and defendants 1 to 4

were also impleaded. The father of the plaintiffs (Pokker) was the first defendant and defendants 1 to 4 were defendants 13 to 16. The trial court held (vide Ex. B1) that the items belonged to Sooppi and they were available for partition. Defendants 1 to 4 look up the matter in appeal; and the appellate court held (vide Ex. B2) that these items belonged to them in their own right and did not form part of the estate of Sooppi. The contention raised in the memorandum of cross-objections is that the earlier suit was for partition of only the self-acquisitions of Sooppi and not of the properties he obtained by succession from his son, Pakkrammar. We do not think that there is any force in this contention. Admittedly, Sooppi had a share in these items on the death of his son and later his wife; and when it was held that these items were not the self acquisition of Sooppi, naturally, the question whether Sooppi had any right in these items might or ought to have been raised in that suit itself. Having failed to do that, the plaintiffs or the other respondents who sail with them cannot now be heard to contend that the earlier decision is not resjudicata. We are in agreement with the reasoning of the Subordinate Judge on this question and we confirm his decision.

6. Now we come to the main question which necessitated reference to the Division Bench by Madhavan Nair J. It was urged before our learned brother that since defendants 1 to 4 took possession of the properties left by Pakkrammar and enjoyed the same for over 36 or 37 years without paying any portion of the income to any of the other co-sharers, it must be presumed that they prescribed for full title against the others. Madhavan Nair J. considered the decisions in Gangadhar v Parashram Bhalchandra I. L. R. 29 Bom. 300, Maddela Krishnayya v Maddela Udayalakshamma 1953 : II M. L. J. 241, Peeran Sahib v. Pedda Jamaluddin Sahib A. I. R. 1958 And. Pra. 48, Dhanji Girja Bhailume and Others Vs. Dharma Kanhu and Others, , Ishak Ali v Mst. Unnasbi Porthahin A. I. R. 1958 Mad. Pra. 209 and lastly, P. Lakshmi Reddy Vs. L. Lakshmi Reddy, . Considering the earlier cases Madhavan Nair J. observed:

This line of decisions shows that the presumption of a co-owner's possession being on behalf of all the co-owners has an exception when the sole enjoyment of the property by a co-owner was for a pretty long time (as about 40 years)

7. And considering the decision of the Supreme Court in the last case our learned brother observed that since the line of cases indicated above was not noticed by their Lordships of the Supreme Court, the observations of the Supreme Court were to be read "in-the context of the case-secundum subjectam materiam-.. " and then the observations of the Supreme Court "cannot imply a disapproval of the dicta in the line of cases" cited above.

8. We have thus to consider whether the line of decisions pointed out by Madhavan Nair J and relied upon by Mr. Ramakrishnan is an exception to the presumption that a co-owner's possession is possession on behalf of all the co-owners, if there is sole enjoyment of the property by the co-owner in possession for a pretty long time; whether the observations of the Supreme Court are only secundum subjectam materiam; and, if not, what is the legal position, if one co-

owner has been in possession and enjoyment for a fairly long time without sharing the income with the other co-owners.

9. We shall at the outset extract one paragraph from the judgment of the Supreme Court already referred to, because that paragraph, in our opinion, furnishes answer for all the questions raised in this case. Paragraph 4 reads:

Now, the ordinary classical requirement of adverse possession is that it should be *nec vi nec clam nec precario* (see (1934) 66 MLJ 134 (Privy Council)) The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (see *Radhamoni Debi v. Collector of Khulna*: 27 Ind. App. 136 at p. 140: P.C.). But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-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 (see *Corea v Appuhamy*: 1912 AC 230). It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains exclusive possession in assertion of hostile title and continues in such possession for a very considerate time and the excluded heir takes no steps to vindicate his title Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai v. Jeevarathnammal A. I. R. 1919 P. C 44* at p. 47 quotes, apparently with approval, a passage from *Culley v. Deo d Taylerson* (1840: 3 P & D 539: 52 RR 566) which indicates that such a situation may well lead to an inference of ouster "if other circumstances concur.(See also AIR 1931 48 (Privy Council) It may be further mentioned that it is well settled that the burden of making out ouster is on the person claiming to, displace the lawful title of a co-heir by his adverse possession.

10. Mr. Ramakrishnan has cited before us the same decisions he cited before Madhavan Nair J. and a few others. We do not think it is necessary to refer to decisions other than those considered by Madhavan Nair J. in the order of reference In *Gangadhar v Parashram Bhalchandra I. L. R. 29 Bom. 300* the facts were that the properties belonged to a Hindu father and four sons, divided in states; that two sons, Balaji and Lakshman, went abroad in 1857 and the father was in management until his death in 1881; that, thereafter, Ganesh, a grandson

through another son, managed till his death in 1893 when his widow succeeded him; that she mortgaged the properties in 1899 to the defendant and she died in 1900; and that the plaintiffs, son of Balaji and Lakshman, sued for recovery of their share in 1901. The Munsiff, the Subordinate Judge and the Bombay High Court (Jenkins C. J. and Batty J.) dismissed the suit holding that the suit was barred by adverse possession. Their Lordships referred to an earlier decisions of the Bombay High Court and also to two English decisions, *Culley v Deo d Taylersont*, and *Fisher and Taylor v Prosser*. This decision has been followed by *Verikatarama Ayyar J. in Maddela Krishnayya v Maddela Udyalakshmamma* 1953: II M. L. J. 241 and by *Subba Rao C. J. and Manohar Pershad J. in Peeran Sahib v Pedda Jamaluddin Sahib A. I. R. 1958 And Pra 48*). Another decision cited by Mr. Ramakrishnan is *Dhanji Girja Bhailume and Others Vs. Dharma Kanhu and Others*, , where *Gajendragadkar J.*, speaking for the Division Bench, observed that from non-participation in the enjoyment of the income by the co-owner out of possession spread over sixty years and more exclusion might well be inferred. Yet another decision relied upon by the counsel of the appellants is *Ishak Ali v Mst. Unnasbi Porthahin A. I. R. 1958 Mad Pra 209*. *Hidayatullah C. J. and V. R. Sen J.* constituted the Division Bench; and their Lordships observed:

But where possession has continued for a considerable period of time exclusively with one co-owner and prima facie to the exclusion of other or others, this principle can hardly be applied.

11. The principle referred to by the learned Judges is the rule of presumption that possession of one co-owner is referable to the title of the other co-owner, unless there is ouster. It was considering these decisions that *Madhavan Nair J.* has observed that this line of decisions is an exception to the rule that one co-owner's possession is on behalf of all the co-owners, when the sole enjoyment of the property by that co-owner in possession was for a pretty long period.

12. The first question is whether these decisions really indicate an exception to the presumption that a co-owner's possession is on behalf of all the co-owners, if there is sole enjoyment by him for a long time. Probably, the passage we have extracted from the judgment of *Hidayatullah C. J. in Ishak Ali's case A. I. R. 1958 Mad Pra. 209* might indicate that such a case is an exception. But, the other decisions of the Bombay High Court do not go to that extent: they only show that such exclusive receipt of profits by one co-owner for a long period may point to an ouster; in other words, from such non participation in the enjoyment of the income for a long time exclusion might well be inferred. *Jenkins C. J.* refers to *Culley's case*, which laid down that exclusive receipt of profits continuously for a long period might point to ouster, but the court must be satisfied that such taking of profits was an indication of the denial of right in the other co-tenant to receive them. The learned Chief Justice then refers to *Fisher and Taylor v Prosser*, the other English case mentioned already. In that case Lord Mansfield left it to the jury to decide whether actual ouster could be presumed from the circumstances and the evidence in the case. What *Gajendragadkar* and

Vyas JJ. have said in *Dhanji Girja Bhailume and Others Vs. Dharma Kanhu and Others*, is also the same, viz., that from long non-participation in the enjoyment exclusion can well be inferred. The same thing appears in clearer terms in the passage quoted from the decision of the Supreme Court. Though Jagannadhadas J. has observed that the question whether the line of cases holding that adverse possession and ouster can be inferred when one co-owner takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time need not be decided, the learned Judge has said that it sufficient to notice that such a situation may well lead to an inference of ouster "if other circumstances concur". In this connection, Jagannadhadas J refers to *Culley's* case and the decision of the Privy Council in *N. Varada Pillai v Jeevarathnammal A. I. R, 1919 P. C. 44* Thus, what appears to us is that when one co-owner takes possession and continues in possession for a considerable enjoying the entire income of the property without sharing it with the other co-owners, that is a circumstance (in our opinion, a strong circumstance) from which ouster may be inferred, if other circumstances also concur. To us it appears that the observation of Hidayatullah C. J. in *Ishak Ali's* case A. I. R. 1958 Mad- Pra. 209 also means only this. We would point out in this connection that the Supreme Court has observed that the burden of making out ouster is always on the person claiming exclusion: if the situation were an-exception to the rule, the onus should shift to the co-owner out of possession, which does not appear to have been intended by the Supreme Court.

13. The next question is whether the observations of the Supreme Court extracted above are only *secundum subjectam materiam*. In the case before the Supreme Court, adverse possession commenced only on 20th January 1930 and the suit was brought on 23rd October 1941 with the result that the adverse possession had not yet perfected title. In view of that, it may even be said that the observations of be Supreme Court on the question of adverse possession were *obiter*. If they were *obiter*, it cannot be said that the observations were *secundum subjectam materiam*, because the observations were not necessary even for deciding the case before the Supreme Court. But, we do not think that we will be right in saying that these observations were *obiter*; nor do we think that the observations were merely *secundum subjectam materiam* and not warranted by the line of decisions discussed above.

14. Lastly, what is then the legal effect of such a situation? The answer to this question we have already indicated in considering the first question. When one co-owner takes possession and continues in possession for a long time enjoying income of the property without sharing it with the other co-owners, it is, in our opinion, a strong circumstance indicative of, or, from which an inference can be drawn, that there was ouster of the co-owners not in possession and if other circumstances also exist in support of this, courts will be justified in inferring ouster or exclusion.

15. In the case before us, both the lower courts have held against adverse

possession. Mr. Ramakrishnan argues that such a finding is not a finding on a pure question of fact, and that the question of adverse possession is always a mixed question of fact and law. He has cited some decisions also in support of this; but, we do not refer to those decisions as we agree with him that this is only a mixed question of fact and law. Therefore, if the decision of the lower courts on this question is erroneous, we can interfere in second appeal, because the question involved is one of law as well.

16. The Subordinate Judge observes that since the second defendant (Dw. 1) admits that he did not know whether Sooppi and Kunhoma were also heirs of Pakkamar, defendants 1 to 4 could not have held the properties adversely to Sooppi and Kunhoma. The reasoning is that since defendants 1 to 4 did not know that Sooppi and Kunhoma were also heirs of Pakkarmmar, there could not have been any hostile animus to prescribe exclusive title against them. The Subordinate Judge also says relying on the decision in *Kesavan v Mayankutty* 1957 KLT 1246, a Division Bench ruling of this Court, that the mere non-participation in the enjoyment of the income by a co-owner out of possession is only a negative aspect of the question and there should be a positive aspect showing that there was ouster in the sense that there was an overt act on the part of the co-owner in possession indicating his hostile animus to exclude.

17. Ouster is certainly a positive matter; and the hostile animus necessary to constitute ouster must also be a positive matter. It is a matter involving action: it cannot be mere inaction. If the co-owner in possession did not give a share of the income to the co-owner out of possession merely because the latter did not ask for it, then, such animus may be only a negative animus. On the other hand, if the evidence shows that even if the co-owner out of possession demanded his share the co-owner in possession would not have given him a share, then, the animus is positive, in the sense that it is indicative of an animus to exclude. For entertaining a hostile animus to oust the real owner, the person in possession need not know who the real owner is. If he has the animus to hold the property as his against the whole world including the real owner, whoever he be, known or unknown, the animus is sufficiently hostile to exclude the real owner also.

18. We may give two or three illustrations. If A and B were neighboring owners and A, under the bona fide belief that a plot lying near the boundary belonged to him, took possession of it and B also thought that the plot belonged to A and allowed him to be in possession thereof, after 12 years A will prescribe full title against B. It will not be an answer by B to the claim of adverse possession by A that the latter did not have the necessary hostile animus as he was all along under the impression that the property belonged to him. The hostile animus, as we have already stated, is the animus to possess the property as owner against the whole world including the real owner whoever he be. Again, if X died leaving Y and Z as heirs but Y and Z bona fide thought that Y was the sole heir and under that bona fide belief Y got into possession of the estate left by X and continued to be in possession thereof for the statutory period, Z will not

thereafter be entitled to claim that Y's possession was under a mistake regarding heirship and he did not have the necessary hostile animus to oust Z. In this case also, while Y was in possession, his hostile animus was to exclude the whole world including the real owner, if any. If P took possession of a plot lying vacant without knowing who the owner was and continued in possession for over the statutory period openly and notoriously without acknowledging title in anybody else, he will prescribe against the unknown owner; and his being unaware of the particularity of the real owner is no bar for his entertaining an animus to exclude the real owner.

19. What appears to have happened in this case is that on the death of Pakkrammar, everyone including Sooppi and Kunhoma thought that defendants 1 to 4 alone were his heirs; and that defendants 1 to 4 got into possession and continued in possession and enjoyment for over 36 or 37 years until this suit was filed. The second defendant (Pw, 1) admits this: and there is no evidence that any of the plaintiffs or any of the defendants who support them knew that Sooppi and Kunhoma had shares in Pakkrammar's estate. The only witness examined on their side is the second plaintiff (Pw. 1); and he was born-only after Sooppi died, because he was only 32 in 1953.

20. There are also several circumstances in the case indicating that defendants 1 to 4 held as full owners. There were occasions when the other co-owners could have claimed their shares. Defendants 1 to 4 took a renewal of items 7 and 8 as if those items belonged to them exclusively: when items 1, 4 and 6 were included is O.S. No. 152 of 1935 as part of the estate of Sooppi, defendants 1 to 4 claimed that they were entitled to those items in their own right; after the disposal of that suit, all the heirs of Sooppi partitioned the estate of Sooppi under Ex. B4 in 1942: and defendants 1 to 4 also effected mutation in their name of some of the items. These were all occasions when defendants 1 to 4 asserted their hostile animus to hold the proportion as their own in full right against the whole world: these were all occasions when the other co-owners, if they had any right, should have or could have claimed their right, which they failed to do. The other heirs were all in the locality; and they must have known what was happening. The Subordinate Judge says that O.S. No. 152 of 1935 was a suit for partitioning the self-acquisitions of Sooppi; and that the present suit is one for partitioning the properties that came to the heirs of Pakkrammar through Sooppi. This is likely to mislead. On the death of Pakkrammar, Sooppi and Kunhoma became entitled to a share in his estate; and on their death, their heirs became entitled to that share, not as heirs of Pakkrammar through Sooppi and Kunhoma, but as heirs of Sooppi and Kunhoma. And defendants 1 to 4 took possession of the suit items as the heirs of Pakkrammar when he died; and they did not enter possession on the death of Kunhoma and Sooppi as their heirs. Thus, when O.S. No. 152 of 1935 was filed for partition of the estate of Sooppi, at least then the share Sooppi got from Pakkrammar should have been claimed as part of his estate. Nothing like that was done in that suit; and even items 1, 4 and 6 were included therein as the self-acquisition of Sooppi and not as inherited from

Pakkrammar which shows that at that time the parties were not aware that Sooppi was an heir of Pakrammar. Even after the disposal of that suit, what the heirs of Sooppi did was only to divide the properties left by him excluding his share in Pakkraramar's estate.

21. Mr. Achuthan Nambiar, the counsel of the contesting respondents, has contended at this stage that there are items not covered by Ex. B12, Ex. B1 and B2 and the pattas obtained by defendants 1 to 4, and regarding them, at any rate, there could not have been any adverse possession. There is no force in this argument, because the adverse possession was not of item by item, but of the share of Sooppi and Kunhoma in the estate left by Pakkrammar-their share in all the items. This argument is again effectively met by the decision of the Privy Council in AIR 1931 48 (Privy Council) , where there were four villages wherein adverse possession was claimed and only regarding three there were revenue proceeding and mutation: still, the Privy Council held that there Was adverse possession even regarding the fourth village.

22. Thus, the exclusive and sole possession and enjoyment of the income by defendants 1 to 4 of the properties left by Pakkrammar for over 36 or 37 years coupled with the other circumstances, their conduct to the knowledge of the heirs of Sooppi and Kunhoma, indicate ouster. One relevant circumstance to be specially reiterated in this connection is that all the heirs of Sooppi and Kunhoma were only in the locality and defendants 1 to 4 were conducting themselves as if they were the full owners of the properties left by Pakkrammar under the very nose of these heirs. We may also add that though we have already held that the decision in O, S. No. 152 of 1935 is res judicata regarding items 1, 4 and 6, the bar of adverse possession will cover these items as well. The suit is thus barred by adverse possession. The second appeal is allowed; the decision of the lower courts is set aside; and the suit is dismissed. The appellants will get their costs of the trial court and half their costs of this Court and the lower appellate court from the plaintiff-respondents (respondents 1 to 5); and they will get the other half of their costs of this Court and the lower appellate court from the other contesting respondents (the defendants who supported the plaintiffs, and their legal representatives) barring respondents 15 to 19. Respondents 15 to 19 (defendants 15 to 19) are not liable for costs, because they supported the appellants; and they will suffer their own costs. The memorandum of cross-objections is dismissed; and the cross-objectors will pay the costs of the appellants (respondents 1 to 3 in the cross-objections) and the other respondents in the cross-objections will suffer their costs.