

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:31.7.2008

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.733 of 1997

1. Mrs Myrtle Florence Vanderveen(died)
2. Patric Vanderveen
3. Ronald Vanderveen
4. Michael Vanderveen
5. Darry L.Vanderveen
6. Marianne Vanderveen

Appellants 1 to 4 & 6
rep. by their Power of Attorney
5th appellant

(Appellants 2 to 6
recorded as L.Rs of the
deceased first appellant
vide order of Court dated 31.7.2008
made in memo dated 31.7.2008)
(Cause title accepted as per
order of Court in C.M.P.
No.9293/97 dated 24/7/1997)

... Appellants/D4,6,8 to 10 & 12

-vs-

1. Derek Peter Sylvester Vanderveen(died)
2. Adrain Charless Rodney Vanderveen(died)
3. Alfred Clarence Conard Vanderveen
4. Davind Erancis Christopher Vanderveen
5. Anthony Rudopl Philips Vanderveen
6. Pamela Anere in Marilyn Vanderveen

(D3 to D6 recorded as LRS of the
deceased RR1 and 2 vide order
of Court dated 31.7.2008 made
in memo dated 31.7.2008)

7. Olive Evalyn Debens(died)

8. Mary Elizabeth Hardin(died)

RR7 and 8 died and since they
remained exparte in the Lower
Court notice to them dispensed
with in A.S.No.733 of 1997 vide
order of Court dated 31.7.2008
made in A.S.No.733/97

(Memo dated 31.7.2008)

9. Louis Ernestine Joseph

10. Corden Vanderveen

11.Barbara Curtis
12.Penelope Joseph
13.Brain Nicholas
14.Avril Fredericks
15.Mrs Muthu (died)
16.Aburvasami
(R16 recorded as Lrs of the deceased
R15 vide order of Court dated 31.7.2008
made in Memo dated 31.7.2008)
17.Arthur Vanderveen
18.Peter Vanderveen

..respondents/Plaintiffs 1 to
6, D1 to D3, D11, D13 to
D16, D18, D19, D5, and D7

This appeal is filed under Section 96 of CPC against the Judgment and decree dated 2.8.1994 made in O.S.No.70 of 1987 on the file of the Court of Subordinate Judge, Nagapattinam.

For appellants : : Mr.B.Ramamoorthy, Advocate
For respondents : : Ms.R.M.Shyamala, Advocate-R16
R1 & R2-died
R3 to R6-No appearance
R7 & R8-died
R9 to R14- NDW
R15-died
R17 & R18-No appearance

JUDGMENT

This appeal has been preferred against an observation made in O.S.No.70 of 1987 on the file of the Court of Subordinate Judge, Nagapattinam, dated 2.8.1994. The appellants are defendants 4, 6, 8 to 10 and 12.

2. The suit was filed by the plaintiffs for partition claiming 1/7th share in the plaint schedule properties. According to the plaintiffs, the plaint schedule properties originally belonged to one Antony Rodgers Vanderveen, who died on 20.7.1938 leaving his wife Emma Reine Vanderveen who also died on 26.2.1948. Their children are Winnerfred Theodara, Francis Antony, David Elizabon, Olive Evelyn (D1), Margery Gertrude, Carmal Jane and Juliana Matilda. Winnerfred Theodara's children Mary Elizabeth Hardin (D3) and Louis Ernestine Joseph. Francis Antony, wife is Mirtle Florence (D4) and their children are Defendants 5 to 12, who are the appellants herein. David Elizabon died in the year 1975 whose wife M.Florence died in the year 1986 leaving plaintiffs 1 to 6. Olive Evelyn is D1. Margery Gertrude died in the year 1973 leaving her only legal heir viz her daughter Barbara Curtis, who is D13 in the suit. The other daughter of Antony Rodgers Vanderveen was Carmal Jane died in the year 1986 leaving D14 to D16 as her legal heirs. The last daughter of Antony Rodgers Vanderveen, Juliana Matilda died in the year 1982 leaving her husband Wylie (D17). Hence the plaintiffs have filed the suit for partition claiming 1/7th share of David Elizabon as one of seven legal heirs of Antony Rodgers Vanderveen. The defence taken by the appellants herein/Defendants 4, 6, 8 to 10 and 12 is that the suit

property originally belonged to the grand father of the appellants viz., Antony Rodgers Vanderveen and the same devolved on his wife Emma Reine Vanderveen, who also died on 26.2.1948 and even before her death, Antony Rodgers Vanderveen, the grand father of the appellants had executed a Will in favour of Francis Antony, the father of the appellants/Defendants 5 to 12. It is the case of the appellants/contesting defendants that after the death of their grand father Antony Rodgers Vanderveen in 1938, his son Francis Antony, the father of the appellants/Defendants 5 to 12 shifted to Nilgiris and that the wife of Antony Rodgers Vanderveen and the other children of Antony Rodgers Vanderveen were shifted to Trichirapalli. Only for the purpose of offering worship to "Our Lady of Health" at Valankanni, the other children of Antony Rodgers Vanderveen occasionally visited to Valankanni. It is the further case of the contesting defendants / appellants that their father Francis Antony alone was in possession and enjoyment of the plaint schedule properties and other properties of Antony Rodgers Vanderveen and was paying land tax after the demise of Antony Rodgers Vanderveen in 1938 and that the mutation was effected and patta was also transferred in the name of Francis Antony Vanderveen, the father of defendants 5 to 12 even in the year 1956 and after the death of Francis Antony Vanderveen on 18.12.1980, fourth defendant being the wife of Francis Antony Vanderveen and Defendants 5 to 12, the children of Francis Antony Vanderveen were in continuous possession and enjoyment of the plaint schedule properties and were paying land revenue for the properties of Antony Rodgers Vanderveen, the grand father of Defendants 5 to 12 while in continuous possession and enjoyment of the properties adverse to the interest of the other sharers and that the specific case of the contesting defendants in their written statement is that their father Francis Antony Vanderveen had prescribed title to the plaint schedule properties which are originally belonged to his father Antony Rodgers Vanderveen.

3. The grievance of the appellants/Defendants 4,6,8,9,10 and 12 is that the learned trial Judge while disposing of the suit, at paragraph 12 line 5 to 10 at inner page 10 of the printed copy of the Judgment, has observed that Defendants 4 to 12/appellants herein have not prescribed title by way of their long continuous possession against the interest of their co-owners(ouster). Further grievance of the learned counsel appearing for the appellants is that while deciding Issue No.2 in O.S.No.70 of 1987, the learned trial Judge at paragraph 10 inner page 7 line 15 of the printed copy of the Judgment has held that since the plaintiffs have filed the suit in the year 1987 itself ie within seven years from the date of death of the father of appellants/Defendants 4,6,8 to 10 and 12 viz., Francis Antony Vanderveen, the suit is barred by limitation. Only against the said observation, the appellants have preferred this appeal even though the suit filed by the plaintiffs has been dismissed by the trial Court.

4. The learned counsel appearing for the appellants would contend that the learned trial Judge has failed to take into consideration the fact that after the death of grand father Antony Rodgers Vanderveen, on 20.7.1938 onwards and also after the death of wife of Antony Rodgers Vanderveen viz Emma Reine Vanderveen on 26.2.1998, the appellants' father viz., Francis Antony Vanderveen was

in possession and enjoyment of the plaint schedule properties adverse to the interest of other co-owners since they lived Valankanni and that grand father Antony Roders Vanderveen had executed a Will in favour of the father of Defendants 5 to 12 viz., Francis Antony Vanderveen bequeathing Valankanni property in favour of Francis Antony Vanderveen, the father of the appellants and on that date onwards, the father of the appellants was in possession and enjoyment of the plaint schedule property and after his death, the defendants are in continuous possession and enjoyment of the plaint schedule property, after the death of their father Francis Antony Vanderveen and that they have prescribed title by ouster. But the alleged Will in favour of the father of the appellants was not produced before the trial Court, the reason is being it was destroyed by the father of the plaintiffs.

5. Since there was no evidence for the above said pleadings of the defendants, the learned trial Judge has come to a conclusion that the plea of ouster cannot be upheld. Any how, it is left open for the appellants/Defendants 4,6,8 to 10 and 12 to prove their title in respect of the plaint schedule property by raising a definite plea of ouster and to prove the same in a separate proceedings. For the future litigation, it is made clear that the observation in the Judgment in O.S.No.70 of 1987 on the file of Court of Subordinate Judge, Nagapattinam at paragraph 11 against defendants 4 to 12 will not amount to res judicata. The question of title of defendants 4 to 12 is left open to be decided in a separate suit and the observation against defendants 4 to 12 by the learned trial Judge in O.S.No.70 of 1987 on the file of Court of Subordinate Judge, Nagapattinam shall not be 'res judicata' inclusive of the finding regarding the limitation. With the above observations, this appeal is disposed of. No costs.

Sd/
Deputy Registrar

/true copy/

सत्यमेव जयते

Sub Asst.Registrar

WEB COPY

sg

To

1. The Subordinate Judge, Nagapattinam

2. The Record Keeper, V.R.Section, High Court, Madras

+1 cc To Mr.B.Ramamoorthy, Advocate, SR.41779

A.S.NO.733 of 1997