# Nagabhushanammal (D) vs C.Chandikeswaralingam on 26 February, 2016

## Equivalent citations: AIR 2016 SUPREME COURT 1134, 2016 (4) SCC 434, 2017 (2) AJR 257, AIR 2016 SC (CIVIL) 1146, (2016) 1 ORISSA LR 842, (2016) 4 CIVLJ 144, (2016) 3 ANDHLD 92, (2016) 2 RECCIVR 469, (2016) 3 ICC 1, (2016) 116 ALL LR 508, (2016) 4 MAD LW 158, (2016) 2 ALL RENTCAS 8, (2016) 1 LANDLR 185, (2016) 132 REVDEC 160, (2016) 3 ALL WC 178, (2016) 2 CIVILCOURTC 636, (2016) 3 SCALE 5, (2016) 161 ALLINDCAS 26 (SC), (2016) 1 CURCC 185, (2016) 1 WLC(SC)CVL 603, (2016) 2 JLJR 153, (2016) 2 JCR 223 (SC), (2016) 1 CLR 701 (SC), (2016) 2 MAD LJ 328, (2016) 2 PAT LJR 262, 2016 (2) KCCR SN 126 (SC)

## Bench: Kurian Joseph, Rohinton Fali Nariman

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1858-1859 OF 2016
(Arising from S.L.P. (C) Nos. 10449-10450/2009)

NAGABHUSHANAMMAL (D) BY LRS. … APPELLANT (S)

VERSUS

C. CHANDIKESWARALINGAM … RESPONDENT (S)

J U D G M E N T

KURIAN, J.:

Delay condoned. Substitution allowed. Leave granted.

Res judicata, partition, ouster and adverse possession are the four principles interestingly arising in the present case.

SHORT FACTS Parties are referred to as plaintiff and defendants. Appellant-Nagabhushanammal, since deceased and substituted by her legal heirs (daughter of deceased Kotilingaraja and Veerammal), filed a suit for partition, O.S. No. 2062 of 1988 before the City Civil Court, Madras. The suit property situated at No. 4, Govindarajulyu Naidu Street, Agaram, Madras-82 was purchased by the plaintiff's

mother Veerammal from her father- in-law and his two sons under a sale deed dated 16.09.1919 (Document No.1919, SRO, Sembium) from out of her own funds. Veerammal had three children, the plaintiff, the first defendant's father named Chandrasekaran and one Neelagandammal. Veerammal, the original owner of the suit property died in 1922 leaving behind her, the plaintiff and her brother, late Chandrasekaran, the other daughter Neelagandammal having pre-deceased her mother Veerammal. After the death of Veerammal, the property vested equally on the plaintiff and Chandrasekaran, the defendant's father. On the death of Chandrasekaran in 1956, his half share of the suit property vested on the defendant and his mother Saradhambal, the widow of Chandrasekaran. According to the plaintiff, in or about 1961, the plaintiff's husband realized that Veerammal, the owner of the property had settled the property in his name by registered document dated 06.02.1954. He settled the property in his wife's (the plaintiff's) name. This was resented by defendant's mother, Saradambal. That necessitated the filing by the plaintiff of a suit O.S. No. 404 of 1962 on the file of the VII Assit., City Civil Judge, Madras praying for possession of suit property on the basis of the settlement made by the said Veerammal and later by her husband. The learned Judge refused to believe the genuineness of the settlement made by Veerammal in favour of her son-in-law, K. Subramanian, the husband of the plaintiff and hence dismissed the suit on 24.08.1964.

Thereafter, the plaintiff filed the present suit in 1988 for partition.

The defendant, in the written statement, mainly contended that the suit for partition is not maintainable and is hit by Section 11 of The Code of Civil Procedure, 1908 on the principle of res judicata. It was his case that after the death of Kotilingaraja in 1955, the property vested on his son Chandrasekaran, after his death in 1956, on his son the defendant and since then the defendant has been in exclusive possession and enjoyment of the suit property paying the property tax, etc., with patta in his name.

A specific contention was also taken that the plaintiff did not have any right in the property and that as to the date of the suit, the defendant had been in exclusive possession of the suit property for more than thirty years, and hence, the suit was liable to be dismissed on the ground of adverse possession and limitation as well.

The following issues were framed by the trial court:

"1. Whether the suit property is liable to be partitioned?

2. Whether the Plaintiff is entitled for half share in the suit property?

3. Whether the Defendant is liable to render accounts for the suit property?

4. Whether the suit is affected by res judicata?

5. To what relief the Plaintiff is entitled?" The trial court held that the suit for partition was hit by the principle of res judicata in view of the dismissal of the earlier suit, O.S. No. 404 of 1962, referred to hereinabove. The defence of adverse possession also was upheld and the suit was thus dismissed by judgment dated 14.08.1990.

In the first appeal, A.S. No. 271 of 1990 on the file of the City Civil Court, Chennai, the judgment of the trial court was reversed and the suit was decreed. According to the first appellate court, the decree in O.S. No. 404 of 1962, a suit for possession and injunction based on a settlement deed executed by the husband of the plaintiff, was not a bar for the plaintiff's suit for partition. It was held that the nature of the suit was different, issues were different and the whole basis of the suit was also different. On adverse possession, the first appellate court held that the plaintiff and defendant were entitled to succeed to the extent of the property of their mother, after the death of their father and that plaintiff and defendant are co-owners in joint possession under law. Unless one of the co-owners, in the present case, the plaintiff, had been ousted in accordance with law, the plaintiff could claim the partition and there is no question of adverse possession.

The defendant took up the matter before the High Court in second appeal in S.A. No. 1792 of 1992 leading to the impugned judgment dated 17.01.2008. The second appeal was admitted on the following substantial question of law:

> "Whether the Lower Appellate Court was right in the view it took that the Appellant has not established prescriptive title to the property?" Later, the following additional substantial question of law was also formulated:
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> "Is not the Plaintiff in the present Suit bound by her admission made in the Plaint filed by her in O.S. No. 404/1962 regarding dispossession from the year 1957?" The High Court was of the view that:
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> "16. The right of the parties was directly in issue in earlier Suit in O.S. No. 404/1962. As discussed earlier in O.S. No. 404/1962, Plaintiff claimed right in the entire Suit Property and sought for declaration and possession. Saradhambal resisted the Suit claiming possession and setting up right in herself. Having regard to the nature of plea taken by both parties, dismissal of O.S. No. 404/1962 is a strong militating circumstances against the Plaintiff and maintainability of the Suit in O.S. No. 2062/1988. The right and title of the parties was directly and substantially in issue in O.S. No. 404/1962. As per Sec.11 of CPC, if the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. In any event the filing of subsequent Suit O.S. No. 2062/1988 is nothing but re-litigation. After putting the case in one way, then putting the case in other way is nothing but abuse of process of Court, which was not kept in view by the trial Court." On adverse possession, despite beautifully summing up the legal position at paragraph-20 in the following lines,:

"20. ... To sum up, the basic distinction between adverse possession as between strangers and ouster and exclusion of co-owners, the law is well settled that as between co-owners, there could be no adverse possession unless there has been a denial of title and an ouster to the knowledge of the other." the High Court entered a finding that the possession of the suit property by the defendant continuously since 1956 has become adverse to that of plaintiff. This finding by the High court is based on the averment made by the plaintiff in the suit that the defendant therein had trespassed into the suit property in 1956. In any case, according to the High Court, after dismissal of O.S. No. 404 of 1962, the possession of the property by the defendant had become adverse to the plaintiff. Accordingly, the judgment and decree of the first appellate court was set aside and that of the trial court, dismissing the suit for partition, was restored and second appeal was allowed. Aggrieved, the present appeal.

'Res judicata' literally means a "thing adjudicated" or "an issue that has been definitively settled by judicial decision".[1] The principle operates as a bar to try the same issue once over. It aims to prevent multiplicity of proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies and was decided and has become final, so that the parties are not vexed twice over; vexatious litigation is put an end to and valuable time of the court is saved. (See Sulochanna Amma v. Narayanan Nair[2]) In Jaswant Singh v. Custodian of Evacuee Property[3], this Court has laid down a test for determining whether a subsequent suit is barred by res judicata:

"...In order that a defence of res judicata may succeed it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings...." The expression 'cause of action' came to be interpreted by this Court in Kunjan Nair Sivaraman Nair v. Narayanan Nair[4], at paragraph-16. To quote:

"16. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises in "cause of action"." In Halsbury's Laws of England(4th Edition), the expression has been defined as follows:

"'Cause of action' has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action." The suit filed by the plaintiff in 1962, based on the settlement deed executed by her husband in her favour and the sufferance of the dismissal of the suit, will not, in any way, be a bar for making a claim for her share, if any, of the family property, if otherwise permissible under law. As succinctly addressed by the first appellate court, the 1962 suit for the entire property was based on a settlement deed and it was a suit for possession. Whereas, the 1988 suit for partition was for plaintiff's one- half share in the property based on her birth right. Cause of action is entirely different.

Thus, the High Court in our opinion is not right on the point of res judicata.

The other main defense in the suit is ouster and limitation. Ouster is a weak defense in a suit for partition of family property and it is strong if the defendant is able to establish consistent and open assertion of denial of title, long and uninterrupted possession and exercise of right of exclusive ownership openly and to the knowledge of the other co-owner This court in Syed Shah Ghulam Ghouse Mohiuddin and others v. Syed Shah Ahmed Mohiuddin Kamisul Quadri and Ors[5] held that possession of one co- owner is presumed to be on behalf of all co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. It was further held that there has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

A three judge bench of this court in P.Lakshmi Reddy v. R.Lakshmi Reddy[6], while examining the necessary conditions for applicability of doctrine of ouster to the shares of co-owners, held as follows:

"4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario. (See Secretary of State for India v. Debendra Lal Khan [ (1933) LR 61 IA 78, 82] ). 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 [ (1900) LR 27 IA 136, 140] ). 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 Cores 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." This Court in Vidya Devi v. Prem Prakash[7] held that: "28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time rescribed by law." In Civil Suit O.S. No. 404 of 1962, filed by the plaintiff in the court of VII Assistant City Civil Judge, it was the stand of the plaintiff that she had been dispossessed from the property in the year 1957. Defendant had taken a plea at paragraph-14 of the written statement that "after the death of Kotilingaraja in 1955, the property vested on his son Chandrasekaralingam and after his death in 1956 on his son this defendant, since then this defendant has been in exclusive possession and enjoyment of the suit property paying the property tax etc., with the patta in his name". At Paragraphs-28 and 29 of the written statement also, the defendant had taken a specific plea on hostile animus and exclusive possession. The averments read as follows:

"28. This defendant submits that for the past 30 years and more he has been in exclusive possession of the suit property and Plaintiff's claim is also barred by adverse possession and limitation.

29. This defendant states that Patta over the suit property has been ordered to be registered in his name and the claim of this plaintiff was rejected by the Settlement Enquiry Tahsildar, by his order dated 14.11.1959, after due enquiry and notice to parties." The above being the emerging true factual and correct legal position, with a view to putting an end to five decades old disputes between a sister and brother, to avoid any further litigation and to get the families to reconcile and restore peace, we put a suggestion for a reasonable settlement. Thanks to the sincere cooperation extended by Sri Viswanathan, learned Senior Counsel for the appellant, Sri V. K. Shukla, learned Counsel for the respondent and the cooperation extended by the parties themselves, it is heartening to note that a solution has evolved. Accordingly, it is ordered that the appellants shall be entitled to 35% and the respondent 65%. Let the suit property be accordingly partitioned. If it is found that it is not possible to do

so by metes and bounds, let the property be sold and proceeds shared accordingly. We direct the Principal City Civil Judge, Madras to take the required steps to work out this order and finalise everything expeditiously, and in any case, within three months from the date of production of a copy of this judgment. The appeals are disposed of accordingly.

There shall be no order as to costs.

……J. (KURIAN JOSEPH) ……J. (ROHINTON FALI NARIMAN) New Delhi;

February 26, 2016.

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[1] Black's Law Dictionary, 8th Edition, p.1337
[2] (1994) 2 SCC 14
[3] (1985) 3 SCC 648
[4] (2004) 3 SCC 277
[5] (1971) 1 SCC 597
[6] AIR 1957 SC 1789
[7] (1995) 4 SCC 496

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