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S.A.No.1381 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.09.2024

CORAM

THE HONOURABLE MR. JUSTICE N. SENTHILKUMAR

S.A.No.1381 of 2011
and M.P. No. 1 of 2011

Kesavan

... Appellant

Vs.

1.Athiammal
2.Minor Deepika
(Minor rep. By her mother & next
friend, 1st respondent)
3.Dhanapal
4.Danasekaran
5.Suresh
6.Malarvizhi

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 12.01.2010 made in A.S.No.101 of 2009 on the file of the Principal District Court, Villupuram, reversing the judgment and decree dated 12.11.2008 made in O.S.No.38 of 2006 on the



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file of the Additional Sub Court, Tindivanam.

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For Appellant : Mr.P.Mani

For R1 & R2 : Mr.C.Venkatesan

For R3 to R6 : No appearance

J U D G M E N T

The Second Appeal is filed by the 1st defendant in the suit against the judgment and decree dated 12.01.2010 made in A.S.No.101 of 2009 on the file of the Principal District Court, Villupuram. The respondents 1 and 2 herein are the plaintiffs in the suit.

2. For the sake of convenience, the parties are referred as Plaintiffs and Defendants as referred in the original suit.

3. The 1st plaintiff is the second wife of the 1st defendant and the 2nd plaintiff is the minor daughter, who was born out of the wedlock between the 1st plaintiff and the 1st defendant. The 2nd and 3rd defendants



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are the brothers of the 1st defendant, 4th and 5th defendants are born out of the wedlock between the 1st defendant and his first wife Kalaiselvi.

4. Before the Trial Court, the 1st plaintiff contended that the 1st defendant had married one Kalaiselvi, 26 years prior to the institution of the suit. The said Kalaiselvi has eloped with one James and started living with him. According to the 1st plaintiff, the marriage between the 1st defendant and Kalaiselvi was dissolved by way of customary practise. Thereafter, the 1st defendant and the 1st plaintiff got married on 18.06.1992 as per the Hindu rites and rituals in a temple at Tindivanam. Out of their wedlock, the 2nd plaintiff was born.

5. The 1st plaintiff has filed the suit for partition of the suit schedule properties to obtain 1/9th share available to the 2nd plaintiff in the suit properties and to direct the 1st defendant to pay maintenance amount of Rs.5,000/- per month and Rs.10,000/- yearly towards mandatory expenses to the plaintiffs 1 and 2. The description of the suit schedule properties are as follows:-

“ சொத்து விவரம்



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திண்டிவனம் டி. திண்டிவனம் சப்.டி.

1.ச.நெ.138/6 0.61 செண்ட் மதிப்பு ரூ 61,000.00

2.ச.நெ.138/7 1.24 செண்ட் மதிப்பு ரூ 1,24,000.00

3.ச.நெ.138/10ஏ 0.58 செண்ட் மதிப்பு ரூ 58,000.00

4.ச.நெ.138/12பி 0.44 செண்ட் மதிப்பு ரூ 44,000.00

திண்டிவனம் ஏகாம்பரப் பிள்ளை வீதியில்
ச.நெ90/8 சுமார் 0.41/4 செண்ட் நாட்டோடு வேய்ந்த
வீடு கதவிலக்கம் 11ஏ. இதன் மதிப்பு ரூ.10,000.00.

மொத்த மதிப்பு ரூ.2,97,000.”

6. The 1st defendant has filed the written statement before the Trial Court, which was adopted by the defendants 4 and 5. The specific case of the 1st defendant is that the suit properties are self-acquired properties of Govindasamy Naidu, the father of the 1st defendant and the properties are already orally partitioned by his father in favour of the defendants 1 to 3.

7. In paragraph 5 of the written statement, the 1st defendant has narrated the manner in which the oral partition has taken place and the same is extracted hereunder:-

“5. கோவிந்தசாமி நாயுடுக்கு சொந்தமான அயிட்டங்களில்



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தாவா 2வது அயிட்டமாக கண்ட 1.24 விஸ்திரணத்தை 1 முதல் 3 பிரதிவாதிகளுக்கு அவரது காலத்திலேயே ஆளுக்கு சுமார் 0.41½ செண்டு வீதம் வாய்மொழி பாகமாக பிரித்து அவர்களுக்கு பிரித்து கொடுத்து விட்டார். அவ்வாறு பிரித்து கொடுத்த பிறகு 15.12.2005 தேதியில் தன் சகோதரரான 3ம் பிரதிவாதி தனசேகருக்கு [ரூ.83,000/-](#) க்கு மேற்படி கேசவன் வகையறாவினால் கிரயம் செய்து கொடுத்துவிட்டார். 4வது அயிட்ட நிலம் 2ம் பிரதிவாதி தனபாலுக்கு வாய்மொழி பாகமாக விடப்பட்டது. வீட்டை 4ம் பிரதிவாதி சுரேஷ்வுக்கு [ரூ.180,000/-](#) க்கு கேவசன் வகையறாவினால் 15.12.2005 தேதிய ரிஜிஸ்டர் பத்திர மூலமாய் கிரயம் செய்து கொடுத்து, 5ம் பிரதிவாதி மலர்விழியை திருமணம் செய்து கொடுக்கவும், நோய் வாய்ப்பட்ட 1ம் பிரதிவாதியின் வைத்திய செலவுகளுக்கு 1ம் பிரதிவாதியின் குடும்ப பராமரிப்பு செலவுகளும் செய்யப்பட்டுவிட்டன.....”

8. The Trial Court has framed the following issues:-

“1.Is the plaintiff right in stating that the suit scheduled properties are unpartitioned ancestral properties of the defendants?



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2.Is the 3rd defendant right in stating that the house property included in Item Nos.2 and 4 of the suit schedule properties is the self-acquired property of Govindasamy Naidu, the father of the defendants 1 to 3?

3.Are the defendants right in stating that the suit scheduled properties were already orally partitioned in favour of the defendants 1 and 3 by Govindasamy Naidu?

4.Is the 3rd defendant right in stating that the marriage said to have taken place between the 1st defendant and 1st plaintiff on 18.06.2022 is not true? The 2nd plaintiff is not born out of the wedlock between the 1st plaintiff and the 1st defendant?

5.Are the plaintiffs entitled to claim the reliefs sought for in the suit?

6.To what other reliefs, the plaintiffs are entitled?"

9. Before the Trial Court, P.W.1 to P.W.4 were examined and Ex. A.1 to A.8 were marked on the side of the plaintiffs. No witnesses were examined and no documents were marked on the side of the



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defendants.

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10. The Trial Court disbelieved the solemnization of the marriage between the 1st plaintiff and the 1st defendant on 18.06.1992 and the 2nd plaintiff's paternity. The Trial Court considered the contention of the defendants that the suit properties are self-acquired properties of the father of defendants 1 to 3 and the same has been already divided by way of oral partition and that the 1st defendant has no income to pay the maintenance amount claimed by the plaintiffs.

11. The Trial Court held that the plaintiffs have failed to prove that the suit properties are undivided ancestral properties of the defendants and the fact that the 1st defendant is earning Rs. 10,000/- per month was not proved by the plaintiffs through oral and documentary evidence. The Trial Court has come to the conclusion that the plaintiffs are not entitled for the reliefs sought for and dismissed the suit.

12. Challenging the Judgment and Decree of the Trial Court in



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O.S.No.38 of 2006 on the file of the Additional Sub Court, Tindivanam, an appeal was filed by the plaintiffs 1 and 2 in A.S.No.101 of 2009 before the Principal District Court, Villupuram.

13. The First Appellate Court has taken five points for determination. The First Appellate Court held that the solemnization of marriage between the 1st plaintiff and the 1st defendant is true and valid. The First Appellate Court considered the case of the plaintiffs that the suit properties are ancestral properties of the defendants and the 2nd plaintiff is entitled to obtain 1/9th share out of 1/3rd share to be allotted in favour of the 1st defendant and held that the plaintiffs have proved their case by producing oral and documentary evidence and the defendants failed to prove their case.

14. As the 1st defendant decided not to enter the witness box to state his own case, adverse inference has been taken against the defendants by the first appellate court. It was held that the defendants



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failed to prove their contentions made in the written statement by producing oral and documentary evidence and as such, the 2nd plaintiff is entitled to the 1/9th share in the suit properties.

15. With regard to the relief of maintenance claimed by the plaintiffs, the First Appellate Court held that the 1st defendant has got sufficient income to bear the maintenance amount as he has not taken steps to disprove the statements made by the 1st plaintiff about his income. Therefore, the First Appellate Court held that the 1st plaintiff is entitled to receive Rs. 1000/- per month towards maintenance from the date of filing of the suit and the 2nd plaintiff is entitled to receive a sum of Rs. 1000 per month towards maintenance till the date of partition of the suit properties and possession of 1/9th share in favour of the 2nd plaintiff. Therefore, the appeal was partly allowed. Challenging the same, the present second appeal has been preferred by the 1st defendant.

16. On 23.12.2011, the Second Appeal was admitted on the



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following Substantial Questions of Law:

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“(i) Whether in law, the marriage between the 1st plaintiff and the 1st defendant is valid when the first marriage between the 1st defendant and one Kalaiselvi has not been dissolved in a manner known to law and when the plaintiff failed to prove the dissolution of the first marriage by caste custom?

(ii) Whether in law, the present suit filed for partition and separate possession by the illegitimate daughter of the 1st defendant is maintainable?

(iii) Whether in law, the 1st plaintiff is entitled to maintenance as the wife of the 1st defendant when the marriage between the 1st defendant and the plaintiff is not valid and when the 1st plaintiff is not the legally wedded wife of the 1st defendant?

17. The contention of the learned counsel for the appellant is that when the marriage between the appellant and Kalaiselvi was not legally dissolved and in the absence of any material to prove that the marriage between the appellant and the 1st respondent was solemnized in



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the manner known to law, the respondents 1 and 2 will not be entitled for any maintenance and a share in the property.

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18. The learned counsel for the appellant would contend that the properties in which, a share is claimed in favour of the 2nd Respondent, are the self-acquired properties of Govindasamy Naidu, the father of the appellant. The learned counsel for the appellant relied upon an order of this Court dated 08.12.2021 made in C.R.P.(PD). No. 1007 of 2019, wherein this Court has given a finding which reads as follows:-

“11. When it is admitted that the grandfather acquired the property out of his own income, the property will be the self acquired property of the grand father. After the advent of the Hindu Succession Act 1956, the self acquired property of a male hindu devolves only under Section 8 of the Hindu Succession Act 1956. Applying Section 8 of the Act, the defendants 1 and 2 alone will inherit the property from the father. The plaintiffs who are the son, grand sons, grand daughter and daughter in law of the 1st defendant are not entitled to inherit the property



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along with the father. As pointed out earlier, the father will exclude his son while getting the property from his father under Section 8 of the Hindu Succession Act 1956. This position is reiterated by several judgments of this Court as well as the Hon'ble Supreme Court. Very object of Hindu Succession Act 1956 will be defeated if the present suit filed by the son is held maintainable during the life time of his father.”

Based on the aforesaid finding of this Court, the learned counsel for the appellant would contend that there is no basis for the claim of a share in favour of the 2nd Respondent in the suit properties which are the self-acquired properties of the appellant's father during the lifetime of the appellant.

19. The learned counsel for the Respondents 1 and 2 would contend that the appellant has neither examined himself before the Trial Court nor has he marked any documents to show that himself and his first wife namely Kalaiselvi are living together and the appellant has not



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marked any documents to prove that the suit properties are the self-acquired properties of his father.

20. It is evident that the First Appellate Court had failed to note, when the marriage between the said Kalaiselvi and the appellant herein was not dissolved in a manner known to law, till the time of obtaining divorce, it is presumed that the marriage between the appellant and Kalaiselvi is valid and legally persisting. The First Appellate Court accepted the evidence marked as Ex.A1 i.e., the marriage invitation dated 18.06.1992, marriage fee receipt marked as Ex.A6 and Transfer Certificate marked as Ex.A8.

21. No doubt, in all these documents, the name of the appellant finds place as husband of 1st respondent and father of the 2nd respondent. A mere mention of name in those documents relied upon by the Respondents 1 and 2 cannot be taken into consideration. In the absence of a valid subsisting marriage between the appellant and the 1st respondent, the question of partition and maintenance does not arise.



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22. As per Section 8 of the Hindu Succession Act, 1956, an ancestral property should devolve from the great grand father to the grand father, then to the father and then to the son. Unless the devolution to four generations is established, the property cannot be held as an ancestral property. Admittedly, the 1st respondent has not proved that the suit scheduled properties are ancestral properties. In view of the above, all the substantial questions of law are answered in favour of the appellant. The judgment and decree passed by the First Appellate Court is liable to be set aside.

23. Accordingly, the Second Appeal is allowed. The judgment and decree dated 12.01.2010 in A.S.No.101 of 2009 passed by the Principal District Court, Villupuram is set aside and the judgment and decree passed by the Additional Sub Court, Tindivanam dated 12.11.2008 in O.S.No.38 of 2006 is hereby confirmed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.



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To

- 1.The Principal District Judge,
Villupuram.
- 2.The Additional Subordinate Judge,
Tindivanam.



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N.SENTHILKUMAR, J.

Gsa

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