

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.11.2016

PRONOUNCED ON : 10.11.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1249 of 1996

Ramanatha Udayar

...Appellant

Vs

1.Ragothama Udayar

2.Balarama Udayar

3.Sampathraj

4.Ragothama Udayar

... Respondents

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of the learned Subordinate Judge, Villupuram, in A.S.No.4 of 1992 dated 19.04.1992 in confirming the judgment and decree of the learned District Munsif, Thirukoilur in O.S.No.849 of 1985 dated 30.10.1991.

For Appellants : Mr.M.Muruganantham
for Mr.V.Ragavachari
For RR1 & 3 : No Appearance
For RR2 & 4 : Died

JUDGMENT

The property which is the subject matter of this second appeal has a checkered history. One Mr.Latchumana Udayar was the original owner of 25 cents of land comprising the present property in dispute. He had three sons by name, Mr.Narayanasami Udayar; Mr.Purushothama Udayar and Mr.Krishna Udayar. His three sons have divided the 25 cents of land into three parts viz., 8 cents each leaving the balance one cent for common purpose. A portion in the 8 cents which was allotted to Mr.Narayanasami Udayar is the subject matter of the suit. The property was in possession and enjoyment of Mr.Narayanasami Udayar till his life time. After his death, his wife Mrs.Ammakannammal has settled the property to her daughter Ms.Viruthambal, who in turn, sold it to one Mr.Krishnasamy Mudaliar on 24.12.1952. The said alienation has been challenged by the legal heir of Mr.Purushothama Udayar and Mr.Krishna Udayar in an earlier suit

in O.S.No.19/1954 on the ground that the settlement made by Mrs.Ammakannammal in favour of her daughter Ms.Viruthambal and further alienation of the property by Ms.Viruthambal to Mr.Krishnasamy Mudaliar is legally invalid. The same was accepted by the trial Court and the alienation in favour of Mr.Krishnasamy Mudaliar was set aside.

2.Mr.Ramanatha Udayar, one of the two sons of Mr.Purusothama Udayar has filed the present suit alleging that after succeeding the case against Mr.Krishnasamy Mudaliar, in respect of the property sold by Ms.Viruthambal, he filed a suit in O.S.No.60 of 1966 for recovery of possession which was contested by him upto the first appeal stage. At that point of time, a settlement has been arrived at between him and the other plaintiffs to the effect that Mr.Purushothama Udayar shall pursue the litigation and recover the property and the other plaintiffs' will later pay the 50% of the litigation expenses and share the property. Till such payment, Mr.Ramanatha Udayar, the first plaintiff in O.S.No.60/1966 will be entitled to enjoy the property absolutely. With this understanding Mr.Ramanatha Udayar who is one of the plaintiff in O.S.No.60/1966 got the delivery of the property through E.P.No.340/1978.

3.The plaintiff's contention is that having obtained the shares of the property from other shareholders except 2nd and 4th defendants who are entitled for 1/8th share each, he is entitled for the remaining 3/4th share in the 8 cents of land where the schedule property is located. While being so, the first defendant claiming himself as a son of Mr.Venunatha Udayar who is none other than the brother of the plaintiff Mr.Ramanatha Udayar claiming right over the property and had taken possession of the property through the third defendant Mr.Sampathraj who was inducted into the property as a tenant. The said plea of the plaintiffs therein was strongly contested by the defendants more particularly, the first defendant on the ground that the earlier suit in O.S.No.19/1954, the Court has held that the sale deed executed by Ms.Viruthambal in favour of Mr.Krishnasamy Mudaliar is void and invalid and on the death of Ms.Viruthambal by the doctrine of reversion, the property has to devolve upon Mr.Venunatha Udayar (father of the first defendant) Mr.Ramanatha Udayar, the plaintiff and the legal heirs of Mr.Krishnappa Udayar. Thus, being the son of Mr.Venunatha Udayar, the first defendant is entitled to 1/3rd share over the suit property. He is the only son of Mr.Venunatha Udayar born through the second wife Ms.Vijayammal. His right over the property cannot be deprived on the ground that he was born to the Mistress of Mr.Venunatha Udayar and he is not a legitimate son of Mr.Venunatha Udayar.

4.The trial Court after taking note of the rival contentions made in the pleadings of the respective parties has held that in

Ex.A.12, Mr.Venunatha Udayar has mentioned the name of Ms.Vijayammal as his "Abimana bariyal". In Exs.B.7 and B.8, Mr.Venunatha Udayar has described the first defendant, Mr.Ragothama Udayar, as his son. On appreciation of evidence, the trial Court has held that Mr.Venunatha Udayar and Ms.Vijayammal had lived together as husband and wife with recognition and approval of the family members. In the light of long co-habitation, they are to be treated as husband and wife.

5.Mr.Venunatha Udayar has always recognised Ms.Vijiyammal, as his wife and Mr.Ragothama Udayar, the first defendant as his son. In the light of Section 114 of the Indian Evidence Act, the right of Mr.Ragothama Udayar, the first defendant cannot be taken away just because Mr.Venunatha Udayar has referred Ms.Vijiyammal as his "Abimana bariyal" in Ex.A.12. With this observation, the trial Court has held that the claim of the first defendant namely Mr.Ragothama Udayar that he is in possession and enjoyment of the suit property since 1966 cannot be ruled out. In addition, for want of evidence, the trial Court has rejected the claim of the plaintiff that other sharers have relinquished the right over the property in favour of the plaintiff. Further, claiming declaration in respect of the portion of the property without including the entire properties cast suspicion over the claim of the plaintiff. Thus, the trial Court concluded that suit property has been positively found to be in possession of the first defendant and he has title over the property through his father Mr.Venunatha Udayar.

6.The First Appellate Court while confirming the findings of the trial Court had reiterated that Mr.Venunatha Udayar has treated Ms.Vijiyammal as his wife and lived with her for long period and also conducted the marriage of his son viz., the first defendant and dealt with his property taking note of the right of Mr.Ragothama Udayar over the property as legitimate son of Mr.Venunatha Udayar.

7.Having been aggrieved by the findings of the Courts below, the plaintiff has preferred this second appeal on various grounds and this Court at the time of admission has formulated the following substantial question of law:-

"Whether the Courts below are right in holding that Vijayammal is the wife of Venunatha Udayar, when he himself had described her as his Abimana Bariyal in Ex.A.12 and under such circumstances, whether it should not have followed the judgment of the Madras High Court in 1989-2-L.W 197 and decreed the suit as prayed for ?"

8.The learned counsel for the appellant strenuously submitted that Ms.Vijayammal who is the mother of the first respondent is admittedly the Abimana Bariyal of Mr.Venunatha

Udayar. It is specifically mentioned in Ex.A.12 that Ms.Vijiyammal is the Abimana Bariyal of Mr.Venunatha Udayar. While so, though admittedly Mr.Ragothama Udayar was born to Mr.Venunatha Udayar and Ms.Vijiyammal, he is only an illegitimate child. As per Section 16(3) of the Hindu Marriage Act, 1955, he cannot have any claim or right over the ancestral property of Mr.Venunatha Udayar. In support of his submission, the learned counsel relied upon Jinia Keotin v. Kumar Sitaram Manjhi (2003 (1) SCC 730).

9. Section 16(3) of the Hindu Marriage Act was introduced in the year 1976. The obvious purpose to have the section with retrospective effect is that, a child born through void or voidable marriage, would carry a stigma for life. This beneficial legislation has removed the stigma of the children born through void or voidable marriage and entitles such children to claim right over the property of their parents.

10. While interpreting the expression, "property of the parents", in Section 16(3) of the Hindu Marriage Act, the Apex Court Jinia Keotin v. Kumar Sitaram Manjhi (cited supra) has observed that, in the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also would attempt to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself.

11. This dicta was followed by the Hon'ble Supreme Court in the subsequent judgment in Neelamma v. Sarojamma (2006(9) SCC 612) and in Bharatha Matha v. R.Vijaya Renganathan (2010(11) SCC 483).

12. The learned counsel for the appellant while referring these judgments has also fairly conceded that in Revanasiddappa and another v. Mallikarjun and others (2011 (11) SCC 1), a Division Bench of the Hon'ble Supreme Court has constrained to differ with the interpretation of Section 16(3) of the Hindu Marriage Act rendered in Jinia Keotin v. Kumar Sitaram Manjhi (cited supra) and Neelamma v. Sarojamma (cited supra) in view of the constitutional values enshrined in the preamble of our constitution which focuses on the concept of equality of status and opportunity and also on individual dignity. They have referred the matter to a Larger Bench for proper interpretation of Section 16(2) of the Hindu Marriage Act. It is understood

from the submission of the learned counsel for the appellant that the Larger Bench has not so far taken a decision in this aspect.

13. Before advertizing further about the merits of the appeal, it is necessary to refer Sections 11 & 16 of the Hindu Marriage Act, 1955 which are extracted below:-

"11.Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5."

16.Legitimacy of children of void and voidable marriages.- (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing of

acquiring any such rights by reason of his not being the legitimate child of his parents."

14. On reading of the facts and evidence in this case, one could find that the dispute in this case is not with respect to application of Section 16(3) of the Hindu Marriage Act, because, as per Ex.B.1, Mr.Ragothama Udayar, the first defendant was born to Mr.Venunatha Udayar and Ms.Vijayammal on 22.02.1935. He was married on 30.10.1955 and the marriage invitation is marked as Ex.B.2. In this marriage invitation Mr.Venunatha Udayar has described Mr.Ragothaman as his son and the plaintiff/appellant herein name also finds place in the invitation as one of the invitor. The overwhelming evidence would not only go to show that, Mr.Venunatha Udayar and Ms.Vijayammal were living together as husband and wife for a long period and the family members have recognised them as husband and wife. Further, the plaintiff himself admits the fact of long co-habitation between them and the parentage of the first defendant. While so, when there was no statutory bar to have a second wife before the enactment of Hindu Marriage Act in the year 1955 which came into force only on 18.05.1955, this Court holds that there was no illegality in the marriage of Mr.Venunatha Udayar with Ms.Vijayammal nor illegitimacy in the birth of Mr.Ragothama Udayar, the first defendant.

15. At this juncture, for better clarify, it is necessary to refer the following passage in *Jinia Keotin v. Kumar Sitaram Manjhi* (cited supra) which vividly explains the reason for introducing Section 16(3) of the Hindu Marriage Act in the year 1976.

"Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardizing the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children which depended very much upon the marriage between their parents being valid or void, thus turned on the act of the parents over which the innocent child had no

hold or control. But, for no fault of it, the innocent baby had to suffer a permanent setback in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children is concerned, to the properties of the parents only".

16. The learned counsel for the appellant heavily relied upon Ex.A.12 wherein, Ms.Vijayammal has been described as Abimana Bariyal by Mr.Venunatha Udayar. This document has been executed on 30.12.1946. The recital of this document (Ex.A.12) reveals certain interesting facts. It is a settlement deed executed by Mr.Venunatha Udayar in favour of his wives and children. Though, at the first instance, while describing Ms.Vijayammal as first party, he has mentioned her as "Abimana Bariyai" (mgpkhd ghhpia) , in the later part of the recital, he refers her as Abimana Manaivi (mgpkhd kditp). This document also refers about his first wife Mrs.Poongavanammal, her daughter Ms.Soundari Kanagambigai and grand daughter Ms.Sivaranjani. Further, the recital goes to show that Mr.Ramanatha Udayar, the appellant herein is the son of Mr.Purushothama Udayar born to his second wife. Hence, Mr.Ramanatha Udayar and Mr.Venunatha Udayar are related to each other by half blood. The litigation is between Mr.Purushothama Udayar's second wife son and Mr.Venunatha Udayar's second wife son. Since, both were born before the legislation prohibiting bigamous marriage, Sections 11 and 16 of the Hindu Marriage Act, has no application to either of them. Hindu Marriage Act, 1955 is not an ex post facto legislation to deprive the legitimacy or property right of a person born through a wedlock held prior to this legislature. This legal position is well settled and in conformity with the view expressed by the Hon'ble Supreme Court in paragraph No.4 of the Jinia Keotin v. Kumar Sitaram Manjhi case (already extracted in paragraph No.15 of this judgment).

17. This Court while formulating substantial question of law has referred the judgment reported in Mohan v Santha Bai Ammal (1989 (2) L.W 197) whether the dictum in this judgment not followed by Courts below. In the course of argument, the learned counsel for the appellant circulated the said judgment for the consideration of this Court.

18.This Court, on going through the above judgment found that the facts involved in that judgment is totally different from the facts involved in the case on hand. In the above referred judgment, one Ms.Drowpathi has claimed that she lived with Mr.Subbarayalu Naidu for considerable period of time as his 'Abimana Manaivi' (mgpkhd kditp) and therefore, the children born to her through Mr.Subbarayalu Naidu got right over the properties of Mr.Subbarayalu Naidu. On appreciation of evidence let in, the Court has found that Ms.Drowpathi was living with Mr.Subbarayalu Naidu for 7 years and begotten two children. Thereafter, she has executed a release deed, got some property from Mr.Subbarayulu Naidu and settled with some other person and through that person, she has begotten two more children. Therefore, the Division Bench of this Court has rightly held that there is no evidence to show that the said Ms.Drowpathi married Mr.Subbarayalu Naidu. Unless there is proof of marriage and that marriage held to be void, due to Section 11 of the Hindu Marriage Act, question of claiming benefit under Section 16 of Hindu Marriage Act will not arise. Based on the above facts of that case, the Court has rightly rejected the claim of Ms.Drowpathi. Whereas, in the present case, the continuous co-habitation is accepted, paternity is accepted and Section 11 of the Hindu Marriage Act which bars second marriage was not in existence at that point of time. Therefore, as observed by the Hon'ble Supreme Court, evil of polygamy was put to an end by the mandate of parliament only on enactment of Hindu Marriage Act, 1955. Till then, polygamy was permissible and also prevalent. At the point of time, when the second marriage was not void, neither the legitimacy of the children born through the second wife is questionable nor their right over the property through their father is tainted.

19.In the light of the above discussion, this Court holds that the case of the plaintiff/appellant has no substance to sustain. Both the Court Courts had rightly rejected the appellant plea. Hence, the second appeal is deserves to be dismissed.

20.In the result, the second appeal is dismissed. There shall be no order as to costs.

Sd/-
Asst.Registrar (CCC)

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Sub Asst. Registrar

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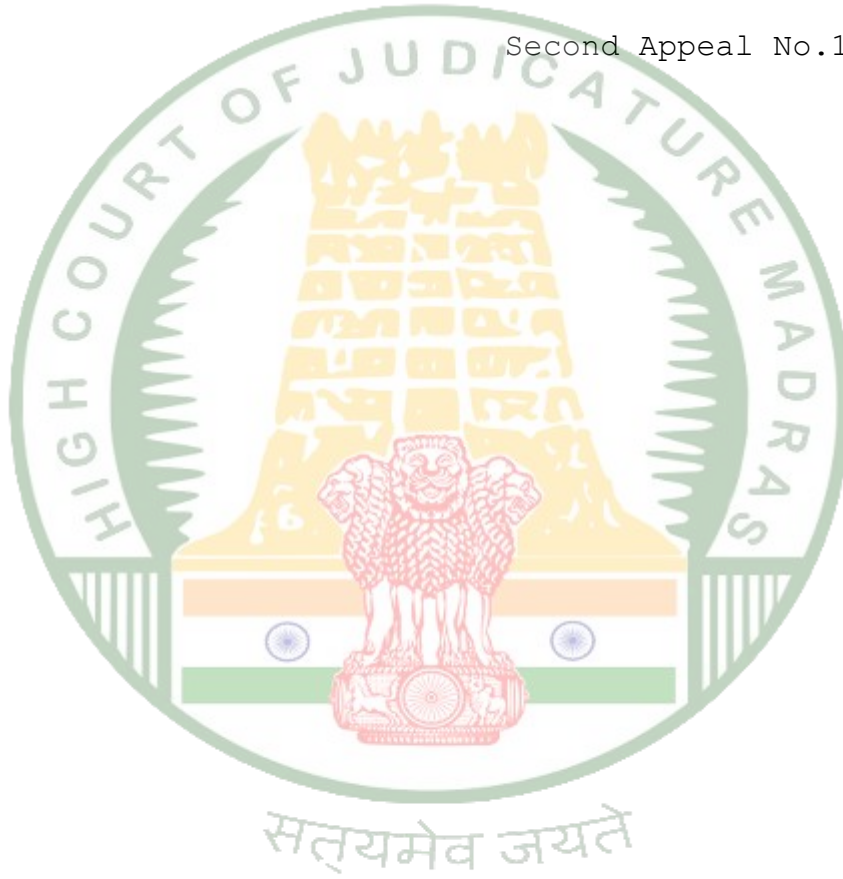
1.The Subordinate Judge,
Villupuram.

2.The District Munsif,
Thirukoilur.

+1 cc to Mr.V.Raghavahcari,advocate,sr.64406

rk(co)
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