

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.03.2017

PRONOUNCED ON : 01.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1015 of 2006

Pappathy ...Plaintiff/Appellant/Appellant

-vs-

1.Palaniammal
2.Latha
3.Abiba@Subaitha Begum ...Defendants/Respondents/Respondents

PRAYER: Appeal is filed under Section 100 of the Civil Procedure Code against the appellant against the judgment and the decree in A.S.No.99 of 2004, dated 28.6.2005, on the file of the Principal Sub Court, Coimbatore confirming the judgment and the decree in O.S.No.477 of 1998, dated 21.07.2004 on the file of the Principal District Munsif's Court, Coimbatore.

For Appellant : Mr.C.R.Prasanan

For R1&R2 : Mr.T.Sivagnana Sambandam

For R3 : Mr.S.Arjun

For M/s.P.Indhumathi

J U D G M E N T

The plaintiff has preferred this Second Appeal in respect of the disallowed portion.

2. For the sake of convenience, the parties are referred to as per the ranking before the Trial Court.

3. The plaintiff filed the suit for declaration that her second daughter Subbulakshmi is presumed to have sustained civil death and for the relief of partition of 3 items of property and for allotment of 2/3rd share in the suit property.

4. The plaint proceeds on the basis that the agricultural dry land to an extent of 3.28 acres in SF Nos.245,246 and 248/2 of Kundiamurthur village, Coimbatore Taluk together with a well and tilled garden sheds therein originally belonged to

the plaintiff's father-in-law Nanjappa Gounder and mother-in-law Subbthal jointly. They had purchased the said lands as per sale deed dated 21.10.1937. Subbathal executed a registered will dated 7.9.1966 bequeathing her share in the said lands to be enjoyed by her husband Nanjappa Gounder and four sons N.Sundaram, N.Chinnasamy, N.Marudhachalam and N.Aruchamy. The parties divided the said properties between themselves as per registered partition deed dated 3.11.1989. The father Nanjappa Gounder did not intent to have any share and therefore he was not allotted any property. The youngest son N.Aruchamy was allotted a total extent of 67-1/4 cents in SF Nos.245,246 and 248/2 with specific boundaries described in items Nos.1 to 5 in schedule D to the said partition deed is "suit lands". Aruchamy also had right to use the well in SF No.246, surrounding space, roads and a small bit of vacant space in common with his brothers that were described in schedule E to the said partition deed, which are described in schedule B hereunder. Eversince the date of partition, Aruchamy was in possession and enjoyment of the suit lands.

5.The plaintiff is the legally wedded senior wife of Aruchamy. Two female children namely Subbulakshmi and Manonmani were born to them in the years 1968 and 1972 respectively. The second child Manonmani died within a few years. When Subbulakshmi was 10 years old in the year 1978, she was missing and her whereabouts were not known. Subsequently, during the middle of the year 1984, she was found at Pollachi in her age of 16 years. When the plaintiff and her husband met her and pleaded for return of home, unfortunately she refused to come with them. However, she had left Pollachi without informing anybody during December 1984. Eversince then she was not heard of for the past more than 12 years by all person, relatives and friends who would naturally be heard of her, if she had been alive.

6.The plaintiff's husband Aruchamy on 21.11.1991 leaving behind his senior wife the plaintiff herein, her daughter Subbulakshmi, who was presumed to be alive on that date as per law and the second defendant, daughter through junior wife the first defendant to succeed the suit lands. Each of them were entitled to 1/3 share in the suit lands. Since she was not known for the past more than 12 years since December 1984, she should be presumed to have sustained civil death. Therefore, her 1/3 share in the suit lands devolved upon her mother the plaintiff. Thus, the plaintiff is entitled to 2/3 share in the suit lands.

7.The third respondent is the purchaser of the portion of the suit property from the defendants 1 and 2.

8.The defendant has filed written statement adopted by her daughter second defendant to the effect that the first defendant is legally wedded wife Aruchamy and the plaintiff is

not legally wedded wife of the said person and the second defendant is the daughter born to the Aruchamy and the first defendant after the death of the Aruchamy on 21.11.1991. They obtained succession certificate in O.P.No.102 of 1992 and based upon the said document, they have sold the portion of the property to the third respondent for valuable consideration and prayed for dismissal. On similar lines, the third defendant has also filed the written statement.

9. In order to prove the pleadings, the first plaintiff examined himself as P.W.1 and marked Exhibits P1 to P15 and also examined P.W.2, Maruthachalam who had witnessed the marriage solemnized between the P.W.1 and the Aruchamy. The first defendant Palaniammal has examined herself as D.W.1 and also examined D.W.2 and D.W.3 and marked Exhibits B1 to B19.

10. On consideration of both oral and documentary evidence, the learned trial Judge came to the conclusion that on relying upon the evidence of P.W.2 and Exhibits A2 and A3 have held that the plaintiff is the legally wedded wife of the said Aruchamy and further held that the marriage between the first defendant and the said Aruchamy was solemnized during the subsistence of the marriage and hence, held the same to be void and further held that though, the second defendant is the daughter born to Palaniammal. In view of the Section 16 clause (3) to Hindu Marriage Act held that she is entitled for a share and based upon the evidence of the P.W.1, P.W.2 and Exhibit A5 to Exhibit A10, the trial Court held that the plaintiff has successfully demonstrated before the Court, all the requirements of the Section 107 of the Evidence Act and the defendants have not rebutted the same nor discharged onus of proof as required under Section 108 of the Indian Evidence Act, and held that the second daughter's born to the plaintiff through Aruchamy is presumed to be dead and accordingly, decreed the suit for declaration of civil death of the said Subbulakshmi and also held that the plaintiff is entitled to only 1/2 share and since, the third defendant has purchased the property for valuable consideration and hence further directed that the property sold in favour of the third defendant is to be excluded and however, 50% of the sale consideration paid by the third defendant to the first defendant is to be paid to the plaintiff. By observing that, it is a self acquired property of the said Aruchamy and accordingly, decreed the suit in-part for passing of preliminary decree to an extent of 1/2 share by a judgment dated 21.07.2004.

11. Aggrieved against the said judgment and decree, the plaintiff has preferred A.S.No.99 of 2004 before the Principal Sub-Court, Coimbatore. After forming the necessary point for determination of appeal and after re-appreciation of evidence on record, the learned Sub-Judge has come to the conclusion that the larger extent of the property including the suit property was purchased by the father-in-law of the plaintiff

along with her mother-in-law on 21.11.1937 under Ex.A1 partition deed. The suit property was allotted to the share of the father-in-law of the plaintiff through him. The Aruchamy has obtained the share and hence, it is an ancestral property in nature and accordingly, set aside the contra-finding given by the trial Court and further held that the plaintiff has successfully demonstrated the conditions laid down under Section 107 of the Indian Evidence Act and in the absence of any evidence to the contrary, the concurrent finding of the trial Court that presumed in respect of the death of the second daughter, Subbulakshmi is proved in the manner known to law. However, held that the plaintiff is entitled to only 1/2 share and dismissed the appeal and hence, this Second Appeal.

12. At the time of admission, the following substantial questions of law were framed for consideration:

1. Whether in law the Courts below erred in overlooking that there can be presumption under Section 108 of Evidence Act regarding factum of civil death of Subbulakshmi, who had not been heard of for more than 7 years, only as on the date of filing the suit and not as on the date of disappearance or within seven years from such disappearance or within seven years from such disappearance as laid down in the dictum reported in AIR 1965 Mad 440, 1964(I) MLJ 246 and AIR 1976 Cal 356 which would entitle the plaintiff to have her daughter's share?

2. Whether in law the lower appellant Court having found that is the ancestral property it ought not to have granted a share to the second defendant?

13. As the point in issue is also inter-connected with the substantial question of law I & II, they are dealt with in common.

14. The admitted factual matrix of the case that the larger extent of land which includes the suit property was originally purchased by Nanjappa Gounder and Subbathal, the father-in-law and mother-in-law of the first plaintiff by a sale deed dated 21.10.1937. Subsequently, the mother-in-law Subbathal executed a registered will on 7.7.1966 bequeathing half share to be enjoyed to her husband Nanjappa Gounder lived and thereafter, vested remained to her 4 sons and the 4th son being Aruchamy and there was a partition on 3.11.1989 (Ex.A1) wherein, the suit property was allotted to the share of the Aruchamy.

15. Point of dispute is that:-

According to the plaintiff, she is a legally wedded senior wife of Aruchamy and out of the legal wedlock Manonmani and Subbulakshmi were born to her in the year 1968 and 1978. While, Manonmani died within few years, the another daughter

Subbulakshmi was 10 years in the year 1978 went missing and whereabouts were not known. Subsequently, during the end of the year 1984 she was found at Pollachi in her age of 16 years and subsequently, she left the home without informing anyone, during 1984, and she has not seen for more than 10 years. She examined herself as P.W.1 and also examined the independent witness P.W.2 who could depose that he had witnessed the solemnization of marriage between Aruchamy and plaintiff and birth of the two children and the oral evidence of the P.W.2 coupled with documentary evidence of Ex.A2, Birth Certificate of Subbulakshmi and Ex.A3, Birth Certificate of Manonmani and other documentary evidence Ex.A5, Ex.A6, Ex.A7 which are all paper publication. The trial Court has held that P.W.1 is legally wedded wife of Aruchamy and the above said two children are born to the plaintiff herein.

16. Though, the defendant denied the legal status of the plaintiff as legally wedded wife of Aruchamy, both the Courts below have concurrently held that the evidence of P.W.2 is reliable and trustworthy coupled with the documentary evidence of Ex.A2 and Ex.A3 have rightly come to the conclusion that plaintiff is the legally wedded wife of the Aruchamy and Subbulakshmi and Manonmani are the children born to them and the same is hereby confirmed in the absence of any contra evidence to that effect.

17. Further, both the Courts below have concurrently held that the marriage between the first defendant and the Aruchamy is void in law and the second defendant is born to the first defendant through Aruchamy and Courts below relying Ex.A4, Death Certificate of Aruchamy have accepted the date of death of Aruchamy as 21.11.1991 and relying Ex.A1 arrived at the finding that the suit property is the ancestral property and the fact that being the second wife, the 1st defendant is not the legally wedded wife and hence, the 2nd defendant though born out of void marriage, however, entitled for a share in his father's property and hence, she is entitled for one share. While, the plaintiff is entitled for one share on the death of the Aruchamy on 21.11.1991.

18. The learned counsel for the appellant has relied upon the following decisions:-

i) 2004(3) CTC 281, L.I.C of India Vs. Anuradha has held that :-

(a) Presumption is only with regard to death and not death on any particular day and Section 108 does not permit presumption or assumption that person not heard of for 7 years was dead on date of his disappearance or soon after date and time on which he was last seen and what point of time person was dead was not matter of presumption but it is matter of evidence either factual or circumstantial and onus of proving that

person died at given point of time and date since disappearance or within 7 years period, is on person who makes claim

(b) Presumption of fact or law cannot be stretched beyond limits permitted by statute or beyond contemplation spelt out from logical reasons or sense prevailing with judges.

(c) Section 108 is exception to Section 107

(d) Burden of proof is on person who affirms death - Section 108 shifts burden of proof on person who asserts fact of person being alive - Presumption under Section 108 is confined to factum of death of person whose life or death is in issue

(e) There is no presumption as to date or time of death or as to facts and circumstances under which person may have died - Presumption under Section 108 arises only on lapse of 7 years

(f) Date of death had to be determined on evidence to be adduced by person who asserts to death having been taken place on given time.

(g) The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years, absence and being unheard of having elapsed before that time.

(h) The presumption stands un-rebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination.

(i) At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death. (emphasis supplied)

19. The learned counsel for the appellant also relied on the following decisions:-

i) 2016(1) CTC 415, (M.Chellammal (deceased)

W/o.Madhava Naidu, and others vs. C.Shanthi,

<https://hcservices.ecourts.gov.in/hcservices/>

W/o.M.Chandrababu, and others)

ii) 2015(4) LW.884, (M.Chellammal, (deceased), W/o.Madhava Naidu and others Vs.C.Shanthi,W/o.M.Chandrababu and others.

iii) 2016(1) CTC 698, (The Managing Director, State Express Transport Corporation Tamil Nadu Limited, Pallavan salai, Chennai and others Vs.E.Tamilarasi has held that:

"Thus, Section 108 is an exception to Section 107. If Section 107, provides the rule, section 108, provides the exception. Once it is established that a person was alive within 30 years, the burden of proving that he is dead is on the person, who affirms it. This is the rule under Section 107. But, if it is proved that such a person, despite being alive within 30 years, has not been heard of for seven years by those, who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person, who affirms that he is alive."

iv. 2010(2) MWN (Civil) 495, The Executive Officer, Karumandisellipalayam Town Panchayat, Perundurai, Vs. Karunal.

20. Based upon the oral and documentary evidence as narrated above, both the Courts have concurrently held that the plaintiff has successfully discharged the initial burden on her shoulder to discharge a necessary facts for raising a presumption in their favour as contemplated under Section 107 of Indian Evidence Act and in the absence of any contra evidence, both the Courts below have concurrently held that the onus of proof subsequently being shifted on the defendants, has been foisted to prove the facts that are necessary as contemplated under Section 108 of Indian Evidence Act has held that the plaintiff is entitled to the declaratory relief that the second daughter Subbulakshmi is presumed to have sustained civil death. As such, there is no contravercy on this issue. Now, the point for consideration in the Second Appeal is as to what date, she presumed to have been dead.

21. As per Ex.A1, partition deed dated 3.11.1989, the father Aruchamy was allotted the suit property and as per Ex.A4, the death certificate, he died on 21.11.1991. Based upon the above factual position, the learned counsel Mr.C.R.Prasanan, who is appearing for the appellant contended that the presumption that the second daughter Subbulakshmi is died relates to the fact that only on the date of present date of plaint in the Court which was in the year 1998 till such time, she is presumed to be alive and hence, on the date of her father Aruchamy viz.21.11.1991, she is presumed to be alive consequently, she is also entitled for a share along with her

mother-the plaintiff pappathi and the second defendant -Latha portion through the junior wife.

22. Per contra, the learned counsel for the respondent initially relied upon the Ex.B9, Succession Certificate issued by the Court in O.P.No.102 of 1998 to show that only the defendants 1 and 2 are the legal heirs of the deceased Aruchamy and contended the point of legal heirs cannot re-opened in this civil suit.

23. In this regard, it is to be stated that in view of the decision reported in 2000(6) SCC 301 (Madhvi Amma Bhawani Amma and others Vs.Kunjikutty Pillai Meenakshi Pillai), wherein it is held that

"Decision regarding grant of succession certificate made in proceedings under S.373 of Succession Act would not bar any party to the said proceedings to raise the same issue in a suit for partition filed in a civil Court and such decision is not final between the parties and S.387 of Succession Act takes the decision outside the purview of Expln.VIII to S.11 - It is the decision on an issue and not mere finding on an incidental question to reach such decision, which operates as res judicata and further held that cannot be construed as final decision on the issue between the parties and hence, this contention of respondents fails to ground.

and hence, this Court has no hesitation to hold that the Succession Certificate issued under Ex.B9 under O.P.No.102 of 1992 in favour of the D1 and D2 is of no avail and the plaintiff who is not a party to the Succession Certificate, can agitate her civil status as a legally wedded wife of the said Aruchamy and hence, this Court is of the considered view that the concurrent finding given by both the Courts below does not warrant any interference and accordingly, the first contention of the learned counsel for the respondent stands negatived.

24.Now, the scope of the Second Appeal is narrowed down to date of presumption of death of the said second daughter Subbulakshmi. In this regard, the appellant counsel relied on the decision rendered in i) AIR 1965 Madras 440, HuseinnyJ.Bhagat and another Vs.Life Insurance Corporation of India, Madra has held that :

"It could not be presumed that he was dead even on the date of disappearance and that the only conclusion possible was that the young man was dead at the time the question arose (date of plaint) owing to the failure of the

opposite party to prove that he was alive".

ii) AIR 1964 (1) MLJ 246, Narayana Pillai Vs.Velayuthan Pillai (unsound mind) represented by Lakshmi has held that:-

"If the question as to a person's existence is raised in issue before the court at a particular point of time and more than seven years had elapsed by that time from the time when a man was last heard of, the presumption will be that he died before the date when the question was raised."

iii) AIR 1976 Cal 356, Chandi Charan Naskar, Vs.Bhagyadhar Mondal and others has held that:

"The presumption under Section 108 relates to the factum of death and not to the date of death of the person untraced. The presumption starts from the date when the dispute arises, that is, when the suit was filed".

25. By placing reliance on the above three decisions, the learned counsel for the appellant contended that presumption of death of Subbulakshmi is from the date of the dispute that arises namely when the suit is filed on 16.03.1998 and drawn the attention of this Court, Ex.B3 to indicate the date of death of the father Aruchami as 21.11.1991 and hence, by legal fiction, the said Subbulakshmi is alive on the date of the death of the father Aruchamy and as a legal heir, she also entitled to a share.

26. On perusal of the ~~red~~ plaint, the suit is filed on 16.03.1988 and it remains to be stated that the statutory period required under Section 108 of the Indian Evidence Act being 7 years and hence, the presumption under the said Section will arise in favour of the plaintiff only to a limited extent that the said Subbulakshmi is presumed to the date in the absence of any specific evidence as to the date in view of the categorical decisions cited supra that the date of death of the person presumed to the date is a matter of evidence and in the absence of in his specific plea or averment or specific evidence being adduced by the plaintiff to show or indicate the date of death of Subbulakshmi, she was alive and hence, this Court is unable to affix a seal of approval for the said contention of the learned counsel for the appellant that the plaintiff is not entitled for a legal fiction as projected. On perusal of the plaint, the same is filed on 16.03.1988 i.e., exactly after the expiry of 7 years and in the absence of any specific evidence, there cannot be any presumption as to the date of the death of the Subbulakshmi.

27. In the result,
i) this second Appeal is dismissed without costs.
ii) Judgment and decree in A.S.No.99 of 2004, dated 28.06.2005, on the file of the Principal Sub-Court, Coimbatore in confirming the judgment and decree in O.S.No.477 of 1998, dated 21.07.2004, on the file of the District Munsif Court, Coimbatore is hereby confirmed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To:

- 1.The Principal Sub Court, Coimbatore
- 2.The Principal District Munsif Court, Coimbatore.

+2cc to Mr.C.R.Prasannan, Advocate SR.No.77609

+1cc to Ms.P.Indumathi, Advocate SR.No.77427

Copy to:The Section Officer,
VR Section,
High Court, Madras

JUDGMENT IN
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