

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:15.12.2016

DATE OF DECISION:02.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.45 of 2006

1.S.K.P.Subramaniam

2.S.K.P.Srinivasan

... Appellants

Vs

1.S.K.Chinnarsaj (Deceased)

2.T.Sarojammal

3.T.Balavenkatesan

4.T.Nidhyakumar

5.T.Balasundaram @ Manoharan

6.C.Palani

7.B.Parameswari

8.N.Santhakumari

9.B.Chithra

10.Marakathammal (Deceased)

11.Muniyammal

... Respondents

(R6 recorded as representative of the deceased RR 1 & 10 vide order of Court dated 16.02.2012 made in A.S.No.45 of 2006 (Memo presented in Court on 16.2.2012)

This appeal is filed under Section 96 of C.P.C. against the judgement and decree in O.S.No.321 of 2004 on the file of the Additional District Judge, Fast Track Court No.II, Kancheepuram dated 28.10.2005.

For Appellants :Mr.V.Raghavachari
For Respondents :Mr.V.Radhakrishnan,
Senior Counsel for
Mr.S.Kadarkarai for RR 2 to9

J U D G E M E N T

The plaintiffs in O.S.No.321 of 2004 on the file of the Additional District Judge (FTC) Kancheepuram are the appellants. The suit was filed as O.S.No.109 1993 on the file of the Sub Court, Kancheepuram. Upon transfer to the District Court, the same has been renumbered as above.

2. The plaintiffs sought for partition and separate possession of their 2/12 share in the suit properties and 1/6th share in the Joint Family businesses. According to the plaintiffs, they are sons of late Ponnusami Mudaliar, who had married their mother Muniyammal in the year 1954, since he had no issues out of the first marriage with one Marahathammal. They would further claim that the suit properties are ancestral properties belonging to the family of the sons of Kurupatha Mudaliar namely, S.K.Ponnusamy Mudaliar, S.K.Thiruvengkata Mudaliar and S.K.Chinnaraj Mudaliar.

3. The plaintiffs would contend that there was no partition between the brothers and as such S.K.Ponnusamy Mudaliar was entitled to 1/3 share in the suit properties. Since the said Ponnusamy Mudaliar died intestate, as his

sons born through second wife, the plaintiffs are entitled to a share in the properties of their father namely, S.K.Ponnusamy Mudaliar. The suit properties included immovable properties and joint family businesses. It is also the plea of the plaintiffs that the businesses are all joint family businesses.

4. Marahathammal, first wife of Ponnusamy Mudaliar was the 10th defendant. Muniammal, the second wife, mother of the plaintiffs was the 11th defendant, S.K.Chinnaraj, the brother of the deceased Ponnusamy was the first defendant. Wife and children of S.K.Thiruvenkada Mudaliar were shown as defendants 2 to 5 and 7 to 9. Son of S.K.Chinnaraj is the 6th defendant. The defendants 1 to 6 filed a common written statement. The 10th defendant filed a separate written statement. But she would adopt the written statement of the defendants 1 to 6 in all respects. Defendants 7 to 9 filed a memo adopting the written statement of 10th defendant. The 11th defendant would remain exparte.

5. Sums and substance of the written statement of the defendants 1 to 6 is as follows:

The alleged marriage between Ponnusamy and Muniammal was denied. It was contended that there was no joint family and the claim of the plaintiffs that the suit properties are joint family properties and the suit business are joint family businesses were stoutly denied. It was claimed that all the businesses which were partnership were dissolved even during the life time of Ponnusamy Mudaliar and as such the plaintiffs cannot claim any right over the businesses. It

was also contended that three brothers namely, Ponnusamy Mudaliar, Thiurvenkadam Mudaliar, Chinnaraju Mudaliar did not have any ancestral property except one house property which did not yield any income. All the properties that the brothers died possessed were all purchased out of their income from various business that they have carried on. It was also contended by the defendants that the deceased Ponnusamy Mudaliar had executed a Will on 9.05.1991, in and by which he has bequeathed the properties to the first defendant and the 6th defendant. The said Will was attested among others by the 10th defendant, namely, wife of Ponnusamy Mudaliar. According to the defendant, the Will being a registered instrument took effect on the death of Ponnusamy Mudaliar and in the light of the said Will, the plaintiffs had no right over the properties of the said Ponnusamy Mudaliar.

6. On the above pleadings the defendants sought for dismissal of the suit. On behalf of the plaintiffs, the first plaintiff was examined as PW1. Exs.A1 to A50 were marked. On the side of the defendants, the first defendant was examined as DW1 and three other witnesses were also examined as DW2 to DW4. Exhibits B1 to B31 were marked.

7. Upon the above pleadings, the learned Additional District Judge framed the following issues were framed on 12.12.1994:

- 1) Whether the plaintiffs are the legal heirs of deceased S.K.Ponnusami Mudaliar?

- 2) Whether the S.K.Ponnusami Mudaliar died intestate?
- 3) Whether the parties are members of joint family?
- 4) Whether the Will dated 09.05.1991 said to have been executed by the deceased Ponnusamy Mudaliar is true and valid?
- 5) Whether the plaintiffs are entitled to share in the suit properties?
- 6) Whether the suit properties are joint family properties?
- 7) To what other reliefs, the plaintiffs are entitled to?

On 18.12.2002, the learned Additional District Judge, who tried the suit framed the following Issues:

1. Whether the deceased S.K.Ponnusamy Mudaliar had married the 11th defendant in 1956 as claimed in the plaint?
2. Whether the deceased S.K.Ponnusamy and 11th defendant lived together as husband and wife?
3. Whether the plaintiffs were born to S.K.Ponnusamy Mudaliar and 11th defendant?
4. Whether the plaintiffs are entitled to seek partition of the estate of Ponnusamy Mudaliar as his legal heirs?

8. The learned Trial Judge had framed the following points for determination while delivering the judgement:

1. Whether the plaintiffs are the sons of deceased Ponnusamy Mudaliar out of the legal wedlock between Ponnusamy Mudaliar and the 11th defendant?

2. Whether the properties scheduled in the plaint are joint family properties of S.K.Ponnusamy Mudaliar and his brothers?

3. Whether the properties owned by S.K.Ponnusamy Mudaliar was bequeathed in favour of defendants 1 and 6 as per the Will dated 09.05.1991?

9. After considering the entire pleadings and the evidence both oral and documentary, the learned Trial Judge came to the conclusion that the marriage between S.K.Ponnusamy Mudaliar and Muniammal has not been established. The learned Judge also had drawn an adverse inference against the plaintiffs for not examining Muniammal, who according to the learned Judge is the best person to speak about the marriage between Ponnusamy Mudaliar and herself. He would also reject the claim of the plaintiffs that a valid marriage between Muniammal and Ponnusamy Mudaliar should be presumed, since they lived together as husband and wife for a considerably long time and the others treated them as husband and wife.

10. According to the learned Trial Judge, the facts that would enable the Court to presume a legal marriage have not been established. No member of the public have been examined on the side of the plaintiff and the plaintiffs themselves had on various occasions described themselves as sons of Muniammal and not sons of Ponnusamy Mudaliar. The learned Trial Judge also took note of the fact that Muniammal herself had claimed, she is only “Abimana Bariyal” in some of the documents executed by her, on the above findings, the learned Trial Judge concluded that the plaintiffs are not sons of S.K.Ponnusamy Mudaliar through Muniammal the 11th defendant.

11. As regards the Will dated 09.05.1991, marked as Ex.B1, the learned Judge upheld the same, relying upon the evidence of DW2, the attesor and DW3, the scribe. On the above findings, the learned District Judge, concluded that the plaintiffs are not entitled to any share in the estate of the deceased Ponnusamy Mudaliar and dismissed the suit.

12. Aggrieved by the said dismissal, the plaintiffs have filed the above appeal. Pending the above appeal, it is seen that the 1st respondent and 10th respondent died and the 6th respondent Palani has been recorded as the legal representative of the deceased 1st and 10th respondents. It is also stated that the 11th respondent namely, Muniammal is no more. She had remained exparte

before the Trial Court. However, the plaintiffs are recorded as her legal representatives.

13. I have heard Mr.V.Raghavachari, learned counsel appearing for the appellant and Mr.V.Radhakrishnan, learned Senior Counsel appearing for Mr.S.Kadarkarai, the learned counsel for respondents.

The following points arise for determination in the above appeal:

1. Whether the plaintiffs have established the marriage between S.K.Ponnusamy Mudaliar and Muniammal, the 11th defendant?

2. Whether there could be presumption of a valid marriage between S.K.Ponnusamy Mudaliar and Muniammal on the evidence on record?

3. Whether the plaintiffs would be entitled to partition as claimed by them?

4. Whether the Will dated 09.05.1991 said to have been executed by S.K.Ponnusamy Mudaliar has been proved in accordance with the law?

14. Mr.V.Raghavachari, learned counsel appearing for the appellants would take me through oral and documentary evidence and would submit as follows:

Eventhough there is no direct evidence for the marriage between S.K.Ponnusamy Mudaliar and Muniammal, the contents of the documents namely Exs.A22, Ex.A35,Ex.A36 and Ex.A37 would provide sufficient proof of a valid marriage having taken place between Muniammal and Ponnusamy Mudaliar. The learned counsel would lay considerable emphasis on Ex.A37 dated 17.04.1987. Ex.A37 is a document titled as “Vivaka Mukurtha Pathirikai “ It contains the signature of S.K.Ponnusamy Mudaliar. The contents shows that marriage of the second plaintiff with one Santhi, daughter of G.Varatharajan was agreed to be performed on 29.06.1987 at Dharmaraja Koil Thirumanamandapam, Thiruttani. The second plaintiff is described as the younger son of S.K.Ponnusamy Mudaliar. This according to the learned counsel would by itself be sufficient to infer the marriage between Ponnusamy Mudaliar and Muniammal.

15. The learned counsel would also rely upon Ex.A.36, which is a transfer certificate issued to the 1st plaintiff, wherein his father's name is shown as S.K.Ponnusami Mudaliar. Ex.A33 is a printed invitation for the marriage of the second plaintiff, in which Mrs and Mr. S.K.Ponnusamy Mudaliar are shown as invitees. Ex.A22 is the birth certificate of the second plaintiff wherein, the father's name is shown as Ponnusamy. Relying upon the above documents, learned Counsel would vehemently contend that this evidence is sufficient to establish the marriage between Ponnusamy Mudaliar and Muniammal. Per

contrary, Mr.V.Radhakrihsnan, learned Senior counsel appearing for the respondent would submit that Ex.A22, the birth certificate and Ex.A36 transfer certificate cannot be used in evidence to prove paternity. He would also invite my attention to the recitals in Ex.B19 wherein, 11th defendant Muniammal had categorically admitted that she has been living with S.K.Ponnusamy Mudaliar for the past 17 years as Abimana Bariyal. Curiously, the said document has been executed on behalf of the plaintiff, who were then minors. In and by the said document, Muniammal has relinquished all her rights and the rights of her minor sons over the properties of S.K.Ponnusamy Mudaliar, the said release is one for consideration.

16. The 11th defendant had described the plaintiffs as her sons and not as sons of the deceased Ponnuswami Mudalliar. The Learned senior counsel appearing for the respondent would also draw my attention to exhibits B-21 and B-22, in and by which the plaintiffs had not only relinquished their right over the properties of the deceased Ponnuswami Mudalliar and they have also chosen to describe themselves as sons of the 11th defendant only. The plaintiffs had also under Exhibit B-21 affirmed the release deed executed by their mother. Under Exhibit B-22 the plaintiffs have after attaining majority confirmed the release by their mother executed on 15-3-1973. In all the above documents, the plaintiffs have described themselves as sons of Muniammal and not as sons of Ponnuswami

Mudalliar. It is also pointed out by the learned senior counsel appearing for the respondents that the 11th defendant, Muniammal applied for a loan with the Cooperative Urban Bank Ltd. during the year 1992. In the said loan application, marked as Exhibit B-31, she had described herself as wife of Gangaiah Naidu and the plaintiffs have been shown as children of Muniammal through the said Gangaiah Naidu. The deceased Ponnuswami Mudalliar has been shown as “Abimana Bariyal”.

17. Relying upon the above descriptions, the Learned senior counsel would contend that irrespective of what was stated by the deceased Ponnuswami Mudalliar, the plaintiffs and their mother never claimed to be the wife and children of the deceased Ponnuswami Mudalliar. Mr V. Radhakrishnan, the learned senior counsel would rely upon a judgment of the Division Bench of this court reported in 1970 (1) MLJ 197 wherein it was held that entries in birth register cannot be used as evidence to prove paternity. As regards the transfer certificate marked as Exhibit A-36, the Learned Counsel would point out that the name of the Father has been interpolated and the community of the people is shown as Agamudiar, whereas the deceased Ponnuswami Mudalliar belonged to Mudalliar community.

18. In the light of the conflicting descriptions in various documents, the learned counsel appearing for the respondents would submit that paternity cannot be presumed, unless it is proved by proper and cogent evidence. Though in some of the documents the plaintiffs have been described as children of Ponnuswami Mudalliar, in later documents the mother of the plaintiffs as well as the plaintiffs themselves have not chosen to follow the said description. In the light of such conflicting descriptions, I am unable to accept the contention of the learned counsel for the appellants that the description of the plaintiffs as children of the deceased Ponnuswami Mudalliar should prevail.

19. It should also be pointed out at this juncture, that there is no direct proof of the marriage between Ponnuswami Mudalliar and the 11th defendant. The best evidence that is available to prove the marriage is by examining the 11th defendant as a witness. The 11th defendant has not chosen to examine herself as a witnesses. Though it is claimed that she has not favourably deposed towards the plaintiffs, there is no evidence to substantiate such a claim. The non-examination of the 11th defendant leads to the conclusion that the plaintiffs have not chosen to produce the best evidence.

20. The learned senior counsel appearing for the respondents would rely upon a judgment of the Honourable Supreme Court reported in AIR 1968

Supreme Court 1413 and contend that adverse inference should be drawn against the plaintiffs for non-examination of the 11th defendant to prove the marriage. On this aspect, I am in agreement with the learned senior counsel appearing for the respondents. The plaintiffs having failed to examine the 11th defendant as a witness, are guilty of suppression of material evidence and an adverse inference has to be drawn against the plaintiffs for their failure to examine the 11th defendant as a witness.

21. It is a further contention of Mr.V. Radhakrishnan the learned senior counsel appearing for the respondents that in view of conflicting descriptions in the documents and the recitals in the School certificate, and birth register extract a presumption under section 114 of the Evidence Act cannot also be drawn. The learned counsel would rely upon a judgment of a Division Bench of this court reported in 1989 (2) LW 197. As already stated though in some of the documents the plaintiffs are described as children of the deceased Ponnuswami Mudalliar, in some other documents the 11th defendant namely, the mother of the plaintiffs and the plaintiffs themselves have chosen to describe them as sons of the 11th defendant only. In the light of such conflicting descriptions, I am of the considered view, that it will be rather unsafe to presume a valid marriage by long cohabitation between Ponnuswami Mudalliar and the 11th defendant.

22. It should be pointed out at this juncture, apart from examining the first plaintiff as PW 1, the plaintiffs have not chosen to examine any other person in order to establish the marriage between the deceased Ponnuswami Mudalliar and the 11th defendant. This, in my opinion, disentitles the plaintiffs from inviting the court to presume a valid marriage. In order to presume a valid marriage it should be shown that the parties were treated as husband and wife by the Society. In the absence of such evidence, it is rather difficult to presume a marriage, particularly a second marriage.

23. In the light of the evidence on record and the above discussion, I find that the plaintiffs have miserably failed to establish their status as children of the deceased Ponnuswami Mudalliar. Therefore the first point raised in the appeal is answered against the appellants/plaintiffs.

24. Mr.V.Raghavachari, learned counsel appearing for the appellants would contend that the release deed dated 15/03/1973 executed by the 11th defendant as well as the consent deed dated 25/07/1991 executed by the plaintiffs, cannot bind the plaintiffs as they are hit by Section 6 of the Transfer of Property Act. In support of the above argument, the learned counsel would rely upon various judgments reported in ILR 39 Madras 554, 38 LW 610, 66 LW 215.

25. On the other hand Mr. V. Radhakrishnan the learned senior counsel appearing for the respondents would rely upon a judgment of mine in *M.Kamala & others vs. Uma Ravichandran & others* reported in 2016 (6) CTC 237 wherein I had followed the judgment of the Honourable Supreme Court in *Gulam Abbas vs. Haji Kayyum* (AIR 1973 Supreme Court 554) and held that a release of a expectant right to succeed for consideration would be binding on the releasor and his/her legal heirs on the ground of estoppel. In effect, the 11th defendant and the plaintiffs would be estopped from contending that the release deed executed by them, though for consideration, will not be binding on them.

26. The learned counsel appearing for the appellants would also invite my attention to the judgment of the Honourable Supreme Court in *Revana Siddappa & another* (2011 (11) SCC 1) vs. *Mallikarjun & others* and contend that the question relating to the status of children borne out of void and voidable marriages has been referred to a Larger Bench by the Honourable Supreme Court. I don't think that the said reference will have any bearing on the case on hand, as the said reference is confined to the question as to whether the children who were legitimised by the operation of Section 16 of the Hindu Marriage Act, could claim a share in the ancestral properties of their father as coparceners or not. Even otherwise, in the light of my conclusion that the plaintiffs have not established their status as children of the deceased

Ponnuswami Mudalliar, the question as to whether they would be entitled to claim a share in the ancestral properties as coparceners or not does not arise at all.

27. Mr.V.Raghavachari, learned counsel appearing for the appellants would contend that the execution of the Will dated 09/05/1991 has not been proved in accordance with law. The learned counsel would claim that the person who attested the document was working under the first defendant and there is no reason for a rich businessman like Ponnuswami Mudalliar to have chosen an employee to attest his Will. The learned counsel would also refer to the evidence of DW-2 and contend that the same is not reliable. Mr. V. Radhakrishnan learned senior counsel appearing for the respondents would submit that a reading of the entire evidence of DW-2 and scribe DW-3 would show that the Will has been proved in accordance with law. He would also rely upon the fact that the Will has been registered in accordance with law and the Sub-Registrar has identified Ponnuswami Mudalliar.

28. I have gone through the evidence of the attesting witness as well as the scribe of the Will. I don't find that their examination in Chief has in any manner been discredited by cross-examination. Except a few questions that has been put to them to the effect that Ponnuswami Mudalliar was unwell and was

hospitalised for some time during the year 1991, I do not find any material to disbelieve their evidence. As regards the status of the attesting witness namely, DW-2, I am unable to agree with the learned counsel for the appellants. The said witness has deposed that he had served as an accountant under Ponnuswami Mudalliar for over 20 years. One cannot expect a testator to invite a stranger to attest his/her will. The learned counsel for the appellants would invite my attention to the judgment of this court in P.Koteeswaran vs. A.Shanmugam and others reported in 2007 (2) CTC 760 and contend that the absence of a jurat in the Will, have the effect of invalidating the same. I am unable to countenance the said submission. In the aforesaid decision, this court was dealing with a will executed by an illiterate lady.

29. On the facts of the said case, this court had found that in the absence of a recital to the effect that the contents of the document was read over and explained to the executant would have a bearing on the proof of the will. In the case on hand the testator is a literate person and the witnesses examined to prove the Will have spoken to the effect that the contents of the Will, were in fact dictated by the testator. The same was also read over to the executant before he signed the Will. Therefore, I find that the defendants have discharged the onus of proving the Will as required under section 68 of the Evidence Act.

30. As a result of the foregoing discussions, I see no ground to interfere with the findings of the trial court both on the question of status of the appellants as well as the validity of the Will dated 09/05/1991. Hence both the points raised for consideration in this appeal are answered against the appellants.

31. In fine the appeal is dismissed confirming the judgment and decree of the trial court 28.10.2005 in O.S.No.321 of 2004 on the file of the Additional District Judge, Fast Track Court No.II, Kancheepuram. However considering the nature of the proceedings, there shall be no orders as to costs in this appeal.

02.01.2017

Internet: Yes/No

Index : Yes/No

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To

Additional District Judge, Fast Track Court No.II, Kancheepuram

R.SUBRAMANIAN,J

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PRE DELIVERY JUGEMENT
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