

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.12.2016

PRONOUNCED ON : 21.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.387 of 2011
and
M.P.Nos.1 & 2 of 2011
and CMP.No.19262 of 2016

1. Neela
2. Ramu
3. Rajendran
4. Jagadambal
5. Raji
6. Varadan

...

Appellants

Vs.

Raja alias Rajapan

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 27.01.2011 passed in A.S.No.55/2010 on the file of the Subordinate Court, Poonamallee, confirming the judgment and decree dated 26.04.2010 passed in O.S.No.383 of 1986 on the file of the Principal District Munsif, Poonamallee.

For Appellants

: Mr.Chitra Sampath
 Senior Counsel
 for J.S.Baskaran

For Respondent

: Mr.S.Parthasarathy
 Senior Counsel
 for Mr.N.Damodaran

JUDGMENT

The defendants 4, 14 to 18, in this second appeal, have challenged the judgment and decree dated 27.01.2011 made in A.S.No.55/2010 on the file of the Sub Court, Poonamallee, confirming the judgment and decree dated 26.04.2010 made in O.S.No.383 of 1986 on the file of the Principal District Munsif, Poonamallee.

2. The suit has been laid by the plaintiff for declaration and permanent injunction.

3. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal

"Whether the finding of the lower appellate court that the plaintiff had proved to be the adopted son of Arumuga Naicker is perverse"

4. Claiming to be the adopted son of Arumuga Naicker, the plaintiff has come forward with the present suit seeking appropriate reliefs. It is not in dispute that the suit properties belonged to Arumuga Naicker. Kalaichiammal is the wife of Arumuga Naicker. It

is not in dispute that Arumuga Naicker and Kalaichiammal have no issue. Now, according to the plaintiff, he has been taken in adoption by Arumuga Naicker and Kalaichiammal, when he was aged about 6 months and the adoption issue was mooted by Arumuga Naicker's friend Madurai Naicker. According to the plaintiff, his natural parents viz., Munusamy and Vembuliammal, over the holy fire, in the adoption ceremony conducted on 05.06.1960 at Kalchathu Amman Kovil at Ramapuram in the presence of one Iyer from Gerugambakkam, gave the plaintiff to Arumuga Naicker and Kalaichiammal and accordingly, Arumuga Naicker had taken the plaintiff in adoption and further, it is pleaded that dinner was hosted by Arumuga Naicker at his house to commemorate the occasion and subsequently, ear boring/Tonsuring ceremony for the plaintiff were all performed by Arumuga Naicker and accordingly, the plaintiff had attended several functions of the relatives and friends of Arumuga Naicker as his adopted son and further, it is the plaintiff, who had performed the death ceremony/obsequies both for his adopting mother Kalaichiammal and adoptive father Arumuga Naicker by lighting the pyre, tonsuring the head and following all the rituals etc., and further, according to the plaintiff, as per the wishes of the adoptive mother Kalaichiammal, the adoptive father Arumuga Naicker had executed a settlement deed in favour of the plaintiff recognizing him

as the adopted son in respect of the suit properties dated 15.02.1973 and thus, according to the plaintiff, he, as the adopted son, is entitled to obtain the properties i.e the suit properties belonging to Arumuga Naicker and inasmuch as the defendants, without any authority, attempted to interfere with the possession and enjoyment of the plaintiff in respect of the suit properties, he has been necessitated to lay the suit for appropriate reliefs.

5. In this case, the plaintiff has originally instituted the suit as against the defendants 1 to 8. The defendants 1 & 2 are the sons of Veerappa Naicker. The defendants 3 to 5 are the legal heirs of Kishtappa Naicker. Veerappa Naicker, Kishtappa Naicker and the defendants 6 & 7 are the brothers of Arumuga Naicker. Pending the suit, the 6th defendant expired and accordingly, his legal heirs were brought on record as the defendants 9 to 15 and similarly, on the death of the first defendant, his legal heirs were brought on records as the defendants 16 to 20 and on the death of the 13th defendant, his legal heirs were brought on record as the defendants 21 to 25. It could be seen that originally, out of the defendants 1 to 8, only the 6th defendant has filed his written statement. As seen from the judgment of the trial court, on account of non appearance, the defendants 3, 5 & 8 were set ex parte and on account of the

defendants 1, 2, 4 and 7 having not filed any written statement, they were also set ex parte.

6. The 6th defendant has, in his written statement, merely denied the averments contained in the plaint and other than that he has not taken any new defence or fact projecting any independent case as regards the adoption plea put up by the plaintiff, the character of Arumuga Naicker, and also, in particular, he has not thrown any challenge to the settlement deed dated 15.02.1973.

7. On the impleadment of the Legal Representatives of the deceased 6th defendant, it appears the 15th defendant has filed his written statement, which has been adopted by the defendants 9 to 12 and 14, 16 to 19 and it also appears that the defendants 21 and 22 have filed their separate written statement. As adverted to earlier, in the written statement, the 6th defendant has only simpliciter denied the plaintiff's case. However, the 15th defendant, who has been added as one of the Legal Representatives of the deceased 6th defendant, has raised various contentions challenging the case of the plaintiff, which had not been particularly taken by the 6th defendant. It is also found that as admitted by the 15 defendant himself, who has been examined as DW1, he had claimed knowledge

about the pleas taken by him in the written statement only through the 6th defendant his father. Therefore, it could be seen that as regards the various contentions put forth by the 15th defendant in his written statement, he has no personal knowledge and on the basis of hearsay evidence i.e. information gathered from his father viz., the 6th defendant, he has put forth several defences. In this connection, the trial court has also observed that when according to the 15th defendant i.e. DW1, he had been informed of all the various facts set out by him in his written statement by his father viz., the 6th defendant, if that pleas have any semblance of truth, the 6th defendant himself would have raised all those issues in the written statement filed by him. Accordingly, the trial court has also observed that the absence of various contentions, put forth in the written statement of the 15th defendant, in the written statement of the 6th defendant, would be fatal to the case of the defendants.

8. Pointing to the above material aspect of this case, the learned senior counsel appearing for the plaintiff, would contend that when it is found that the 15th defendant had been brought on record only as the Legal Representative of the deceased 6th defendant and before his impleadment, when the 6th defendant had already filed a written statement independently, according to him, as enunciated

under Order 22 Rule 4(2) of the Civil Procedure Code, the person, who had been made a party on the death of the deceased defendant in the capacity of his legal representative, could make any defence appropriate to his character as the legal representative of the deceased defendant. Placing reliance upon the said provision of law, it is contended by the learned senior counsel that when the 6th defendant, the father of the 15th defendant has not thrown any challenge, in particular, to the pleas of adoption put up by the plaintiff and also, the capacity of the adoptive father Arumuga Naicker to take him in adoption, the character of Arumuga Naicker having not been assailed in any manner by the 6th defendant, according to him, the new pleas set out in the written statement filed by the 15th defendant cannot be received as appropriate defence pleas in his capacity as the legal representative of the deceased 6th defendant and hence, he submitted that all the fresh pleas pleaded by the 15th defendant in his written statement should be eschewed in toto.

9. Deriving support for the above said contentions, the learned senior counsel placed strong reliance upon the decisions reported in ***AIR 1986 SC 1952 (Bal Kishan V. Om Prakash)*** and ***AIR 1995 SC 1653 (Vidyawati V. Man Mohan)***. In those decisions, it has been

held as follows:-

" Sub-rule (2) of Rule 4. Order XXII, authorises any person who is brought on record as the legal representative of a defendant to make any defence appropriate to his character as legal representative of the deceased defendant. The said sub-rule authorises the legal representative of a deceased defendant or respondent to file an additional written statement or statement of objections raising all pleas which the deceased tenant (defendant) had or could have raised except those which were personal to the deceased defendant or respondent."

and

" In the present case, the perusal of para 2 of the petitioner's application seeking permission to file additional written statement, as reproduced above, shows that the pleas which the petitioner seeks to incorporate by way of additional written statement are not those which are appropriate to his character as a legal representative of deceased defendant.

The pleas which he wants to incorporate are the one, which were personal and were available to the original defendant i.e. Bhagwan Dass deceased . Thus, the same cannot be allowed to be raised by the petitioner by way of additional written statement under Order 22, Rule 4(2) of the Code.

10. Further, according to the learned senior counsel for the plaintiff, the above decisions had been followed by the Punjab and Haryana High Court, in the decision reported in **AIR 2005 Punjab and Haryana 203 (M.M.Katyal Vs.Subhash Chand and another)**. Further, for the appreciation of law, he also placed reliance upon the judgment of the Bombay High Court, reported in **2008 (2) BomCR 248 (Mr.Manguesh Rajaram Wagle and Vs.Mr.Suresh D.Naik and ors)**, wherein also, it has been held that the legal representative could make a defence appropriate to his character as the legal representative and not entitled to raise any plea in the derogation of and contrary to the plea taken by the deceased defendant.

11. As regards the above position of law, it is also admitted by the learned senior counsel appearing for the appellants that she has no quarrel over the same, but she would contend that considering the

proof affidavit of the plaintiff filed in this case, the Court could infer that the plaintiff was well aware of the various defences put forth by the 15th defendant in the written statement and accordingly, had projected his case by placing evidence available with him and in such view of the matter, it is contended that the plaintiff has not been taken by surprise over the defence set out by the 15th defendant in the written statement and in such view of the matter, according to the learned senior counsel appearing for the appellants, there is nothing wrong in the 15th defendant setting out new pleas of defence not raised by the 6th defendant and on that ground, the defendant's case should not be thrown out.

12. But, it has to be noted that the proof affidavit filed on behalf of the plaintiff is after the pleadings are completed and when the matter was taken up for trial with the commencement of the oral evidence of the parties. In such view of the matter, it could be seen that since the 15th defendant has raised various pleas in his written statement challenging the case of the plaintiff, it could be seen that the plaintiff in his proof affidavit has also adverted to about the same and on that score alone, it cannot be construed that the plaintiff has admitted that the 15th defendant is entitled as per law to raise new pleas in his capacity as the Legal Representative of the deceased 6th

defendant, when such pleas had not been put forth by the deceased 6th defendant in his written statement.

13. Be that as it may, keeping the above position of law in mind, it has to be seen whether the plaintiff has established the plea of adoption made by him for claiming the reliefs sought for. As pointed out by the courts below, it could be seen that the plaintiff has placed various proof to hold that he has been taken in adoption by Arumuga Naicker. As regards the proof required for establishing the plea of adoption, it is found that the trial court has relied on various authorities pertaining to the same and in such circumstances, this Court feels that it is unnecessary again to reproduce all such authorities with reference to the above aspect of the matter. The counsel for the appellants has also in this second appeal placed the following decisions with reference to the proof to be laid for establishing the plea of adoption and also the distinction to be made as regards "the Valarppu Mahan, Abimana Puthira and adopted son" viz., **(2003) 8 Supreme Court Cases 740 (Kashi Nath (dead) through Lrs Vs. Jaganath), 1992 – 2-L.W 460 (R.Ramachandran Vs. R.Govindaraju) and 2009-2-L.W.636 (S.Ganesan Vs. S.Kuppuswamy and another)**. The Principles of Law enunciated in the above said decisions are taken into consideration and followed as

applicable to the facts and circumstances of the present case.

14. Apart from examining himself as PW1, the plaintiff, to establish his case, has also examined PW2, A.Munusamy and PW3 Ramadas Naidu. As regards the evidence of PW3 K.Ramadas Naidu is concerned, it could be seen that he has testified that he knew Arumuga Naicker through the 6th defendant and the above said fact has not been refuted by the defendants. This is also noted by the trial court. Further, PW3 has also deposed that the plaintiff was given in adoption to Arumuga Naicker by his biological parents and a function was conducted for the same and that, he had attended the function and six months thereafter, Arumuga Naicker had conducted the ear boring function of the plaintiff. It is also found that PW3 has testified that he had witnessed the physical act of giving and taking the plaintiff in adoption by the biological parents and adoptive parents and accompanying delivery and acceptance pertaining to the same. He has also referred to about the feast arranged in connection with the function. As rightly found by the trial court, PW3 being aged about 72 years and rightly found that as deposed by him, he would have witnessed the adoption ceremony and accordingly, deposed the essential facts regarding the taking of the plaintiff in adoption by Arumuga Naicker and the giving and taking of the plaintiff in adoption

by the biological parents vis-a-vis the adoptive parents. The evidence of PW3, it is found, has not been seriously impeached or destroyed by the defendant during cross examination. Further, as rightly found by the trial court, PW3 has also deposed that after the adoption ceremony, the plaintiff is residing with Arumuga Naicker. Based upon the above unchallenged evidence of PW3, the courts below have also accepted the plea of adoption put forth by the plaintiff. I do not find any error in the approach of the courts below in placing reliance upon the evidence of PW3 as regards the plea of adoption put forth by the plaintiff.

15. Not stopping there, the plaintiff has also examined A.Munusamy, PW2 and it is found that PW2 has testified that he is a friend of not only the plaintiff and also the 15th defendant examined as DW1 and PW2 used to play with the plaintiff in the suit property and also testified that he used to accompany the plaintiff as well as DW1 to the school and further, he has deposed that the first defendant had secured job for him as well as the plaintiff. The trial Court has rightly found that even DW1 in his evidence has admitted that PW2, the plaintiff and DW1 used to go to school together and they had their curriculum in the same school from 1965 to 75. Further, DW1 has also deposed that he knew PW2. The defence

witness No.2 Mani has also deposed that he knew PW2 and the plaintiff studied in the school and the plaintiff, DW1 and PW2 and their brothers used to go to school from the suit properties. Therefore, it could be seen that PW2's evidence being of the above nature, the courts below have rightly placed reliance upon his evidence in holding that inasmuch as the plaintiff had been taken in adoption by Arumuga Naicker, the plaintiff had been going to the school along with PW2 as well as DW1 and it is found that they used to proceed to school only from the house located in the suit properties and inasmuch as the plaintiff had been living with Arumuga Naicker even from his school days, it could be seen that he had been going to school from the suit properties along with PW2, DW1 and others. In such circumstances, as rightly found by the courts below, inasmuch as DW1 has not projected any enmity as against PW2 for his support to the plaintiff's case, it could be seen that considering the evidence of PW2, not being seriously impugned and also not shown to be unacceptable, the plaintiff's case is buttressed by the evidence of PW2 also as regards his stay with Arumuga Naicker from his school days.

16. Though DW1 in his written statement has raised a plea that the plaintiff had never stayed with Arumuga Naicker in the suit

property, during his evidence, has admitted that right from 1960 onwards, the plaintiff and his mother used to stay in Manthi Naicker Thottam and prior to 1973, the plaintiff's natural father had expired and the plaintiff's mother had been staying in the place of Arumuga Naicker along with the plaintiff. Therefore, based upon the above said oral evidence adduced on the side of the plaintiff, the Courts below have accepted the plea of adoption projected by the plaintiff. It is also found that DW2 has also admitted as regards the stay of the plaintiff and his mother with Arumuga Naicker in the suit properties.

17. To buttress his case, the plaintiff has also placed reliance on the settlement deed dated 15.02.1973 marked as Ex.A2, wherein, Arumuga Naicker had settled the suit properties in favour of the plaintiff. A perusal of Ex.A2 would go to show that Arumuga Naicker in toto has described the plaintiff as his adopted son in Ex.A2. Though in some places, he would describe the plaintiff as his Valarppu mahan, but a reading of the document, as a whole, as rightly put forth by the plaintiff, only lead to the conclusion that inasmuch as Arumuga Naicker had taken the plaintiff in adoption, as projected by the plaintiff, it could be seen that after the death of his wife Kalaichiammal, he had, with a view to satisfy the wish and desire of Kalaichiammal, settled the suit properties in favour of the

plaintiff under Ex.A2 and accordingly, inasmuch as he had taken the plaintiff in adoption and since it is well within the knowledge of Arumuga Naicker, it could be seen that he had described the plaintiff as his adopted son in Ex.A2. In such view of the matter, the mere fact that at some places, he had described the plaintiff as his foster son would not by itself lead to the conclusion that the plaintiff has not been taken in adoption by Arumuga Naicker.

18. Ex.A2 has been challenged by the 15th defendant in his written statement. However, no challenge has been made by the 6th defendant as regards Ex.A2. It is found that as seen from the evidence of DW1, both his father as well as DW1 knew about Ex.A2 much earlier i.e. even before the laying of the suit. Further according to DW1, inasmuch as Arumuga Naicker was given to evil habit of consuming alcohol etc., he apprehends that making use of the weakness of Arumuga Naicker, the document Ex.A2 would have been created by the plaintiff and his henchmen. When the 6th defendant and DW1 are in the know of things, particularly, as regards Ex.A2, as rightly argued by the plaintiff counsel, if Ex.A2 had been brought about by deceit, as now contended by DW1, particularly, using the weakness of Arumuga Naicker, certainly, the 6th defendant would have projected necessary defence with reference to the same

in his written statement. However, nothing has been stated about Ex.A2, particularly, challenging the same, as now putforth by the 15th defendant in the written statement filed by the 6th defendant. As found earlier, as regards the pleas put forth by the DW1 in his written statement, he has no direct knowledge and it has been admitted by him that all the above said pleas had been taken by him only as heard from his father. If that be so, if the above pleas now taken by the 15th defendant are reflecting true state of affairs, certainly, the 6th defendant would have also raised such pleas in his written statement, but the position is otherwise.

19. Therefore, when DW1 is not personally aware of the character of Arumuga Naicker and also about Ex.A2 to say that Ex.A2 has not been executed by Arumuga Naicker and it would have been obtained by exploiting the weakness of Arumuga Naicker etc., as such cannot be accepted, especially, when there is nothing on record for accepting the same. As rightly found by the trial court, other than DW1, the other defendants have not thrown a serious challenge to the plaintiff's case. Particularly, as far as defendants 6 & 7 are concerned, who are the brothers of Arumuga Naicker, the 6th defendant has not taken any new plea, other than, the denying the plaintiff's case. The 7th defendant has not filed any written statement and he has remained ex parte. In such view of the matter, when the

defendants, who had filed the written statement, have no personal knowledge about the pleas made by them and also not taken care to establish the pleas set out in the written statement filed by them, for challenging the case of the plaintiff, it could be seen that the pleas put forth by the defendants cannot be countenanced. Particularly, when as seen earlier, the defendants are not entitled to put fresh pleas other than the pleas taken by their parents before their death. Therefore, viewed in that context, it could be seen that the fresh pleas projected by the 15th defendant, namely, DW1 having no legs to stand on their own either factually or legally, it could be seen that the plaintiff's case cannot be thrown out on such pleas, when no proof has been placed before the courts below to accept the same.

20. In this second appeal, the learned Senior counsel appearing for the appellants also contended that Ex.A2 has not been proved by the plaintiff as required by law and therefore, Ex.A2 should not be relied upon by the Court. According to the learned senior counsel for the appellants, the plaintiff has not examined one of the attestors to the document Ex.A2 and hence, the court should hold that Ex.A2 has not been proved as enunciated under Section 68 of the Indian Evidence Act. However countering the same, the learned senior counsel appearing for the plaintiff would contend that as per the proviso appended to section 68 of the Indian Evidence Act, it shall

not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provision of the India Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. Now according to the learned senior counsel for the plaintiff, when the 6th defendant has not specifically denied Ex.A2 and when DW1 has failed that he is legally entitled to take a new plea apart from the pleas taken by the 6th defendant in his character as the legal representative of the 6th defendant, as rightly put forth by the learned senior counsel for the appellants, inasmuch as no specific denial has been made in the written statement as regards Ex.A2, as per law, by DW1, in particular, it could be seen that applying the proviso appended to Section 68 of the Indian Evidence Act, the plaintiff is not required to examine one of the attestors to the document for establishing its authenticity.

21. However, in support of her contention, the learned senior counsel appearing for the appellants would rely upon the decision of the Hon'ble Supreme Court of India dated 09.08.2000 rendered in the case between (***Rosammal Issetheenammal Fernandez (Dead) By Lrs & Ors Vs. Joosa Mariyan Fernandez & Ors.***) and contended that the apex court has insisted for the examination of the attesting

witness for the proof of document in the nature of Ex.A2. However, a reading of the above decision would only go to show that the apex court only observed that everything hinges on the recording of the fact of denial and if there is no specific denial, the proviso comes into play. But, if there is any denial, the proviso will not apply and so holding the apex court on the exigencies of the case covered in the said decision, finding that there is a clear denial of the execution of the document, in the nature of Ex.A2, proceeded to hold that sans the examination of the attestors to such document, the proof of such document cannot be accepted as per law. However, as rightly argued by the learned senior counsel for the plaintiff in so far as this case is concerned, as found, the 6th defendant has not made any specific denial as regards Ex.A2. In such view of the matter, DW1 as per law would also not be entitled to place fresh plea with reference to the plaintiff's case about Ex.A2. Therefore, it could be seen that the above decision relied on by the learned senior counsel appearing for the plaintiff would not be applicable to the facts and circumstances of the case at hand.

22. Moreover, the learned senior counsel for the plaintiff would, in support of his case, place reliance upon the decisions reported in **2004-2-L.W.701 (Govindaraju (died) and two others V.**

Rathinammal and 6 others), ***AIR 2000 Supreme Court 426(1)*** (***Ishwar Dass Jain (dead) through Lrs V.Sohan Lal(dead) by LRS***) and ***(2016) 5 MLJ 73 (SC) LNIND 2016 SC 195 (Muddasani Venkata Narsaiah (D) Th.Lrs V. Muddasani Sarojana)***, on this issue. The principles of law adumbrated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

23. As regards the decision reported in ***2004-2-L.W.701 (Govindaraju (died) and two others V. Rathinammal and 6 others)*** is concerned, a plea has been taken that the settlement deed involved therein was executed under threat, intimidation, coercion and undue influence, the court has held such a plea not amounting to specific denial has held that the proviso to Section 68 of the Indian Evidence Act would apply in such a case and in such view of the matter found that the proof of the document is not required to be established by the examination of the attesting witness. The facts of the above said case are almost akin to the present case.

24. However, as far as this case is concerned, evidence has been adduced to show that Arumuga Naicker's brother had attested Ex.A2. In this connection, DW1 has admitted during the course of his

evidence that there is recital found in Ex.A2 about the plaintiff taken in adoption by Arumuga Naicker and that it is true, Periyasamy Naicker had attested Ex.A2. Further, he has admitted that there is no enmity between Periyasamy Naicker's family and his father and that apart, it is also admitted by DW1 that he had married the grand daughter of Periyasamy Naicker. Therefore, it could be seen that when even as per the contesting defendant namely DW1, Perisasamy Naicker, the brother of Arumuga Naicker had attested the document and when there is no enmity pleaded between Periyasamy Naicker and the defendants, it could be seen that on the above admission of DW1, the plaintiff has established the authenticity of Ex.A2, as required under law. As regards the contention that the document should be established by the examination of attesting witness, when the signature of the attesting witness has been admitted by the contesting parties, it could be seen that the contention put forth by the defendants that Ex.A2 should not be relied upon in support of the plaintiff on his failure to establish the document as per law with the aid of the other attesting witness cannot be countenanced. As seen earlier, both the 6th defendant and DW1 knew about Ex.A2. If Ex.A2 is surrounded by suspicious circumstances or is not a true document, it could be seen that they would have challenged the same in the manner known to law. However, Ex.A2 has not been challenged till

date by the defendants. As found earlier, the 6th defendant has not refuted Ex.A2 specifically in his written statement. Therefore, it could be seen that the plaintiff has established the genuineness of Ex.A2 on the basis of the evidence adduced in the matter and in such circumstances, it is not incumbent upon the plaintiff to examine Ex.A2 by summoning the other attesting witness.

25. Further, it is vehemently argued by the learned senior counsel for the plaintiff that Ex.A2's authenticity has also been established by the plaintiff. Since Ex.A2 had been executed by Arumuga Naicker, according to him, inasmuch as Arumuga Naicker had the special knowledge about taking in the plaintiff in adoption, accordingly, he has described the plaintiff as his adopted son in Ex.A2 and in such view of the matter, according to him, placing reliance upon section 32(5) of the Indian Evidence Act, it is argued that Arumuga Naicker, since dead, his statement found in Ex.A2 could be relied upon by the court for accepting the case of the plaintiff, as per Section 32(5), reads as follows:-

" 32. Cases

**(5) or relates to existence of
relationship. - When the statement relates**

to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

26. Therefore, as per the above Section, it could be seen that the recitals found in Ex.A2 could be taken as the statement of dead person i.e. Arumuga Naicker and since Arumuga Naicker has recited about his relationship with the plaintiff as having taken him in adoption and when it is found that the parties at that point of time are not at loggerheads in any manner, the genuineness of Ex.A2 and the contents therein had been established by the plaintiff by the application of the above principles of law as Ex-A2 was made ***ante litem motum***. In support of his contention, as regards the above issue, the learned senior counsel appearing for the plaintiff would rely upon the decision reported in ***AIR 1959 Supreme Court 914 (1) (Dolgobinda Paricha V. Nimai Charan Misra and others)***, wherein, it has been held that for invoking the section 32 (5) of the Indian Evidence Act as admissible statement of dead person, four

conditions must be fulfilled and they are pointed out by the apex court as follows:-

" Four conditions must be fulfilled for the application of sub-s (5) of S.32: firstly, the statements, written or verbal of relevant facts must have been made by a person who is dead or cannot be found etc., as mentioned in the initial part of the section; secondly, the statements must relate to the existence of any relationship by blood, marriage or adoption; thirdly, the person making the statement must have special means of knowledge as to the relationship in question; and lastly, the statements must have been made before the question in dispute was raised. A woman made a statement on her own behalf and on behalf of her three sons, as to a pedigree. The woman was dead and so was one of the brothers:

Held that the statement was as much a statement of the woman and one of the brothers who were dead, as a statement of brothers who were alive and was admissible under S.32(5), if it was made ante litem motam (Statement held was made ante litem motam)"

27. As rightly argued by the learned senior counsel appearing for the plaintiff, it is found that EX.A2, a document ***ante litem motam*** and the parties were not at issue on any aspect at the time when Ex.A2 was executed. As found earlier, till date Ex.A2 has not been challenged by the contesting defendant in the manner known to law, though they are in the know of things about Ex.A2. Further, Ex.A2 has not been established to have been brought about by exploiting the weakness of Arumuga Naicker or in any other deceitful manner. Further, it has not been established that Arumuga Naicker had succumbed to evil ways like drinking liquor etc,. In such circumstances, when all the four necessary ingredients to invoke Section 32(5) of the Indian Evidence Act are available as regards Ex.A2, it could be seen that based upon the principles of law enunciated under Section 32(5) of the Indian Evidence Act and also relying upon the above said decisions relied by the learned Senior counsel appearing for the plaintiff, it has to be held that the plaintiff has established the genuineness and authenticity of Ex.A2 as well as his plea of adoption for claiming title to the suit properties.

28. Not stopping there, it could be seen that the plaintiff has also placed other materials that he had been taken in adoption by

Arumuga Naicker. In this connection, the learned Senior counsel appearing for the plaintiff placed reliance upon the document marked as Exs.A17 to 20, which are sale agreement, sale deed, Uruthimozhi Pathiram and sale deed respectively executed by various persons in favour of the plaintiff. It is found that Ex.A19 had been executed by Pommiammal also, who is none other than, the mother-in-law of DW1. In all the above said documents, the plaintiff has been described as the adopted son /son of Arumuga Naicker. Therefore, it could be seen that as pleaded by the plaintiff, inasmuch as he has been taken in adoption by Arumuga Naikar, the relatives of Arumuga Naicker had been acknowledging the plaintiff as his adopted son and accordingly, when the documents Exs.A17 to 20 were executed, the plaintiff had been naturally described as his adopted son/son of Arumuga Naicker. It is also the case of the DW1 that he is amicably disposed of with his mother-in-law and in such circumstances, when his mother-in-law had described the plaintiff as the adopted son of Arumuga Naicker in one of the above said documents, as rightly found by the trial court, nothing prevented DW1 from examining his mother-in-law to establish as to in what circumstances, she had described the plaintiff as the adopted son in the document. Therefore, it could be seen, as rightly found by the trial court that nothing has been placed by the contesting defendants to impeach the

authority of the above said documents, whereunder the plaintiff has been clearly described as the adopted son /son of Arumuga Naicker. Therefore, the courts below have also placed reliance the above said documents for accepting the case of the plaintiff and no exception, whatsoever, could be taken to the same either factually or legally. Further, the plaintiff, in support of his case, has also marked as Exs.A11 and 12. Ex.A11 is notice issued by the plaintiff with reference to the 15th day ceremony of his deceased adoptive father Arumuga Naicker wherein, he has been described as the adopted son and Ex.A12 Wedding invitation of the plaintiff, wherein also Arumuga Naicker himself had described the plaintiff as his adopted son. Thus, the above said documents would also buttress the plaintiff's case that he has been taken in adoption by Arumuga Naicker and that he is the adopted son of Arumuga Naicker.

29. However, countering the above case of the plaintiff, the contesting defendants would place reliance upon the documents marked as Ex.B2, B3, Exs.X1 and 3. Ex.B2 is the copy of the sale deed dated 19.03.1979, wherein, the plaintiff one of the parties to the document had alienated the properties of his biological father along with his biological mother and his brother. Pointing to the same, it is argued that inasmuch as the plaintiff had not been taken

in adoption by Arumuga Naicker and as the plaintiff continued to be the son of his biological parents, accordingly, while executing Ex.B2 sale deed, the plaintiff had joined in the execution of the document along with the other heirs of his natural father Munusamy Naicker and therefore, according to the Senior counsel appearing for the appellants, the plaintiff's case should not be accepted that he is the adopted son of Arumuga Naicker. However, as rightly found by the trial court as well as the first appellate court, on the basis of Ex.B2 alone, we cannot discard the plaintiff's case. No doubt, Ex.B2 has come to be executed by the plaintiff also along with his natural mother and brother, but long prior to Ex.B2, the plaintiff has been taken in adoption by Arumuga Naicker and the same had not been cancelled in the manner known to law. It could be seen that as rightly found by the trial Court, the valid adoption of the plaintiff by Arumuga Naicker cannot be cancelled even by the adoptive father or mother or any other person nor can the adopted son renounce his status as such and return to the family of his birth. This could be seen from Section 15 of the Hindu Adoptions and Maintenance Act, 1956. Therefore, when a valid adoption has already been taken as regards the plaintiff by Arumuga Naicker even during the year 1960, the document Ex.B2 dated 19.03.1979 would not by itself amount to cancelling the adoption of the plaintiff by Arumuga Naicker and in

such view of the matter, the approach of the courts below in not accepting Ex.B2, for rejecting the plaintiff case is not found to be erroneous in law.

30. As regards the voters list Ex.B3, as rightly found by the Courts below, the same being after the institution of the suit, on the description therein of the plaintiff's father as Munusamy Naicker, it cannot be held that the plaintiff had not been adopted by Arumuga Naicker. As rightly found by the courts below, the plaintiff address is shown in the voters list only as Manthi Naicker Thottam. Further, as rightly found by the courts below, Ex.B3 would only advance the case of the plaintiff for holding that after the adoption, he has been residing along with Arumuga Naicker in Manthi Naicker Thottam.

31. As regards Ex.X1, the transfer certificate, wherein the plaintiff's elder brother Mani has been shown as the guardian. It is not the case that Mani is the guardian of the plaintiff. In such view of the matter, the wrong description of Mani in Ex.X1 would not either support the plaintiff's case or the defendants case. Therefore, no safe reliance could be attached to Ex.X1 for adjudicating the issue involved in this case.

32. As regards Ex.X3, it is the school record of the plaintiff and it has been projected to show that Munusamy Naicker has been shown as the father of the plaintiff. However, in Ex.X3, as rightly found by the Courts below, Arumuga Naicker has been shown as guardian of the plaintiff. This would only go to show that inasmuch as Arumuga Naicker had taken the plaintiff in adoption, he has been shown as guardian in Ex.X3 and even other wise, from the school records it cannot be taken that the biological parents had put the plaintiff in school and therefore, the reasonings of the courts below for not accepting the defendants' case based upon Ex.X1 and X3 cannot be faulted in any manner.

33. In the light of the above discussions, it could be seen that the plaintiff has placed overwhelming evidence in support of his case of adoption and accordingly, it could be seen that placing reliance upon the above said evidence, the courts below have found that the plaintiff is the adopted son of Arumuga Naicker and accordingly, entitled to seek the relief of declaration that he is the adopted son of Arumuga Naicker as well as claim title to the properties i.e. suit properties belonging to Arumuga Naicker as his adopted son.

34. As regards the plea of the relief of permanent injunction

sought for by the plaintiff, the courts below have discarded the plea of the plaintiff as regards the third item (13 cents) of the suit properties. No exception could be taken to the above said findings of the courts below. Further, as regards the items 1 & 2 of the suit properties, the courts below, placing reliance upon the admission of DW1 and also, the plea put forth by the 6th defendant in his written statement and finding that the 15th defendant cannot independently take new pleas, other than the pleas that could be taken by him in the character as the legal representative and also, placing reliance upon the kist receipts standing in the name of the plaintiff and also the patta standing in the name of the plaintiff and the notice Ex.A22 issued to the plaintiff by the department of Urban Land Tax and the documents marked as Ex.14 and Ex.A15 as regards the complaint given to the police regarding the contesting defendants' unlawful interference in the plaintiff's possession and enjoyment of the suit properties and also with reference to the damage caused to the tomb of Arumuga Naicker, rightly found that the plaintiff is entitled to seek the relief of permanent injunction as regards the said items. Nothing serious has been canvassed in this second appeal as regards the above findings of the courts below for upholding the relief sought for by the plaintiff in the nature of permanent injunction. The courts below have rightly approached the issue and accordingly, found that

the plaintiff is entitled to seek the relief of declaration and permanent injunction as regards the items 1 & 2 of the suit properties.

35. For the reasons afore stated, I hold that the findings of the courts below as regards the case of the plaintiff that he is the adopted son of Arumuga Naicker are not perverse and misdirected against the evidence on record. Thus, the substantial question of law formulated in this second appeal is answered in favour of the plaintiff and against the defendants.

In conclusion, the second appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition Nos. 1 & 2 of 2011 and CMP.No.19262 of 2016 are closed.

21.02.2017

Index : Yes/No
Internet: Yes/No
sms

To

1. The Sub Court, Poonamallee.
2. The Principal District Munsif, Poonamallee.

T.RAVINDRAN,J.

sms

Pre-delivery Judgment in
S. A.No.387 of 2011
and
M.P.Nos.1 & 2 of 2011
and CMP.No.19262 of 2016

21.02.2017

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