

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.10.2017

PRONOUNCED ON : 06.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.719 of 2001

Thiagarajan ... Appellant /Respondent/Plaintiff  
Vs.

1. Raja alias Muniga Naidu alias Munusami Naidu
2. Balakrishnan
3. Nagaraj
4. Shanmugham ... Respondents/Appellants/Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Principal District Judge of Dharmapuri at Krishnagiri in A.S.No. 4/2000 dated 17.08.2000 reversing the judgment and decree of the Subordinate judge of Krishnagiri dated 08.10.1999 in O.S. No. 240 of 1994.

For Appellant : Mr.V.Nicholas  
For Respondents: Mr.P.Mani

JUDGMENT

This second appeal is directed against the judgment and decree dated 17.08.2000 passed in A.S.No.4/2000, on the file of the Principal District Court, Dharmapuri at Krishnagiri, reversing the judgment and decree dated 08.10.1999, in O.S. No. 240 of 1994, on the file of the Subordinate Court, Krishnagiri.

2. The parties are referred to as per their rankings in the trial Court.

3. Suit for partition.

4. The case of the plaintiff, in brief, is that he is the son of the first defendant born through his first wife and living with his mother at Salamarathupatti village and the first defendant had married another lady and living with her and through the second wife, defendants 2 to 4 were born to the first defendant, besides three daughters. Through the first

wife, the first defendant had two sons including the plaintiff and a daughter. One of the sons namely Sundaravadivelu died in the year 1973 and the daughter namely Saraswathi, is married and living separately. The suit properties are the ancestral properties of the first defendant, acquired by his father Betroya Naidu and as such the plaintiff and the defendants are jointly entitled to the suit properties and thus, the plaintiff is entitled to 1/5<sup>th</sup> share in the suit properties. The first defendant seems to have partitioned the suit properties amongst himself and the other defendants, excluding the plaintiff, who is entitled to 1/5 share in the suit properties and the above said partition effected among the defendants is not valid and binding on the plaintiff and hence, the plaintiff issued a notice, calling upon the first defendant to effect partition of his share in the suit properties and as the same had been refused, the suit for partition.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts and it is false to state that the plaintiff is the son of the first defendant through his first wife and it is false to state that the first defendant had two sons and a daughter through his first wife. The parents of the plaintiff's mother Gengiammal, celebrated child marriage of this defendant with the plaintiff's mother in 1955 and at that time, the first defendant was 16 years old and Gengiammal was 18 years old and the marriage took place against the will of Gengiammal and the marriage was not consummated and Gengiammal ran away on the same date to her parents house and ever since, been living there and also having illicit intimacy with one Baladasari, the then V.A.O. of Salamarathupatti village and living with him as a kept concubine and gave birth to a child through one Baladasari and gave notice to the first defendant, claiming maintenance and the first defendant issued a suitable reply to the same, disclaiming the fatherhood of the child and it appears that the child died subsequently. Gengiammal lodged a police complaint and the enquiry was conducted and on 17.5.60, at the instance of the panchayatdars, Gengiammal was divorced by the first defendant at Murukkampatty Vinayagar koil, by returning back the Thali, voluntarily in the presence of village elders and hence, the marriage between Gengiammal and the first defendant is null and void, in the eyes of law and the marriage was not consummated and even otherwise, dissolved voluntarily on 17.5.1960, by customary divorce and the plaintiff and the other children were born to Gengiammal, only through Baladasari and the first defendant is not their father and hence, the plaintiff cannot claim to be the son of the first defendant.

6. The suit properties are the ancestral properties of the first defendant and his father had 1/2 share in the suit

properties and he had bequeathed the said right, in favour of the defendants 2 and 3 by a Will dated 11.01.1971 and the first defendant is entitled only to the remaining 1/2 share and the plaintiff never enjoyed the suit properties jointly with the defendants and not entitled to claim any share in the suit properties and hence, the suit is liable to be dismissed.

7. In support of the plaintiff's case PWs 1 to 3 were examined and Exs.A1 and A2 were marked and on the side of the defendants DWs 1 to 4 were examined and Exs. B1 to B9 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit as prayed for. On appeal by the defendants, the first appellate court, on an appreciation of the materials placed, reversed the judgment and decree of the trial Court, thereby allowing the appeal, dismissed the suit laid by the plaintiff. Impugning the same, the present second appeal has been preferred.

9. The following substantial questions of law were formulated for consideration, at the time of admission of the second appeal:

1. When there is no material placed to substantiate the alleged illicit relationship between Gengiammal and Balatherisi and having found that the customary divorce alleged to have been taken place between the 1<sup>st</sup> defendant and his 1<sup>st</sup> wife Gengiammal was not established, consequently the presumption is that the plaintiff is the son of the 1<sup>st</sup> defendant through his 1<sup>st</sup> wife Gengiammal, whether the lower appellate Court is correct in holding that the plaintiff is not the son of the 1<sup>st</sup> defendant?
2. When both the courts below found the suit properties are the joint family properties, the alleged Will executed by Betraya Naidu was not proved whether the lower appellate Court is correct in negating the claim of the plaintiff for partition of his 1/5<sup>th</sup> share in the suit properties?

10. It is not in dispute that the suit properties are the ancestral joint family properties of the first defendant. Claiming to be the son of the first defendant, born through his first wife Gengiammal, the plaintiff has laid the suit claiming

1/5<sup>th</sup> share in the suit properties. It is not in dispute that the first defendant had married Gengiammal as his first wife. It is also not in dispute that the first defendant contracted a second marriage and through his second wife, defendants 2 to 4 were born to him. Now, according to the plaintiff, through his first wife, the first defendant had two sons and a daughter and of the two sons, the son, by name Sundaravadivelu died in 1973 and the daughter Saraswathi got married and living separately. The defendants are contesting the claim of the plaintiff to be the son of the first defendant born through his first wife Gengiammal. According to the defendants, though the marriage was celebrated between the first defendant and Gengiammal, it is stated that the marriage was not consummated at any point of time and immediately, after the marriage, since it was performed against the will of Gengiammal, she got separated and lived separately at Salamarathupatti village and developed illicit relationship with the V.A.O. of the village, namely Baladasarai and it is the further case of the defendants that following the police complaint given by Gengiammal, the dispute between the parties was sort out by panchayatdars and as per the custom prevailing between the parties, the marriage between Gengmmal and the first defendant got dissolved, by removal of Thali by Gengiammal, in the presence of the villagers in the temple and therefore, it is stated that the marriage between the first defendant and Gengiammal got dissolved and at no point of time, Gengiammal had lived with the first defendant after the alleged marriage and as Gengiammal had illicit relationship with the V.A.O. above stated and the children born to her are only through the said illicit relationship, according to the defendants, the plaintiff cannot claim to be the son of the first defendant, born through his first wife Gengiammal and hence, as such, the plaintiff is not entitled to claim partition in the suit properties, as putforth in the plaint. Further, the defence taken by the defendants is that the first defendant's father had 1/2 share in the suit properties and he had bequeathed the same to the defendants 2 and 3 by way of a will dated 11.01.1971 and the first defendant is entitled only to the remaining 1/2 share in the suit properties and not the entire suit properties.

11. Inasmuch as the marriage between the first defendant and Gengiammal has been admitted, it is for the defendants to establish that their marriage got dissolved in the manner known to law. Now, according to the defendants, following the police complaint lodged by Gengiammal, the matter was resolved between the parties through panchayatdars and as per the custom prevailing in the communities of the parties, Gengiammal has removed the Thali, in the presence of the village elders and thereby, the marriage between Gengiammal and the first defendant got dissolved. The above defence set out by the defendants is contended by the plaintiff stating that no such custom prevails

in the parties' communities and the dissolution of marriage by Gengiammal, as pleaded by the defendants, is false. In this connection, Gengiammal examined as PW2, has disputed the above case of the defendants stoutly. Be that as it may, at the foremost, the defendants have to establish that such a practice is prevailing in the communities of the parties, as regards the dissolution of the marriage entered into between the parties. Though DWs 2 and 3 would depose that such a practice was prevailing in the communities, however, the first defendant examined as DW1, during the course of cross-examination has testified without any ambiguity that he is not aware as to who had introduced such a custom in his community and further, he has also admitted that it is correct to state that no such custom is prevailing in their community for the dissolution of the marriage by removal of Thali. It is also admitted by him that he had not laid the suit to declare the marriage between him and Gengiammal as null and void and therefore, even as per the deposition of the first defendant, examined as DW1, it is seen that there is no practice in the communities of the parties concerned, as to the dissolution of marriage by removal of Thali, in the presence of village elders at the temple. Therefore, the defence built up by the defendants that the marriage between the first defendant and Gengiammal got dissolved as per the custom prevailing in the communities cannot be believed and accepted in any manner. As admitted by DW1, till date, he has not instituted any lis to declare his marriage with Gengiammal as null and void. Resultantly, when it is found that it has been admitted in black and white that a valid marriage took place between Gengiammal and the first defendant, till its dissolution, the said marriage is valid and therefore, the plea of the defendants that the marriage between the parties, namely, the first defendant and Gengiammal had been nullified, as stated by them, cannot be countenanced in any manner. In addition to that, it is also pleaded by the defendants that ever since the date of marriage, Gengiammal and the first defendant had not lived together under the same roof and Gengiammal left the home immediately after the marriage and living separately at Salamarathupatti village and not having contact with the first defendant thereafter and on the other hand, developed illicit intimacy with the V.A.O. of the above said village and therefore, it is contended that the plaintiff is not the son born to the first defendant through Gengiammal. However, as regards the plea of the defendants that Gengiammal had developed illicit relationship with the V.A.O. of the village, namely, Baladasari, there is no reliable evidence on the part of the defendants. The above defence version has been strongly resisted by Gengiammal, examined as PW2. During the course of her evidence, she has clearly deposed that she does not know who is Baladasari and not having any relationship with him and when there is no material placed contrary to the above

testimony of PW2 and when, as seen above, the marriage between the first defendant and Gengiammal has not been dissolved in the manner known to law and if really, Gengiammal had developed illicit relationship with the concerned V.A.O., as rightly argued, the first defendant, would have initiated necessary action against the same. But, the very fact that the first defendant has not initiated any action with reference to the same, would go to show that the above pleadings of the defendants that Gengiammal had developed illicit relationship with the V.A.O. is false and cannot be accepted in any manner sans proof and reliable materials.

12. It is admitted that the plaintiff was born to Gengiammal. As above discussed, the marriage between the first defendant and Gengiammal has not been dissolved in the manner known to law and therefore, their marriage subsists till date and therefore, it is found that as per Section 112 of the Indian Evidence Act, 1872, any person born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten, this would apply to the present case, as the marriage between Gengiammal and the first defendant has not been dissolved till date, admittedly, the plaintiff having been born to Gengiammal, in such view of the matter, it is seen that the plaintiff having been born during the continuance of marriage between the first defendant and Gengiammal, the same would be conclusive proof that he is the legitimate son of the first defendant. However, it is argued and contended by the defendants' counsel that even though there had been a valid marriage between Gengiammal and the first defendant, Gengiammal had at no point of time, lived with the first defendant and was living separately continuously and in such view of the matter, there had been no access to each other at any time and therefore, it is stated that though the plaintiff would have been born to Gengiammal, since, at the relevant point of time the parties had no access to each other, the plaintiff could not be declared to be the son of the first defendant and hence on that score the plaintiff's case should be rejected. In this connection, strong reliance was placed upon the admission of Gengiammal examined as PW2, by the first appellate court for dismissing the plaintiff's case. According to the first appellate court, Gengiammal examined as PW2, at one point of examination, has admitted that after her marriage with the first defendant, she had left to her mother's house and after denying the lodgement of the police complaint against the the first defendant in 1960, deposed that after 1960, she had lived with the first defendant for six months and thereafter,

left to her mother's house and till date, the first defendant did not come to the house. Placing reliance upon the so called admission of PW2, the first appellate court has proceeded to hold that inasmuch as there had been no access between the first defendant and Gengiammal after 1960, the plaintiff having claimed to have born to Gengiammal during 1968, it had concluded that the plaintiff could not have been the son born to Gengiammal through the first defendant. However, the above approach of the first appellate court apropos of the issue involved in the matter is erroneous and unacceptable, as rightly putforth by the plaintiff's counsel. On a conjoint reading of the evidence of PW2, tendered during the course of both cross and chief examination would go to show that only on account of certain petty quarrels between the first defendant and Gengiammal, after marriage, frequently, thereby she had been living in her mother's house as a consequence thereof and had no reason to live in her mother's house permanently on account of the dispute between her and the first defendant. She had also not stated that there had been no access to each other, after the so called disputes between them. Further, she had also disputed that she had developed illicit relationship with the V.A.O. and also denied the suggestion that the children were begotten through the said V.A.O. Therefore, when the evidence of PW2 read wholly, it is seen that she had been only living in her parents house on account of certain, sundry quarrels with the first defendant. By that alone, it cannot be concluded without materials that the first defendant was not at all having contact with her subsequently, as putforth by him. She has only stated in the so called above admission that the first defendant had not come to the house after 1960. She has not stated that they had no access to each other thereafter and when the marriage between them has not been dissolved in the manner known to law, it is seen that the conclusion of the first appellate court that PW2 had categorically admitted that she is not having any contact with the first defendant as such cannot be countenanced. On the other hand, it is found that the parties are living separately on account of certain petty quarrels now and then, though having access to each other after the disputes being resolved. Therefore, the determination of the first appellate court that the latter part of Section 112 of the Indian Evidence Act had been established by the defendants on the above said admission of PW2 cannot be accepted in any manner, when the evidence of PW2 is read coupled with her other evidence adduced in this matter and particularly, when the marriage between the parties till date has not been dissolved in the manner known to law. Therefore, it is found that the above approach of the first appellate court for dismissing the plaintiff's case as such cannot be accepted in any manner. Therefore, I hold that the first appellate court has erred in holding that the plaintiff is not the son of the first defendant.

13. As above adverted to, it is not in dispute that the suit properties are the ancestral properties of the first defendant. Though the defendants have set out in the defence that the father of the first defendant had  $\frac{1}{2}$  share in the suit properties and bequeathed the said  $\frac{1}{2}$  share in favour of the defendants 2 and 3, by way of Will dated 11.01.1971, marked as Ex.B4, as regards the above case of the defendants, there is no material forth coming. It is found that Ex.B4 Will has not been established to be a genuine document in the manner known to law. Therefore, it is found that the Courts below have disbelieved the Will projected by the defendants. Barring Ex.B4, it is seen that the suit properties are the ancestral joint family properties of the first defendant. In the light of the above discussions, it is seen the plaintiff is the son of the first defendant born through his first wife Gengiammal. As seen above, it is admitted case that the defendants 2 to 4 are the sons of the first defendant born through his second wife. It is thus found that the plaintiff being the son of first defendant is entitled to obtain  $\frac{1}{5}$  share in the suit properties, the same being the ancestral joint family properties of the parties concerned. In the light of the above position, the first appellate court has erred in negating the claim of the plaintiff seeking for the obtainment of partition of his  $\frac{1}{5}^{\text{th}}$  share in the suit properties.

14. The principals of law outlined in the decision relied upon by the plaintiff's counsel reported in 2017 (3) CTC 769 (Selvi Vijayalakshmi Vs. A.Sankaran 2. Sumathy) are taken into consideration and followed as applicable to the case at hand.

15. In view of the above discussions, the substantial questions of law formulated in this second appeal are answered in favour of the plaintiff and against the defendants.

16. In conclusion, the judgment and decree dated 17.08.2000 passed in A.S.No.4/2000, on the file of the Principal District Court, Dharmapuri at Krishnagiri are set-aside and the judgment and decree dated 08.10.1999, in O.S. No. 240 of 1994, on the file of the Subordinate Court, Krishnagiri are confirmed, resultantly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any is closed.

Sd/-

Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,  
Dharmapuri at Krishnagiri.

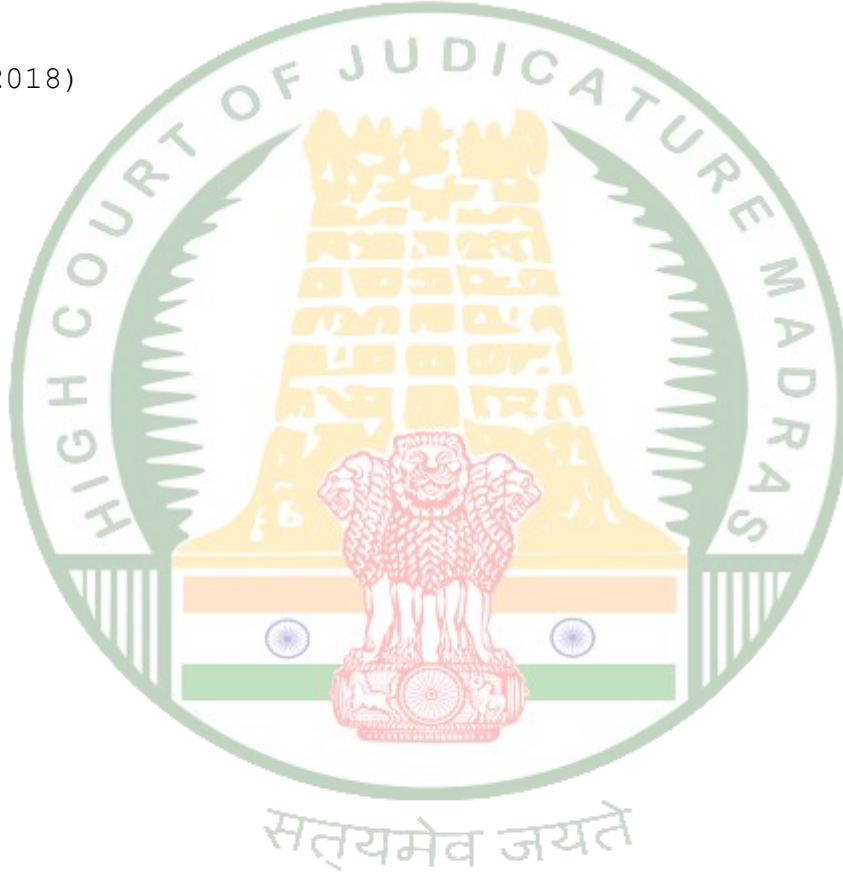
2. The Subordinate Judge,  
Krishnagiri.

+1cc to Mr.V.Nicholas, Advocate SR.No.78633

+1cc to Mr.P.Mani, Advocate SR.No.78723

S. A.No.719 of 2001

GJ(CO)  
GN(24/01/2018)



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