



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 24.01.2017

CORAM:

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THE HONOURABLE MR. JUSTICE M. DURAISWAMY

S.A. (MD) No. 39 of 2011

1. K. Thangam
2. K. Mathiyarasi

.. Appellants/Appellants/
Plaintiffs

Vs.

1. Subburaj
2. C. Rengaraj
3. Muthulakshmi
4. Sankarammal
5. Angammal
6. Chitra
7. Dineshkumar
8. Selvaraj
9. Soundararajan

.. Respondents/Respondents/
Defendants

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Decree and Judgment of the Principal District Court, Tirunelveli, made in A.S.No.42 of 2008, dated 14.08.2009, confirming the Decree and Judgment of the Additional Subordinate Court, Tenkasi made in O.S.No.44 of 2005, dated 08.08.2008.

For Appellants : Mr.V.Kalyanasundaram
For Respondents : Mr.P.Velmurugan
for R.1 to R.8
: Mr.S.Ramesh @ Ramiah
for R.9

JUDGMENT

Aggrieved over the judgment and decree passed in A.S.No.42 of 2008, on the file of the Principal District Court, Tirunelveli, confirming the judgment and decree passed in O.S.No.44 of 2005, on the file of the Additional Subordinate Court, Tenkasi, the plaintiffs have filed the above Second Appeal.

2. The plaintiffs filed the suit in O.S.No.44 of 2005 for partition, separate possession and for mesne profits.

3. The brief case of the plaintiffs is as follows:

(i) According to the plaintiffs, the suit properties are originally belonged to the family of one Kalidass, who is the first plaintiff. The father-in-law of the first plaintiff had died 35 years prior to the filing of the suit and he had three sons. The husband of the first plaintiff viz., Kalidass died on 19.12.2003. The defendants 1 and 2 are the brothers of Kalidass. The defendants 3 and 4 are the sisters of Kalidass.



The defendants 1 to 4 are the legal heirs of one Chelliah Naidu. The said Chelliah Naidu died intestate. The marriage between the first plaintiff and Kalidass had taken place 30 years prior to the filing of the suit.

(ii) According to the plaintiffs, Kalidass and the first plaintiff had two daughters viz., Usharani and the second plaintiff. Later, the first daughter Usharani had died. Kalidass married the fifth defendant as his second wife. The defendants 6 to 8 are the children of Kalidass and the fifth defendant. The marriage between Kalidass and the fifth defendant is an invalid marriage, since the marriage with the first plaintiff was subsisting. Since the properties are ancestral properties, the defendants 5 to 8 are not entitled to the properties, after the demise of Kalidass. The plaintiffs are entitled to 6/20 share and the defendants 1 and 2 are each entitled to 6/20 share. The defendants 3 and 4 are each entitled to 1/20 share. The properties are in joint possession of the parties. Since the defendants 1 to 4 did not partition the properties, the plaintiffs have filed the suit.

4. The defendants sold the first item of the properties to the ninth defendant. The defendants 3 to 8 executed a release deed in favour of the second defendant on 12.03.2004.

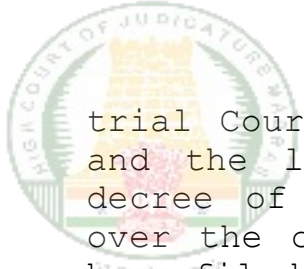
5. The brief case of the defendants 1 to 5 and 8 is as follows:

According to the defendants, the first plaintiff is not the wife of Late Kalidass. The second plaintiff is also not the daughter of Kalidass. The defendants 1 to 4 did not know who are the plaintiffs. The first plaintiff and Kalidass did not live as husband and wife. The marriage between Kalidass and the fifth defendant took place on 03.05.1976 at Srivilliputhur. On 19.12.2003, the said Kalidass died leaving behind the defendants 5 to 8 as his legal heirs. When Kalidass was alive, he and his brothers and sisters sold the first item of the properties to the ninth defendant on 12.09.2002. They have also executed an amendment deed on 14.07.2004 in favour of the ninth defendant, since at the time of execution of the amendment deed, Kalidass was not alive. His wife Angammal and the defendants 1 to 4 have executed the amendment deed. The said Kalidass partitioned the third item of the property through the defendants 1 and 2 and with the permission of the defendants 3 and 4. In these circumstances, the defendants prayed for dismissal of the suit.

6. The brief case of the ninth defendant is as follows:

The ninth defendant had reiterated the averments stated in the written statement filed by the defendants 1 to 5 and 8 and further stated that under two sale deeds dated 12.09.2002, he purchased the first item of the properties. The ninth defendant also prayed for dismissal of the suit.

7. Before the trial Court, on the side of the plaintiffs, ~~since no evidence was~~ were examined and 15 documents viz., Exs.A.1 to A.15 were marked and on the side of the defendants, two witnesses were examined and 16 documents viz., Exs.B.1 to B.16. The trial Court, after taking into consideration the case of both parties, dismissed the suit. Aggrieved over the judgment and decree of the



trial Court, the plaintiffs filed an appeal in A.S.No.42 of 2008 and the lower Appellate Court also confirmed the judgment and decree of the trial Court and dismissed the appeal. Aggrieved over the concurrent findings of the Courts below, the plaintiffs have filed the above Second Appeal.

8. At the time of admission of the Second Appeal, the following Substantial Questions of Law arose for consideration:

"1. Whether the Courts below have committed an error in simply holding that the second plaintiff was not born out of lawful wedlock between Kalidass and the first plaintiff, without framing an issue regarding the paternity of the second plaintiff and without deciding it?

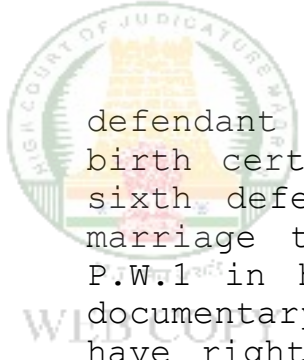
2. Whether the findings of the Courts below that the marriage between the first plaintiff and Kalidass was not proved is perverse?"

9. It is the case of the plaintiffs that the marriage between the first plaintiff and Kalidass took place 30 years prior to the filing of the suit and that they had two daughters viz., Usharani and the second plaintiff. The first daughter Usharani was born in the year 1977 and the second plaintiff was born in the year 1984. Subsequently, the first daughter Usharani had died. It is also the case of the plaintiffs that Kalidass married the fifth defendant as his second wife and the defendants 6 to 8 are their children. The said Kalidass had died on 19.12.2003.

10. In order to prove the marriage between Kalidass and the first plaintiff, the first plaintiff was examined as P.W.1 and she deposed that the marriage between her and Kalidass took place 30 years ago and Usharani and the second plaintiff are the daughters born to them. However, P.W.1 did not depose the date, month and year of the marriage. P.W.2 deposed that the marriage between the first plaintiff and Kalidass took place in the year 1973. Though he has stated that the marriage took place in the year 1973, he has stated that he did not attend the marriage and he does not know where the marriage took place. Further he was not in a position to give the date and month of the marriage. P.W.3 also stated that the marriage took place in the year 1973. In spite of the same, as stated by P.W.2, P.W.3 also stated that he did not attend the marriage and that he came to know about the marriage through one Velammal about one month before and that she did not tell the date and month of the marriage.

11. Since the evidence of P.W.1 to P.W.3 were not specific and categorical, the Courts below rejected the evidence of P.W.1 to P.W.3 with regard to the marriage between the first plaintiff and Kalidass. In Ex.A.1 - death certificate, the name of the deceased has been mentioned as Usha and it was not mentioned as Usharani. Even in the school certificate, the first plaintiff's name has not been mentioned, however, the father's name has been mentioned as Kalidass. The Courts below have concurrently disbelieved the case of the plaintiffs with regard to the factum of marriage.

12. On the side of the defendants, in order to prove the marriage between Kalidass and the fifth defendant, D.W.1 was examined. The marriage invitation of Kalidass and the fifth



defendant was also marked on the side of the defendants. The birth certificate and the transfer certificate pertaining to the sixth defendant were also marked before the trial Court. The marriage took place on 03.05.1976. This was also admitted by P.W.1 in her evidence. Taking into consideration the oral and documentary evidences let in by the defendants, the Courts below have rightly come to the conclusion that the fifth defendant is the legally wedded wife of Kalidass and the defendants 6 to 8 are born to them.

13. The first item of the suit properties was sold even during the life time of Kalidass under two sale deeds executed on 12.09.2002. The correction deed was executed after the death of Kalidass by the legal heirs of Chelliah Naidu. D.W.2 also supported the case of the defendants and about the purchase made by him. Since the plaintiffs failed to prove the factum of marriage, they have no right over the suit properties. The Courts below also rightly dismissed the suit and rightly held that the sale deeds dated 12.09.2002 as well as the correction deed dated 14.07.2004 are valid and binding on all the parties. Further, the Courts below rightly held that the release deed obtained by the second defendant with regard to the second item of the properties is also valid and binding on the parties. Taking into consideration the oral and documentary evidences let in by the parties, the Courts below have rightly dismissed the suit.

14. In these circumstances, I do not find any ground much less any substantial question of law to interfere with the concurrent findings of the Courts below. The Second Appeal is liable to be dismissed. Accordingly, the same is dismissed. There shall be no order as to costs.

Sd/-

Assistant Registrar(CO)

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Sub Assistant Registrar

To

1. The Principal District Judge, Tirunelveli.

2. The Additional Subordinate Judge, Tenkasi.

+3 cc to MR.V.Kalyanasundaram,ADVOCATE, SR NO:4445,4180

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