

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2018

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

Second Appeal No.289 of 2008
and M.P.No.1 of 2008

1. Nagammal
2. Kodichi
3. Karuppayee
4. Nagammal

... Appellants/Respondents/Plaintiffs

Vs.

Kodiyan

... Respondent/Defendant

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code praying against the judgment and decree dated 08.10.2007 made in A.S.No.10 of 2007 on the file of Principal Subordinate Judge, Gobichettipalayam reversing the judgment and decree dated 18.07.2005 made in O.S.No.421 of 2004 on the file of District Munsif Court, Gobichettipalayam.

For Appellant : Mr.Thirumandiram
for Mr.R.T.Doraisamy

For Respondent : Mr.Durai Vaiyapuri
for M/s.N.Manokaran

J U D G M E N T

The plaintiffs in O.S.No.421 of 2004 (O.S.No.76 of 2001 on the file of Subordinate Court, Gobichettipalayam) are the appellants. The suit was laid for partition and separate possession of the plaintiffs' 5/6th share

2. The claim of the plaintiffs was that the plaintiffs' mother Muthammal was given in marriage to one Kuppavalayan, who died on 01.08.1983. Out of the said wedlock, the plaintiffs were born. It is further contention of the plaintiffs that the suit properties are ancestral properties of the said Kuppavalayan. The plaintiffs would also aver that the said Kuppavalayan developed illicit intimacy with one Karuppayee, who was his brother's wife and out of the said relationship the

defendant was born to him. Therefore, the plaintiffs would term the defendant as illegitimate son of the said Kuppavalayan. Contending that on the death of Kuppavalayan the properties devolved on their mother Muthammal, the plaintiffs herein as his daughters and the defendant as illegitimate son in equal shares.

On the death of Muthammal in 1992, the plaintiffs became entitled to her share also. Hence, the plaintiffs claimed 5/6th share in the suit properties.

3. The suit was resisted by the defendant contending that it was Karupayee, who was the wife of Kuppavalayan, they having got married in or about 1945. The defendant would term Muthaiammal as a concubine of the said Kuppavalayan. The defendant contended that Muthammal was married to one Sadaiyan and plaintiffs were born out of said wed lock. On the above contentions, the defendant sought for dismissal of the suit.

4. At trial, the first plaintiff examined herself as PW.1 [Nagammal] and two witnesses namely PW2 [Ramasamy] and PW.3 [Kolandan], who were aged about 70 years and 65 years, were examined to prove the marriage between Muthammal and Kuppavalayan. The plaintiffs also produced Ex.A.1 to Ex.A.10. On the side of the defendant, he examined five witnesses, namely DW.1 to DW.5. Ex.B.1 to Ex.B.11 were marked by the defendant.

5. The trial Court framed necessary issues and on examination of the evidence both oral and documentary concluded that the plaintiffs have established their case and decreed the suit, as prayed for.

6. The trial Court also took note of the written statement filed by the defendant in the earlier suit namely O.S.No.4 of 1984 filed by the plaintiffs for partition, wherein, the defendant and his mother Karupayee had admitted the fact that the plaintiffs were born to Kuppavalayan and Muthammal, though they have claimed that Muthammal was only a concubine of Kuppavalayan and there was no marriage between them.

7. Aggrieved by the decree of the trial Court, the defendant filed an appeal in A.S.No.10 of 2007 before the Sub Court, Gopichettipalayam.

8. The Lower Appellate Court had concluded that the marriage between the Muthammal and Kuppavalayan was not a valid marriage. Taking into account of the description of Karupayee as the wife of Kuppavalayan in the death certificate

of Karupayee, which was marked as Ex.B.1, the Learned Subordinate Judge, Gopichettipalayam held that the plaintiffs having failed to establish the marriage between Muthammal or Muthayal and Kuppavalyan, are not entitled to any share in the properties. On the above said findings, the learned Subordinate Judge, Gobichettipalayam had allowed the appeal and dismissed the suit. It is against the said judgment the plaintiffs are come forward with the above Second Appeal.

9. At the time of admission, the following substantial questions of law were framed by this Court.

(i). Whether lower Appellate Court is correct is disbelieving the evidence of PW.2 and PW.3 aged about 77 years and 65 years with reference the marriage of Muthammal with Kuppavalyan and the legitimacy of the plaintiffs without giving valid reasons?

(ii) Whether the Lower Appellate Court is correct in holding that the plaintiffs have not produced documents to prove their possession without considering Exhibits A-1 to A-4 and A8 and A-9?

10. Heard Mr.T.Thirumandiram, the learned counsel appearing for the Mr.R.T.Doraisamy for the appellants and Mr.Durai Vaiyapuri appearing for the respondent.

11. Elaborating on the questions of law Mr.T.Thirumandiram the learned counsel for the appellants would contend that the lower Appellate Court had not adverted to evidence of DW.2 and DW.3 who had spoken specifically about the marriage between Muthammal and Kuppavalyan. Taking me through the evidence of PW.2 [Ramasamy] and PW.3 [Kolandan], the learned counsel would point out that their testimony regarding the marriage between the Muthammal and Kuppavalyan has not been discredited in any manner in cross examination. He would also contend that the fact that the plaintiffs were born to Muthammal and Kuppavalyan has been admitted by the defendant and his mother in the written statement filed by them in the earlier suit, which has been marked as Ex.A.7.

12. Per contra, Mr.Duraivaiyapuri learned counsel appearing for the respondent would contend that the admissions in the earlier written statement are only to the effect that the

plaintiffs are illegitimate daughters of Kuppavalayan. In the absence of any proof of marriage between the Muthammal and Kuppavalayan, they will not be entitled to the benefits Section 16 of Hindu Marriage Act, which confers the status of legitimacy of the children born out of the void marriages.

13. I have considered the rival submissions as also the evidence on record. As rightly pointed out by the learned counsel for the appellants the evidence of PW.2 [Ramasamy] and PW.3 [Kolandan] regarding the marriage between Muthammal and Kuppavalayan has not been controverted. The lower Appellate Court has not adverted to the said evidence. In fact there is a admission by the defendant and his mother, Karupayee in the written statement filed by them in the earlier suit in O.S.No.4 of 1984.

14. Though it is pleaded that Ex.B1 is the death certificate of Karuppayee, wherein, she is described as wife of Kuppavalayan, is after the earlier suit. PW.2 [Ramasamy] has also admitted in his evidence that the defendant was born to Karuppayee and Kuppavalayan and Karupayee was living with Kuppavalayan.

15. The claim of both the parties is that the other is illegitimate issue. There is no concrete evidence to prove the marriage of both Muthammal and Karupayee, except the oral evidence of PW.2 and PW.3.

16. The fact that the lower Appellate Court has not adverted to the evidence of PW.2 and PW.3 is clear from the reading of the judgment of the Lower Appellate Court. The Lower Appellate Court has merely relied upon Ex.B1 which came into existence in the year 1987 after the institution of the prior suit, wherein, Karuppayee is described as the wife of Kuppavalayan. I am therefore of the considered opinion that the marriage between Kuppavalayan and Karuppayee should be presumed in view of the evidence of PW.2 coupled with recital in Ex.B.1. As regards the marriage between Kuppavalayan and Muthammal, there is no concrete evidence. The resultant situation is that though the marriages have not been proved, from the evidence on record, it would be presumed that Kuppavalayan had married both Muthammal as well as Karuppayee at some point of time. Even assuming that there is no direct evidence of marriage a marriage could be presumed by long cohabitation. The fact that the Kuppavalayan was living with Muthammal as well as Karuppayee is borne out in evidence. Therefore, I am of the considered

opinion that the lower Appellate Court ought not to have dismissed the suit in its entirety.

17. At the same time, the trial Court has also erred in concluding that the Muthammal is the wife of Kuppuvalayan and granting her 1/6th share in the suit property, which has on her death devolved on the plaintiffs. Therefore, I am of the considered opinion that the plaintiffs as well as the defendant could be treated as illegitimate children entitled to benefits of Section 16 of Hindu Marriage Act and considered as legitimate children. Therefore, the plaintiffs as well as the defendant would be entitled to 1/5th share each in the suit properties.

16. The first question of law is answered partially in favour of the plaintiffs.

17. The second question of law relating to possession would not strictly arise. In view of the fact that I have held on the first question of law that the plaintiffs as well as defendant would inherit as illegitimate children as per Section 16 of Hindu Marriage Act.

18. In view of the forgoing discussions, the Second Appeal is allowed, and the judgment and decree passed by the Lower Appellate Court is set aside. The judgment and decree of the trial Court is modified, granting 1/5th share each to the plaintiffs as well as defendant. There shall be no order as to cost in this appeal. Consequently, connected Miscellaneous Petition is also closed.

सत्यमेव जयते

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

bsm/rli

1. The Principal Subordinate Judge,
Gobichettipalayam.

2. The District Munsif Court,
Gobichettipalayam.

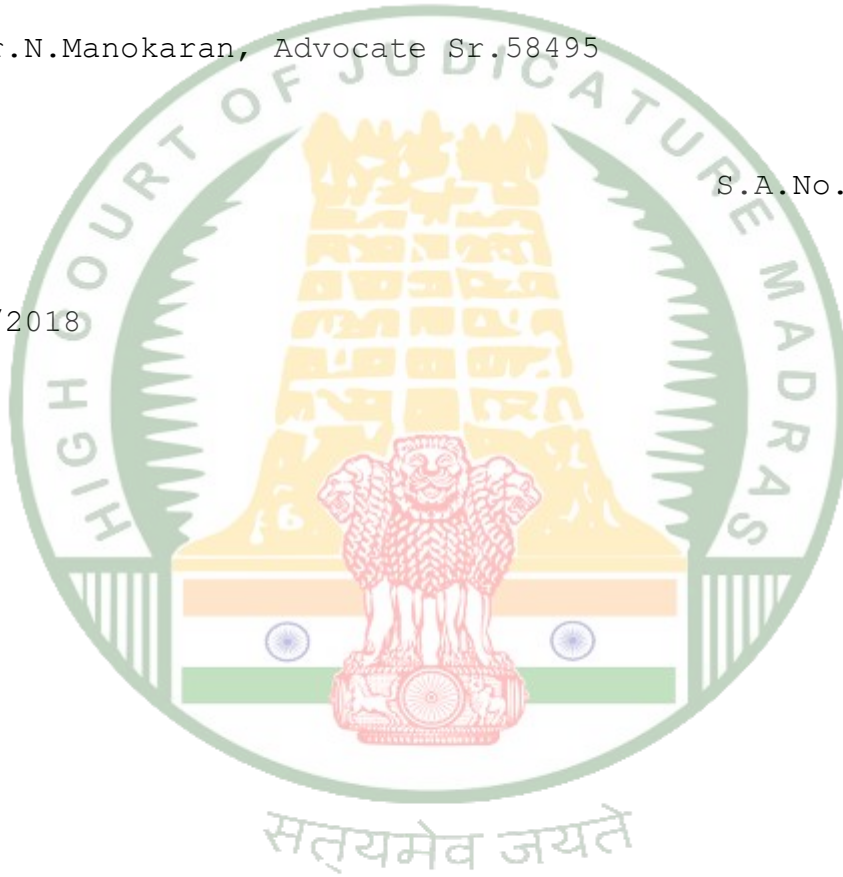
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The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.N.Manokaran, Advocate Sr.58495

S.A.No.289 of 2008

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