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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.03.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.33 of 2015
and M.P.No.1 of 2015

1. Murugana Gounder
2. Ammasaiammal
3. Vadivelu

.. Appellants/Defendants 1 to 3

Vs.

1. Prabhu
2. Shanthi
3. Valliammal

.. Respondents/Plaintiffs 1 and 2

.. Respondent/Defendant 4

* * *

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 28.08.2014 passed in A.S.No.33 of 2013 on the file of the II Additional District and Sessions Court, Tirupur, confirming the judgement and decree dated 30.03.2012, in O.S.No.183 of 2010 of on the file of the Sub Court, Perundurai.

* * *

For Appellants : Mr.N.Manokaran

For Respondents: Mr.A.K.Kumarasamy,
1 and 2 Senior Counsel for
Mr.S.Kaithamalai Kumaran

For Respondent 3: Served - No appearance

J U D G E M E N T

The defendants 1 to 3 are the appellants, challenging the decree granted in favour of the plaintiffs in a suit filed for declaration that the second plaintiff is the legally wedded wife of one Velliangiri and the first plaintiff is the son born to the second plaintiff out of their wedlock and for partition of the first item of the suit properties and restraining the defendants from creating any encumbrance over the second item of the suit properties by means of a permanent injunction.



2. The case of the plaintiff is as follows :

(i) The second plaintiff is the mother of the first plaintiff. The first and second defendants are father and mother of the third and fourth defendants. The first and second defendants also had another son by name Velliangiri. The second plaintiff claims to be wife of the said Velliangiri and the first plaintiff is the son born to them.

(ii) There are two items of properties scheduled in the suit. The first item is claimed to be the joint family property. The second item originally belonged to the second defendant's father Vadivelappa Gounder, who had executed a Will on 02.09.1936 bequeathing the said property in favour of eight of his daughters for life and thereafter to the male heirs absolutely. Therefore, the second defendant has got only life estate in the second item of the property, after her life time, it has to devolve on the third defendant and the first plaintiff as son of the pre-deceased son.

(iii) It is stated that the second plaintiff was married to one Thangavelu, who died in the year 1983. Thereafter, the second defendant had married the said brother of the third defendant Velliangiri at Omalur Mariamman Temple. After the marriage, they were living as husband and wife in Kunnathur, Gobichettipalayam Road. Out of the said wedlock, the first plaintiff was born on 08.08.1986. While so, it is stated that the second plaintiff's husband Velliangiri committed suicide on 28.09.1988. After the death of the husband, the second plaintiff along with the first plaintiff migrated to Salem, where, her parents were living. The plaintiffs claimed that as per the Hindu Succession Act, they are the legal heirs of the brother of the third defendant Velliangiri.

(iv) Though the defendant had been contributing a meagre amount for the maintenance of the plaintiffs, they have suddenly stopped giving the same. There is also no partition between the defendants family. When the plaintiff approached them for a division of the properties, the defendants denied her relationship as wife of the deceased Velliangiri and also, the first plaintiff's status as son of the Velliangiri. As stated earlier, it is claimed that the second defendant has got only a life estate in the second item of the suit properties and with respect to the first item of the suit property, the defendants have got no right for alienating the same, as the plaintiffs have got a share in the same. Hence, the suit has been filed.

3. Denying the averments in the plaint, the third defendant has filed written statement, which was adopted by the first and second defendants. It is admitted that first and second defendants are the parents of the third and fourth defendants



and also the deceased Velliangiri. However, the relationship of the second plaintiff as wife of Velliangiri is denied. It is also admitted that the first item of the suit property are admittedly the joint family property and the second item of the suit property originally belonged to Vadivelappa Gounder and as per the Will, life estate was given to the daughters and thereafter, to their male heirs absolutely. The fact of marriage, as alleged in the plaint, is also denied by the defendants. The defendants have stated that in the plaint, when the date of death of the first husband of the second plaintiff and also the date of marriage of the second plaintiff with Velliangiri is not mentioned, the alleged marriage cannot be true. It is also pointed out that in the School Transfer Certificate, the community is also mentioned wrong and there are certain discrepancies in the date of birth of the first plaintiff. Hence, the defendants sought for dismissal of the suit.

4. The fourth defendant also filed a separate written statement denying the averments made in the plaint. According to her, the suit has been filed only to defame the reputation of the defendants family in the society.

5. In the reply statement, the plaintiffs have clarified that the date of birth has been wrongly mentioned and produced original of the birth certificate and the name of the father was mentioned as V.M.Giri instead of Velliangiri.

6. Before the Trial Court, on the side of the plaintiffs, P.Ws.1 to 3 were examined and Exs.A.1 to A.20 were marked. Defendants 3 and 4 were examined as D.Ws.1 and 2, and they have chosen not to mark any document on their side.

7. The Courts below have concurrently passed preliminary decree in favour of the plaintiffs. Aggrieved by the same, the above second appeal is filed.

8. The following substantial questions of law were formulated for consideration by this Court at the time of admission :

"a. Whether the Courts below were right in holding that there was valid marriage between the 2nd respondent and Velliangiri, based on the photographs which are disputed and the School Transfer Certificate of the 1st respondent ? And

b. Whether the courts below were right in denying a share to the 4th respondent, though the Amendment Act 2005 to the Hindu Succession Act makes the 4th defendant as a Coparcener entitled for a share in the suit properties ?"



9. Heard the learned counsel for the appellants and the learned counsel for the respondents 1 and 2 and perused the material available on record.

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10. The plaintiffs have based the suit on the marriage between Velliangiri and the second plaintiff. If the marriage of the second plaintiff with the deceased Velliangiri is proved and the parentage of the first plaintiff is declared, they would be entitled to the share, as claimed in the suit. It is the categorical case of the plaintiffs that the marriage between the second plaintiff and the Velliangiri was performed in a temple in Omalur. But to substantiate the same, there is no document or any certificate is filed. Instead, the plaintiffs have filed Ex.A.2, which is claimed to be a voter ID, but it is the voters enumeration copy, in which, the second plaintiff's husband name has been mentioned as Velliangiri and the date is 25.01.1988. In the said document, Velliangiri is said to have signed as V.M.Giri and in the said document, Velliangiri is shown as son of Murugana Gounder, who is the first defendant. Even in the death certificate of Velliangiri, the father of Velliangiri is mentioned as Murugan. Ex.A.5 is the community certificate and Ex.A.6 is the School Transfer Certificate of the first plaintiff. In both the documents also, the second plaintiff husband's name and first plaintiff's father name is mentioned as Velliangiri. The other document filed by the plaintiffs is Exs.A.8, which is the letter issued to the second plaintiff from the District Employment Exchange, Salem District. The plaintiffs had relied on the above said documents to show the second plaintiff's relationship with the said Velliangiri as husband and the first plaintiff, being born out of the said wedlock. In Ex.A.2 the election enumeration card, which is dated 25.01.1988, the husband signed as V.M.Giri and the said V.M.Giri cannot be any other person, as his father's name is shown as Murugana Gounder and the house address is also correct. The said Velliangiri died only nine months later and it was an unnatural death. Therefore, by no stretch of imagination, it can be presumed that Ex.A.2 or Ex.A.3 are created for the purpose of the case.

11. P.W.2 was examined by the second plaintiff to support her case. P.W.2 is none else than the first defendant's sister's daughter and brother's wife. She has been examined on the side of the plaintiffs for the purpose that she was one of the witnesses to the wedding of second plaintiff with Velliangiri. P.W.2, being one of the family members of the first defendant, her evidence cannot be discounted. There is no material to show that there was enmity between P.W.2 and the defendants family, and that, she had deposed against them. The Courts below have held that the marriage of the second plaintiff is true and valid and the same cannot be disbelieved for the



simple reason that the second plaintiff had not furnished the date, month and year of marriage. As stated earlier, in Ex.A.2 Velliangiri himself has furnished the name of the second plaintiff as his wife and the said document is not created by the members of the family, but it was prepared by the Officer in-charge. Even otherwise, there is no convincing reason given by the defendants for P.W.2 to depose in favour of the plaintiffs.

12. Yet another evidence is Ex.A.15, which is a letter written by the deceased Velliangiri to his maternal uncle and husband of P.W.2. A reading of Ex.A.15 also goes to show that the said Velliangiri was away from his family and he had been not keeping good health. The tenor of Ex.A.15 goes to show that all was not well with Velliangiri and his family, as he had been staying away from the family even during his lifetime. Therefore, it is probable that the plaintiffs were also denied of their legitimate share in the property.

13. The plaintiffs also have filed photographs, Exs.A.17 to A.20 taken along Velliangiri. Though the said photographs were objected to in the absence of any evidence that they are created for the purpose of the suit, the Courts have admitted the same.

14. The defendants have specifically taken an objection that the name - V.M.Giri found on the plaintiffs documents is different from Velliangiri and hence, the said documents are inadmissible. However, in the absence of any evidence to show that the name V.M.Giri found on those documents do not relate to the deceased Velliangiri, the argument of the defendants/appellants are not acceptable. The said Velliangiri had not died naturally, but had committed suicide. A reading of Ex.A.15 and the health condition of the said Velliangiri, and his staying away from the family even during his lifetime collectively go to show that Velliangiri was ignored by the family even during his lifetime.

14(a). It is specifically argued by the learned counsel for the appellants that reliance cannot be placed on School Transfer Certificate and Birth Certificate to prove the parentage of the first plaintiff and in turn, prove the factum of marriage, placing reliance on the following decisions :

(i) This Court in paragraph 9 of the judgement in Kamakshi V. Minor Ramalingam alias Munusami, 1993 (3) MLJ 17, held as follows :

"9. Further, the above said Ex.A-2 birth extract of the plaintiff cannot also be relied on to prove the parentage of the plaintiff, or in other words, to prove the factum of marriage between the 1st defendant and Singarammal. It has also been held so in Nagayasami Naidu V. Kochadai Naidu, 81 L.W.



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436 : A.I.R. 1969 Mad. 329 (D.B.), while dealing with the scope of Section 35 of the Evidence Act, Rajambal v. Veeramuthu Udayar, 99 L.W. 175 (D.B.), has also held likewise. It relied on an earlier decision in Nagayasami Naidu V. Kochadai Naidu, which observed: "Under Section 35 of the Evidence Act (I of 1872), it is only the entry made by a public servant in the discharge of his official duties that is admissible as a relevant fact. Other particulars not strictly covered by the entries are not admissible under Section 35 of the Evidence Act."

(ii) In Tmt.Girija alias Shanmuga Easwari, etc. V. Smt.Saraswathi Ammal, etc. and 3 others, 1999-1-L.W. 261, this Court held as hereunder :

"12. The learned counsel for the respondents 1 to 3 has brought to the notice of the Court a decision reported in Mohan and another V. Santha Bai ammal and others, 1989-2-L.W. 197, wherein, it was held that recitals in Birth Extract Register and School Certificate are not sufficient to establish a marriage, when it is disputed."

(iii) However, the learned Senior counsel for the respondents 1 and 2 submitted that factum of marriage has been proved by the documents and evidence. He also placed his reliance on Rajagopal Pillai and others V. Pakkiam Ammal and Another, 1968 (2) MLJ 411, wherein, it has been held as follows :

"7. The marriage state being the chief foundation on which the superstructure of society rests, presumption of the marriage arising from cohabitation of spouses is a Very strong presumption. Where a man and a woman had lived together as man and wife, the law will presume, until the contrary is proved, that they were living together by virtue of a legal marriage and not in concubinage.

8. The presumption of law is the strongest of legal presumptions and is not lightly-to be repelled by a mere balance of probabilities and the evidence repelling that presumption must be strong, distinct and satisfactory. Every intendment is made in favour of a marriage de facto and the more distant, the date of the marriage, the more readily is the presumption drawn, based upon cohabitation and repute. The weight of the presumption gets strengthened when it is proved that the party whose marriage is in



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question distinctly intended to marry and went through a form of a marriage with that intent and also subsequently lived together as man and wife and were esteemed and reputed as such by those who knew them. The presumption still exists, even when there is no positive evidence of any marriage having taken place. Reference may be made to the following statement of law in 19 Halsbury's Laws of England, third edition (Simonds) page 812, paragraphs 1323 and 1324:

Presumption from cohabitation.--Whether a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be, no positive evidence of any marriage having taken place, and the presumption can be rebutted only by strong and weighty evidence to the contrary.

Presumption of validity.--Where there is evidence of a ceremony of marriage having been gone through followed by the cohabitation of the party, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence."

(iv) The above decision is followed in V.V.Kannan V. K.Sridhar, 2004 (3) CTC 199 and Sarangapani and others V. Varadhan and others, AIR 1995 Mad 188.

15. Even if a man and woman are living under the same roof and cohabitates for a long time, the presumption of law is in favour of marriage and the children born out of the said marriage are legitimate, unless such presumption is rebutted by leading unimpeachable evidence. In the present case, the second plaintiff has proved that she is the wife of deceased Velliangiri and that is also corroborated by the evidence of P.W.2, who is the aunt of the said Velliangiri himself. In fact, the best person to speak about the factum of marriage would be the first and second defendants, who are parents of the deceased Velliangiri. The fact that they have not chosen to get into the box itself shows that they were acting against the interest of the plaintiffs.

16. The relief that are asked for in the suit is declaration of the status of the second plaintiff as legally wedded wife of Velliangiri and the first plaintiff born out of the said wedlock. In the light of the above findings, this Court is of



the view that the Courts below have rightly granted the said relief and there is no reason to interfere with the same.

17. In so far as division of properties is concerned, with respect to the second item of the property, it is the specific case of the plaintiffs themselves that the property originally belonged to Vadivelappa Gounder, who is the father of the second defendant Ammasiammal. Vadivellappa Gounder had executed a Will dated 02.09.1936 bequeathing the said property in favour of his eight daughters for life, and thereafter, to the male heirs born to them. As the father of the first plaintiff - Velliangiri is the male heir born to the second defendant, she has got no right of alienation as per the Will and only after her lifetime, it would devolve upon her male heirs. The deceased Velliangiri, being one of the male heirs of the second defendant, the first plaintiff may make a claim. Though the Will is dated 02.09.1936, according to the learned counsel for the appellants, the same is not proved under Section 63 of the Indian Succession Act or under Section 68 of the Indian Evidence Act. It is also not the case of the plaintiffs that the Will, which is very old in terms of time, has been proved in any other legal proceedings in the manner known to law. Only a certified copy of the Will has been produced and the original has also been not produced. In such situation, the claim of the plaintiffs, in the absence of proof of Will, cannot be granted and the plaintiffs cannot claim any share in the property under the Will.

17(a). Mr.N.Manokaran seriously contended that the conduct of the plaintiffs have to be taken note of, as they have come to Court very late. In support of his contentions, he invited the attention to Article 110 of the Limitation Act, 1963. The defendants had not raised the plea in their written statement. Besides, there is no material to show from when the plaintiffs were kept away. All along it had been contended that the plaintiffs were not even the members of the family. Therefore, the said contention is unacceptable.

18. Therefore, as far as the first item of the property is concerned, it is a joint family property of the Muruganna Gounder. The first defendant and the deceased Velliangiri is entitled to a share in the same and after his death, the plaintiffs have succeeded to the share of the Velliangiri along with second defendant, mother. Therefore, the plaintiffs are entitled to 5/18th share in the first item of the suit property.

19. In the light of the above discussions, the decree of the Courts below are modified, as indicated below :

(i) The judgments and decree of the Courts below declaring the second plaintiff as the legally wedded wife of the deceased Velliangiri and the first plaintiff as son of second plaintiff and Velliangiri born out of their lawful wedlock are confirmed.

(ii) The claim of the plaintiffs with respect to the second



item of the property of Vadivellappa Gounder is dismissed.

(iii) The claim of the plaintiffs with respect to the first item of the property, as granted by the Courts below, is confirmed.

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20. In the result, in the second appeal is partly allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition shall stand closed.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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To

1. The II Additional District and Sessions Judge
Tiruppur.
2. The Subordinate judge
Perundurai.

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The Section Officer
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+1 cc to Mr.S.Kaithamalai kumaran Advocate sr 19015
+1 cc to Mr.N.Manokaran Advocate sr 19410

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