

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.12.2017

PRONOUNCED ON : 17.01.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.289 of 2002

Subramaniam

...

Appellant

Vs.

1. Ramasamy Asari
2. Srinivasa Reddiar
3. Dakshinamurthy
4. Rathina Asari (Died)
5. Vaithilingam
6. Sundaram
7. Dhanalakshmi
8. Sarasu
9. Vadivelu
10. Chandra
11. Kasthuri
12. Kalpana

...

Respondents

(RR6 to 12 brought on record as
Lrs of the deceased R4 vide
order of Court dated 18.07.2011
made in CMP No.1088/2010)

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 25.10.2000 made in A.S.No.25 of 1997 on the file of the Subordinate Court, Kallakurichi confirming the judgment and decree dated 29.04.1993 made in O.S.No.258 of 1998 on the file of the Additional District Munsif Court, Kallakurichi.

For Appellant : Mrs.Mythili Suresh

For Respondent : No appearance
Nos. 1 to 5

For Respondent : Mrs.R.Meenal
Nos.6 to 12

JUDGMENT

This second appeal is directed against the Judgment and decree dated 25.10.2000 passed in A.S.No.25 of 1997 on the file of the Subordinate Court, Kallakurichi, confirming the judgment and decree dated 29.04.1993 passed in O.S.No.258 of 1988 on the file of the Additional District Munsif Court, Kallakurichi.

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

3. Suit for Partition and future mesne profits.

4. The case of the plaintiff, in brief, is that the suit properties originally belonged to Periasamy Asari, who died about 33 years ago in 1955 leaving behind him his widow Manickkammal and his adopted son viz., the first defendant as his heirs and on the death of Periasamy Asari, the said Manickkammal and the first defendant became entitled to the suit properties, each being entitled to half share in the suit properties. As the said Manickkammal had sold her half share in the suit properties to the plaintiff under a registered sale deed dated

13.06.1986, he is entitled to half share in the suit properties. Inasmuch as the plaintiff expressed his inconvenience in the joint enjoyment of the suit properties, he issued a notice dated 09.08.1986 to the first defendant and to the same, the first defendant sent a reply containing false allegations and the allegation that Manickkammal is not the wife of Periasamy Asari is false. On the other hand, Manickkammal is the second wife of the deceased Periasamy Asari and while writing the adoption deed in 1953, the scribe appears to have committed a mistake in mentioning in the said document as if both the wives of Periasamy Asari were dead. Whereas, in fact, only the first wife was dead and the second wife Manickkammal was still alive and taking advantage of the mistake committed in the adoption deed, the first defendant had sent a reply containing false allegations as if Manickkammal is not the wife of the deceased Periasamy Asari. The first defendant had alienated the portions of the suit properties to the defendants 2 to 5 and accordingly, the defendants are attempting to trespass into the suit properties to the exclusion of the plaintiff and hence, the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts and the defendants denied that

Manickkammal is the widow of Periasamy Asari and that, she is an heir to Periasamy Asari. Manickkammal mentioned in the plaint was never at any point of time, the wife of Periasamy Asari and no marriage took place between them at any point of time and Manickkammal had never lived with Periasamy Asari as husband and wife and on the death of Periasamy Asari, Manickkammal had not acquired the status of his widow and not acquired any right to the suit properties and in fact, after the death of Periasamy Asari, for the past more than 30 years, Manickkammal had never claimed any right of ownership in any of the properties left behind by Periasamy Asari as his heir and therefore, the plaintiff cannot lay any valid claim to the suit properties through Manickkammal. The truth and validity of the sale deed dated 13.06.1986 is denied and the vendor Manickkammal had no competency to convey the suit properties to the plaintiff by way of the above said sale deed and the said sale deed is a forged document and on the basis of the said sale deed, the plaintiff is not entitled to seek partition or future mesne profits. Periasamy Asari had two wives and both of them had predeceased him and accordingly, the same had also been incorporated while Periasamy Asari had adopted the first defendant as his son under the deed of adoption dated 10.02.1953 and it is false to state that by mistake the recitals had been wrongly

incorporated in the adoption deed as if Periyasamy's two wives had predeceased him. On the other hand, as on 10.02.1953 Periasamy Asari had no wife living and therefore, Manickkammal cannot claim to be the legally wedded wife of Periasamy Asari and it is only the first defendant, who as his sole heir succeeded to the properties of Periasamy Asari on his demise and on account of the long and continuous enjoyment, the first defendant along with the other defendants have acquired title to the suit properties by prescription and to the notice sent by the plaintiff, suitable reply has been given containing the true facts and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs1 to 7 were examined and Exs.A1 to A4 were marked. On the side of the defendants, DW1 was examined and Exs.B1 to B15 were marked .

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to reject the plaintiff's case. Assailing the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (a) When the oral evidence of independent witnesses, namely P.Ws.2 to 7 would clinchingly establish that P.W.2 is the wife of the deceased owner, whether the Courts below are right in law in discarding the same on the sole ground that the illiterate villagers had not spoken about the exact date of marriage?

(b) Whether the Courts below are right in law in not presuming the marriage between P.W.2 and the deceased owner based on long cohabitation as husband and wife?"

9. It is not in dispute that the suit properties originally belonged to Periasamy Asari. It is also not in dispute that the first defendant is the adopted son of Periasamy Asari and it is also admitted that the adoption deed dated 10.02.1953 marked as Ex.B1 has been executed with reference to the same and therefore, it is found that the first defendant is the legal heir of Periasamy Asari. The plaintiff has claimed to have purchased half share of the suit properties from

Manickkammal examined as PW2 and according to the case of the plaintiff, Manickkammal is the legally wedded second wife of Periasamy Asari and thus, she also succeeded to the suit properties as one of his heirs and entitled to half share in the suit properties and accordingly, she had conveyed her half share in the suit properties by way of a sale deed dated 13.06.1986 to the plaintiff marked as Ex.A1 and based on the above said document, the plaintiff has levied the suit for partition and other reliefs. It is found that the plaintiff has issued a pre-suit notice marked as Ex.A2 to the defendants and with reference to the same, the defendants had sent replies marked as Exs.A3 & A4. In the replies above stated, the defendants have disputed the marital status of Manickkammal with Periasamy Asari as claimed by the plaintiff. It has been specifically averred by them that Manickkammal is not the wife of Periasamy Asari and that, no valid marriage took place between them and they had never lived as husband and wife at any point of time and therefore, Manickkammal has no legal competency to alienate half share in the suit properties to the plaintiff under Ex.A1 on the footing that she is the one of the heirs of Periasamy Asari and therefore, according to the defendants, the plaintiff cannot claim any right whatsoever in respect of the suit properties based on Ex.A1.

10. In the light of the above defence set out by the defendants, it is found that at the foremost the plaintiff has to establish that Manickkammal, the alleged vendor of Ex.A1, is the legally wedded wife of Periasamy Asari. It is not in dispute that Periasamy Asari's first wife had died. According to the plaintiff, Manickkammal had been taken as the second wife and they had been living together as husband and wife. Despite exchange of notices between the parties as above stated, in the plaint, the plaintiff has not averred as to when actually the marriage between Manickkammal and Periasamy Asari took place and what was the mode of marriage, where the marriage took place, who had participated/celebrated the said marriage and where, thereafter, Periasamy Asari and Manickkammal had lived together as husband and wife etc., With reference to the above said facts, the plaint is completely silent. Other than stating that Periasamy Asari died leaving behind Manickkammal and the first defendant as his heirs, nothing has been whispered as to whether at all a valid marriage took place between Periasamy Asari and Manickkammal and whether at all they, thereafter, lived together as husband and wife. The above facts are required to be incorporated in the plaint. particularly, when in the reply notices marked as Exs.A3 & A4, the defendants have thrown a challenge to the marital status of Manickkammal with Periasamy Asari.

Such being the position, when the plaintiff has already been put on notice about the defence taken by the defendants and intended to be taken as the defence in the matter, with a view to portray a clear picture about his case, particularly, to base a foundation that Periasamy Asari took Manickkammal as his legally wedded wife in the manner known to law, the plaintiff, seeking the reliefs in the matter only on that footing, should have come forward with the plaint containing more particulars about the factum of marriage said to have been celebrated between Periasamy Asari and Manickkammal. However, as above seen, the plaint is conspicuously absent as regards the above said material facts for sustaining the plaintiff's case.

11. It is admitted that it is the case of the plaintiff that Manickkammal had been taken as the wife of Periasamy Asari prior to Periasamy Asari taking the first defendant as his adopted son by way of Ex.B1, the adoption deed dated 10.02.1953. So, if the above case of the plaintiff is true, it is found that if Periasamy Asari had really taken Manickkammal as his legally wedded wife prior to Ex.B1 and if the above said marriage had been performed with all the characteristics of a legal and valid marriage and if thereafter, Periasamy Asari and Manickkammal had lived together as husband and

wife in the eyes of the society and if the above facts are true, definitely, as rightly argued by the defendants' counsel, at the time of adopting the first defendant by way of Ex.B1, Periasamy Asari would have incorporated necessary recitals with reference to having married Manickkammal as his legally wedded wife. On the other hand, no reference at all has been mentioned in Ex.B1 as to the factum of Periasamy Asari having married Manickkammal as his second wife. On the other hand, the recitals in Ex.B1 would only disclose that Periasamy Asari's two wives had already predeceased him and such being the position, the above said factum alone would go to dismantle the case of the plaintiff and as Manickkammal had not been taken as the legally wedded wife of Periasamy Asari at any point of time, accordingly, no reference at all has been made pointing to the same in Ex.B1. Therefore, the plaintiff, examined as PW1 in the matter, cannot be allowed to take shelter that the recitals found in Ex.B1 had been wrongly incorporated to shield his case as such.

12. The plaintiff examined as PW1, during the course of cross examination, has clearly admitted that he does not know as to whether the marriage had been celebrated between Periasamy Asari and Manickkammal and he being the party, who had laid the suit seeking

for specific reliefs, has also not placed any material to show that after the alleged marriage between Periasamy Asari and Manickkammal, they had lived together as husband and wife and been treated as husband and wife by the society at large. If really they had been treated as husband and wife by the society at large to the knowledge of the plaintiff and if any one has apprised him of the same, when the defendants have challenged the relationship between Periasamy Asari and Manickkammal as put forth by the plaintiff, as rightly argued, the plaintiff should have named the persons in the plaint who has informed him that the above said two persons had been living together as husband and wife and also treated as husband and wife by the society at large. However, as above seen, the plaint does not contain any particulars whatsoever as regards the form of marriage between Periasamy Asari and Manickkammal and also as to whether at all they had been acclaimed as husband and wife by the society at large on account of their alleged long cohabitation as husband and wife. In such view of the mater, it is found that as regards the above said crucial aspects, the evidence of PW1 would not serve any purpose.

13. Manickkammal has been examined as PW2. She, during the course of cross examination, has admitted that it is only the first

defendant, who had performed the death obsequies of Periasamy Asari and also admitted the adoption deed Ex.B1 and however, would claim that she is not aware whether the first defendant had been taken in adoption by Periasamy Asari. This statement of hers by itself would only go to show that inasmuch as she had never lived as the wife of Periasamy Asari, it is found that she was kept in dark about the factum of adoption made by Periasamy Asari while taking the first defendant as the adopted son by way of Ex.B1. Therefore, the above aspect of the matter also would go to disclose that PW2 was not living under the same roof with Periasamy Asari at any point of time. Further, PW2 has also admitted that there is no document whatsoever to establish that she had lived as the wife of Periasamy Asari and accordingly, it is found that she has also admitted that there is no proof to show whether their marriage had been celebrated and resultantly, she is also unable to place any material to prove that both of them had been living together under the same roof as husband and wife and treated as husband and wife by the society at large. If they had been living together as husband and wife at any place, at any point of time, definitely, as rightly put forth, necessary documents would have been secured by them, like ration card, voters I.D, etc., and the non production of the above said records, prima facie would only go to

show that PW2 had never lived as the wife of Periasamy Asari at any point of time. Further, PW2 has also admitted that she had celebrated the Kumbabishegam festival of Sree Maha Mariamman temple in her village and admitted that in the stone description of the said temple, she is described only as the daughter of Hariharaputhira Asari and not as the wife of Periasamy Asari. If really, she had lived as the wife of Periasamy Asari, pursuant to a valid marriage, definitely, in the stone description of the temple, in respect of which, she had celebrated the Kumbabishegam function, she would have been described as the wife of Periasamy Asari. However, the fact that she had been described as the daughter of Hariharaputhira Asari and not as the wife of Periasamy Asari, would go to reveal that she had, at no point of time, enjoyed the status of the wife of Periasamy Asari. Hence, the evidence of PW2 does not in any manner advance the case of the plaintiff to safely hold that PW2 is the wife of Periasamy Asari and that, they had lived together as husband and wife and treated as husband and wife by the society at large. In such view of the matter, it is found that the claim of the plaintiff to the suit properties based on the purchase of the same from PW2 cannot be given any legal credence as such for the grant of the reliefs sought for.

14. PW3 Samidurai has been examined to establish the marital status of PW2. During the course of cross examination, he has admitted that he does not know about the marriage of PW2 and not a relative of PW2, such being his testimony, merely on his testimony without the support of any acceptable and reliable documents, it cannot be safely held that Periasamy Asari and Manickkammal had been living together as husband and wife under the same roof as deposed by him during the course of chief examination. As above seen, if the above factum that they had been living together as husband and wife is true, at least, some prima facie documents would have been projected to sustain the same and on the other hand, when PW3 is not the relative of PW2 and not a witness to the marriage, it is seen that his evidence cannot at all be relied upon for upholding the plaintiff's case.

15. PW4 Kannusamy would claim that Periasamy Asari and PW2 Manickkammal had been living together as husband and wife. However, during the course of cross examination, he has also admitted that he does not know about the marriage of PW2 with Periasamy Asari. Though he would further claim that Periasamy Asari is distantly related to him, there is no material forthcoming to establish the same.

He would also admit that he only learnt about the adoption of the first defendant by Periasamy Asari. If he is closely associated with Periasamy Asari definitely, he would have been a part of the adoption function conducted by Periasamy Asari, while taking the first defendant as his adopted son. Therefore, it is found that the Courts below have rightly discarded the evidence of PW4 as unreliable and untrustworthy.

16. PW5 Navammal would claim that Periasamy Asari and PW2 Manickkammal were living together as husband and wife and that, after the death of Periasamy Asari, PW2 had removed her Thaali and thereafter, it is only the first defendant, who had provided shelter and food to PW2. However, it is suggested to PW5 that enmity exists between her and the first defendant with reference to the property issue and accordingly, it is found that merely on the uncorroborated and unreliable evidence of PW5, we cannot safely conclude that PW2 and Periasamy Asari had been living together as husband and wife pursuant to a valid marriage as deposed by her. If that be the true facts, as rightly argued by the defendants' counsel, necessary records pointing to the same would have been placed by the plaintiff. PW2 herself is unable to substantiate her marriage and joint living with Periasamy Asari as his wife. Such being the evidence of PW2 herself, it

is found that PW5 appears to be more loyal than the king and has deposed as if she is in the know of things about the family of Periasamy Asari, without placing any acceptable material to substantiate her evidence. Therefore, there is no error or infirmity in the approach of the Courts below in not believing the evidence of PW5 to uphold the plaintiff's case.

17. Similarly, PW6 Rajagopal, though would claim during the chief examination that Periasamy Asari and Manickmmal marriage was celebrated, however, does not state as to when and where, the said marriage had been celebrated. Very carefully, during the course of cross examination, he has stated that the marriage was celebrated in the house belonging to Periasamy Asari and however, would accept that he does not know as to which priest had celebrated the marriage and does not know as to when, at what time, the marriage took place etc., Further, he has also admitted that he was serving in the army during a particular period of time and such being the position, it is highly doubtful whether at all PW6 would have been present at the time of the alleged marriage between Periasamy Asari and PW2 and accordingly, is unable to furnish the particulars as to the factum of marriage and such being the position, his evidence also cannot be safely relied upon to uphold the plaintiff's case.

18. PW7 Nagammal is stated to be the sister of the first defendant and she, in her evidence, has stated that PW2 is the second wife of Periasamy Asari. Further, she would also claim that after the death of Periasamy Asari, it is only the first defendant, who had been maintaining PW2. However, during the course of cross examination would assert that Periasamy Asari had not taken the first defendant as the adopted son but has also admitted that it is only the first defendant, who has been in possession and enjoyment of the property of Periasamy Asari. Therefore, it is highly doubtful whether at all PW7 would be in the know of things about the family of Periasamy Asari and such being the position, it is found that no safe reliance could be placed upon her evidence to accept the plaintiff's case and as above seen, if really Periasamy Asari and PW2 had been living together as husband and wife at any point of time, prima facie records pointing to the same would have been placed and in such view of the matter, it is seen that the Courts below have rightly not accepted the evidence of PWs 1 to 7 for upholding the plaintiff's case and I do not find any error, mistake or infirmity in the approach of the Courts below as regards the same.

19. It is further seen that though some of the witnesses of the plaintiff would state that it is only the first defendant, who had been maintaining PW2 after the death of Periasamy Asari, the case materials only would go to show that PW2 had not lived together with the first defendant and this could also be seen from the voters list marked as Exs.B11 to 15 and it is rightly found by the Courts below that there is no reference at all, as PW2 either living together with Periasamy Asari or living together with the first defendant in the above said documents and this would only probablise the theory that inasmuch as at no point of time, PW2 had lived either with Periasamy Asari or with the first defendant, it is seen that the name of PW2 is not reflected in the voters list. Moreover, the plaintiff has not established that the above said voters lists are not true and unacceptable documents. That apart, the plaintiff has not placed any document, as above seen, to uphold safely that PW2 had lived under the same roof with Periasamy Asari and after his death, with the first defendant as claimed by the witnesses of the plaintiff. In particular, it is found in Ex.B11 that the name of Periasamy Asari alone is reflected and there is no reference about PW2 in the said document. If really PW2 had lived together with Periasamy Asari as his wife, certainly her name would have been reflected in the said document and the other voters list projected also

only reflect the name of the first defendant and his wife and not the name of PW2 as living together with them. All these aspects have been rightly gone into by the Courts below and accordingly, held that the plaintiff has miserably failed to establish that PW2 is the legally wedded wife of Periasamy Asari and that, they had been living together as husband and wife and they had been treated as husband and wife by the society at large.

20. In such view of the matter, when it is found that the Courts below have properly assessed the oral and documentary evidence produced in the matter in the right perspective both on factual as well as the legal aspects and given cogent and acceptable reasons for discarding the oral and documentary evidence projected by the plaintiff for not accepting the case of the plaintiff that PW2 is the wife of Periasamy Asari and that they had been living together as husband and wife and treated as husband and wife by the society at large on account of long cohabitation etc., it is, thus, seen that no interference is called for in the judgment and decree of the Courts below rejecting the plaintiff's case. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

In conclusion, the second appeal fails and accordingly, is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

17.01.2018

Index : Yes/No

Internet : Yes/No

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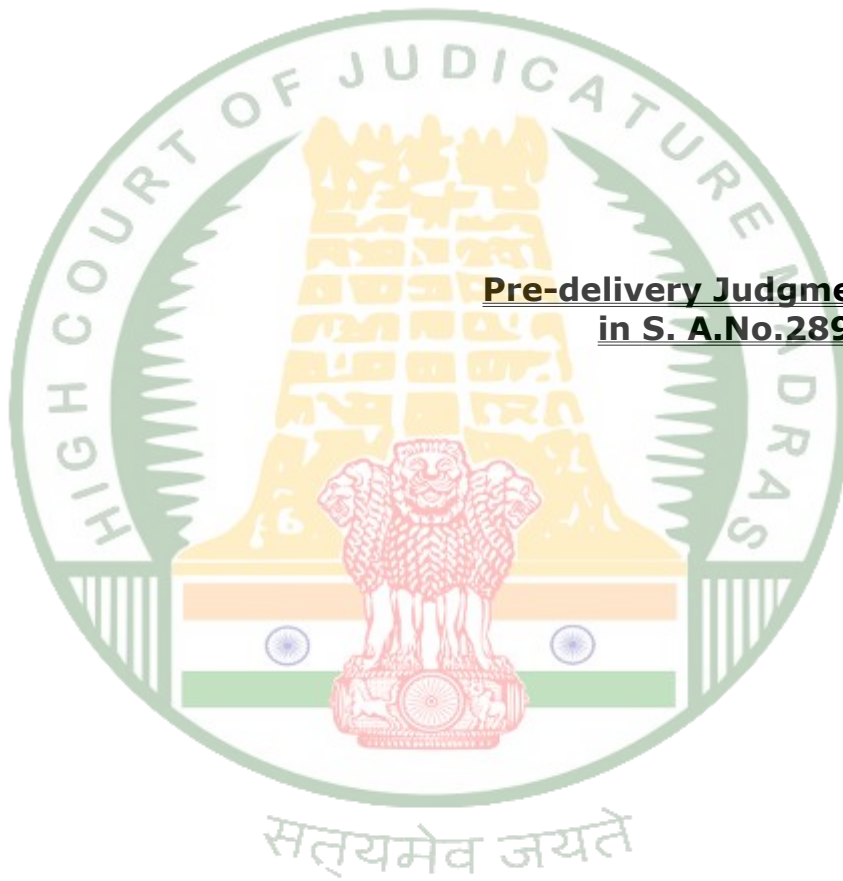
1. The Subordinate Court, Kallakurichi.
2. The Additional District Munsif Court, Kallakurichi.



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T.RAVINDRAN,J.

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**Pre-delivery Judgment made
in S. A.No.289 of 2002**

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