



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

C.R.P (MD) (PD) .No.463 of 2013

and

M.P (MD) .No.1 of 2013

R.Periyasamy

... Petitioner/1st Defendant

Vs.

P.Subramanian

... Respondent/Plaintiff

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order dated 10.01.2012 in I.A.No.38 of 2011 in O.S.No.81 of 2010 on the file of Sub Court, Kulithalai.

For Petitioner	:	Mr.K.Govindarajan
For Respondent	:	Mr.Jayavel for Mr.V.Karuna

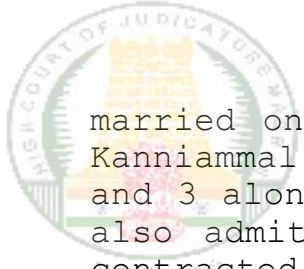
ORDER

This civil revision petition has been filed by the defendant in O.S.No.81 of 2010 on the file of the Sub-Court, Kulithalai as against the order passed in I.A.No.38 of 2011 in O.S.No.81 of 2010.

2.The brief facts, that are necessary for the disposal of this Civil Revision Petition are as follows:-

2.1.The respondent in this revision petition, as plaintiff, filed a suit in O.S.No.81 of 2010 before the the Sub-Court, Kulithalai , for partition of $\frac{1}{4}$ share in all the suit properties and for other consequential reliefs.

2.2.The case of the respondent in the plaint is that the plaintiff is the son of the first defendant and one Deivanai and he is the only male heir of the first defendant. It is further stated in the plaint that the marriage between the plaintiff's mother namely, Deivanai and the first defendant was solemnized about 35 years back. It is also the case of plaintiff that the first defendant/revision petitioner drove the mother of the plaintiff away from the matrimonial home because of the difference of opinion and dissolved their marriage in the presence of panchyathars as per custom. Though it is admitted that the first defendant later



married one Kunjammal as the second wife and another lady by name Kanniammal as his third wife, it is contended that the defendants 2 and 3 alone are the legitimate children of first defendant. It is also admitted in the plaint that the plaintiff's mother Deivanai contracted second marriage by marrying one Perumal as per caste custom. Since the suit properties are the ancestral properties of the first defendant, it is stated that the plaintiff has got a right to claim equal share along with the first defendant. Since the defendants 2 and 3 were the legitimate sons of the first defendant born after the discard of marriage between the plaintiff's mother and first defendant, it is admitted that they are also entitled to share in the suit properties.

2.3. While filing the suit, the plaintiff relied upon the LIC policy and the receipt and the plaintiff's driving license apart from Bank Passbook and the registration certificate of Motor Vehicle as documents showing the relationship between the plaintiff and the first defendant as father and son. Since the plaintiff and the defendants 2 and 3 are the members of the joint family consisting of plaintiff and his father and other two legal heirs, the plaintiff claims that he is entitled only for $\frac{1}{4}$ share and the remaining share should go to the defendants.

3. The suit was contested by the first defendant by filing a detailed written statement. The first defendant disputed the relationship between the plaintiff's mother and the first defendant and the marriage between the plaintiff's mother and the first defendant. It was stated in the written statement that the said Kunjammal is the only wife of the first defendant. It is the specific case of the first defendant that the said Deivannai/Plaintiff's mother was the wife of Perumal and that the plaintiff is the son of the said Perumal and Deivanai. In the written statement several transactions, showing the plaintiff as the son of Perumal, are referred to. As a matter of fact, in a suit filed by the first defendant for a declaration and consequential injunction in O.S.No.537 of 2004, the plaintiff has been impleaded along with his father Perumal as defendants. A settlement deed had been executed by Perumal in favour of his son, the plaintiff, on 08.10.2002. Subsequently, the same was cancelled by another document, dated 10.12.2004. Since the plaintiff mortgaged some properties in favour of first defendant, the said suit is for a declaration that the settlement deed dated 10.12.2004 will not affect the right of the plaintiff there in as an usufructuary mortgagee and consequential injunction restraining the defendants from alienating or encumbering the suit properties.

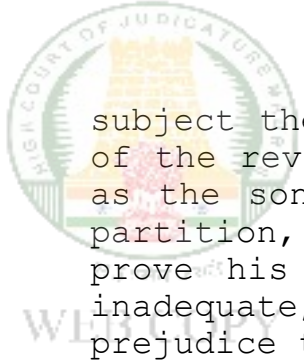
4. During the pendency of the suit in O.S.No.81 of 2010, the plaintiff filed an application in I.A.No.38 of 2011 before the Sub-Court, Kulithalai to direct the revision petitioner/first defendant in the suit to submit himself to DNA examination to compare with the DNA of plaintiff in order to prove that the plaintiff is the son of respondent / first defendant. Though this petition was opposed



by the revision petitioner, the lower Court allowed the petition by order dated 01.10.2012. It is, against the said order, the above Civil Revision Petition has been filed by the first defendant in the suit.

5. The learned Counsel appearing for the revision petitioner submitted that the petition, to have DNA Medical Examination of both the revision petitioner and the plaintiff, is an abuse of process of law and it was filed purposely with an intention to embarrass the revision petitioner. It is further submitted by the learned counsel for the revision petitioner that the respondent has filed a suit for partition alleging that his mother is the legally wedded first wife of the revision petitioner. Since the revision petitioner has disputed the marriage of the plaintiff's mother and the first defendant, the learned counsel submitted that the plaintiff has to prove the marriage of plaintiff's mother with the revision petitioner and that unless the factum and the validity of the said marriage is proved, he is not entitled to maintain the suit. It is not in dispute that the plaintiff is the son of Deivanai. If the plaintiff is able to establish that his mother was legally married to the first defendant and that the suit properties were the joint family properties of the first defendant and his ancestors, the plaintiff is entitled to claim share in the property as a member of the joint family. Till he proves the marriage between the plaintiff's mother and the first defendant, it is further stated that there is no scope for granting any relief in favour of the plaintiff in the suit. Hence it is submitted that apart from merits, the petition for comparison of DNA is unnecessary in this case and that it is meant to tarnish the reputation and to embarrass the revision petitioner.

6. In the counter affidavit filed before the Court below, the revision petitioner has stated few facts and the details of several documents which would prove that the plaintiff is the son of one Perumal and not the son of first defendant. It is not in dispute that the suit was earlier filed in O.S.No.537 of 2004 in relation to a mortgage that was executed in favour of the first defendant by the plaintiff. It is also stated that the mortgage was cleared. The settlement deed executed by the Perumal in favour of the plaintiff in the suit as early on 08.10.2002 is also relevant to note that the plaintiff has been shown as the only son of Perumal. The fact remains that in the mortgage deed executed by the respondent in favour of revision petitioner, the said Perumal was referred to as the father of plaintiff. The question whether the petition is necessary to subject the first defendant and the plaintiff for DNA samples has no consequence in this case. The plaintiff in order to succeed in the suit for partition has to prove that the suit properties are the joint family properties of the first defendant. Unless the plaintiff proves the same, he may not be succeeded. Secondly, the plaintiff has to further establish that there was a marriage between the plaintiff's mother and the first defendant. Self serving documents and claim alone cannot be relied upon to



subject the revision petitioner, to embarrass himself at the behest of the revision petitioner, who claim $\frac{1}{4}$ share in the suit property, as the son of first defendant. It is true that in the matter of partition, the burden is always on the side of the plaintiff, to prove his case. Merely because the evidence adduced by him is inadequate, the Court cannot grant relief by saying that no prejudice to the individual is likely to be caused. The Trial Court has allowed the application without considering the fact that the plaintiff has to prove the marriage between his mother and the first defendant in the suit and its validity. Further even if the plaintiff proves that revision petitioner is the biological father of plaintiff he cannot succeed in the suit as the plaintiff can at best show that he is an illegitimate son who has no right in the property during the life time of first defendant. The document produced by the revision petitioner prima facie shows that the plaintiff is the son of one Perumal and hence, the documents produced by the respondent, cannot be considered as documents, proving the relationship between the parties, as pleaded by the plaintiff. In these circumstances, this Court is inclined to allow this petition.

7.As a result, this Civil Revision Petition is allowed and the order passed by the learned Sub-Judge, Kulithalai in I.A.No.38 of 2011 in O.S.No.81 of 2010 is set aside. The application filed by the respondent herein in I.A.No.38 of 2011 in O.S.No.81 of 2010 on the file of the Sub-Court, Kulithalai stands dismissed. The plaintiff is at liberty to prove his claim by proving that his mother was legally married to first defendant and that he was born out of the wedlock. It is made clear that the question whether the plaintiff is the biological son of first defendant is not decided in this revision as it is not required at this stage. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-I)

/True copy/

Sub Assistant Registrar

To

The Sub Court,
Kulithalai.

+1cc to Mr.K.Govindarajan, Advocate, SR.No.68271.

C.R.P (MD) .No.463 of 2013 (PD)
12.06.2018

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