

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 09.07.2019

Judgment Pronounced on :12.09.2019

CORAM:

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

S.A.No.699 of 2002

1.Kuppa Gounder (Deceased)

2. Kesammal

3.Muthammal

4.Muniammal

[RR3 to 5 transposed as appellants 2 to 4 vide order of Court dated 25.01.2019 made in C.M.P.No.199/2013 in S.A.No.699/2002(CVKJ)]

...Appellants/Defendants

...Versus...

1.Elumalai

2.Panchavarann ..Respondents/Plaintiffs

PRAYER:This Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 25.06.2001 made in A.S.No.107 of 2000 on the file of the Principal District Judge, Villupuram District, reversing the judgment and decree in O.S.No.734 of 1993 dated 23.03.1999 on the file of the Principal District Munsif Court, Tirukoilur.

For Appellants:: Mr.A.K.Kumaraswamy, Senior Counsel
for M/s.S.Kaithamalai Kumaran

For R1&R2 :: Mr.A.R.Nixon

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J U D G M E N T

The defeated defendants are the appellants herein.

2. Pending the Second Appeal, the first appellant/first defendant-Kuppa Gounder died and the original respondents, namely respondents 3,4 and 5, who are the daughters of the deceased appellant-Kuppa Gounder had not joined him, though, they are beneficiaries under the settlement deed at the time of

filing of the Second Appeal and hence, they have arrayed as respondents 3 to 5. On the death of sole appellant-Kuppa Gounder, namely the first defendant, by way of an application, respondents 3 to 5 (defendants 3 to 5) were transposed as the appellants 2 to 4.

3. The respondents herein filed a suit for partition and separate possession of the respondents/plaintiffs, half share in the suit property alleging that the suit 'B' schedule properties originally belonged to one Kattaiya Kounder, who died 40 years back, 1st defendant and Muniya Gounder are his sons. After death of Kattaiya Kounder, his sons enjoyed the properties in common. When they were leading a joint family, the second plaintiff married to Muniya Gounder and from the wedlock, the first plaintiff was born. The said Muniya Gounder died of small Pox. Except the plaintiffs, no other legal heirs are available for deceased Muniya Gounder. The 1st defendant and Muniya Gounder each are entitled to half share in the suit properties. The half share of Muniya Gounder has devolved upon the plaintiffs. After death of Muniya Gounder, the second plaintiff remarried one Natesan.

4. It is further alleged by the the respondent/plaintiff that taking advantage of the absence of plaintiffs in the village, the first defendant obtained patta in his name for all the properties. The first plaintiff has been demanding partition for which the first defendant was denying. On 15.06.1992, the first plaintiff demanded partition. But, it was refused by the first defendant. It appears that in order to defeat the rights of plaintiffs, the first defendant has executed a settlement in favour of defendants 2 to 4 with respect to all the properties, for which the first defendant was not entitled. After exchange of notice, he has filed the suit.

5. The first defendant who is paternal uncle of the first plaintiff filed a written statement, which was adopted by the defendants 2 and 3, denying the entitlement of half share in the suit property, inter-alia, contending that about 28 years back, the second plaintiff was married to Muniya Gounder, but, even prior to the marriage, the second plaintiff was having illicit intimacy with one Natesan of Kadiyar village and within three months from the date of marriage, second plaintiff eloped with Natesan. Hence, Muniya Gounder-the first defendant and village elders went to Kadiyar village and effected a customary divorce (rpf;fWg;g[]) . Afterwards, Muniya Gounder got affected with small pox and he died after six months. The second plaintiff has been leading life with Natesan and through such relationship the first plaintiff was born. In addition to this, they have one male and female child. The first defendant has been enjoying the share of Muniya Gounder as II class heir, since there were No

class I heir. The plaintiffs are not having any right over the suit properties. Since, the second plaintiff was divorced by Muniya Gounder in customary way, the plaintiffs cannot be legal heirs of deceased Muniya Gounder.

6. In the written statement, it is further averred that on 11.06.1992, the first defendant has executed a registered settlement deed in favour of defendants 2 to 4, who are his daughters, by means of which, they are in possession. Since, the first defendant and defendants 2 to 4 have been in possession and enjoyment of the properties for over 40 years, they have prescribed right by adverse possession in the suit properties.

7. During trial, the plaintiffs have examined two witnesses and the defendants have examined two witnesses on their sides. Exs.A1 to A4 have been marked on the side of the plaintiffs and no exhibits have been marked on the side of the defendants. After considering the evidence let in by the witnesses and on perusing the documents filed during the course of trial, the Lower Court has dismissed the suit. Aggrieved against the judgment and decree of the Lower Court, the plaintiffs have preferred A.S.No.107 of 2000.

8. While, the Trial Court has dismissed the suit and the appeal was allowed by the Lower Appellate Court. The defeated defendants are the appellants herein.

9. This Court, at the time of admitting the Second Appeal on 29.04.2002, has formulated the following Substantial Questions of Law:-

"1. Whether the Lower Appellate Court is justified in decreeing the suit for partition especially when the paternity of the 1st plaintiff is not proved by acceptable evidence?

2. Is the Lower Appellate Court justified in granting a preliminary decree as prayed for when the second plaintiff herself admits that she is married to one Natesan when Munian was alive?

3. Whether the lower Appellate Court is justified in reversing the findings of the trial Court without considering the entire evidence on record, especially it is the final Court of fact?

10. On perusal of the pleadings in the plaint and written statement, the relationship of parties has been described as 'A' schedule. However, it is disputed by the respondents. 5 items of landed properties in Punja and Nanja in Sivanarthangal village

and one vacant site in Vadiyankuppam village have been described under 'B' schedule. It is admitted fact that the 'B' schedule properties originally belonged to one Kattaiya Gounder, whose sons are first respondent and one Muniyan and that second plaintiff was married to Muniyan.

11. Thus, P.W.1 and D.W.1 and their respective pleadings indicate that the first respondent/first plaintiff deposed that he was born to the second respondent-Panchavarnam through Muniyan. While, it is the definite plea of the first appellant/first defendant that within three months from the date of marriage, the second respondent-Panchavarnam left the matrimonial home and eloped with one Natesan and through him alone, the first respondent-Elumalai was born. Thus, the controversy involved is whether the first defendant is the legitimate son of the Muniyan Gounder, born through Panchavarnam.

12. To succeed to the half share in the property and to prove that he is son of Muniyan/first plaintiff has produced Ex.A3-voters list, in which in page 3 under S.No.298, the name of first appellant is found entered as son of Muniyan. Ex.A3 pertains to the year 1995. The suit was filed in the year 1993.

13. P.W.1 was confronted with the question in the cross-examination that he never resided in the Vadiyankuppam village. However, to prove the same, he has produced Ex.A4-Family Card and also examined P.W.2 resident of the said village who was aged about 65 years, at the time of the evidence, he had vouchsafe of the averment of the respondent/plaintiff.

14. It remains to be stated that P.W.2 in the cross-examination also deposed that no customary divorce took place between the Muniyan and Panchavarnam. This evidence assumes significance as it remains unchallenged.

15. In the absence of any motive being attributed to P.W.2 and in view of the clear evidence of P.W.2 coupled with Ex.A4, the Lower Appellate Court has held that the evidence of P.W.2 is reliable and trustworthy.

16. At this juncture, it is relevant to refer to the evidence of D.W.1. The learned counsel for the appellant submitted that there was a customary divorce between the Muniyan and the Panchavarnam and the Panchavarnam lived with Natesan only and he has specifically deposed that Ramasamy, Pattuvel, Singaram and Muthusamy accompanied by D.W.1 went to Natesan's house at Kadiyur village where the second respondent/2nd plaintiff-Panchavarnam was living with the said Natesan and effected the customary divorce as it is prevailing in their Kounder community. He has also stated that at that relevant point of time, the second respondent/2nd plaintiff-Panchavarnam

was not pregnant.

17. To substantiate the version, he also examined D.W.2-Arumugam who would state that he went along with the appellant-Kuppa Kounder and other 4 persons Singara Nattar, Kuppusamy, Kattaiya Kounder, Muthusamy and effected the customary divorce.

18. At this juncture, it is to be stated that though D.W.1 and D.W.2 deposed regarding the alleged customary divorce between the Muniyan Kounder and Panchavarnam on the ground that the second respondent-Panchavarnam was leading a illicit relationship after eloping with one Natesan, it remains to be stated that there was no reference in their evidence as to the period of happening of the alleged customary divorce. In other words, though D.W.1 and D.W.2 deposed about the customary divorce said to have taken place between Muniyan Kounder and Panchavarnam, they never mentioned or whispered anything regarding the month and year. When the said alleged factum of customary divorce had taken between the said persons. This fact assumes significance.

19. Yet another point is that in the legal notice issued by the first respondent-Elumalai as son of Muniyan Kounder and the reply issued by the appellant/defendant, there is no plea of customary divorce as projected by him in the witness box. On perusal of Ex.A2-notice, it is only stated that Elumalai-the first respondent herein is not born to Muniyan. Had there been a customary divorce, as now spoken to by D.W.1 and D.W.2, it could have been emerged as a factum during the exchange of legal notice between the parties at the earliest point of time.

20. Furthermore, in the written statement, the number of Panchayathars and Members of the families who are alleged to have been participated in the alleged customary divorce is also found to be missing and wanting.

21. As the written statement is bereft of details regarding the name of Mediators and Panchayathars at the time of effecting the customary divorce, this Court is of the considered view that the version of D.W.1 and D.W.2 at the witness box suffers from embellishment as the same has been spoken to for the first time in the witness box.

22. At the risk of repetition, however for the sake of clarity, it has to be stated that Ex.A2-reply notice, there is a total silence about the alleged customary divorce and even the written statement is bereft of details regarding name of the Panchayathars and Mediators and only in the witness box, both D.W.1 and D.W.2 have projected the same and hence, the Lower Appellate Court is right in discarding the

evidence of D.W.1 and D.W.2 as the same suffers from embellishment and in view of the clear evidence of P.W.1 and P.W.2 coupled with Ex.A4 the Lower Appellate Court categorically held that Elumalai-first respondent herein is the legitimate the son of the Muniyan Kounder having born to Panchavarnam. The said finding does not call for any interference.

23. That apart, it is the settled proposition of law that customary of divorce has to be proved strictly prevailing in the community. As has been held by this Court in M.Chandralekha Vs.Subramani and others reported in 2002 1 CTC 556 is as follows:-

"a) the respondents have not pleaded the existence in their community of a customary dissolution; b) not denied the sect of community to which they belong; c) no satisfactory evidence has been let in to prove the custom; d) witnesses have not spoken that the custom prevalent in Nattu Gounder community is also the same in Kongu Vellala Gounder community; e) none of the witnesses have spoken to about the procedure to be followed for such dissolution of marriage; and f) both the parties have not signed the document."

24. The said proposition of law was also affirmed by the Hon'ble Supreme Court in Subramani and others Vs.M.Chandralekha reported in (2005) 9 Supreme Court Cases 407 wherein also it has been held that:-

"Prevalence of customary right to divorce in a community must be specifically pleaded and established by the person propounding such custom and on facts, in absence of any pleadings or satisfactory evidence to prove that the marriage between the respondent and her husband, K, since deceased, could be dissolved."

25. In the instant case, the appellants failed to produce any iota of evidence to establish the customary right to divorce in the community.

26. In view of the evidence available on record and also the admission of P.W.1 in the cross-examination that at the time of death of the Muniyan, she was not pregnant, the second substantial question of law does not arise for consideration and the same is wrong framed erroneous on fact.

27. On a combined reading of the evidence of P.W.1 and P.W.2 coupled with Ex.A1 and Ex.A4, the Lower Appellate Court

has rightly come to the conclusion that the paternity of the first plaintiff was proved in the manner known to law by adducing legally acceptable evidence and the Panchavarnam, the second plaintiff has not married Natesan when Muniyan was alive and only after the death of the Muniyan, she was married to the said Natesan.

28. It remains to be stated that though defendants 2 to 4 who are now the appellants 2,3,4 on the death of the sole appellant. They have never joined their father for filing the Second Appeal. This factor also leads an indication as to the nature of the relationship of Kuppa Gounder with his children.

29. In view of the above discussion, all the Substantial Questions of Law framed at the time of the admission, does not merit consideration on the above factual position and hence, all the three Substantial Questions of Law are answered in the negative against the appellants/defendants. Consequently, there is no merit in the Second Appeal.

30. In the result, this Second Appeal is dismissed. No costs. The judgment and decree of the First Appellate Court is confirmed.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

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To

1. The Principal District Judge, Villupuram District,

2. The Principal District Munsif, Tirukoilur.

3. The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.A.R.Nixon, Advocate SR.No.78860

+1cc to Mr.A.K.Kumaraswamy, Advocate SR.No.78756

S.A.No.699 of 2002

KJI (CO)
GMY (08/11/2019)