



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03.04.2019

WEB COPY

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A.Nos.26 and 27 of 2011
and M.P.No.1 of 2011

1.Venugopal
2.Mannangatti
3.Varadaraj
4.Rekha
5.Sivaraj .. Appellants/Respondents
/Defendants
[in S.A.No.26 of 2011]

1.Venugopal
2.Varadaraj
3.Rekha
4.Sivaraj .. Appellants/Defendants
[in S.A.No.27 of 2011]

versus

Rani .. Respondent/Appellant/
Plaintiff
[in both S.As]

COMMON PRAYER: Second Appeals have been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 31.08.2010 made in A.S.Nos.49 and 47 of 2008 respectively on the file of the learned Subordinate Judge, Kallakurichi, modifying the judgment and decree dated 23.04.2008 made in O.S.No.557 of 2003 passed by the III Additional District Munsif, Kallakurichi.

For Appellants : Mr.A.Gouthaman
[in both S.As]

For Respondent : Mr.P.Valliappan
[in both S.As]

C O M M O N J U D G M E N T

These Second Appeals have been filed as against the common order passed by the First Appellate Court in Appeal Suit Nos.49 and 47 of 2006 respectively.



2. The suit was originally filed by the plaintiff against the first defendant for partition of her 1/4th share in the suit properties. The plaintiff claiming that she is the daughter of the first defendant born through her mother, Palaniammal. According to her, the properties are ancestral properties.

3. The defendants denied the contention of the plaintiff. It is their contention that the plaintiff's mother was lived with the first defendant only for few years and thereafter, she left him and there was a customary divorce in the village. After such divorce, the first defendant has married one Mallika and the defendants 3 to 5 are the children of the first defendant through Mallika. It is their further contention that the plaintiff is born through one Selvam. In additional written statement, it is the contention of the defendants that Muruga Gounder was the father of the first defendant, he divided the suit properties into two equal shares and also executed the Will in respect of one share to the defendants 3 to 5 and other share to the children of the second defendant.

4. The trial Court has framed necessary issues. Before the trial Court, on the side of the plaintiff, P.W.1 to P.W.4 were examined and Ex.A.1 to Ex.A.5 were marked. On the side of the defendants, D.W.1 to D.W.3 were examined and Ex.B.1 and Ex.B.2 were marked. The trial Court has decreed the suit, passing preliminary decree to 1/10 equal share to the plaintiff, as against which, two Appeals have been filed. The First Appellate Court has modified the decree and granted 1/4th share to the plaintiff in the suit properties. As against which, the present Second Appeals are filed.

5. The learned counsel appearing for the appellants would submit that Muruga Gounder has also executed the Will in favour of the third defendant and others, therefore, the plaintiff has no right in the properties.

6. The learned counsel appearing for the respondent would contend that both the Courts below found that the Will has not been proved and the evidence to be disbelieved, further execution and attestation has not been believed by the trial Court. Similarly, the plaintiff stated that she is the daughter of the first defendant born through the first marriage whereas the defendants 3 to 5 are born through the second wife and there is no evidence available on record to show that there was a



customary divorce. Similarly, the allegation that the plaintiff is not born to the first defendant that has not been established by the first defendant. The presumption under Section 112 of the Evidence Act, would also not in favour of the first defendant. Hence, submitted that there is no merit in the appeals and prayed for dismissal.

7. These appeals are filed as against the finding of the First Appellate Court. It is not in dispute that the properties originally belongs to one Muruga Gounder, the suit properties are ancestral properties and the defendants 1 and 2 are his sons. The plaintiff claimed a share in the properties as the daughter of the first defendant born through the first wife. Though it is contended by the defendants that the plaintiff is not born to the first defendant and born to somebody that factum has not been established by the defendants, in fact the marriage of the first defendant with one Palaniammal, mother of the plaintiff is admitted.

8. The only contention of the first defendant and others is that the marriage was customary divorced but that has not been established. Similarly, the plaintiff born in 1978, if the first defendant disowns the paternity of the plaintiff, he must prove the non access between himself and Palaniammal, during the relevant period, in which, the plaintiff born. As the non access proved and established by the husband, he cannot contend that the plaintiff born to his first wife is not his daughter. Hence, the Courts below correctly found that the plaintiff is the daughter of the first defendant.

9. It is also not in dispute that the defendants 3 to 5 are born to the second wife and that the second marriage itself is not valid under law, the defendants 3 to 5 certainly come under the category of illegitimate children, though they born to the second wife. Therefore, they cannot claimed any equal rights in the properties in the joint family properties. At the most, they are entitled to claim share from their father, namely, the first defendant whereas the plaintiff born to the first wife, she is also entitled to equal share. Though the Will has been projected by the defendants, the trial Court and the First Appellate Court disbelieved the Will and execution and attestation has not been established. The Courts below found that there are inconsistency and discrepancy in the evidence of D.W.2 and D.W.3 and found that the Will has not been valid. The First Appellate Court also found that the evidence of the



attesting witness do not satisfy the attestation and disbelieved the Will. When the Courts below factually found that the Will has not been proved as per law, I do not find any substantial questions of law.

WEB COPY

10. With these observations, these Second Appeals are dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

sri

To

1.The Subordinate Judge,
Kallakurichi.

2.The III Additional District Munsif,
Kallakurichi.

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

+1cc to Mr.A.Gouthaman, Advocate Sr.32174

+2cc to Mr.P.Valliappan, Advocate Sr.32464

S.A.Nos.26 and 27 of 2011
and M.P.No.1 of 2011

rv[col]
srg 25/09/2019