

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 30.10.2019	Delivered on 12.11.2019
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CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.360 of 2014

and MP No.1 of 2014

1. P.Duraisamy

2. Ravichandran

3. Babu Sundar

4. Maheswari

5. Kalaiselvi

6. B.Alamelu ..Appellants/ Defendants1,3 to 7

vs.

1. D.Latha

2. D.Sasidevi

3. D.Selvakumar ... Respondents/Plaintiff/2nd Defendants

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 27/11/2013 made in A.S.No.22 of 2012 on the file of the Principal Sub Court, Salem, confirming the judgment and decree dated 20.10.2011 made in OS No.1232 of 2008 on the file of the III Additional District Munsif Court, Salem.

For Appellants : Ms. Zeenath Begum

For Respondents R1&R2 : Mr. R.Nalliappan

J U D G E M E N T

The defendants 1 and 3 to 7 in OS No.1232 of 2008 having suffered a decree for partition and separate possession of the

plaintiff's 2/8th share in the suit properties at the hands of the Courts below have come up with the above Second Appeal.

2. According to the plaintiffs, the suit properties are ancestral properties of the plaintiffs and the defendants. The first defendant/father of the plaintiffs had married the plaintiff mother Pachiammal, 45 years prior to the filing of the suit. Since the couple did not have any issues for some time, the first defendant married Bothamani @ Maniammal, as his second wife. It is claimed that both the wives and the first defendant were living under the same roof and children were born through both the wives. The plaintiffs are the daughters of the first defendant through his first wife Pachiammal and the second defendant is the son. While the defendants 3 and 4 are the sons of the first defendant through his second wife Bothamani @ Maniammal, defendants 5 and 6 are the daughters. Claiming that the plaintiffs have been in joined possession of the enjoyment of the suit properties along with the defendants and the defendants attempted to alienate the valuable properties to the prejudice of the plaintiffs, the plaintiffs have sued for partition and separate possession of their 1/8th share in the suit property.

3. The suit was resisted by the defendants contending that the mother of the plaintiffs and the second defendant Pachiammal was not legally wedded wife of the first defendant. According to the first defendant, he had married Bothamani @ Maniammal alone. The first defendant would further aver that he developed contact with Pachiammal, who was a Nurse when he was an inpatient in the Hospital, after suffering an accident. It was claimed that he started living with her and out of such union, the plaintiffs and the second defendant were born. Thus, that it could be seen that the first defendant while acknowledging the paternity of the children, pleaded that there was no marriage between Pachiammal and the first defendant. Since the properties were admittedly ancestral properties and the plaintiffs and the second defendant are only illegitimate children they are not entitled to claim partition during the lifetime of the first defendant. On the above contention, the defendants sought for dismissal of the suit.

4. The Trial Court on a consideration of the evidence on record particularly the evidence of P.W.2 concluded that Pachiammal was the first wife of the first defendant. P.W.2 who is close relative of the first defendant also deposed that the first defendant had married Bothamani @ Maniammal, as his second wife and defendants 3 to 6 were born through Bothamani @

Maniammal. Considering the said evidence of P.W.2, aged about 80 years, who is also related to the first defendant, as well as the evidence of the first defendant in cross-examination, the Trial Court concluded that Pachiammal is the first wife of the first defendant. The Trial Court also took note of the fact that there was no positive evidence let in on the side of the defendants to show that the exact date of marriage between the first defendant and Bothamani @ Maniammal. Therefore, the Trial Court decreed the suit as prayed for. Aggrieved the defendants preferred an appeal in AS No.22 of 2012.

5. The Lower Appellate Court agreed to the conclusions of the Trial Court. In the Appellate Court an application was filed by the appellants/defendants seeking permission to let in additional evidence. The said application was allowed and the documents namely, the personal history of Duraisamy, maintained by his employer was marked as Ex.B1 and the Service Register of Pachiammal was marked as Ex.B2. The Lower Appellate Court taking note of the admission by the first defendant that the plaintiffs and the second defendant were born to him and Pachiammal, concluded that a marriage could be presumed by long cohabitation between the first defendant and Pachiammal. The Lower Appellate Court also invoke Section 16 of the Hindu Marriage Act, to reach a conclusion that, even assuming that the plaintiffs and the second defendant are illegitimate children of the first defendant through Pachiammal, they would be presumed to be legitimate, in view of Section 16 of the Hindu Marriage Act. Upon such a conclusion, the Lower Appellate Court dismissed the Appeal and confirming the judgment and decree of the Trial Court. Aggrieved the defendants 1 and 3 to 7 are on appeal.

6. The following questions of law were framed at the time of admission:

1. Whether there is any cause of action to institute the present suit during the life time of the first appellant?
2. When the plaintiffs have not proved the factum of marriage between their mother and the first appellant, then, whether they would be entitled to the benefit available under Section 16(3) of the Hindu Marriage Act?
3. Whether the Courts below sought to have drawn an adverse inference against the plaintiffs for not examining their mother Pachiammal as a witness to prove her marriage with the first defendant?

7. I have heard Ms. Zeenath Begum, learned counsel appearing for the appellants and Mr.R.Nalliappan, learned counsel appearing for the respondents.

8. Elaborating on the questions of law, Mr.Zeenath Begum, learned counsel appearing for the appellants would contend that the Courts below were wrong in granting a decree for partition after having reached a finding that the plaintiffs and the second defendant are illegitimate children of Pachiammal and Duraisamy, namely, the first defendant. According to the learned counsel, the illegitimate children do not get a right by birth in the joint family property. They would be entitled only to a share in their father's share and they do not have a right to sue for partition even during the lifetime of the father. There is no controversy on the legal submissions of the learned counsel for the appellants. The illegitimate children who are deemed to be legitimate by virtue of Section 16 of the Hindu Marriage Act, do not get the status of a coparcenor and they do not get a right by birth over the properties of the joint family.

9. Of course, the question whether such illegitimate children who are deemed to be legitimate, under Section 16 of the Hindu Marriage Act, would be entitled to a share equal to that of a coparcenor is pending on a reference before the Larger Bench of the Hon'ble Supreme Court, but the law as on today is that the deemed legitimate children would not be entitled to devolution under Section 6 as coparcenor and they would only inherit under Section 8 and Class I heirs. But in the case on hand, the Trial Court has categorically found that Pachaimmal, mother of the plaintiffs, and the second defendant was the legally wedded wife of the first defendant and as such, the question of applicability of Section 16 of the Hindu Marriage Act, did not arise at all.

10. While referring to the arguments of the learned counsel for the defendants based on Section 16, the Trial Court had specifically pointed out that it has decided that the plaintiffs have proved that the first defendant had married Pachiammal 50 years prior to the filing of the suit and the defendants failed to prove that the first defendant married Bothamani @ Maniammal in 1962. It has also specifically said that discussions as to legitimacy or otherwise under Section 16 of the Hindu Marriage Act is wholly unnecessary. Therefore, the finding of the Trial Court is that Pachiammal was the legally wedded wife of the first defendant Duraisamy.

11. The Lower Appellate Court has not disturbed the finding of the Trial Court on the status of Pachiammal, as the first wife of Duraisamy, all that the Lower Appellate Court said is that even assuming that there was no marriage between Duraisami and Pachiammal, Section 16 would come to the aid of the plaintiffs. Therefore, it is the correctness of the finding of the Trial Court regarding the status of Pachiammal, which should be now gone into. The trial Court had relied upon the evidence of P.W.2, who is aged about 80 years is also related to the first defendant, to conclude that Pachiammal was married by Duraisami, over 50 years, prior to the filing of the suit and he married Bothamani @ Maniammal, as his second wife, a few years after the first marriage. The first defendant would admit that he was living with Pachiammal and the plaintiffs and the second defendant were born to him.

12. Ex.B2 is the Service Register of Pachiammal, maintained by her employer viz., The Government of Tamil Nadu, the same has been opened on 25.04.1970, at the time when she joined as an auxiliary Nurse in the Primary Health Centre, at Ariyapalayam, Salem District. Even in the Service Register of Pachiammal has been described as wife of Duraisamy, the first defendant and she shown to be residing at Sunnonbu Choolai Medu, Uthamasolapuram, Veerapandy, Salem District. Even in the plaint, the address of the defendants has been given as Choolai Medu, Uthamasola puram, Salem District.

13. Though it is claimed that by the defendants that the first defendant had married Bothamani @ Maniammal, in the year 1962, as rightly pointed out by the Trial Court, there is no evidence regarding the exact date of the marriage, the Trial Court has also adverted to the evidence on record particularly, the evidence of the first defendant as D.W.1, to buttress its conclusion that Pachiammal would legally wedded wife and Bothamani @ Maniammal, is the second wife of the first defendant. The Lower Appellate Court has not disturbed the said findings regarding the status of Pachiammal and Bothamani @ Maniammal. The Lower Appellate Court while confirming those findings had only added that even assuming that Pachiammal is the second wife, her children would be deemed to be legitimate children under Section 16 of the Hindu Marriage Act.

14. While doing so, the Lower Appellate Court apparently overlooked the status of such children or the rights of such children, who are deemed to be legitimate, by virtue of Section 16 of the Hindu Marriage Act. The conclusion of the Trial Court

regarding status of Pachiammal, has to be necessarily upheld as the same is based on valid evidence and the same cannot be said to be perverse or without any basis. I must point out here that the Appellate Court had not discussed the evidence of P.W.2 or D.W.1 at length, when it agreed with the findings of the Trial Court on the status of Pachiammal as the first wife of Duriasami. Since the Appellate Court had not adverted to the entire evidence on record, I had looked into the evidence of P.W.2 as well as D.W.1 and the documentary evidence available. The evidence on record both oral and documentary, in my considered opinion, shows that the plaintiffs and the second defendant were born to Pachiammal and the first defendant.

15. Ex.B2, the Service Register of Pachiammal, which has been produced by the appellants themselves, before the Lower Appellate Court shows that Pachiammal has been recorded as the wife of Duraisami, even when she entered service in 1970. Therefore, the plea of the first defendant that he got into the contact with Pachiammal only in the year 1975, when he met with an accident is falsified by Ex.B2. Of course there was no direct evidence regarding the marriage between Pachiammal and Duraisami. But the Marriage is said to have taken place 45 years prior to the filing of the suit that is quite impossible parties to produce direct evidence on the factum of marriage.

16. In the case on hand, the evidence of P.W.2, admissions of D.W.1 as well as the documentary evidence in the form of the Service Register of Pachiammal and the marriage invitation that has been produced would to a great extent proper probalise the case of the plaintiffs that Pachiammal was married Duraisami as the first wife and thereafter, Duraisami took Bothamani @ Maniammal, as his second wife. Therefore, the findings of the Trial Court with reference to status of Pachiammal as the first wife of the first defendant will have to be confirmed and it is accordingly confirmed. The Courts below have, however, granted a decree for 1/8th share to the plaintiffs and defendants 1 to 6.

17. As already pointed out by the learned counsel for the respondent, the computation of shares made by the Courts below is incorrect. The character of the properties that ancestral joint family property, is admitted. Once Pachiammal is found to be the first wife of the first defendant Duraisami, then by virtue of the Hindu Succession Amendment Act 39 of 2005, Duraisami the first defendant, Selvakumar the second defendant

and the plaintiffs would be entitled to equal shares as coparceners in the joint family. Therefore, each one of them would get 1/4th share. The defendants 3 to 6, who are children of the first defendant through Bothamani @ Maniammal, would not get a right by birth in the suit properties and they would not be entitled to a share till Duraisami is alive. Therefore, the Courts below should have granted a decree for 2/4th share in favour of the plaintiffs instead of 2/8th share.

18. The suit being one for partition, the endeavour of the Court should be to grant appropriate shares that the parties are legally entitled to. The non filing of the appeals by the defendants against the judgment of the Trial Court or their prayer seeking 1/8th share cannot deter the Court from granting just shares the parties would be entitled to under law. Therefore, it is found that the plaintiffs would be entitled to 2/4th share in the suit properties as daughters cum coparceners along with Duraisami and the second defendant Selvakumar,

19. In view of the above conclusions, the first question of law is answered to the effect that the plaintiffs being coparceners, in view of the provisions of the Hindu Succession Amendment Act 39 of 2005, are entitled to maintain the suit, during the life time of the first defendant.

20. The second question of law relating to the deeming provision under Section 16(3) of the Hindu Marriage Act, need not be answered in view of the fact that I have confirmed the factual findings of the Trial Court to the effect that Pachiammal is the first wife of Duraisami and the plaintiffs and the second defendant are the children born out of such marriage.

21. On question of law No.3, the non examination of Pachiammal, no doubt, would cast a cloud on the case of the plaintiffs, but the evidence on record particularly, the evidence of P.W.2 and the admissions of D.W.1 during cross-examination would conclusively establish that Pachiammal had married Duraisami ahead of Bothamani @ Maniammal, and therefore, there is no need for drawing an adverse inference against the plaintiffs for non-examination of Pachiammal.

22. In view of the conclusions, the Second Appeal is dismissed. However, exercising power under Order XLI Rule 33 of

the Code of Civil Procedure, the judgment and decree of the Courts below are modified granting a preliminary decree declaring the plaintiffs' 2/4th share in the suit properties. However, in the circumstances of the case, there will be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(co)

//True Copy//

Sub Assistant Registrar

jv
To

1. The Principal Subordinate Judge,
Salem.
2. The III Additional District Munsif,
Salem.

Copy to:

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

+1cc to Ms. Zeenath Begum , Advocate SR.No. 93669

+1cc to Mr.R.Nalliappan , Advocate SR.No. 93655

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and MP No.1 of 2014

A.SK(11/11/2020)

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