

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 27.09.2019	Delivered on 15.10.2019
---------------------------	----------------------------

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.248 of 2014

and MP No.1 of 2014

1.R.Selvam : Appellant/Appellant/Plaintiff

vs.

1.Murugan @ Raju

: 1st Respondent/1st Respondent/1st Respondent

2.Malliga

: 2nd Respondent/2nd Respondent 2nd Respondent

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 23.01.2014 rendered in AS No.258 of 2006 on the file of the Principal District Judge at Puducherry, confirming the decree and the judgment dated 28.08.2003 rendered in O.S.No.190 of 1994 on the file of the Principal Subordinate Judge, Puducherry.

For Appellant : Mr.S.Subbiah, SC
Mr.P.Raja

For Respondents : Mr. V.V.Sairam

J U D G E M E N T

The plaintiff in OS No.190 of 1994, a suit for declaration and recovery of possession was dismissed by the Trial Court and confirmed by the Lower Appellate Court, has come up with this Second Appeal.

2. According to the plaintiff, the suit property belonged to one Kuppusamy son of Subburayan. The plaintiff became a tenant under the said Kuppusamy in the year 1982 and he was doing business in roasted nuts and edible cereals. In the year 1980 Kuppusamy had mortgaged the property with the plaintiff as a security for the borrowing of a sum of Rs.5,000/-. The said Kuppusamy died on 30.06.1990, leaving behind his Widow Adilakshmi as his only legal heir. Adilakshmi unable to repay the mortgage loan agreed to convey the property to the plaintiff and eventually sold the property for a consideration of Rs.47,000/- on 17.09.1993 to the plaintiff.

3. It is the further claim of the plaintiff that a portion of the property collapsed due to the heavy rains during October and November 1993 and hence the plaintiff was forced to stop his business. Taking advantage of the same, the first defendant trespassed into the property and occupied the same. Claiming that he is the absolute owner, pursuant to the Sale Deed executed by Adilakshmi on 17.09.1993, the plaintiff seeks a declaration of his title and recovery of possession.

4. The suit was resisted by the first defendant contending that Adilakshmi was not wife of Kuppusamy. It is the case of the first defendant that Kuppusamy had married his mother Jayalakshmi in the year 1958, through the said wed-lock, two children were born i.e., the first defendant himself and one Mallika. Therefore, according to the first defendant, the first defendant himself, the said Jayalakshmi and his sister Malliga are the only heirs of Kuppusamy. It was also claimed that the Sale Deed executed by Adilakshmi dated 17.09.1993 in favour of the plaintiff would not confer any title to the plaintiff. A plea of non-joinder of necessary parties was also raised, pursuant to which the plaintiff had impleaded the second and third defendants who are the mother and sister of the first defendant.

5. The learned Principal Subordinate Judge, Pondicherry, who tried the suit. Upon a consideration of evidence on record concluded that Adilakshmi is the legally wedded wife of Kuppusamy. The learned Subordinate Judge also concluded that the first defendant is the son of Kuppusamy through the second defendant Jayalakshmi. This conclusion was arrived at by the learned Subordinate Judge, based on the fact that the present plaintiff himself had impleaded the first defendant as the son of Kuppusamy in the suit filed by him for recovery of money, based on the mortgage in OS No.250 of 1991.

6. The first defendant had also produced certified copies of certain other legal proceedings in OS No.954 of 1988 and EP No.435 of 1989 wherein the first defendant was shown as son of Kuppusamy. Considering the evidence, the learned Subordinate Judge concluded that though Adilakshmi is the legally wedded wife of Kuppusamy, the first defendant and the third defendant are the children of Kuppusamy born through Jayalakshmi, therefore, being the children of the second wife, the first and the third defendant would be illegitimate children of Kuppursami deemed to be legitimate children and as such, they would also be entitled to the property of Kuppusamy. On the aforesaid findings, the learned Subordinate Judge dismissed the suit for declaration and recovery of possession, leaving it open to the plaintiff to file a suit for partition.

7. Aggrieved the plaintiff preferred an appeal in AS No.258 of 2006 on the file of the Principal District Judge, Pondicherry. The learned Principal District Judge concurred with the findings of the Trial Judge and dismissed the appeal. The learned Appellate Judge also framed an issue relating to non-joinder of necessary parties and found that the vendor of the plaintiff namely, Adilakshmi is a necessary party to the suit. The plaintiff has come up with this Second Appeal, challenging the judgment of the Lower Appellate Court made in AS No.258 of 2006.

8. The following substantial questions of law were framed at the time of admission.

1. When a person was already legally married, and when, children were born to him through another woman, whether the finding that they are illegitimate children in between the said person and another woman is lawful, without any proof of marriage in any form under Section 16 of the Hindu Marriage Act?
2. When the alleged marriage itself was not proved, by the person claiming to have undergone a form of marriage, in accordance with the provisions of the Hindu Marriage Act, though, it might be invalid in view of Section 11 of the Hindu Marriage Act, whether, without any proof of such a marriage, any children born to them could be held to be their illegitimate children?
3. When the party to a marriage was very much alive and capable of giving an evidence, whether any other evidence is admissible or reliable to hold the performance of the so called marriage and as such, whether, any other evidence could be received and relied upon, without the examination of a party to an alleged marriage?
4. Whether a customary law of succession among the Hindus in Pondicherry would over ride the provisions of Section 6 of the Hindu Succession Act?

9. I have heard Mr.S.Subbah, learned Senior Counsel appearing for Mr.P.Raja, for the appellant and Mr.V.V.Sasiram, learned counsel appearing for the respondents.

10. Mr.S.Subbiah, learned Senior Counsel appearing for the appellant would vehemently contend that the Courts below erred in presuming the legitimacy of the respondents 1 and 3 in the absence of proof of a marriage between Kuppusamy and Jayalakshmi. He would also contend that the Courts below were not right in invoking the Customary Hindu Law and deciding the status of respondents 1 and 3 based on the Customary Hindu Law. He would also contend that on and from the date of enactment of

the Hindu Succession Act 1956 and the enactment of Hindu Marriage Act 1955, all Customary Laws applicable to Hindus stood abrogated in view of the provisions of Section 4 of the Hindu Succession Act and Hindu Marriage Act, which provide that any Customary Law applicable will cease to have effect with respect to any matter for which the provision is made under the said enactments, namely, the Hindu Marriage Act and the Hindu Succession Act. It is not in dispute that both the enactments were extended to Pondicherry from 01.10.1963.

11. Admittedly the parties namely, Kuppusamy and Jayalakshmi were Hindus living Pondicherry. The Customary Hindu Law applicable in the then British India or the enactments in British India which prohibited bigamy do not apply in the French Territory of Pondicherry. It is in evidence that Kuppusamy and Jayalakshmi got married some time in 1958, when Pondicherry was still a French Territory. Therefore, the validity of the second marriage between Jayalakshmi and Kuppusamy would depend on the Law that was in force in Pondicherry at the relevant point of time. Title V of the French Code Civil deals with marriages, Article 147 of the Code Civil declares a second marriage as unlawful. It reads as follows:

"Article 147: It is not lawful to enter into a second marriage before the first has been dissolved."

12. The parties being Hindus the law relating to marriage or its validity provided under the French Code Civil will not apply to them. We have to therefore necessarily look into the Customary Hindu Law as has been in vogue in the Pondicherry Region during the French regime. In the book on French Hindu Law authored by Thiru.S.Perumal, titled as "Civil Law as applied to Hindus of Union Territory of Pondicherry" by J.Sanner, the then Attorney General of Chief of the Judiciary, the law relating to marriage of Hindus in Pondicherry is dealt with in first Chapter of Title V. As per the customary law in Pondicherry, the capacities and conditions required to contract the marriage are as follows:

"No condition as to age required for the future spouses. The consent of spouses is not necessary for the validity of the marriage under Brahma and Assura forms, on the contrary, the assistance of parents, at least on the father's side, is generally required. Physical capacity to contract marriage, identity of caste, absence of prohibitions based upon kinship and identity of religion are required for validity of a marriage."

13. As regards the existence of the prior marriage, the law is stated as follows:

"In existence of a prior marriage: Article 147 of Code Civil proclaims that a second marriage cannot be contracted before the dissolution of the First Union. This rule, does it exist in Hindu Law? We must distinguish whether the second marriage is contracted by the wife, or by the husband.

So far as Hindu wife is concerned, not only the existence of a prior non-dissolved marriage, is an absolute obstacle to the celebration of a second union, but in castes said to be higher or middle, even the widow is not authorised to contract a second marriage. The campaign, conducted since more than forty years by some propaganda societies, composed of enlightened Hindus, in view of reacting against the usage, of which the consequences are so deplorable, brought only some meager fruit, The caste retains its traditions, although they don't correspond to any social conception of the present times and opposes a blind resistance to the laudable enterprises of those who wish that the institutions of their country should follow the progress of ideas and manners.

This resistance, we must admit, has, as foundation, in some castes, the religious faiths. For many a Hindu, the marriage is a sacrament so indissoluble, that the ties are not broken, at least, from the religious point of view, by the death of one of the spouses. The Appellate court made upon it, its judicious remark, in its judgment of 25 Mai 1897. As women have no right to have two husbands; the widow is unable to marry again.

Compared with the husband, the contract certainly does not change its character. It is also indissoluble. But, the widower can, contract a second marriage, the polygamy is allowed for the man in great majority of castes.

Yet, the husband, who wants to contract a new union is-he bound to get the prior consent of his first wife?

It was held that, this authorization was necessary in principle, except in some cases (incurable sickness of the first wife, sterility, death of all her children after ten years of marriage, absence of male child after eleven years), and it was also held, that the lack of

consent, in some non authorized cases, vitiated the second marriage."

14. While discussing the question of nullity for marriage, the Customary Hindu Law as it existed in Pondicherry enunciated by J.Sanner, reads as follows:

"Nullity deriving from the existence of a first marriage. The existence of a first marriage is, as we have said for the Hindu wife, an unsurmountable impediment for the celebration of a new union. The nullity of the marriage contracted in spite of this prohibition is absolute.

So far as the husband is concerned, the existence of such Union, is-it a cause of nullity of the new marriage? And the first wife, is-she entitled to propose the nullity of the second contract?

Mr.Sorg in his study of this question (treatise of Hindu law page 57) remarks at first, that according to British doctrine and jurisprudence, the Hindu is not under any restriction, so far as the number of wives is concerned and he can contract a second marriage without the consent of his first wife.

But the same author affirms that the custom is different at Pondicherry. The husband can take a second wife, only when the first one agrees, or when she is sick with an incurable disease, or if she did not beget any male child; A sterile woman can be replaced after eight years of marriage, a woman whose children are all dead, after ten years and that who begot only girls, after the eleventh child."

A reading of the above text would show that there was no absolute prohibition of a second marriage in the Pondicherry region, prior to the extension of the Hindu Marriage Act to Pondicherry. However, there were certain restrictions on second marriage. The restriction in respect of Hindu wife is absolute and the same is not the case in respect of Hindu husband. He is allowed to contract a second marriage either with the consent of the first wife or in some cases without her consent, like when the first wife suffering from incurable diseases, sterility, death of all her children after 10 years marriage or absence of male child after eleven years.

15. The second marriages contracted by the husband in cases where the exceptions existed can not be termed a nullity. Therefore, a second marriage that had taken place when the

conditions stated above existed would be perfectly a legal marriage and therefore, there is no question of the children born out of such marriage being held to be illegitimate children. Even under the Code Civil the illegitimate children can be legitimated by a subsequent marriage of the parents as per Article 333, which reads as follows:

"Article 333: Children legitimated by a subsequent marriage have the same rights as if they were born in wed lock".

16. Article 331 provides for legitimation of illegitimate children by acknowledgment of the parents in the form provided by law, either before marriage or at the time of marriage.

17. Article 334 of the Code Civil provides that illegitimate child can be acknowledged by a document drawn up before a notary when the acknowledgement did not take place in the birth record itself.

18. I do not think we need to delve further into the issues relating to legitimacy or illegitimacy, in view of the fact that the first respondent was born on 08.10.1965 as evidenced by Ex.B6, i.e., after the extension of the Hindu Marriage Act to Pondicherry. It now become necessary for us to consider the contention of Mr.S.Subbiah, learned Senior Counsel appearing for the appellant regarding proof of a valid marriage. The said contention of Mr.S.Subbiah, proceeds on the footing that a second marriage is illegal and the first respondent could claim as a legitimate child, only under Section 16 of the Hindu Marriage Act.

19. Section 16 of the Hindu Marriage Act, reads as follows:
Section 16: Legitimacy of children of void and voidable marriages.-

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being

annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

A reading of Section 16 would demonstrate that the same has been enacted with avowed object of preventing bastardisation of children born out of void or voidable marriage. It would apply to a case where the marriage contracted between the spouses is either void under Section 11 of the Hindu Marriage Act or is voidable on any of the grounds found in Section 12 of the said Act.

20. Mr.S.Subbiah would draw my attention to various judgments of the Hon'ble Supreme Court and this Court, on Section 16 of the Hindu Marriage Act to contend that unless there is proof of a marriage the benefits of Section 16 cannot be conferred upon an illegitimate child. According to him, proof of marriage is must for conferring the benefits of Section 16 on the alleged illegitimate child. But the said question may not strictly arise in the case on hand, in view of the fact that there was no absolute prohibition of a second marriage in Pondicherry region in the year 1958, when the second marriage was contracted.

21. Admittedly, Kuppusamy had no issues through Adilakshmi and as such one of the conditions prescribed under the Customary Hindu Law that was prevalent in Pondicherry viz., that a husband can contract a second marriage, if the wife is sterile did exist. Therefore, the second marriage said to have been contracted between Kuppusamy and Jayalakshmi was perfectly legal, when it actually took place in the year 1958. Unfortunately, there is no direct proof of such marriage having taken place. Of course there is some evidence regarding the factum of marriage, but as rightly contended by Mr.S.Subbiah, learned Senior Counsel appearing for the appellant, the said evidence is insufficient to conclude that a marriage had in fact taken place between Jayalakshmi and Kuppusamy.

22. Mr.S.Subbiah, learned Senior Counsel is right in his contention that the Courts should have drawn an adverse inference against the first respondent for not examining his

mother Jayalakshmi to prove the second marriage. I do not think such strict Rules of evidence could be invoked particularly in deciding an issue relating to legitimacy of children and invalidity of marriage.

23. As rightly pointed out by Mr.V.V.Sairam, learned counsel appearing for the respondents, the appellant himself had in fact conceded that the first respondent is the son of Kuppusamy by impleading him as the second defendant in the suit filed by him in OS No.250 of 1991 seeking to enforce the mortgage created by Kuppusamy in his favour. It is also seen from Exhibits B7 and B8, which are the proceedings in OS No.954 of 1988 and EP No.435 of 1999 that the first respondent was shown as son of Kuppusamy.

Ex.B11 the Voter Enumeration Card shows that the first respondent is mentioned as a son of Kuppusamy.

24. As already stated Exhibits B8, B9 and B10 which are the proceedings in OS No.954 of 1988 show that the first respondent is described as son of Kuppusamy and he is shown to be residing with Adilakshmi at the same address. It is not borne out from these records that Adilakshmi who was party to the said proceeding, had taken a stand that the first respondent is not the son of Kuppusamy. Of course as already observed that there is no direct evidence for the marriage between Jayalakshmi and Kuppusamy, but there are circumstances which would show that the first respondent was treated by the public at large as son of Kuppusamy, even the appellant himself as plaintiff in OS No.250 of 1991 had impleaded the first respondent as a second defendant in the said suit and has obtained a decree against the second defendant upon his consent. Though Adilakshmi was shown as the first defendant in the said suit, she remained ex-parte.

25. The above documentary evidence would definitely show that the first respondent was treated as the son of Kuppusamy by the public at large. In the absence of any evidence to the contrary, I am of the considered opinion that a marriage between Kuppusamy and Jayalakshmi could be presumed. A presumption of a marriage by long probabilitation is available in the case where it is shown that third parties treated the spouses husband and wife and the children born to them as their legitimate children.

In my considered opinion, the evidence available in the case on hand, particularly Ex.B6, the birth certificate of the first respondent, Exs.B1 to B3 the certified copies of the plaint, Judgment and decree in OS No.250 of 1991, Exs.B7, B8, B9 and B10 certified copies of the judgment in OS No.954 of 1988, certified copy of order in EP No.435 of 1999 in OS No.954 of 1998, sale notice in EP No.435 of 1987 and the counter in EP No.435 of 1987, would show that appellant and others treated the first respondent as the son of Kuppusamy.

26. The decisions relied on Mr.S.Subbiah, learned Senior

Counsel, appearing for the appellant which relate to legitimation of children born out of void or voidable marriages and conferring them the benefits of legitimacy under Section 16 of the Hindu Marriage Act, will not strictly apply to the case on hand. I have already referred to the law that was prevalent in Pondicherry with reference to the second marriage by a Hindu male. Second marriages were allowed, of course, subject to certain conditions and indisputedly one such condition, namely sterility of the first wife was available in the case on hand. Therefore, I am of the considered opinion that the Courts below were right in concluding that the plaintiff/appellant is not entitled to a declaration that he is the absolute owner of the suit property.

27. I must, however, point out that there is absolutely no evidence to show that the third defendant Malika is the daughter of Jayalakshmi and Kuppusamy. No document is filed to demonstrate that she was born to Jayalakshmi and Kuppusamy. She had also not examined herself to establish her status. Therefore, the Courts below were not right in concluding that she is the daughter of Kuppusamy and Jayalakshmi and she would be entitled to a share in the estate of Kuppusamy.

28. In view of the conclusions reached regarding the validity of the marriage between Jayalakshmi and Kuppusamy, as per the Customary Hindu Law prevailing in Pondicherry prior to 01.10.1963, the questions of law 1 and 2 do not really arise in the case on hand, since they were framed on an assumption that Section 16 of the Hindu Marriage Act, would apply to the case on hand. Now that it has been concluded that a second marriage in the year 1958, in Pondicherry would be valid even if the first wife is alive, it is not necessary for me to go into the question as to legitimation under Section 16 of the said Act.

29. As regards the substantial question of law No.3, I have already concluded that even in the absence of examination of Jayalakshmi, there is enough for more evidence to presume of marriage between Jayalakshmi and Kuppusamy and such a marriage having taken place in the year 1958 itself, would be perfectly valid under the law that was in force in Pondicherry.

30. On the question of law No.4, we have already noticed that the Hindu Succession Act was extended to Pondicherry region on 01.10.1963 and in view of Section 4 of the Hindu Succession Act Customary Law relating to succession that was in force in the Pondicherry region would stand abrogated and the Act will over ride any Customary Law. Of course Section 2(A) of the Hindu Succession Act, makes the Act inapplicable to renouncants of Union Territory of Pondicherry. It is not the case of the parties that Kuppusamy was renoucant. This Court has in Gowri

v. Subbu Mudaliar, reported in 2017 (4) CTC 503, held that only persons who had renounced their personal law and adopted French Civil Law can be called renouncants. It is not the case of either of the parties that kuppusamy had renounced his personal law and adopted French Civil Law. However, the answer to the said question of law does not alter the situation since Kuppusamy died after the extension of the Hindu Succession Act to Pondicherry.

31. The Courts below, however, dismissed the suit for declaration and recovery of possession upon the conclusion that the plaintiff is not the absolute owner of the property. It is not in dispute that Adilakshmi wife of Kuppusamy had conveyed the property to the appellant on 17.09.1993, the said sale deed would be valid to the extent of her interest in estate of Kuppusamy. Kuppusamy died on 30.06.1990 leaving behind Adilakshmi his first wife, Jayalakshmi his second wife and the first respondent, his son. The estate of Kuppusamy would devolve under Section 8 of the Hindu Succession Act. The other heirs of Kuppusamy are also parties to the suit and I am therefore of the opinion that the Courts below should have moulded the relief and granted a lesser relief of partition instead of driving the plaintiff/appellant to file a fresh suit for partition which would in effect be a relitigation on the same questions of law and fact.

32. I therefore proceed to determine the shares that the parties would be entitled to. As already stated Kuppusamy died on 30.06.1990, leaving behind Adilakshmi his first wife, Jayalakshmi his second wife and the first respondent Raju @ Murugan his son, all of them are Clause I heirs. In view of Section 10 of the Hindu Succession Act, if there are more widows than one all the widows together will take one share and the surviving sons and daughters and the mother of the intestate shall each take one share.

33. Therefore, Adilakshmi and Jayalakshmi would be entitled to half share and Raju @ Murugan/first respondent would be entitled to the other half share. Adilakshmi had sold her share to the appellant, therefore, the appellant would be entitled to half share of Adilakshmi in the half share inherited by her along with Jayalakshmi. Thus Adilakshmi would be entitled to $\frac{1}{4}^{\text{th}}$ share and Jayalakshmi would be entitled to the remaining $\frac{1}{4}^{\text{th}}$. Jayalakshmi died pending appeal. Therefore, her share would devolve on her heirs as per Section 15 of the Hindu Succession Act. It is already been held that the first respondent is the son of Jayalakshmi and Kuppusamy, therefore, he would be entitled to $\frac{1}{2}$ plus (+) $\frac{1}{4}$ [$\frac{1}{2} + \frac{1}{4} = \frac{3}{4}$] and the appellant as the purchaser from Adilakshmi would be entitled

to 1/4 share.

34. In view of the above, the Second Appeal is partly allowed. The judgment and decree of Courts below are set aside.

The suit in OS No.190 of 1994 would stand decreed, granting preliminary decree, declaring the plaintiff's 1/4th share in the suit property. Considering the relationship between the parties there will be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-IV)

// True Copy//

Sub Assistant Registrar

jv

To

1. The Principal District Judge
Puducherry.
2. The Principal Subordinate Judge
Puducherry.
3. The Section Officer,
V.R.Section,
High Court of Madras.

+1cc to Mr.V.v.Sairam, Advocate, SR.No.86458.

+1cc to Mr.P.Raja, Advocate, SR.No.86709.

सत्यमेव जयते

S.A.No.248 of 2014
and MP No.1 of 2014

VSN II(CO)

CSR: 03.03.2020

WEB COPY