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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2021

CORAM

THE HON'BLE Mr. JUSTICE G.K.ILANTHIRAIYAN

A.S.No.242 of 2013
and M.P.No.1 of 2013

1. Rajeswari

2. Padmanabhan ...Appellants/1st & 2nd Defendants

Vs.

1. A.Lakshmi ...1st & 2nd Respondents/Plaintiffs

2. India Gandhi

3. The Arani Town Co-operative Bank
Arani.

4. The Manager,
Indian Bank,
Arani.

5. The Branch Manager,
Lakshmi Villas Bank Ltd.,
Arani. ...3 to 5 Respondents/3 to 5 Defendants

PRAYER: Appeal Suit filed under Section 96 of C.P.C., to set aside the Judgment and Decree dated 28.10.2010 in O.S.No.29 of 2005 on the file of the learned District Judge, Thiruvannamalai.

For Appellants : Mr. R.Rajarajan

For Respondents

For R1 & R2 : Mr.V.Raghavachari

For R3 : Mr.L.P.Shanmugasundaram

For R4 & R5 : No appearance

JUDGMENT

The Appeal Suit is filed as against the Judgment and Decree dated 28.10.2010 made in O.S.No.29 of 2005 by the learned District Judge, Thiruvannamalai.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiffs is that the first defendant got married with one Ayyadurai Achari and the



marriage was dissolved between them. Thereafter, he got married the first plaintiff in the month of Karthigai 1972 at Puthira Kametteeswarar Temple, Arani. Thereafter, the first defendant was being his former wife, she was allowed to stay in the same house. Due to the wed lock between the first plaintiff and the said Ayyadurai Achari, they gave birth to the second plaintiff on 08.12.1973. Thereafter, the second plaintiff's marriage was solemnized by her father and the marriage invitation was printed in the joint names of the said Ayyadurai Achari and the first plaintiff as parents of the second plaintiff.

3.1. Therefore, the second defendant born through the first defendant cannot be considered as legitimate son of the said Ayyadurai Achari. Out of his earning, the said Ayyadurai Achari had purchased the suit properties by the registered sale deeds dated 05.12.1991 & 26.12.1986. The entire suit properties were purchased by the said Ayyadurai Achari out of his self earning and all the properties are self-earned properties. During his life time, the said Ayyadurai Achari constructed a marriage hall known as Rajalakshmi Ayyadurai Marriage Hall, in which the marriage of the second plaintiff was solemnized. Thereafter on 27.01.2005, the said Ayyadurai Achari died leaving behind the plaintiffs and the defendants. After his demise, the second defendant is appropriating the entire income from the suit properties. When the plaintiffs made demand to the defendants to pay their equal share in the suit properties, the same was refused as such, the plaintiffs filed suit for partition.

4. Resisting the same, the defendants filed written statement stating that the first defendant alone legally wedded wife of the said Ayyadurai Achari and the second defendant is only the legitimate son of the said Ayyadurai Achari. the plaintiffs have no right to file suit for partition and hence the entire claim is not legally sustainable. Further stated that the said Ayyadurai Achari is running wedding shop under the name and style of Rajeswari Nillayam. If the first defendant had been divorced, he would not run his shop in the name of the first defendant viz., Rajeswari. There was no necessity for the said Ayyadurai Achari to marry the first plaintiff that too in the temple. In fact, he owned Kalyana Mandapam, as such there was no marriage between the first plaintiff and the said Ayyadurai Achari. It is true that the said Ayyadurai Achari got married the first defendant and there is absolutely no iota of evidence to show that the said Ayyadurai Achari and the first defendant got divorce. Therefore, the plaintiffs have no right to file the suit and they are not entitled for any share in the suit properties.

5. On hearing the rival pleadings, the learned trial Judge framed the following issues for determination of the suit.



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"(i) Whether it is true that 1st plaintiff is the legally wedded wife of Ayyadurai Achari?

(ii) Whether the plaintiffs are entitled to 2/3 shares in the suit properties as prayed for?

(iii) Whether the defendants 1 and 2 are bound to render account for the plaintiffs income from their share in 1 to 3 of the suit properties from the date of plaintiff till delivery of the plaintiffs 2/3 share in those properties?

(iv) Whether the plaintiffs are entitled to permanent injunction as prayed for?

(v) To what relief, the plaintiffs are entitled to?"

6. On the side of the plaintiffs, they examined P.W.1 & P.W.2 and marked 40 documents as Ex.P.1 to Ex.P.40. On the side of the defendants, they examined D.W.1 to D.W.3 and no documents were marked. On perusal of the material produced on record and considering both the oral and documentary evidence adduced by the respective parties and also the submissions made by the learned counsel on either side, the trial Court partly allowed the suit thereby allotted 1/3 share in the properties in favour of the second plaintiff alone and 1/3 share allotted in favour of the defendants 1 & 2 each. Aggrieved by the same, the defendants 1 & 2 preferred this appeal suit.

7. The learned counsel appearing for the appellants/defendants submitted that the plaintiffs failed to establish the factum of marriage alleged to have been held between the deceased Ayyadurai Achari and the first plaintiff and as such the second plaintiff is not entitled to have any share as contemplated under Section 16 of the Hindu Marriage Act. The plaintiffs also failed to prove the factum of alleged divorce between the deceased Ayyadurai Achari and the first defendant herein. Therefore, the Court below wrongly invoked Section 114 of Indian Evidence Act that too after holding that the marriage between the first plaintiff and the deceased Ayyadurai Achari not held to be proved by the evidence adduced on the side of the plaintiffs, the presumption could have been drawn only when the evidence is not forthcoming. Once the marriage held has not been proved, the benefit under Section 114 of India Evidence Act cannot be availed in favour of the plaintiffs.

7.1. He further submitted that under Section 16 of the Hindu Marriage Act, if the factum of marriage proved, the children can claim the benefit, who born out of the said wed lock. Whereas in the case on hand, the factum of marriage



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itself failed to prove by the plaintiffs and as such granting the benefits under Section 16 of the Hindu Marriage Act is not applicable to the plaintiffs. In support of his contention, he relied upon the following reported judgments :-

- (i) 2011 (5) MLJ 86 - Dhanalakshmi v. S.Prabhavathy and Others
- (ii) 2015 (4) LW 509 - Baby @ Rohini (Deceased) and others vs. Kamalam Kumerasan and others

8. Per contra the learned counsel appearing for the respondents 1 & 2/plaintiffs submitted that the case of the plaintiffs is that the one Ayyadurai Achari originally got married with the first defendant. After dissolution of marriage, he got married with the first plaintiff and gave birth to the second plaintiff. The second plaintiff marriage was solemnized by the said Ayyadurai Achari. The marriage invitation was printed in the joint names of the said Ayyadurai Achari with the first plaintiff as parents of the second plaintiff. In fact, the marriage was solemnized in R.L.A.Marriage hall, which was owned by the said Ayyadurai Achari. Though the first defendant got divorce with the said Ayyadurai Achari, she was permitted to stay under the same roof, due to which she gave birth to the second defendant on 12.06.1976. Whereas the second plaintiff was born on 08.12.1973 itself, in Arani Government Hospital. Therefore, the second defendant cannot be considered as legitimate son of the said Ayyadurai Achari. Unfortunately, the plaintiffs failed to prove the dissolution of marriage between the said Ayyadurai Achari and the first defendant as such, the trial Court had drawn a presumption under Section 114 of the Indian Evidence Act and allotted 1/3th share to the second plaintiff.

8.1. He further submitted that it is the categorical evidence of the first plaintiff that all the plaintiffs and the defendants were living under the same roof. That apart, the first plaintiff lived with the said Ayyadurai Achari as wife, in his life time in long cohabitation with each other and gave birth to the second plaintiff. Though the plaintiffs failed to prove the marriage between the first plaintiff and the deceased Ayyadurai Achari, they lived cohabitants each other as husband and wife and the second plaintiff was born to them. Therefore, it may presume as they married. In support of his contention, he relied upon the following reported judgments:-

- (i) 2019 (11) SCC 491 - Kamala & Ors. v. M.R. Mohan Kumar
- (ii) 2002 (4) LW 783 - A. Murugesan vs. Angamuthu Gounder and Ors.

9. Heard Mr.R.Rajarajan, learned counsel appearing for the appellants, Mr.V.Raghavachari, learned counsel appearing for the respondents 1 & 2 and Mr.L.P.Shanmugasundaram, learned counsel appearing for the third respondent.



partition. According to the plaintiffs, the first plaintiff got married the late Ayyadurai Achari at Puthira Kametteeswarar Temple, Arani, in the month of Karthigai, 1972. The marriage between the late Ayyadurai Achari and the first defendant was dissolved and thereafter the late Ayyadurai Achari got married with the first plaintiff. Due to their wedlock, they gave birth to the second plaintiff. The late Ayyadurai Achari also permitted the first defendant to live with the same house. Due to which, the second defendant was born through the first defendant. During his life time, the late Ayyadurai Achari purchased the suit properties. He died on 27.01.2005, leaving behind the plaintiffs and defendants as his legal heirs. Therefore, the plaintiffs sought for their respective shares in the suit properties.

11. Though the plaintiffs averred that the marriage between the late Ayyadurai Achari and the first defendant got dissolved, they failed to prove the same by adducing evidence. Therefore, the Court below concluded that the marriage between the late Ayyadurai Achari and the first defendant was not dissolved and the first defendant remains to be a legally wedded wife of the said late Ayyadurai Achari and alleged marriage between the late Ayyadurai Achari and the first plaintiff has not been proved in the manner known to law.

12. Therefore, the points for consideration in this appeal is that whether Section 16 of the Hindu Marriage Act is applicable, when the marriage is not proved between the late Ayyadurai Achari and the first plaintiff?

13. As stated supra, the plaintiffs failed to prove the dissolution of marriage between the first defendant and the late Ayyadurai Achari. But it doesn't mean that the marriage between the late Ayyadurai Achari and the first plaintiff is not proved. Admittedly, the plaintiffs and the defendants were living under the same roof with the late Ayyadurai Achari till his death viz., 27.01.2005. Therefore, continuous cohabitation of late Ayyadurai Achari and the first plaintiff for number of years raised the presumption of marriage. Therefore, under Section 16 of the Hindu Marriage Act, the second plaintiff is entitled to have her share in the suit properties.

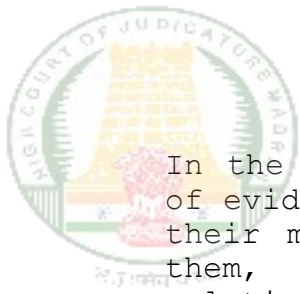
14. In this regard, the learned counsel appearing for the appellants relied upon the judgment reported in 2011 (5) MLJ 86 in the case of Dhanalakshmi v. S.Prabhavathy and Others, as follows :-

"18. No doubt, there are certain documents which would also exemplify and demonstrate that Varadarajulu during his lifetime described Ranganayaki as his wife, but both the Courts below negatived the contention of Ranganayaki and her children and held that they are not the legitimate heirs of deceased Varadarajulu as against



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which they have not chosen to prefer any objection or appeal and as such this Court need not ponder over those documents. There is no iota or shred, shard or miniscule, pint of jot of evidence available on the side of D11 to demonstrate that Krishnabai was ever referred to by Varadarajulu as his wife even though Krishnabai claims to have lived with him for four decades or so. The reliance placed on the Birth Certificates undoubtedly refer to the parents of those children as Krishnabai and Varadarajulu. Simply because the children were born to them, it cannot be presumed that there was legitimate relationship between the two and that that too in the wake of specific allegation by the plaintiff, D1 and D2 that Krishnabai was already married to Andi Munusamy and one of the children was born to Krishnabai through Andi Munusamy and the remaining children were born of Varadarajulu. Any children born out of adulterous relationship cannot be treated as the ones eligible to invoke Section 16 of the Hindu Marriage Act. Over and above that, I would like to refer moment I even thought of referring to the old Hindu Law which would contemplate that even an illegitimate child born out of a kept mistress or concubine could also be taken as one entitled to a small moiety along with the legitimate child. But in this case, Varadarajulu died only in the year 1983 long after the commencement of Hindu Marriage Act as well as Hindu Succession Act and once codified new law in the form of Section 16 of the Hindu Marriage Act started occupying the field, the question of invoking the contrary old Hindu Law does not arise. In such an event also I would like to point out that nowhere in the old Hindu law it is found envisaged that a child born out of adulterous connection would be entitled for a share in the self acquired property of its Hindu father. The first appellate Court in paragraph Nos.23 and 24 of its judgment clearly dealt with those points, so to say *au fait* with the correct proposition of law the dispute was decided warranting no interference in the Second Appeal. With a fine-toothed comb, the matter does not warrant it to be combed as already such exercise was properly performed by the first appellate court"



In the above judgment, this Court held that there is no iota of evidence is available on the side of the plaintiffs to show their marriage. Simply because of the children were born to them, it was not presumed that there was a legitimate relationship between the two. After the commencement of the Hindu Marriage Act as well as the Hindu Succession Act, once codified new law in the form of Section 16 of the Hindu Marriage Act started occupying the field, the question of invoking the contrary old Hindu Law does not arise. No where in the old Hindu law, a child born out of adulterous connection would be entitled for a share in the self acquired property of its Hindu father.

15. In the case on hand, as stated supra the plaintiffs failed to prove the divorce between the first defendant and the late Ayyadurai Achari. Whereas, P.W.1 categorically stated that she got married Ayyadurai Achari in the month of Karthigai in the year 1972 at Puthira Kametteeswarar Temple, Arani. Admittedly, the late Ayyadurai Achari and the first plaintiff lived as husband and wife continuously and their continuous cohabitation as husband and wife, raised the presumption of marriage. Therefore, the judgments relied upon by the learned counsel appearing for the appellants are not helpful to the case on hand.

16. The learned counsel appearing for the respondents 1&2 relied upon the judgment reported in 2019 (11) SCC 491 in the case of Kamala & Ors. v. M.R. Mohan Kumar, in which the Hon'ble Supreme Court of India held as follows :-

"16. It is fairly well settled that the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years. After referring to various judgments, in Chanmuniya v. Virendra Kumar Singh Kushwaha (2011) 1 SCC 141, this Court held as under:-

"11. Again, in Sastry Velaider Aronegary v. Sembecutty Vaigalie (1881) 6 AC 364, it was held that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

12. In India, the same principles have been followed in Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Balahamy AIR 1927 PC 185, in which the Privy Council laid down the general proposition that where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary is clearly proved, that they were living together in



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consequence of a valid marriage, and not in a state of concubinage.

13. In Mohabbat Ali Khan v. Mohd. Ibrahim Khan AIR 1929 PC 135 the Privy Council has laid down that the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years.

14. In Gokal Chand v. Parvin Kumari AIR 1952 SC 231, this Court held that continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them."

The Hon'ble Supreme Court of India held in various judgments that continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage.

17. The above judgment is squarely applicable to the case on hand. P.W.1 and D.W.1 categorically stated that they were lived under the same roof. Ex.A.1 to Ex.A.7 revealed that the second plaintiff was born on 05.06.1973, to the late Ayyadurai Achari and the first plaintiff. On attainment of puberty, the second plaintiff's function was conducted by her father viz., the late Ayyadurai Achari and her marriage was also solemnized on 11.6.1997 at R.L.A. Marriage Hall, i.e., one of the suit properties. Therefore, the Court below rightly allowed the suit in part and allotted 1/3rd share in the suit properties to the second plaintiff and defendants 1 & 2 each. Therefore, this Court doesn't find any infirmity or illegality in the order passed by the Court below.

18. In the result, the Appeal Suit stands dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

Sd/-

Assistant Registrar

//True copy//

Sub Assistant Registrar

rts

To

1. The District Judge,
Thiruvannamalai.

<https://hcservices.ecourts.gov.in/hcservices/>



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

+1cc to Mr.V.Raghavachari, Advocate SR.No.32408

+1cc to Mr.G.Rajan, Advocate SR.No.32514

A.S.No.242 of 2013
and M.P.No.1 of 2013

GMR (CO)
GMY (26/11/2021)