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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.02.2021
PRONOUNDED ON : 09.07.2021

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.357 of 1997

1.Nagalakshmi
2.Leela @ Neelambal
3.Kesavan
4.Sakthivel

...Appellants/Appellants/Plaintiffs

Vs.

1.Krishnaraj (Died)
2.Ramaraj
3.Meenakshi Ammal (Died)

...Respondents1to3/Respondents1to 3/
Defendants 1to3

4.Mani
5.Selvaraj
6.Gopalakrishnan
7.Usha @ Ushadevi
8.Uma @ Umadevi
9.K.Velu
10.K.Sethuraman
11.K.Arumugam
12.R.Radhabai

...Respondents

(RR4 to 6 brought on record as legal representatives of the deceased R1 viz., Krishnaraj, RR7 and 8 brought on record as legal representatives of the deceased R3 and RR9 to 12 impleaded vide order of Court dated 17.09.2020 made in CMP.No.478 to 484 of 2012 in S.A.No.357 of 1997)

PRAYER: This Second Appeal has been filed under Section 100 of CPC., against the judgment and decree dated 13.03.1995 in A.S.No.233 of 1993, on the file of the Principal District Court, Salem modifying the judgment and decree dated 30.07.1993 in O.S.No.935 of 1990, on the file of the Principal District Munisf Court, Salem.

For Appellants: Mr.R.Thanjan

For R1 & R3 : Died

For R2 : Mr.K.Chandrasekaran

For R4 to R12 : No appearance



JUDGMENT

The unsuccessful plaintiffs are the appellants herein.

2. For the sake of convenience, the parties are referred as per the ranking before the Trial Court.

3. Brief facts of the case are as follows:

(a) One Balarama Chettiar said to have had three wives viz., third defendant/Meenakshi Ammal is the first wife, fourth defendant/Rajammal is the second wife and first plaintiff/Nagalakshmi is the third wife. The plaintiffs 2 to 4 are the children of the said Balarama Chettiar through the third wife. One Krishnaraj/first defendant is son through the first wife. While second defendant is the son of the Balarama Chettiar through the second wife.

(b) The plaintiffs have filed a suit in O.S.No.935 of 1990 before the learned Principal District Munsif, Salem, for the partition. The plaintiffs relied upon Ex.A1/settlement deed executed by the said Balarama Chettiar, wherein, the first plaintiff and the other plaintiffs are shown as the third wife and the children of the said Balarama Chettiar.

(c) Per contra, the defendants have filed Ex.B10, whereby, settlement deed was duly cancelled. The Trial Court has held that the plaintiffs are entitled to the partition, however, rejected the relief of the parties on the ground that two daughters of the second wife are necessary parties and they were not impleaded and subsequent purchasers of the suit properties were also not impleaded and accordingly dismissed the suit.

(d) Aggrieved against the said judgment and decree passed in O.S.No.935 of 1990, the plaintiffs have preferred an appeal suit in A.S.No.233 of 1993, before the Court of the learned Principal District Judge, Salem and the defendants have also filed cross objection. The said appeal suit filed by the plaintiffs has been dismissed on 13.03.1995 and the cross objection filed by the defendants was allowed, on the ground that since, the alleged marriage between the first plaintiff and one Balarama Chettiar would have taken place prior to the year 1943 and hence, the same is hit by the prevention of the Bigami Act prevailed at the relevant time and further held that since the children born prior to the commencement of the Hindu Marriage Act, 1955, they are not entitled to any share under Section 16(3) of Hindu Marriage Act, and hence rejected the appeal and also allowed the cross objection filed by the defendants and all the findings of the Trial Court are vacated. Hence, the Second Appeal.



4.The above Second Appeal was admitted on the following substantial questions of law.

"1.When Section 11 of the Hindu Marriages Act, 1955 clearly states that any marriage solemnised after the commencement of the Act shall be null and void and may, on petition presented by either party thereto, if so declared, having given a finding that the marriage could have taken place in 1943, are the courts below correct in holding that the Balarama Chettiar's third marriage with the first plaintiff is null and void?

2.When the Section 16(1) of Hindu Marriages Act, 1955 clearly states that notwithstanding the marriage is null and void under Section 11, and child of said marriage who would have been legitimate if the marriage was valid, shall be legitimate whether such a child is born before or after the commence of the Marriages Law (Amendment) act, 1976, are the courts below correct in holding that the plaintiffs 2 to 4 are not entitles to any share in the suit properties even as illegitimate children?".

5.The learned counsel for the appellants would submit that though the marriage between the third wife of the said Balarama Chettiar is illegal, plaintiffs 2, 3 & 4 are entitle to share in the Balarama Chettiar property to limited extent.

6.Heard both the learned counsels and perused the materials placed on record.

7(a).The originally first plaintiff viz., Nagalakshmi has filed a suit for partition alleging that she is third wife of one Balarama Chettiyar along with her sons against the defendants and for partition of 17/35 share in the suit property. The suit was initially filed as Pauper suit and subsequently numbered as O.S.No.935 of 1990. As per the plaint, admitted case is that the third defendant is the first wife of said Balarama Chettiyar; fourth defendant is second wife of Balarama Chettiyar; defendants 1 and 2 are the sons of the said Balarama Chettiyar born through his first wife and second wife respectively.

7(b).The original plaintiff viz., Nagalakshmi claimed that she is the third wife of the deceased Balarama chettiyar and for herself and for her children, she has filed a suit for partition on the footing that the suit property is a joint family property.

8.The plaint only raised upon Ex.B10/Settlement Deed said to have been executed by deceased Balarama Chettiyar in favour of the plaintiffs, wherein, the first plaintiff was described as the third wife and plaintiffs 3 & 4 are described as sons born



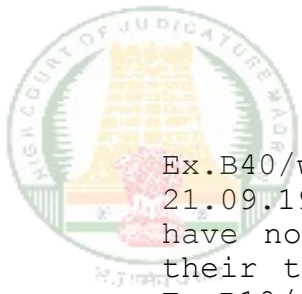
through the said Balarama Chettiyar and first plaintiff/third wife.

9. On the contrary, the defendants have filed Ex.B11/cancellation of the settlement deed executed by the said Balarama Chettiyar. In the settlement Deed, the property was described as self acquired property, assumes significance. The first plaintiff has not filed any document to show that it is an ancestral property or joint family property to claim partition and hence, the Lower Appellate Court has rendered a specific finding to that effect and also taking into consideration the nature of the suit namely partition suit, the Trial Court has held that since, the first plaintiff is the third wife, she is not entitled for any share, however, granted a share for the plaintiffs 3 & 4 on the ground that they are legitimate children and they are entitled for limited extent of share as falls to the share of the said Balarama Chettiyar. Thereafter, an appeal was filed by the plaintiffs and cross appeal was filed by the defendants in respect of the allotted and dis-allotted portion respectively. The appeal filed by the plaintiffs was dismissed while, the cross appeal filed by the defendants was allowed. Consequently, the suit was dismissed in entirety.

10. Before the Trial Court, on behalf of the plaintiffs, the first plaintiff examined herself as PW1 and one Venkatraman was examined as PW2 and Exs.A1 to A8 were marked. On behalf of the defendants, second defendant was examined as DW1, attester were examined as DW2 and DW3 and Exs.B1 to B50 were marked.

11(a). The case of the plaintiffs/appellants is solely raised upon Ex.A1 is the certified copy of Ex.B10/original settlement deed said to have been executed by the said Balarama Chettiyar in favour of the plaintiffs. As per Ex.B11, the said settlement deed was cancelled on 24.02.1965. The first plaintiff alleged that she is the third wife of the said Balarama Chettiyar. The said plea of marital status of first plaintiff with the said Balarama Chettiyar was denied by the defendants in the additional written statement and no other document has been filed to substantiate the plea that the first plaintiff was married to said Balarama Chettiyar as third wife. Even in the evidence of PW1, she has not deposed anything regarding place of marriage or year of marriage and who had attended the marriage. No piece of evidence for the alleged marriage between first plaintiff with the said Balarama Chettiyar were placed before the Court.

11(b). It appears that the defendants resisted the suit on mainly two grounds viz., (i) the alleged marital status of the first plaintiff with the said Balarama Chettiyar and (ii) Ex.B11/cancellation of settlement deed, dated 24.02.1965 and



Ex.B40/will executed by the said Balarama Chettiyar, dated 21.09.1969. Both the Courts below have held that the plaintiffs have not challenged Will nor filed any suit for declaration on their title in respect of the suit property on the strength of Ex.B10/settlement deed, which appears to have been cancelled by Ex.B11/cancellation deed. Moreover, the plaintiffs have not adduced evidence to prove the contents/recital in Ex.B10, regarding the alleged marriage. Neither attester nor anyone connected thereto have not examined. Even PW2 could not give or make out any source regarding details of alleged marriage. Hence, this Court finds that there is lack of legally acceptable evidence in support of plea of plaintiffs.

12.In the cross-examination of PW1, certain snap answer was elicited regarding the year of the marriage. For the reasons best known, PW1 has evaded to answer in affirmatively regarding year of marriage with the said Balarama Chettiyar. The Lower Appellate Court based upon the snap answer, has presumed certain calculations and proceeded to hold that the marriage would have been taken place in the year 1945 or so. Such approach by the lower Appellate Court is not based on any legal proposition. Accordingly, the finding of Lower Appellate Court is hereby stands vacated for the reason infra.

13.It is to be stated that in respect of marital status of a person with the person alleged, there must be a specific pleadings of alleged factum of marriage, solemnization of marriage, place of marriage. It is for the plaintiffs to plead and prove the factum of marriage by necessary pleading, the place of marriage, details of marriage and the year of marriage, in particular and to substantiate the same by adducing positive legal evidence viz., oral and documentary evidence.

14.In the instance case, the plaintiffs have failed to do so. However, based upon the snap answer in the cross examination, the learned District Judge appears to have adopted a supposition and assumption and thereafter made calculations for himself and arrived the year of marriage on such proposition and presumption of his own calculation, which is not based in any legal provisions or sound legal reasoning. Accordingly, the finding given by the Lower Appellate Court as if the marriage between the first plaintiff and the deceased Balarama Chettiyar would have been taken place in the year 1945 and such finding legally unsustainable and the same is hereby vacated. Consequently, it is held that the first substantial question of law does not arise for consideration.

15.The second substantial questions of law is framed based upon the above said finding and not on the factual ground. In other words, the second substantial question of law is based



upon the defect in the processing of the mistake in writing the judgment not on the factual and legal evidence adduced in the instance case. Accordingly, the second substantial question of law does not arise on the factual situation of the case.

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16. As seen from the pleadings and evidence, it appears that in the absence of any specific pleadings as to the date of marriage and particulars of marriage are not being furnished by the plaintiffs either in the pleadings or in the evidence, this Court finds that the question of application of provisions of Hindu Marriages Act 1955 cannot be invoked by Courts below.

17(a). In the decision reported in 1990 1(LW) 461 - (Valliambal Vs. Kamalambal and 8 others), it is mentioned as follows:

"There is no indication anywhere in S.16 of the Hindu Marriage Act that retrospective effect could be anterior to the coming into force of the Hindu Marriage Act itself. That the Act itself was not retrospective in nature should not be lost sight of. Hence, by amending the provision, i.e., S.16 in 1976, there could be no question of extending retrospective applicability in respect of marriages which have taken place before the coming into force of the Act, i.e., before 18.05.1955. The words "any child of such marriage" are also to be taken note of, because these words crystalize as to with regard to what categories of marriage and out which children born acquire the statutory legitimacy for a limited purpose. Hence, the plea that by the amendment made in 1976 to S.16, It applies retrospectively in respect of such types of marriages which are envisaged under S.11, and which had taken place prior to the coming into force of the Hindu Marriage Act., i.e., before 18.05.1955 is without any substance"

17(b). In respect of Section 16 of the Hindu Marriage Act (Amendment Act), the Division Bench of this Court, in the above rendered decision, has observed as follows:

"It is expressly stated in S.16 that is confined to a child born out of 'such' a marriage, which means marriages which are covered by S.11. S.11 is categorical that it deals with only certain categories of marriages which are solemnized" after the commencement of this Act". Therefore, the legislative intent was to grant relief only to limited instances i.e., only in respect of those children born of marriages



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solemnized on and after 18.05.1955 and covered by S.11 instances father. "Merceby because Parliament considered that illegitimacy should not be foisted in respect of children born out of marriages which are hit by S.11 of the Act, it does not mean that it had intended to legitimize offspring from out of bigamous marriages which had taken place prior to the coming into force of the Hindu Marriages Act"

18.In short, the Hindu Marriage Act came into force on 18.05.1955 and the section 16 reference should be read along with Section 11 of the Act and the marriages that was solemnized after the commencement of the Act alone the benefit of Section 16(3) could be invoked.

19.As per the evidence of PW1/Nagalakshmi, the said marriage as spoken to by PW1 could not be fixed on hypothetical ground and in the absence of any positive evidence as to the date of marriage, this Court finds that the finding rendered by both Courts below that the plaintiffs are not entitled for partition is hereby confirmed on a different analysis as stated supra. Yet another point is that in the absence of any pleadings beside the sole document that has been relied upon by the plaintiffs is Ex.B10/settlement deed, which has been cancelled under Ex.B11 and none connected with Ex.B10 were examined to prove Ex.B10 document and its contents, assumes significance.

20.Hence, the devolution of property upon the plaintiffs cannot be inferred with. The recitals in Ex.B10 are not proved in the manner known to law. In the absence of any positive evidence to speak about the recital contained in Ex.B10 regarding alleged marital status of the first plaintiff and the said Balarama Chettiyar. Moreover, on the point of nature and character of the suit property being sustainable in law, both the Courts below have rightly held that the plaintiffs have not adduced any positive evidence to show the ancestral nature of the property and the said finding is hereby confirmed. For the reasons assigned in the preceding paragraphs, this Court finds that on the above factual background that in the absence of any positive evidence to show the factum of marriage of the first plaintiff with Balarama Chettiyar, this Court finds that the first substantial question of law does not arise for consideration and hence, both the substantial questions of law are hereby stands negatived.

21.In view of the above said decision, the plaintiffs 3 & 4, who are not born out of the marriage alleged, are not entitled to the provisions of the Section 11(3) of the Act. Further, on a perusal of records, it is seen that the other legal



representatives, purchaser and subsequent purchaser were not impleaded and I find that the suit is bad for non-joinder of necessary parties.

22. Accordingly, the Lower Appellate Court has rightly rejected the claim of the plaintiffs 3 & 4 and in view of the above factual position, this Court finds that the finding rendered regarding the period of marriage of the first plaintiff with the Balarama Chettiyar and birth of the plaintiffs 3 & 4 are not proved and both the substantial questions of law does not arise for consideration on the factual circumstances and in this view of the matter, both the substantial questions of law are held against the plaintiffs and in favour of the defendants.

23. Accordingly, the Second Appeal is devoid of merits, dismissed and judgment and decree dated 13.03.1995 in A.S.No.233 of 1993, on the file of the Principal District Court, Salem modifying the judgment and decree dated 30.07.1993 in O.S.No.935 of 1990, on the file of the Principal District Munisf Court, Salem is hereby confirmed. No costs.

Sd/-
Assistant Registrar(JJ Act)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal District Court, Salem.

2.The Principal District Munisf Court, Salem.

Copy To

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

S.A.No.357 of 1997

NR(CO)
RGA(23/11/2021)