

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 29TH DAY OF SEPTEMBER 2021

THE MASTER

A.No.1363 of 2021

and

A.No.2614 of 2021

in

E.P.No.41 of 2017

in

C.S. No. 413 of 2002

P. N. Gopinathan,
Office at III Floor, Asha Mansion,
No. 59, Monteith Road,
Egmore, Chennai - 600 008.

... Plaintiff

-Versus-

1.O. Harendra Kumar Dave
No.59, Monteith Road,
Egmore, Chennai - 600 008.

2.R.Madhusudhanan,
Office at Thillai Complex, 1st Floor,
No.723, Poonamallee High Road,
Aminjikarai, Chennai - 600 029.

... Defendants

E.P.No.41 of 2017:

P.N.Gopinathan,
S/o.G.Narayanaswamy
Office at II Floor, Asha Mansion,
No.59, Monteith Road, Egmore,
Chennai 600 008
Now Office at No.29, Precision Plaza,
No.397, Anna Salai, Teynampet,
Chennai 600 018.

..Petitioner/ Decree Holder

Vs

1.O.Harendra Kumar Dave (Deceased)

2.R.Madhusudhanan

S/o.T.P.Ramakrishnan,

Office at Thillai Complex First Floor,

No.723, Poonamalle High Road,

Amjikarai,

Chennai-600 029.

..Respondents/Judgment Debtors

3.Mrs.Asha Dave, (*)

W/o.Late Harendra Kumar Dave

4.Mrs.Sharmila Lazro(*)

D/o.Late Harendra Kumar Dave

5.Mr.Sanjay Dave (*)

S/o.Late Harendra Kumar Dave

6.Mr.Anand Dave, (*)

S/o.Late Harendra Kumar Dave

Judgement Debtors Nos. 3 to 6 are (*)

residing at No.59, Montieth Road,

Egmore, Chennai 600 008

Judgment Debtors 3 to 6 are brought on (*)

record as legal Heirs of the Deceased first

judgment Debtor as per order dt.04.10.2017

passed in application No.6035 of 2017.

A.No.2614 of 2021:

O.Harendra Kumar Dave (since deceased)

1.Asha Dave,

W/o.Late Harendra Kumar Dave

2.Sharmila Lazro
D/o.Late Harendra Kumar Dave

3.Sanjay Dave
S/o.Late Harendra Kumar Dave
Represented by Power Agent
Mr.Anand Dave

4.Mr.Anand Dave,
S/o.Late Harendra Kumar Dave

All of whom reside at:
No.59, Montieth Road,
Egmore, Chennai 600 008.

..Applicants/Respondents 2 to
5/Judgement Debtors 3 to 6

Vs

P.N.Gopinathan (since deceased)

1.A.Vijayalakshmi
Wife of Late .P.N.Gopinathan
Residing at 10-B G1
Sharvashree Home
19/10 Sampangi Street,
Opposite Street to Kittu Park
West Mambalam,
Chennai 600 033.

2.C.G.Vijayanarayana (Minor)
Aged about 17 years
Represented by Guardian
A.Vijayalakshmi
Residing at 10-B G1
Sharvashree Home
19/10 Sampangi Street,
Opposite Street to Kittu Park
West Mambalam,
Chennai 600 033.

..Respondents/Petitioners 2 &3/ Decree Holders 2
& 3

Application praying that this Hon'ble Court be pleased to determine the question as to whether the 1st and 2nd Respondents are the legal heirs of Late.P.N.Gopinathan and to consequentially, dismiss the E.A.No.1363 of 2021 and E.P.No.41 of 2017.

A.No.1363 of 2021:

P.N.Gopinathan (since deceased) ..Petitioner/ Decree Holder/Plaintiff

1.A.Vijayalakshmi
W/o.Late .P.N.Gopinathan
Residing at 10-B G1
Sharvashree Home
19/10 Sampangi Street,
Opposite Street to Kittu Park
West Mambalam,
Chennai 600 033.

2.C.G.Vijayanarayana (Minor)
Aged about 17 years
Rep. by Guardian
A.Vijayalakshmi
Residing at 10-B G1
Sharvashree Home
19/10 Sampangi Street,
Opposite Street to Kittu Park
West Mambalam,
Chennai 600 033.

..Petitioners 2 &3/ Decree Holders 2 & 3

Vs

O.Harendra Kumar Dave (since deceased)

1.Asha Dave,
W/o.Late Harendra Kumar Dave
No.59, Montieth Road,
Egmore, Chennai 600 008.

2.Sharmila Lazro
D/o.Late Harendra Kumar Dave
No.59, Montieth Road,
Egmore, Chennai 600 008.

3.Sanjay Dave
S/o.Late Harendra Kumar Dave
Represented by Power Agent
Mr.Anand Dave

4.Mr.Anand Dave,
S/o.Late Harendra Kumar Dave
No.59, Montieth Road,
Egmore, Chennai 600 008.

5.R.Madhusudhanan
S/o.T.P.Ramakrishnan,
I Floor Thillai Complex
723, Poonamallee High Road,
Aminjikarai, Chennai 600 029.

..Respondents/Judgment
Debtors 2 to 6

Application praying that this Hon'ble Court be pleased to bring on record the following persons 1)A.Vijayalakshmi W/o.P.N.Gopinathan (deceased) Hindu, aged about 59 years 2) C.G.Vijayanarayana (Minor) aged about 17 years represented by Guardian A.Vijayalakshmi as Petitioners 2 & 3 & Decree Holders 2 & 3 in E.P.41 of 2017 in C.S.No.413 of 2002.

These Applications coming on this day before this Court for hearing, the Court made the following order:

1. There are two applications in which the subject matter is one and

the same. The first application in A.No.1363 of 2021 is to bring the legal representatives of deceased decree holder. The second application in A.No.2614 of 2021 is under Section 47 C.P.C. to decide whether the petitioners are legal heirs of the deceased decree holder.

2. The suit in C.S.No.413 of 2002 was decreed and E.P.No.41 of 2017 was filed by the decree holder for the execution of the decree. During the pendency of this E.P.No.41 of 2017, the petitioner/decreed holder namely Thiru. P.N.Gopinathan passed away. Application in A.No.1363 of 2021 was filed by the petitioners 1. A.Vijayalakshmi and 2. Minor C.G.Vijayanarayana to implead them as 2nd and 3rd petitioners to proceed with this E.P.No.41 of 2017. Meanwhile, the judgment debtors in this E.P.No.41 of 2017 came with an application in A.No.2614 of 2021 under Section 47 of C.P.C. to determine the question as to whether the 1st and 2nd respondents are the legal heirs of deceased P.N.Gopinathan.

3. The contention of the petitioners in LR application in A.No.1363 of 2021 is that the first petitioner is the second wife and the second petitioner is the minor son of deceased P.N.Gopinathan. Hence they may be added as 2nd and 3rd petitioners in the E.P.No.41 of 2017.

4. The contention of the judgment debtors/respondents/applicants in A.No.2614 of 2021 is that the first petitioner is not the legally wedded wife of deceased P.N.Gopinathan. This

marriage was not solemnized as per custom. The second petitioner is not represented by proper guardian. The first petitioner is not the guardian of second petitioner minor Vijaya Narayanan. No permission petition is filed for the appointment of guardian for the minor second petitioner as required by law. Hence the LR application has to be dismissed and 47 application has to be allowed.

5. Now the points for determinations are.

i) Whether the petitioners are the legal heirs of deceased P.N.Gopinathan?

ii) Whether the second petitioner is properly represented by the first petitioner?

6. Both sides heard.

7. The learned counsel for the petitioners in LR application submitted that the first petitioner is the second wife and the second petitioner is the minor son of deceased P.N.Gopinathan. Hence they may be added as 2nd and 3rd petitioners in the E.P.No.41 of 2017. The learned counsel further submitted that to prove his case he has filed 7 documents. The documents will show that both petitioners are the legal heirs of the deceased P.N.Gopinathan. Hence they may be added as 2nd and 3rd petitioners.

8. The learned counsel for the judgment debtors/respondents/applicants in A.No.2614 of 2021 submitted that the judgment debtors do not agree that the petitioner are the legal heirs of the deceased P.N.Gopinathan. The learned counsel for the judgment debtors submitted that the first petitioner is not the legally wedded wife of deceased P.N.Gopinathan. Further the learned counsel submitted that the second petitioner is not represented by proper guardian. The first petitioner is not the guardian of second petitioner minor Vijaya Narayanan. No permission petition is filed for the appointment of guardian for the minor second petitioner as required by law.

9. He further argued that as per Section 47 (3) when a question arises about the representative of a party it shall be determined by the court under this provision. Further the learned counsel submitted that the name of the decree holder is P.N.Gopinathan. Subsequently he changed his name as Gopinarayan Yadav. But he filed the E.P. as P.N.Gopinathan only. So he cannot maintain the E.P. Further the name of Vijayalakshmi is mentioned as second wife in the legal heir certificate. There is no whisper about the first wife.

10. The learned counsel further submitted that there is no proof to show that the said marriage had actually taken place. Section 5 of the Tamil Nadu Hindu Marriage (Registration) Rules, 1967, says every Hindu

Marriage solemnized shall be registered with the Marriage Registrar, by the parties to the Marriage within 3 months from the date of solemnization of the marriage. In terms of Section 12 of the said Rules, the Marriage Registrar shall maintain a Hindu Marriage Register in Form IV to record registration of Hindu Marriages. Section 3 of the Tamil Nadu Registration of Marriage Act, 2009, every marriage performed on and from 24.11.2009 shall be registered under the said act. Moreover the document submitted is not a marriage certificate, but only an application for marriage.

11. The learned counsel further submitted that the petitioners failed to produce any document to prove the legal status of the alleged marriage between Late P.N.Gopinathan and the 1st respondent. The 1st respondent is not entitled to continue the present E.P. by proclaiming herself to be a legal heir of Late P.N.Gopinathan.

12. He further argued that the 2nd respondent is also not a legal heir of Late P.N.Gopinathan. No document has been filed before this Hon'ble Court, except the suspicious legal heirship certificate dated 19.07.2021. The alleged legal heirship of the 2nd respondent also cannot be taken as valid. In the absence of any appointment from this Hon'ble court as required under Order XXXII of C.P.C., the 1st respondent is not at all entitled to represent the 2nd respondent.

13. The learned counsel further submitted that in the ration card, the age of Mr.Vijay Nayanana Yadav is shown as about 15 years. He further argued that the documents submitted by the petitioner show that Vijayalakshmi as wife Vijayanarayanan as son. The date of birth of son is mentioned as 01.01.2006. The date of marriage between P.N.Gopinathan and Vijayalakshmi is shown that was solemnized on 29.06.2014. The age of 2nd respondent is shown as 15. Even according to 1st respondent, the alleged marriage between Late P.N.Gopinathan and Ms.A.Vijayalakshmi held during the year 2014. Hence, it can be easily seen that the 2nd respondent is not the son of the 1st respondent. The death certificate first was not filed along with application. After a long time the death certificate of first wife is submitted. At first the counsel took a stand that first wife is alive. Later he produced Ex.R7 as the death certificate of the first wife of P.N.Gopinathan. Therefore Section 47 application has to be allowed and LR application has to be dismissed.

14. This court gave its anxious consideration to both sides.

15. At this stage it is relevant to point out Section 47 of C.P.C. which runs as under.

Section 47. Questions to be determined by the Court executing decree:-

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution,

discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) (Omitted by Amendment Act, 1976.)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

16. No doubt that the dispute as to determine the status of parties whether they are the representatives of the deceased is under the purview of Section 47 of C.P.C. and this application is maintainable. The issue to be decided is whether the petitioners are the representatives of the deceased P.N.Gopinathan. The petitioners stated that 1st petitioner is the wife and 2nd petitioner is the son of the deceased and they are the legal heirs. To prove the same, they have exhibited 7 documents. i.e., Ex.R1 to Ex.R7.

17. Before going into the contents of the documents Ex.R1 to Ex.R7 submitted by the petitioners, this court wants to analyze the admissibility and evidentiary value of these documents. The respondent has submitted 7 documents in A.No.1363 of 2021 which were marked as Exs.R1 to R7 in A.No.2614 of 2021. All these documents are photocopies. The originals are not produced and there is no whisper as to why the originals are not produced and in whose custody the original documents are.

18. As per Evidence Act, A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the

circumstances of the particular case, to act upon the supposition that it exists.

The fact may be proved by evidence. Evidence means and includes,

All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

All documents including electronic records produced for the inspection of the Court such documents are called documentary evidence.

19. To prove a fact through a documentary evidence, the contents of the document shall be proved. The contents of the documents shall be proved as per the provisions of Evidence Act which is extracted hereunder.

S. 61. *The contents of documents may be proved either by primary or by secondary evidence.*

S. 62. *Primary evidence means the document itself produced for the inspection of the Court. Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.*

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

S. 63. *Secondary evidence means and includes—*

- 1) Certified copies given under the provisions hereinafter contained;*
- 2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;*
- 3) Copies made from or compared with the original;*

- 4) *Counterparts of documents as against the parties who did not execute them;*
- 5) *Oral accounts of the contents of a document given by some person who has himself seen it.*

20. The documents submitted by the petitioners are photocopies. The photocopies are obtained through mechanical process, which comes under the category of sub clause (1) and sub clause (2) of Section 63 of Evidence Act. Whether these photocopies can be looked into is a question. Sections 64 and 65 of Evidence Act speaks about the situations where the secondary evidence is admissible.

S. 64. *Documents must be proved by primary evidence except in the cases hereinafter mentioned.*

S. 65. *Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—*

- (a) *When the original is shown or appears to be in the possession or power — of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;*
- (b) *when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*
- (c) *when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;*
- (d) *when the original is of such a nature as not to be easily movable;*
- (e) *when the original is a public document within the meaning of section 74;*
- (f) *when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence2; 1 [India] to be given in evidence2;"*

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

21. Unfortunately in this case, the learned counsel for the petitioners did not produce the original documents and did not even try to make the submitted documents to be admissible in evidence. These documents are submitted by the counsel and marked as Ex.R1 to Ex.R7. The counsel for the respondents would say that the documents that is the photocopies have already been marked, hence it may be considered. But marking of documents is only for the convenience of the Court by giving serial number to consider the same. Mere marking of document will not create any right and it does not mean that the document is admissible in evidence and the contents of the document is proved. The petitioner and their counsel without following the procedure established by law in a very casual manner filed photocopies and sought for orders. The Court can never look into the photocopies since they can be easily manipulated.

22. In view of this Court, these documents which are the photocopies that can never be looked into for any purpose, unless they are marked by the procedure established under Indian Evidence Act. Even after

strong contest by the other side, the petitioners side failed to produce and mark the originals. The petitioners are not even ready to produce their original family card. In such a situation, this Court can easily come to the conclusion that the petitioners failed to prove the fact that the petitioners are the legal heirs of the deceased P.N.Gopinathan and this point is answered accordingly.

23. The another contention by the respondent counsel is that since 2nd petitioner is the minor, he should have represented by proper guardian. He submitted that the first petitioner is not the mother of the 2nd petitioner. He further submitted that she is not the natural guardian of 2nd petitioner. The petitioner would have been resorted to Order XXXII of C.P.C. by filing application to seek permission for the appointment of guardian.

24. At this stage it is relevant to go through Order XXXII of C.P.C

Order XXXII Rule 1 - Minor to sue by next friend

Every suit by a minor shall be instituted in his name by a person who in such shall be called the next friend of the minor.

Explanation - In this Order, "minor" means a person who has not attained his majority within the meaning of section 3 of the Indian Majority Act, 1875 (9 of 1875) where the suit relates to any of the matters mentioned in clauses (a) and (b) of section 2 of that Act or to any other matter.

Order XXXII Rule 4. Who may act as next friend or be appointed guardian for the suit

(1) Any person who is of sound mind and has attained majority may act as

next friend of a minor or as his guardian for the suit:

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent [in writing] be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, for Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested 1[or out of the property of the minor], and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

25. If a minor comes as a plaintiff he should be represented by next friend as per Order 32 Rule 1. The learned counsel took a stand that the interest of 2nd petitioner is adverse to that of 1st petitioner. Hence, 2nd petitioner could not be represented by 1st petitioner. The petitioners would have applied for the permission to sue 1st respondent as next friend for the minor 2nd petitioner or they would have applied for the appointment of guardian. For a sake of argument, if the arguments of learned counsel is taken into account then the same principle applies to applicant in Section 47 application also.

26. The applicant in A.No.2614 of 2021 while filing application under Section 47 of C.P.C. against the minor respondent, ought to have filed

a third party affidavit to appoint a natural guardian or he would have filed an application for the appointment of court guardian for minor 2nd respondent. At this stage it is relevant to bring the attention to the provision of Order XXXII Rule 3 of C.P.C.

Guardian for the suit to be appointed by court for minor defendant.- (1)

Where the defendant is a minor, the court, on being satisfied of fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed

guardian has not interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father, or where there is no father, to the mother, or where there is no father or mother, or other natural guardian of the minor, or, where there is no father, mother, or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

(4A) The court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also.

(5) A person appointed under sub-rule (1) to be guardian for the d for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree.

27. The applicant in Section 47 application who is the respondent in LR application failed to follow the same. The applicant in A.No.2614 of 2021 filed Section 47 application against the minor showing

1st respondent as the guardian and contesting that she is not the natural guardian for 2nd respondent. Therefore Section 47 application against the minor respondent without application for appointment of guardian is also not maintainable. As such Section 47 application filed by the applicant is deserved to be dismissed.

28. This court has not decided the issues involved in both applications on merits, since the petitioners failed to submit the original documents. Hence it is needless to answer this issue at this stage. Further it is needless to say that there is no bar for the minor respondent in future to proceed in this matter in accordance with law within the period of limitation. Hence, A.No.2614 of 2021 is closed. Since the petitioners failed to prove that they are the legal heirs of the deceased P.N.Gopinathan A.No.1363 of 2021 is dismissed. No costs.

Sd./-MASTER
29/09/2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

jj 30/11/2021

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