



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WEB COPY

AS (MD)No.115 of 2010

and

MP(MD) No.1 of 2010 & CMP(MD)No.5211 of 2021

1.W.T.K.M.R.Palanisamy (died) ... Appellant / 2nd defendant

2.P.Mallika

3.P.Jayasudha

4.Rathika

5.P.Rama Priya

6.P.Roselin ... Appellants

(Appellants 2 to 6 are brought on record
as Lrs of the deceased sole appellant vide order
dated 09.02.2018)

vs .

1.M.Ramasamy ... 1st respondent / Plaintiff

2.Mahalakshmi ... 2nd respondent / 1st defendant

3.Pushpam ... 3rd respondent / 3rd defendant

(R-3 WAS SET EXPARTE BEFORE THE TRIAL COURT)

PRAYER: Appeal Suit filed under Section 96 of C.P.C., to set aside the judgment and decree dated 12.02.2010 made in O.S No.246 of 2004 on the file of the Additional District Court cum Fast Track Court, Dindigul.

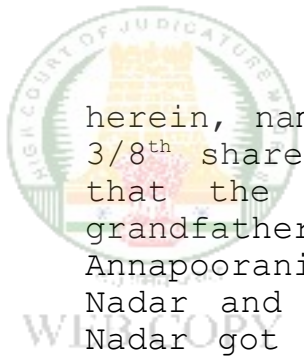
For Appellants : Mr.H.Arumugam

for Mr.S.Kumar

For Respondents : Mr.J.Lawrance for R1 and R2

JUDGMENT

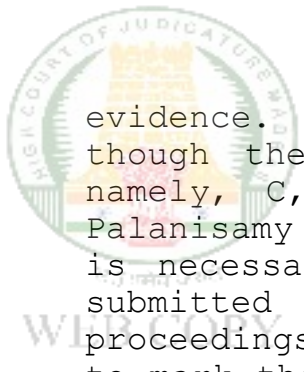
This appeal is directed against the judgment and decree dated 12.02.2010 made in O.S No.246 of 2004 on the file of the Additional District Judge/Fast Track Court, Dindigul. The first respondent



herein, namely, M.Ramasamy filed the said suit seeking partition of 3/8th share in the suit properties. The case of the plaintiff is that the suit properties are the ancestral properties of his grandfather Ramasamy Nadar. Ramasamy Nadar was married to one Annapoorani Ammal. Through the wedlock, two sons, namely, Muthiah Nadar and Palanisamy and one daughter Pushpam were born. Muthiah Nadar got married to Mahalakshmi, the first defendant and through the said wedlock the plaintiff was born. Muthiah Nadar passed away on 24.03.1978 intestate. The grandmother Annapoorani Ammal passed away on 17.11.1988 intestate. The grandfather Ramasamy Nadar had died in late 1940s. According to the plaintiff, the said properties had not been partitioned. Since the second defendant Palanisamy, the paternal uncle did not come forward for an amicable partition, the suit had to be laid. The second defendant filed a detailed written statement controverting the plaint averments. The contention of the second defendant was that the plaintiff was not born through the wedlock between his brother Muthiah Nadar and the first defendant Mahalakshmi. The marriage between Muthiah Nadar and Mahalakshmi took place on 08.05.1970. The first defendant had filed HMOP No.22 of 1971 before the Sub Court, Ramanathapuram for annulling the marriage. In the said HMOP, the second defendant Palanisamy was shown as the guardian to represent Muthiah Nadar. Mahalakshmi had specifically averred in the said OP that Muthiah Nadar was impotent. She also pointed out that the marriage between them was dissolved through customary mode. Mahalakshmi has been leading an immoral life. The first defendant Mahalakshmi filed written statement claiming that though she filed a OP for annulling her marriage, it was allowed to be dismissed for default and that there was marital reunion with Muthiah Nadar and through the said wedlock, the plaintiff M.Ramasamy was born. The first defendant also denied the various allegations made by the second defendant against her character and conduct.

2. Based on the divergent pleadings, the trial court framed the necessary issues. The plaintiff examined himself as PW.1 and marked Exs.A1 to A12. One Pandiyarajan was also examined on the side of the plaintiff. The first defendant herself examined as DW.1 and one Jeyaseelan and Mookaiah were examined as DW.2 and DW.3. The second defendant was examined as DW.4 and three other witnesses were also examined on the side of the defendants. Exs.B1 to B32 were marked. After considering the evidence on record, the trial court by the impugned judgment and decree dated 12.02.2010, granted preliminary decree as prayed for. The first defendant was allotted 1/8th share in the suit properties. Aggrieved by the same, this first appeal came to be filed by the second defendant W.T.K.M.R.Palanisamy. During the pendency of the appeal, he passed away and his legal heirs have come on record.

3. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds. The



evidence. The learned counsel for the appellants submitted that though the suit items are five in number, three of the items, namely, C, D and E stand in the name of the second defendant Palanisamy and to prove that those items were purchased by him, it is necessary to adduce additional evidence. The learned counsel submitted that a first appeal is a continuation of the original proceedings. He also submitted that the original appellant failed to mark these documents before the trial court. Only recently, the appellants were able to trace these documents. Since in spite of due diligence on the part the appellants the documents could not be filed before the court below, they were constrained to mark them as additional documents. He would also submit that vigilance or negligence on the part of the appellants should not matter and since these documents would facilitate rendering an appropriate judgment, he called upon this Court to allow the civil miscellaneous petition filed under Order 41 Rule 27 of CPC.

4.Coming to the merits of the matter, the learned counsel for the appellants submitted that there is no dispute that both Ramasamy Nadar and his wife Annapoorani Ammal passed away intestate. He strongly emphasised that when the first defendant had taken a specific stand that the deceased Muthiah Nadar was impotent and also filed OP to that effect, the averments made in that O.P cannot be ignored. He would also point out that as per the civil rules of practice, the person concerned must affirm the averments set out in a petition for nullity. He drew my attention to Ex.B9 to show that since the first defendant had been leading an immoral life and that Muthiah Nadar was impotent, the plaintiff Ramasamy could not have been born through the wedlock. He would also submit that the marriage between them was dissolved before the local panchayat. In fact, Mahalakshmi issued receipt in favour of the original appellant Palanisamy in this regard. The said receipt was marked as Ex.B8. The learned counsel for the appellant submitted that later Mahalakshmi had executed the deed of release dated 18.08.1979. Since the original document was lost, they could mark only a xerox copy. Mahalakshmi admitted having executed the said document. She was given Rs.25,000/- towards her rights and interest in the suit properties. He would also point out that Pushpam, the third defendant had executed release deed in favour of her mother Annapoorani Ammal and her brother Palanisamy vide Ex.B32 dated 28.12.1982. In the light of these developments, the learned counsel for the appellant submitted that the trial court ought not to have granted preliminary decree as prayed for. He called upon this Court to allow CMP(MD)No.5211 of 2021 and set aside the judgment and decree passed by the trial court and dismiss the suit in toto.

5.Per contra, the learned counsel for the respondents submitted that the impugned judgment and decree passed by the trial court do not warrant any interference.



6.I carefully considered the rival contentions and went through the evidence on record. The points that arise for determination are as follows :

“1.Whether the plaintiff Ramasamy was born to Muthiah Nadar and hence, entitled to maintain the instant suit for partition ?

2.Whether the marriage between Muthiah Nadar and Mahalakshmi was dissolved in the manner known to law?

3.If the answers to the aforesaid questions are in favour of the plaintiff, what would be the entitlement of Ramasamy?

4.Whether the plea for adducing additional evidence deserves to be allowed ?.”

The specific case of the plaintiff is that the suit properties pertained to his grandfather Ramasamy Nadar and that he died intestate and that they are amenable for partition. Nowhere, the contesting defendants had pleaded that 3 out of 5 suit items are his self acquired properties. It is not as if the documents that are now sought to be adduced as additional evidence were not available originally. There is no pleading that items C, D and E are his absolute properties. No explanation has been given as to why the documents now sought to be filed as additional evidence were not produced before the court below. As rightly contended by the contesting respondents, when the items were purchased, Palanisamy was hardly twenty years old. He could not have had any other avocation. I therefore dismiss CMP(MD)No.5211 of 2021. I hold that the all the properties are joint family properties. Since the properties have been held as joint family properties, Annapoorani Ammal, Muthiah Nadar, Palanisamy and Pushpam will have 1/4th share each. There is no dispute that Muthiah Nadar got married to the first defendant Mahalakshmi. It is true that Mahalakshmi filed a O.P for annulling her marriage with Muthiah Nadar. But the fact remains that the O.P was dismissed for non-prosecution. But when no conclusive judicial finding has been rendered and the O.P itself suffered a dismissal for non-prosecution, it would be most unsafe to come to a conclusion that Muthiah Nadar was impotent. Section 112 of the Indian Evidence Act was enacted to avoid stigmatization. It contains a conclusive presumption. Ramasamy was admittedly born when the wedlock between Muthiah Nadar and Mahalakshmi was subsisting. It is true that the other defendants filed some evidence to show that the marriage between Muthiah Nadar and Mahalakshmi was dissolved before the local panchayat. The parties belong to the Nadar community. It has not been shown that among the members of the Nadar community, there was any practice of dissolution of marriage through customary mode. The marriage between the two was not dissolved in the manner known to law. The marriage took place on 08.05.1970. The plaintiff was born on 06.01.1974. Muthiah Nadar died on 04.03.1978. It has not been shown that there was no



access between the parties to the marriage. Therefore, I have to necessarily hold that Muthiah Nadar was very much the father of the plaintiff Ramasamy.

7. Having come to this conclusion, I hold that Muthiah Nadar had $1/4^{\text{th}}$ share in the suit property. Muthiah Nadar passed away on 24.03.1978. His $1/4^{\text{th}}$ share devolved on his mother Annapoorani Ammal, wife Mahalakshmi and son Ramasamy. Mahalakshmi had however relinquished her share in the suit property by Ex.B10 which is equivalent to Ex.A11 in favour of Ramasamy. Therefore, following the said relinquishment as evidenced by Ex.A11 equivalent to Ex.B10 Mahalakshmi did not have any share in the suit properties. On the other hand, Ramasamy the plaintiff was having $1/12^{\text{th}}$ share in the suit properties. But then, certain subsequent developments took place. Pushpam/third defendant had also relinquished her share in the suit properties in favour of her brother Palanisamy and mother Annapoorani Ammal. Annapoorani Ammal was having $1/4^{\text{th}}$ share in the suit properties. Since she died intestate, her share devolved on the three branches. The plaintiff had got $1/12^{\text{th}}$ share from Annapoorani Ammal.

8. To recapitulate, Annapoorani Ammal, Muthiah, Palanichamy and Pushpam got $1/4^{\text{th}}$ share each from Ramasamy Nadar. Muthiah Nadar's $1/4^{\text{th}}$ share devolve upon $1/3^{\text{rd}}$ each (i.e. $1/12$) to Annapoorani Ammal (mother), Mahalakshmi (wife) and Ramasamy (son). Pushpam relinquished her $1/4^{\text{th}}$ share to Annapoorani Ammal and Palanisamy through Ex-B-32. Mahalakshmi relinquished her $1/12^{\text{th}}$ share obtained from her husband Muthiah to Palanisamy under Ex-A11/Ex-B10. Annapoorani Ammal died intestate and her share devolve upon her 3 children, namely, Muthiah, Palanisamy and Pushpam. The plaintiff and D-1 will share the Muthiah's undivided right.

9. For easy division of share, the total share of Ramasamy can be taken as 144 i.e. $1/4 \times 36/36$. Therefore one share of $\frac{1}{4}$ is equal to $36/144$. Annapoorani Ammal, Muthiah, Palanisamy Nadar and Pushpam all will get $36/144$ each. Muthiah's $36/144$ will devolve upon three persons, Annapoorani Ammal, the plaintiff Ramasamy and D-1 Mahalakshmi equally by $12/144$ each. Pushpam's $36/144$ will devolve upon Annapoorani Ammal and D-2 Palanisamy equally through Ex.B-32, i.e. $18/144$ each. The Plaintiff Ramasamy will get $12/144$ from Muthiah. Mahalakshmi who got $12/144$ from Muthiah relinquished the same in favour of Palanisamy under Ex.A-11 = B-10. Thus, Annapoorani Ammal got $36/144$ from Ramasamy, $12/144$ from Muthiah and $18/144$ from Pushpam. Thus, she got $66/144$. Since she died intestate her share will devolve upon the branch of Muthiah, Palanisamy Nadar & Pushpam equally i.e., $22/144$ each. The $22/144$ of Muthiah's Branch will devolve upon Ramasamy and Mahalakshmi, i.e. Plaintiff and D1 equally i.e., $11/144$ each.

10. The impugned judgment and decree passed by the trial court is confirmed subject to the following modifications :



a) The plaintiff will get 12/144 from his father Muthiah and 11/144 from his grandmother AnnapooraniAmmal. Thus he is entitled to 23/144.

b) D-1 Mahalakshmi is entitled to 11/144 inherited from Annapoorani Ammal.

c) D-2 Palanisamy will get 36/144 from his father Ramasamy, 12/144 through relinquishment by Mahalakshmi (D-1), 18/144 from Pushpam (D-3) through relinquishment and 22/144 from Annapoorani Ammal. Thus, he will get 88/144.

d) D-3 Pushpam will get 22/144 from Annapoorani Ammal.

The appeal is partly allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS.II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

To

1.The Additional District Court cum Fast Track Court, Dindigul.

2.The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai. (2 Copies)

+1 cc to Mr.S.KUMAR, Advocate, SR.No.27070 dt.24/08/2021

+1 cc to Mr.J.LAWRANCE, Advocate, SR.No.27122 dt.24/08/2021

AS (MD) No.115 of 2010

and

MP (MD) No.1 of 2010 &

CMP (MD) No.5211 of 2021

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