



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.08.2021

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WEB COPY

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.862 of 2005

Velu Pillai

... Appellant/Appellant/Plaintiff

Vs.

1.Chandra alias Sirumbayee
2.Silambayee
3.Raju Ammal
4.Dhanalakshmi

...Respondents/Respondents/Defendants 1 to 4

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.19 of 2004 on the file of the Subordinate Court, Kulithalai, dated 24.09.2004 in confirming the judgment and decree in O.S.No.17 of 2001 dated 18.03.2004 on the file of the District Munsif Court, Kulithalai.

For Appellant : Mr.V.Singan

For Respondents : Mr.P.Thiagarajan for R1
Mr.K.Govindarajan for R2 to R4

JUDGEMENT

The plaintiff in O.S.No.17 of 2001 on the file of the District Munsif Court, Kulithalai is the appellant in this second appeal. The suit was for partition. The case of the appellant is that the suit property belonged to one Ramasamy. Ramasamy got married to one Chinammal. A daughter by name Amirtham was born through the said wedlock. Chinammal later passed away. Thereafter, Ramasamy got married to one Pappammal and through her begot as many as four children namely., Silambayee, Raju Ammal, Sivachiambaram and Dhanalakshmi. Amirtham born through Chinammal also passed away. The plaintiff/Velu Pillai and the first defendant/Sirumbayee are the children born to Amirtham. According to him, the suit property was never partitioned. Since the children born through the second wife were not coming forward for an amicable partition, the said suit came to be instituted. The defendants filed written statement controverting the plaint averments. Though in the plaint, the plaintiff had admitted that the defendants 2 to 4 are the children born to Ramasamy and Pappammal, the contesting defendants did not accept that Ramasamy had a wife by name, Chinammal or that a daughter by name Amirtham was born to them. In other words, tracing



of ancestry by the plaintiff to Ramasamy was contested. Based on the rival pleadings, the trial Court framed the necessary issues.

2.The plaintiff examined himself as P.W.1 and one Subramaniyapillai, a villager elder was examined as P.W.2. Exs.A1 to A6 were marked. The second defendant examined herself as D.W.1 and one Muruganantham was examined as D.W.2. Exs.B1 and B2 were also marked.

3.After a consideration of the evidence on record, the trial Court by judgment and decree dated 18.03.2004 dismissed the suit. Challenging the same, the plaintiff filed A.S.No.19 of 2004 before the Sub Court, Kulithalai. The first appellate Court by the impugned judgment and decree dated 29.04.2004 dismissed the appeal. Questioning the same, this second appeal came to be filed.

4.The second appeal was admitted on the following substantial questions of law:-

"1.Whether the plaintiff being the grandson of Ramasami through his daughter Amirtham is entitled to a share in the suit properties?

2.Whether the decree and judgment of the appellate Court is sustainable in law, especially when the first appellate Court having come to the conclusion that the plaintiff is the heir of Ramasami through his daughter Amirtham? and

3.Whether the plaintiff's mother Amirtham, being the daughter of Ramasami is entitled to a share in the suit property and if so, whether it will not devolve upon the plaintiff?"

5.The learned counsel for the appellant drew my attention to the findings given by the first appellate Court in paragraph No.10 of its judgment. The first appellate Court had given a finding that the plaintiff and the first defendant are the grand children of Ramasamy and that their mother namely., Amirtham was born to Ramasamy and Chinnammal. However, the first appellate Court came to the conclusion that the plaintiff will not have right in the suit property. Because he was the son born through the daughter of Ramasamy, he cannot be considered as a member of joint family. The learned counsel for the appellant pointed out that this reason can no longer stand. He also pointed out that even though the trial Court had held that the claim of the plaintiff that Chinnammal was the first wife of Ramasamy was not proved, the first appellate Court had accepted the status claimed by the plaintiff and that the contesting defendants did not file any cross appeal.



6.Per contra, the learned counsel for the respondents submitted that he is very much entitled to challenge the aforesaid finding rendered by the first appellate Court in the impugned judgment and he is not obliged to file any cross appeal. The learned counsel for the respondents invoked Order 41 and Rule 33 of CPC in support of his contention. He submitted that no substantial question of law really arises for consideration.

7.I carefully considered the rival contentions and went through the evidence on record.

8.The specific case of the plaintiff is that he is the grandson of Ramasamy, the father of the contesting respondents herein. According to him, Ramasamy originally married one Chinnammal and through the said wedlock, his mother namely., Amirtham was born. Later Chinnammal passed away and thereafter, Ramasamy got married to Pappammal, the mother of the contesting respondents herein. Even though the plaintiff had conceded that the contesting respondents were born to Ramasamy, the respondents did not reciprocate the gesture. They disputed the claim of the plaintiff that Ramasamy had a first wife by name Chinnammal or that a daughter Amirtham born to them. The plaintiff had not adduced any satisfactory evidence before the trial Court. Therefore, the trial Court had negatived the said claim put forth by the plaintiff. The trial Court had rendered a categorical finding that the claim that Ramasamy had a first wife by name Chinnammal had not at all been established. The first appellate Court had accepted the version given by the plaintiff on the strength of Ex.A1. Ex.A1 is only a genealogy. Any genealogy will have to be proved. It cannot be taken as a gospel truth on the face of it. The first appellate Court without assigning any reason had mechanically accepted the case projected by the appellant on its face value. Even though the reason assigned by the first appellate Court for non-suiting the plaintiff may not be correct, still I must hold that the foundational facts have not at all been established by the plaintiff. Before the first appellate Court, the plaintiff marked Ex.A7. Ex.A7 is a birth certificate. From the contents of Ex.A7, one can notice that a girl child was born to Ramasamy Pillai and one Chinnammal, who were residing at Thaliyampatti on 01.12.1915 and it was registered on 06.12.1915. Of course, the learned counsel for the appellant is right in his contention that during the relevant time, the practice of entering the name of the child was not there and only the gender alone will be mentioned. As rightly pointed out by the learned counsel for the respondents, Ex.A7 was straight away marked without following the procedure set out under Order 41 Rule 28 of CPC. It has not been established that Ex.A7 pertains to Amirtham, the mother of the plaintiff. Though the respondents have not filed any cross appeal against the finding rendered by the first appellate Court, still in view of Order 41 and Rule 23 of CPC, they are very much entitled to challenge the aforesaid finding set out in Paragraph No.10 of the



impugned judgment of the first appellate Court. The said finding is vacated. No substantial question of law arises for consideration. The second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To:

1.The Sub Court,
Kulithalai

2.The District Munsif Court,
Kulithalai.

Copy to:

The Record Keeper, (2C)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.SARVABHAUMAN ASSOCIATES, Advocate (SR-26792[F] dated 19/08/2021)

+1 CC to M/s.P.THIAGARAJAN, Advocate (SR-26876[F] dated 19/08/2021)

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