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A.S.No.831 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.12.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MRS.JUSTICE N.MALA

A.S.No.831 of 2009
and M.P.Nos.1 & 2 of 2009

1.Sivakumar @ sudhakar
2.Saraswathi

...Appellants/Defendants

Vs.

Sandiressegarane

... Respondent/Plaintiff

1.G.Baskar
2.G.Sasikumar
3.Chinnamale @ Padmini

... Respondents/Defendants

Prayer:- Appeal Suit filed under Section 96 of C.P.C., against the judgment and decree dated 26.03.2009 made in O.S.No.12 of 2006 passed by the learned III Additional District Judge, Pondicherry.

For Appellants : Mr.B.J.Agannath
for Mr.R.Kannan

For R1 : Mr.V.Selvaraj

For R2 : Mr.Dalit Tiger C.Ponnusamy

For R3 & R4 : Mr.V.M.Venkatraman



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JUDGMENT

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[Judgment of the Court was made by **S.S.SUNDAR, J.,**]

The defendants 1 and 2 in the suit in O.S.No.12 of 2006 on the file of the learned III Additional District Judge, Pondicherry, are the appellants in the above appeal.

2. The 1st respondent as plaintiff filed the suit originally before the learned Principal Sub Judge, Pondicherry in O.S.No.103 of 2001 for partition of his 1/5th shares in the suit properties and for other consequential reliefs.

3. The said suit was later transferred to the file of the learned III Additional District Judge, Pondicherry and numbered as O.S.No.12 of 2006. The 1st respondent is the son of one Gopalakichenin. It is admitted in the plaint that the suit A and B schedule properties belonged to one Rathinavelu who is the son of Patchayappa Kounder through a Partition Deed dated 17.11.1973. After the death of the said Rathinavelu in 1977, it is stated that the plaintiff's father Gopalakichenin alias Kannan succeeded to the properties. However it is also admitted that during his life time the said Rathinavelu executed a Will dated 10.11.1973 giving life estate to his only son Gopalakishnan (or Gopalakichenin)



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and vested right in favour of his grandson namely the 1st defendant to succeed to the properties. The plaintiff and defendants 2 to 4 are stated to be the children through the 2nd wife of Gopalakichenin by name Chinnammal. Stating that the properties are the ancestral properties of Gopalakichenin, the plaintiff came forward with a suit for partition of 1/5th shares.

4. The suit was contested by defendants 1 and 2 who are the appellants in this appeal. Since the property originally belonged to Rathinavelu, the grandfather of the 1st appellant, and he died leaving behind his son Gopalakichenin, it is stated that in light of the Will executed by Rathinavelu in favour of 1st defendant, the plaintiff or anyone as a legal heir of the said Gopalakichenin have no right to question the same. It is also contended in the written statement that Gopalakichenin had only one wife namely the 2nd defendant and that the 5th defendant is not the 2nd wife of said Gopalakichenin. Stating that the Will said to have been executed by Rathinavelu in favour of Gopalakichenin is not denied, the defendants prayed for dismissal of the suit.

5. In the written statement, the legal status of the plaintiff/respondent is specifically denied and it is also contended that Section 16 of the Hindu Marriage Act, 1955 will not help the plaintiff to claim share in the properties which are not



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the self-acquired properties of the father. Having regard to the final order proposed to be delivered in this appeal. we need not deal with several other issues raised by the defendants in the written statement.

6. Before the Trial Court, several issues were framed. One of the issues was relating to the legal status of plaintiff and defendants 3 and 4 as children of Gopalakichenin. It is to be seen that the fact that the plaintiff is the son of Gopalakichenin is admitted and no issue was raised by the defendants. It is also admitted that the 2nd wife and son of Gopalakichenin filed a petition for maintenance under Section 125 of CPC and it is evident that the plaintiff was recognized and held to be the son of the deceased while granting maintenance and the legal status of plaintiff as illegitimate son of Gopalakichenin may be true.

7. However the further issue that arise for consideration is whether the factum of marriage between Gopalakichenin and the 2nd wife, who is the 5th defendant in the suit, is proved. From the evidence on record, this Court is unable to find any direct evidence to prove the factum of marriage. Though the suit was decreed by holding that the Will executed by Rathinavelu dated 10.11.1973 is invalid since the character of the properties as ancestral is admitted, the question whether the plaintiff is entitled to claim share in the property of Gopalakichenin



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under Section 16 of the Hindu Marriage Act can be held in favour of the plaintiff only if the factum of marriage is proved.

8. The learned counsel appearing for the respondent has produced before this Court several judgments of the Hon'ble Supreme Court suggesting that the Court is entitled to draw a presumption of marriage between the plaintiff's mother and Sri.Gopalakichenin. This Court is unable to agree with the submission of the learned counsel appearing for the respondent that Section 16 can be invoked even without proving the factum of marriage between plaintiff's mother the 5th defendant and Gopalakichenin. In the present case, it is admitted that the plaintiff has not impleaded some of the daughters of Gopalakichenin through his 1st wife. Therefore, the suit is also liable to be dismissed on the ground of non-joinder of the daughters of Gopalakichenin, since they are necessary parties. In the present case, the above appeal has been filed by the contesting defendants namely defendants 1 and 2. Though several issues were raised by the appellants, the appellants have not even raised a single ground as against the finding of the Trial Court holding that the plaintiff is the son of Gopalakichenin. Therefore he is entitled to claim a share under Section 16 of the Hindu Marriage Act, 1995 if the factum of marriage is proved irrespective of the validity of marriage. Since this Court is unable to sustain the judgment of Trial Court as the suit is admittedly not



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maintainable without impleading the daughters through the 1st wife of Gopalakichenin, the issue whether the factum of marriage is proved by material evidence can also be gone into in the presence of all the parties. There is no sufficient evidence let in by the plaintiff to prove the factum of marriage. Since this Court has decided to remit the matter on the ground that other legal heirs of Gopalakichenin though the 1st wife are not impleaded, the Trial Court may decide all the issues afresh.

9. In view of the discussions above, this Court sets aside the judgment and decree of the Trial Court on all issues and remits the matter to the Trial Court. It is open to the plaintiff/respondent to prove the factum of marriage to sustain their claim to a share in the property of Gopalakichenin under Section 16 of the Hindu Marriage Act after impleading necessary parties in the suit for partition. The question whether the Will is proved in accordance with law may also be gone into.

10. Therefore on the ground that the suit is bad for non-joinder of necessary parties, the judgment and decree granted by the Trial Court are set aside. Since the issue whether the suit is barred for non joinder of necessary parties is not raised by the defendants in the written statement, this Court permit



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the plaintiff/respondent to file a petition to implead the other two daughters of Gopalakichenin through the 1st wife and decide the suit afresh. It is open to the parties to lead evidence to prove their respective cases. The appellants are permitted to file an additional written statement to raise questioning the entitlement of the plaintiff under Section 16 of the Hindu Marriage Act. The parties shall appear before the Lower Court on 19.12.2022, the Lower Court shall dispose of the suit on merits and in accordance with law after giving sufficient opportunity to the plaintiff to implead two daughters of 2nd defendant and dispose of the same within a period of three months from the date of filing such petition. No costs. Consequently, connected miscellaneous petitions are closed.

[SSSRJ] [NMJ]
01.12.2022

cda

S.S.SUNDAR, J.,



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AND

N.MALA, J.,

cda

To

- 1.The III Additional District Judge, Pondicherry.
- 2.The Section Officer, VR Records,
High Court, Chennai.

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