



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.12.2021
PRONOUNCED ON : 25.01.2022

CORAM

THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

S.A.No.200 of 2019
and
C.M.P.No.3376 of 2019

Logambal Ammal @ Indirani

...Appellant / 3rd Defendant

Vs.

1.Thilagavathi

2.Kanagavalli Ammal

3.Unnamalai Ammal

4.Sarasu Ammal

5. S. Durairaj

...Respondents / 1st Plaintiff /
Defendants 2, 4 & 5

[R5 impleaded vide order of the Court, dated 19.12.2020 made in
CMP.No.26643 of 2019 in SA.No.200 of 2019]

Prayer:- Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 19.04.2002 in A.S.No.102 of 2000 on the file of the Principal District Court, Cuddalore, confirming the judgment and decree dated 17.07.2000 in O.S.No.11 of 1996 on the file of the learned Subordinate Judge, Panruti.

For Appellants : Mr.R.Gururaj

For Respondents : Mr.S.Ganesh for R1
Mr.J.Srinivasamohan
for TVJAssociates
for R2.
Mr.D.S.Thirumavalavan for R3
Mr.S.Nalliappan for R5
R4-Dead.



JUDGMENT

This Second appeal is filed challenging the judgment and decree in A.S.No.102 of 200 on the file of learned Principal District Judge, Cuddalore confirming the judgment of the learned Sub Judge, Panruti in O.S.No.11 of 1996.

2. First respondent/plaintiff and one Appar filed the suit for partition of dividing the suit properties into six equal shares and allot 2/6 shares to the plaintiffs in the suit. The case of the plaintiffs is that the suit properties belong to Rathinavel Nainar. He died intestate on 17.10.1990 leaving the plaintiffs and defendants to succeed his property. He married the first defendant Thailammai sixty years before and begot defendants 2 and 3. He was having business of hiring lights, cycles and also doing agriculture. He married Meenakshi ammal 45 years before. Plaintiffs, D4 and D5 are born to Rathinavel Nainar and Meenakshi ammal. Rathinavel Nainar was living with his wives in Chekkumedu. He purchased item No.1 of property in 1943. First defendant was housed in item No.3 and Meenakshi ammal was housed in Chekkumedu. All the properties are his self-acquired properties. Rathinavel Nainar married his wives before the advent of Hindu Bigamy Act 1949 and therefore, both the marriages are valid marriages. Ten years before his death Rathinavel Nainar's eye sight got impaired. So he was confined to the house in item No.1 of the suit properties. After his death, plaintiffs demanded partition, but the defendants are not willing to effect partition. Therefore, the suit.

3. The case of the defendants, is as follows:

The first defendant is the only wife of Rathinavel Nainar. Meenakshi was never the wife of Rathinavel Nainar. No marriage had taken place between them. Plaintiffs are not the children born to Rathinavel Nainar and Meenakshi. Meenaskshi was married to a person at Pondicherry, lived with him for some time and after deserting him, came to Panruti and she was residing in Chekkumedu street. Rathinavel Nainar lived only with first defendant at No.5, Jawahar street, Panruti. First defendant never shifted her residence to item No.3 or any other place. Item No.3 is only a cultivable land and there is only pumpset. Nobody resided there. All the suit properties are Rathinavel Nainar's self-acquired properties. Plaintiff cannot claim to be the legalheirs of Rathinavel Nainar and Meenakshi ammal and claim partition. Therefore, the suit is liable to be dismissed.

4. Trial Court framed the following issues,

i) Whether the plaintiffs are entitled to claim partition in the suit properties, if so, what is their entitlement?



ii) Whether the plaintiffs are entitled for seeking accounts in respect of the suit properties?

iii) To what relief, the plaintiffs are entitled?

WEB COPY

5. During the trial, PW1 to PW4 were examined and Exhibits A1 to A13 were marked on the side of the plaintiffs. DW1 and DW2 were examined and Exhibits B1 and B2 were marked on the side of the defendants. On going through the oral and documentary evidence, the learned Trial Judge found that plaintiffs are entitled for the relief of partition and decreed the suit granting partition and other incidental reliefs. Appellant filed appeal in A.S.No.102 of 2000. The First Appellate Judge confirmed the findings of the Trial Court and dismissed the appeal. Therefore, appellant/defendant filed this Second Appeal.

6. At the time of admission of the second appeal, following substantial question of law was framed.

Whether the Courts below were justified in granting 2/6th share to the plaintiffs when admittedly they are children of the second wife of deceased Rathinavel Nainar and they would not be heirs of Thailammal/the deceased first defendant, who is admittedly their step mother ?

7. The learned counsel for the appellant submitted that there is no proper pleadings with regard to the year, time and place of alleged marriage between Meenatchi Ammal and Rathinavelu Nainar. There is no evidence produced to prove the alleged marriage between them. The second marriage after the introduction of Tamil Nadu Bigamy Prohibition Act is null and void. Without a legally acceptable evidence, both the courts found that there was a marriage between Meenatchi Ammal and Rathinavelu Nainar and that finding is not correct. Exs. A.1 and A.2 documents have come into existence after the filing of the suit and therefore they have to be rejected outright. Other documents have not been properly proved. Though they may be used for deciding the paternity of the plaintiffs, those documents will not in any way help in proving the marriage between Meenatchi Ammal and Rathinavelu Nainar. The Appellant is residing in first item of the suit property. Without giving notice to the appellant, final decree proceedings were initiated. It is found by the Advocate Commissioner that item one of the suit property cannot be divided and it was sold in court auction sale. Proceedings had been initiated against the final decree proceedings. Shares allotted is also not correct.



R5 has no right to argue in this appeal since he is not a party before the courts below.

8. Learned counsel for the appellant relies on the judgments, 'Bhaurao Shankar Lokhande and another vs. The State of Maharashtra and another reported in [AIR 1965 supreme court 1564]' and 'Priya Bala Ghosh vs. Suresh Chandra Ghosh reported in [[1971] AIR (SC) 1153]', for the proposition as to what constitute solemnization of marriage. Both the judgments arise out of a criminal case and for the reasons aforesaid, they cannot pressed into service in this case. The next judgment relied by the learned counsel for the appellant is 'Surjit Kaur vs Garja Singh & Ors reported in [1994-1-L.W.38]' for the proposition that without pleadings and evidence in support of the pleadings, a valid marriage cannot be presumed. The judgment 'The Ahmedabad Municipal Corporation of the City of Ahmedabad vs Haji Abdul Gaful Haji Hussenhbai reported in [1971 0 AIR (SC) 1201]' is relied for the proposition that there is no warranty of title in court auction sale.

9. Learned counsel appearing for R2 and R3 supported the arguments of appellant. Learned counsel for the first respondent submitted that the marriage between Meenatchi Ammal and Rathinavelu Nainar had been proved through unimpeachable documentary evidence. Both the courts have concurrently found that marriage between Meenatchi Ammal and Rathinavelu Nainar had been proved and plaintiffs are their children. When the appellant claim that Meenatchi Ammal married a person at Puducherry, no effort has been taken to prove this allegation. Appellant had participated in the final decree proceedings and the property was delivered to R1 in E.P.No.15 of 2010.

10. The learned counsel for the second respondent relied on the judgment 'Mohan & Mother vs. Santha Bai Ammal & Others reported in [CDJ 1987 MHC 431]' for the proposition that marriage has to be specifically pleaded and proved. The relevant portions are extracted below:

'18. A faint attempt was made to show that since the Plaintiffs are admittedly the children of Subbarayulu Naidu born through their mother P.W. 2 the paternity is not in dispute. Therefore, they are entitled to succeed to the properties of Subbarayalu Naidu under the provisions of Section 16 of the Hindu Marriage Act, 1953, which reads as follows :

"Legitimacy of Children of void and voidable marriages-(I) Notwithstanding that a marriage, is null and void under Section 11, any child of such marriage who would have



WEB COPY

been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petitioner under this Act.

(2) Where a decree of nullity is granted in respect of voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be. their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in Sub-section (S) or Sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case, where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

The abovesaid provisions is of no help to the plaintiffs since even if the said provision is applicable, the plaintiffs will have to show that actually there was a marriage between their mother P.W. 2 and Subbarayalu Naidu and that that marriage is null and void under S. 11 of the Act. Since we have held in this case that there was no marriage between P.W.2 and late Subbarayalu Naidu the plaintiffs are not entitled to seek any benefits under the said provision in the Hindu Marriage Act. '

Unless it is pleaded and proved, the children out of void marriage cannot seek to gain from the provisions of Section 16 of the Hindu Marriage Act, 1955. He also relied upon the judgment 'Bhaurao Shankar Lokhande & another vs State of



Maharashtra & another reported in [CDJ 1965 SC 135]' relating to a criminal case as to what constitutes solemnization of marriage. Then again it is judgment rendered in a criminal case.

11. It is submitted by the learned counsel for the 5th respondent that the suit O.S.No.11 of 1996 was decreed on 17.07.2000. The appeal filed in A.S.No.102 of 2000 was dismissed on 19.04.2002. The second appeal was numbered only in the year 2019. Meanwhile, final decree petition was filed and final decree was passed. The 5th respondent took delivery of the property in E.P.No.15 of 2010. This is a vexatious second appeal only to harass the respondents and is liable to be dismissed.

12. Considered the rival submissions and perused the records. There are 10 items of the suit properties. There is no dispute between the parties with regard to the fact that the suit properties were purchased by Rathinavelu Nainar and they are his self acquired properties. The suit was filed by first respondent Thilagavathi along with her brother Appar for partition. During the pendency of the suit, Appar died as a bachelor. As a sister Thilagavathi is his only legal heir and therefore that was recorded.

13. The case of the first respondent is that one Thailammai Ammal was the first wife of Rathinavelu Nainar. Appellant and respondents 2 to 4 are the daughters born to Thailammai Ammal through Rathinavelu Nainar. After the filing of the suit, Thailammai Ammal died. Appellant and R2-R4 are her legal heirs and that was recorded. 5th respondent is an auction purchaser of the suit properties and therefore he was impleaded as a respondent in this second appeal. First respondent admitted that Thailammai Ammal was the first wife of Rathinavelu Nainar and her mother Meenatchi Ammal is the second wife. The marriage between her mother Meenatchi Ammal and Rathinavelu Nainar had taken place before the advent of Hindu Bigamy Act, 1949 and therefore the marriage is valid. As the legal heirs of Rathinavelu Nainar, she and her brother along with Thailammai Ammal and her children are entitled to shares in the suit properties. Appellants 2 to 4 stoutly denied that Meenatchi Ammal was the wife of Rathinavelu Nainar and first respondent and Appar were born to them.

14. What is important here is that only the appellant and third respondent had filed written statement in the suit, other respondents have not filed written statement, especially the first wife Thailammai Ammal has not filed any written statement. She is the right person to deny the marriage between Meenatchi Ammal and Rathinavelu Nainar. Courteously, she has not filed written statement. Therefore, it is required to find out whether there was a marriage between Meenatchi Ammal and



Rathinavelu Nainar and the first respondent and Appar were born to them.

15. In the Trial Court, first respondent examined four witnesses and produced Exs. A1 to A13 documents in support of her case. Of these documents, Exs.A.1 and A.2 documents are the birth certificates of first respondent and Appar. The Trial court found that both these documents had come into existence after the filing of the suit and therefore much reliance cannot be placed on these documents. However, the Trial Court found from the other documents namely Exs.A.3 to A.13, the evidence of P.W.2 that there are enough evidence available to conclude that there was a marriage between Meenatchi Ammal and Rathinavelu Nainar during 1946 and the first respondent and Appar were born to them. Therefore, first respondent entitled for 2/7th share that is, 1/7th share for herself and 1/7th share as the legal heir of her deceased brother, Appar, totally 2/7th share. The learned First Appellate Judge concurred with this view.

16. Ex.A.3 is the marriage invitation of first respondent with Kumarasamy dated 09.06.1965. Ex.A.4 is the receipt given on the same day by Veeraganeswar Devastanam for the celebration of this marriage. Ex.A.5 is the voters card issued for Meenatchi Ammal. Ex.A.6 is the patta, Ex.A.7 is the Kist receipt issued in the name of Meenatchi Ammal. In Ex.A3 and A4, the first respondent is shown as daughter of Meenatchi Ammal and Rathinavelu Nainar. In Exs.A.5, A.6 and A.7, Meenatchi Ammal is shown as wife of Rathinavelu Nainar. Ex.A8 is patta in the names of Kaumarasami and Appar. Appar is shown as son of Rathinavelu Nainar in this document. In Ex.A.9, Life Insurance Policy also Appar is shown as son of Rathinavelu Nainar. Ex.A10, Uttira Girayapatarikai, shows the invitation was extended by Appar as the son of Rathinavelu Nainar. Exs.A.11 and A.12, School records show, Appar as the son of Rathinavelu Nainar. P.W.2 has spoken about these documents. Ex.A.13, issued by Southern Railways shows Appar as son of Rathinavelu Nainar. From these documents it can be concluded without any doubt that first respondent and Appar were born to Meenatchi Ammal and Rathinavelu Nainar. Of course there is no direct evidence produced with regard to the marriage between Meenatchi Ammal and Rathinavelu Nainar and there is no specific pleadings in the plaint giving details about year, month, date and place of marriage. The marriage said to have taken place somewhere in 1946. The suit was filed in 1996. It is practically not possible to examine a person who had witnessed the marriage 50 years back. Moreover, the second marriage, when the first wife is alive would always take place in secret. There may not be many invitees to the marriage. Hence it is very difficult to find an eye witness, who witnessed the marriage, especially for



a marriage which said to have taken place 50 years ago. In the absence of direct evidence in proof of marriage, we have to go by the other evidences available to find out the relationship between the parties. As indicated above, the documents produced by the first respondent shows that Meenatchi Ammal and Rathinavelu Nainar lived as husband and wife and their relationship was recognized by Exs. A5-A7 documents issued by Government authorities. Out of their marital relationship, first respondent and Appar were born to them. Exs. A3, A4, A8-A13 confirms this. Though Exs. A1, A2 are after suit documents, they confirm and corroborate other documents that plaintiffs are the children of Rathinavelu Nainar and Meenatchi Ammal. Thus, both the courts below concurrently found there was a marriage between Meenatchi Ammal and Rathinavelu Nainar and first respondent and Appar were born to them. This court finds no reason to interfere with the findings of the courts below in this regard.

17. It is found from the oral and documentary evidence produced in this case, both the courts have concurrently found that there was a marriage between Meenatchi Ammal and Rathinavelu Nainar and first respondent and Appar were born to them. This marriage had taken place while the first wife Thailammai Ammal was alive. Therefore, this marriage is hit under Section 5 (i) of the Hindu Marriage Act, 1955 and therefore it is a void marriage. One of the conditions for a valid hindu marriage is that "neither party has a spouse living at the time of marriage". Admittedly at the time of marriage between Meenatchi Ammal and Rathinavelu Nainar, Rathinavelu Nainar's first wife was alive and therefore the marriage between Meenatchi Ammal and Rathinavelu Nainar is a void marriage. However, Section 16 of the Hindu Marriage Act legitimises the children of void marriage to claim right of the property of their parents. In the case beforehand, first respondent and Appar are entitled to claim right in the property of their parents namely Meenatchi Ammal and Rathinavelu Nainar.

18. This position is reiterated in many judgments, especially in the judgment ' in Revanasiddappa and another vs Mallikarjun and others reported in [AIR 2011 SC 2447]. It is observed that :

'26. On a careful reading of Section 16 (3) of the Act we are of the view that the amended Section postulates that such children would not be entitled to any rights in the property of any person who is not his parent if he was not entitled to them, by virtue of his illegitimacy, before the passing of the amendment.



WEB COPY

However, the said prohibition does not apply to the property of his parents. Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate. If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral. The prohibition contained in Section 16(3) will apply to such children with respect to property of any person other than their parents.

41. In the instant case, Section 16 (3) as amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self acquired or ancestral.

42. For the reasons discussed above, we are constrained to take a view different from the one taken by this Court in Jinia Keotin (supra), Neelamma (supra) and Bharatha Matha (supra) on Section 16 (3) of the Act.

43. We are, therefore, of the opinion that the matter should be reconsidered by a larger Bench and for that purpose the records of the case be placed before the Hon'ble the Chief Justice of India for constitution of a larger Bench.'

19. The reading of this judgment shows that illegitimate children will have a right to whatever becomes the property of their parents, whether self acquired or ancestral. This issue is referred to a larger bench. In the light of this judgment, this court finds that judgments reported in [1994-1-L.W.38] and [1987 MHC 431] are not applicable to this case.

20. Admittedly, the suit properties are the self acquired properties of Rathinavelu Nainar and therefore first respondent and Appar along with Rathinavelu Nainar's first wife and children born through his first wife are entitled to equal



share in the suit properties. During the pendency of the proceedings, Appar and Thailammai Ammal died. Appar died as a bachelor and therefore his share goes to first respondent as his only legal heir. Thailammai Ammal's share will go to appellant and respondents 2 to 4. Thus appellant and respondents 2 to 4 are entitled to 5/28 share each in the suit properties.

21. One more aspect to be considered in this second appeal is that as rightly pointed out by the learned counsel appearing for the 5th respondent that the partition suit filed in 1996 was decreed on 17.07.2000, First Appeal filed against the judgment in A.S.No. 102 of 2000 was also dismissed on 19.04.2002. Though the appellants filed the second appeal in time, the second appeal was numbered only in 2019, nearly after 17 years of the dismissal of the first appeal. Appellant submits that wrong copy of the judgment was given and it had to be corrected. Therefore, it resulted in delay in numbering the second appeal. This is a flimsy reason for such a long delay in getting the second appeal numbered.

22. During the interregnum period of disposal of the first appeal and numbering of the second appeal, final decree proceedings had been initiated. Item 1 of the suit property was sold in court auction sale. The 5th respondent had also taken possession of the suit properties. Much water had flown under the bridge since the disposal of the first appeal on 19.04.2002. On merits, appellant has no case. The long delay in numbering the second appeal further worsens the appellant's claims.

23. In this view of the matter, this court has no reason to differ from the judgment of the first appellate court, confirming the judgment of the Trial Court. The substantial questions of law is answered that the first respondent is entitled to 8/28 share and appellant and respondents 2 to 4 are entitled to 5/28 shares each. In fine, the judgment of the First Appellate Court in A.S.No.102 of 2000 confirming the judgment of the Trial Court in O.S.No.11 of 1996 is confirmed and this second appeal is dismissed with the costs of first respondent throughout and the fifth respondent in the second appeal.

Sd/-

Assistant Registrar(CS IV)

True Copy//

Sub Assistant Registrar

Ep/mrn



To

1. The District Judge,
Cuddalore.
2. The Subordinate Judge,
Panruti.
3. The Section Officer,
VR Section,
High Court of Madras.

+1cc to Mr.S.Nalliappan, Advocate, S.R.No.4388
+1cc to Mr.D.Baskar, Advocate, S.R.No.4375
1cc to Mr.S.Ganesh, Advocate, S.R.No.4784
1cc to Mr.J.Srinivasamohan, Advocate, S.R.No.5029

S.A.No.200 of 2019
and
C.M.P.No.3376 of 2019

SSV[co]
NSK 29/04/2022