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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.01.2022

PRONOUNCED ON : 28.02.2022

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A. No. 73 of 2013

1. Neelaveni
2. Kanageswaran @ Kanagesan
3. Major Thirumagal
4. Major Thirugunam ... Appellants/Plaintiffs

(Appellants 3 & 4 declared as major and next friend their mother viz Neelaveni discharged from the natural guardianship vide Court order dated 23.11.2021 made in C.M.P. Nos. 20338 and 20339 of 2017 in S.A. No. 73 of 2013 by TKRJ)

Vs.

1. Rani
2. Rajeswari
3. Suguna
4. Ambica
5. Sivakumar
6. R.Geetha
7. Minor R.Vikram
8. Minor R.Sushmitha ... Respondents/Defendants
(rep by their mother 6th respondent herein)

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 26.09.2012 passed in A.S. No. 46 of 2011 by the Subordinate Judge, Vaniyambadi, confirming the decree and judgment dated 01.08.2011 passed in O.S. No. 38 of 2009 by the Additional District Munsif Court, Vaniyambadi.



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For Appellants : Mrs.R.T.Sundari
for Mr.P.Jayaprakash

For Respondents : Mr.Anand Venkatesh for R6,R7,R8
for Mr.L.K.Manjunath
No appearance for R1, R2 & R3
R4 & R5 - given up

J U D G M E N T

Defeated unsuccessful plaintiffs are the appellants herein. For the sake of convenience, the parties are referred as per ranking before the trial Court.

2. The plaintiffs filed the suit for partition. According to plaint, the 1st plaintiff is the legally wedded wife of Sivalingam and other plaintiffs are sons and daughter born to the 1st plaintiff through the said Sivalingam. Hence, she claims declaration of title to declare the sale deed dated 06.12.2006 in favour of the defendants 1 and 2 and sale deed dated 02.03.2009 in favour of the 7th defendant as null and void.

3. The contesting 3rd defendant filed written statement stating that the 2nd item of the suit property originally belongs to one Periyasamy. He has executed a gift deed with regard to the said properties in favour of his son, namely, Sivalingam on 20.01.2006. The said Sivalingam was in possession and enjoyment over the said properties along with the defendants. The defendants 4 to 6 are the son and daughters of the said Sivalingam born through the 3rd defendant. She is only the wife to the said Sivalingam. It is false to state that the said Sivalingam as per the caste customs divorced the 3rd defendant in the Village Panchayat. It is also further false to state that the said Sivalingam and his father allotted the property near Kanganachiamman Temple for maintenance to the defendants as alleged in the plaint. It is also not correct to state that the defendants sold the alleged property to Advocate Subramani. It is undiluted falsehood to state that the defendants settled at Periyakammampattu Village about 38 years ago.

4. Further, she submits that, the 1st plaintiff is not the alleged 2nd wife of Sivalingam. She is only the wife to the said Sivalingam. The said Sivalingam during his life time never married either the 1st plaintiff or any other lady as his 2nd wife. The plaintiffs in order to grab the suit properties had shown wrongly in the long cause title and in the plaint that she is the 2nd wife of Sivalingam. On the other hand, the 1st plaintiff is the



wife of one Perumal, S/o.Chinnapaiyan of Pallathoor Village. The plaintiffs and the said Perumal are living together at Pallathoor Village. The 1st item of the suit property originally belongs to one Rajammal who is the mother of the Sivalingam. The said Rajammal on 01.04.1976 executed a gift deed bequeathing the 1st item of the suit property in favour of Sivalingam. From the date of gift deed, the said Sivalingam was in possession and enjoyment over the 1st item of the suit properties along with the defendants 4 to 6. Her husband Sivalingam sold the 1st item of the suit properties to one Manickam, S/o.Munisamy Gounder on 19.06.2000. Further, her husband on 26.12.2005 repurchased the above said properties from the said Manickam. Her husband Sivalingam died on 03.11.2006. The said Sivalingam and the defendants were lived together in the suit properties. The said Sivalingam never divorced the 3rd defendant at any point of time. The said Sivalingam never allotted any property towards maintenance. When there is no divorce, then the question of allotting properties to the 3rd defendant for maintenance does not arise. The 3rd defendant alone performed the death ceremonies of Sivalingam as a wife. The plaintiffs never participated in any of the proceedings. After the death of Sivalingam, the defendants alone were in possession and enjoyment over the suit properties and they are residing in the suit properties itself. The defendants are paying due kist to the Government and are paying house tax to the Panchayat. All the revenue records pertaining to the suit properties stand only in favour of the 3rd defendant.

5. The learned District Munsif, Vaniyambadi has dismissed the suit before the trial Court. The plaintiffs examined themselves as PW1 to PW5 and Exs.A1 to A21 were marked. On behalf of the defendants, DW1 to DW3 were examined and Exs.B1 to B16 were marked. On behalf of the 3rd plaintiff, another set of Exs.A1 to A7 were marked and on behalf of 4th defendant, Ex.A8 was marked and on behalf of 5th defendant Ex.A9 and A10 were marked. The trial Court dismissed the suit in A.S. No. 46 of 2011 on the file of the Subordinate Judge, Vaniyambadi. Hence, the second appeal. Notice of motion was ordered in the Second Appeal.

6. When the matter is taken up for final disposal, the learned counsel appearing for the appellants / plaintiffs filed two additional typed set of documents viz., voter list for the year 1995, photographs, Transfer Certificate of Kanakesan, Death Certificate of Sivalingam, voter list for the year 2006, Patta, Nativity Certificate, Transfer Certificate of Thirugunam, etc.



7. The learned counsel appearing for the appellants / plaintiffs submits that relying on Exs.A2 to A10 and A12, they sought for the relief of declaration of title in entirety. The 1st plaintiff claims to be the second wife of the deceased Sivalingam after divorce with the 3rd respondent / 3rd defendant and placed reliance upon Ex.B10. Ex.B10 is the divorce petition between deceased Sivalingam and the 3rd respondent / 3rd defendant which appears to be dismissed for default. The explanation was offered by the PW1 plaintiff that in view of the compromise arrived at between the parties regarding allotment of land near the Temple, the case was dismissed for default.

8. On perusal of Exs.B1, B2 and B4, this Court finds that the 2nd item of the suit property was initially owned by the family members of Sivalingam. Subsequently, it was sold to the third parties and it was again purchased back by the said Sivalingam. After his death, the defendants 3, 4 and 5 sold under Ex.A12 and thereafter, the 2nd item of the suit property was sold to the defendants 1 and 2 under Exs.A10 and A11. With regard to the Item No.1 of the suit property, it was purchased by the Sivalingam under Ex.A1. In fact, it was repurchased and the defendants 3 to 6 have sold the property to the 7th defendant under Ex.A12 dated 02.03.2009. Thus, Exs.A10 and A12 are the documents.

9. The case of the plaintiffs is that the 1st plaintiff is the wife and other plaintiffs are the sons and daughter born to the land owner Sivalingam. In this connection, I find that the Service Register of the said Sivalingam was marked through PW5 Deputy Tahsildar. But there is no endorsement regarding the legal heir in the Service Record. The 1st plaintiff admitted that the said Annammal is the first wife of Sivalingam. Since the said Annammal died after the judgment of the trial Court and the legal heirs are brought on record in the appellate stage. No positive evidence has been let in to prove the alleged marriage between the 1st plaintiff - Neelaveni with Sivalingam. At the Second Appeal stage, two photographs and the voter list of the year 1995 were filed and Transfer Certificate of Kanakesan dated 31.05.2001 is also filed. The aadhar card of the plaintiffs also have been filed.

10. Heard the learned counsel appearing for the respondents. The plaintiffs relied upon Ex.A3. Both the Courts below rejected the case since no connected documents were examined by the appellants / plaintiffs. The 1st plaintiff and Sivalingam got married according to the Hindu Rights and Customs



on 22.02.1983. In this connection, Ex.A13 was marked and it was issued by the Temple authorities. Both the Courts below have not assigned any reason for rejecting the said document.

11. At the outset, I could state that the learned District Munsif, Vaniyambadi has not even properly numbered the documents. Exs.A1 to A21 were marked. Subsequently, I find that through the 3rd plaintiff, again A1 to A7 were marked. Subsequently, the defendants have marked Exs.B1 to B16. Again I find that on behalf of the 4th defendant, Ex.A8 was marked. On behalf of the 5th defendant, Exs.A9 and A10 were marked. It has created a lot of confusion in dealing with the documents. Since both Judicial Officers are removed from service on domestic enquiry, I am not proposed to pass any adverse remarks as they are no longer in service. The lower appellate Court has not given any findings with regard to the Exs.B7 and B9, whether they are related to the suit property or not, so also Exs.B13 and B14.

12. Per contra, I find that Exs.A5 to A7, A16 and A17 are receipts and Exs.A8 and A9 are EB receipts as to the possession of the plaintiffs and these documents are not appraised by the Courts below probably, due to the wrong ranking of the exhibits as noted supra. It is a specific case of the appellants / plaintiffs that Exs.A1 and B16 are the conclusive proof to establish divorce between Sivalingam and the 3rd defendant and consequently, the marriage between 1st plaintiff with Sivalingam.

13. Placing reliance upon the documents now filed in the additional typed set of documents, the learned counsel appearing for the appellants / plaintiffs would contend that they, being the sons of the Sivalingam, are entitled for share. However, Exs.A13 and B13 are taken into consideration along with Ex.A13 temple receipt and Ex.B16 is the Civil Court proceedings. If the divorce between Sivalingam and 3rd defendant is proved, then the plaintiffs would be entitled for 4/7th share and the defendants 4 to 6 will be entitled for 3/7th share. In alternative, if the marriage of the 1st plaintiff and Sivalingam is not proved, the 1st plaintiff is not entitled for any share. However, if the plaintiffs 2 to 4 are the legal heirs of the Sivalingam, they are entitled for 3/7th share. In otherwords, whether the alleged divorce between Sivalingam and the 3rd defendant is proved, then the plaintiffs will get 4/7th share. If the divorce is not proved, the plaintiffs 2 to 4 are entitled for 3/7th share subject to the proof of paternity. Nevertheless the lower appellate Court has not dealt with the matter in the proper perspective.



14. Hence, I am of the considered view that it is a fit case for remitting the matter to the appellate Court. Hence, the Second Appeal stands allowed and the judgment and decree passed in A.S. No. 46 of 2011 is set aside and the matter is remitted back to the learned Subordinate Judge, Vaniyambadi and A.S. No. 46 of 2011 is ordered to restore. The additional documents that are now filed as indicated in the above paragraph, i.e., voters list, photographs, Transfer Certificate of Kanakesan and Transfer Certificate of Thirugunam are to be marked with an opportunity to be given to other side to cross-examine the same and thereafter, the findings have to be rendered by the lower appellate Court as the paternity of the plaintiffs 2 and 3 are the legal heirs of the deceased Sivalingam. Besides, the another specific finding as to whether the alleged divorce between the 3rd defendant with the said Sivalingam has to be given. Hence, in view of the document filed at the typed set, viz., voters list and school certificate in connection with same already the plaintiffs have let in oral evidence, but not marked any documentary evidence. Hence, before marking the documents, an opportunity has to be given to other side to challenge the same by way of cross-examination. Hence, when liberty is given to the appellants / plaintiffs for having necessary applications before the lower appellate Court for marking the documents at the appellate stage with an option to cross-examine by the defendants side.

15. Accordingly, the matter is remitted back to the Sub Court, Vaniyambadi for reconsideration with liberty to the appellants to mark additional documents with the cross-examination of the defendants and thereafter, the lower appellate Court shall pass an order keeping in mind observation given in the preceding paragraph regarding alleged divorce between the deceased Sivalingam and the original 3rd defendant and establishment of plea of paternity by the plaintiffs and specific findings has to be rendered therein and the time for disposal of the first appeal is four months from the date of receipt of a copy of this order. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS-IX)

// True Copy //

Sub Assistant Registrar

vji



To

1. The Subordinate Judge,
Vaniyambadi.

2. The Additional District Munsif,
Vaniyambadi.

Copy to:
The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.L.K.Manjunath, Advocate SR.No.13866

S.A. No. 73 of 2013

GP(CO)
CB(08/04/2022)