



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.04.2022

CORAM:

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD) No.407 of 2010

Balasubramanian ... Appellant/Appellant/2nd Defendant

vs.

1.Vijayalakshmi (Died)
2.Thiruvannamalai Ammal
3.Amuthavalli
4.Boominathan
5.Paramakalyanasundram
6.Balasubramanian
7.Nagarani
8.Meenakumari
9.Harikrishnan
10.Subramania Nadar

.. Respondents/Respondents/
Plaintiffs & 1st Defendant

[10th respondent given up]

[Memo presented before the Court on 22.12.2021 is recorded as R1 died and respondents 2 to 10 who are already on record, are recorded as LRs of the deceased R1 vide Court order dated 22.12.2021 made in S.A.(MD) No.407 of 2010]

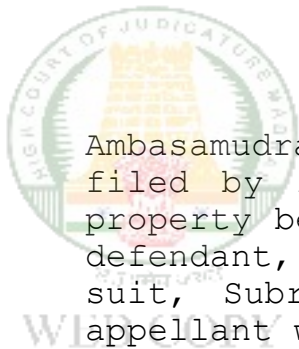
Prayer :- Second Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 30.01.2010 made in A.S.No.42 of 2006 on the file of Sub Court, Ambasamudram confirming the judgment and decree dated 29.12.2005 made in O.S.No.44 of 2004 on the file of Principal District Munsif Court, Ambasamudram.

For Appellant : Mr.A.Arumugam

For RR2 to 9 : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi

JUDGMENT

The 2nd defendant in O.S No. 49 of 1996 on the file of Sub Court, Ambasamudram (later transferred and renumbered as O.S No.44 of 2004 on the file of the Principal District Munsif Court,



Ambasamudram) is the appellant in this second appeal. The suit was filed by respondents 1 to 9 herein for declaring that the suit property belongs to them and for recovery of possession from the 1st defendant, namely, Subramania Nadar. During the pendency of the suit, Subramania Nadar sold the suit property in favour of the appellant who got impleaded as the 2nd defendant on 03.10.1997.

2.The stand of the plaintiffs is as follows :

The suit property belonged to Chidambaram Pillai; the 1st plaintiff, Vijayalakshmi was his second wife, the first wife being Gomathi @ Vannamuthammal; the other plaintiffs were born to Vijayalakshmi through Chidambaram Pillai; Chidambaram Pillai executed settlement deed dated 30.03.1959 settling the suit property in favour of the plaintiffs ; Chidambaram Pillai and the 1st plaintiff were residing in the said property; Chidambaram Pillai passed away on 25.06.1981; suppressing the said settlement deed, Vannamuthammal, the 1st wife of Chidambaram Pillai mortgaged the suit property in favour of the 1st defendant on 02.04.1987; upon coming to know of the same, the 1st plaintiff issued notice dated 22.07.1987 to the 1st defendant cautioning him; the 1st defendant did not respond; on 26.06.1991, the 1st defendant obtained a sale deed from Vannamuthammal and her daughters; since Vannamuthammal and her daughters did not have any right to alienate the suit property in favour of the 1st defendant, the plaintiffs filed the suit.

3.The plaintiffs filed pauper OP in the year 1991. It was numbered as POP No.34 of 1992 on the file of the Sub Court, Tenkasi. It was later transferred to Sub Court Ambasamudram and numbered as O.S No.49 of 1996. During the pendency of the suit, the 2nd defendant purchased the suit property from the 1st defendant and got impleaded in the year 1997. It was then transferred to Principal District Munsif Court, Ambasamudram. The 1st defendant remained exparte. The 2nd defendant filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial court framed the necessary issues. The 1st plaintiff examined herself as P.W.1. Ex.A1 to Ex.A5 were marked. The 1st defendant though remained exparte, entered the witness box in support of the 2nd defendant. He was examined as D.W.2. Three other witnesses were examined on the side of the defendants. Ex.B1 to Ex.B20 were marked. After consideration of the evidence on record, the trial court by judgment and decree dated 29.12.2005 decreed the suit as prayed for. The defendants were directed to handover possession of the suit property to the plaintiffs. Aggrieved by the same, the 2nd defendant filed A.S.No.42 of 2006 before the Sub Court, Ambasamudram. By the impugned judgment and decree dated 30.01.2010, the decision of the trial court was confirmed and the first appeal was dismissed. Challenging the same, this second appeal came to be filed.



4.The second appeal was admitted on 29.04.2010. The enforceability of the settlement deed (Ex.A5) was formulated as the substantial question of law. The learned counsel appearing for the appellant first contended that the marriage between Chidambaram Pillai and Vijayalakshmi (P1) was not at all established. He challenged the very paternity of the other plaintiffs. According to him, they were not born to Chidambaram Pillai. In the alternative, he submitted that since Ex.A5 had been executed for an unlawful object, it was void. He reiterated the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial question of law in favour of the appellant and set aside the impugned judgment and decrees and dismiss the suit. Per contra, the learned counsel appearing for the plaintiffs submitted that the impugned judgment and decree do not call for any interference.

5.I carefully considered the rival contentions and went through the evidence on record. There is no dispute regarding the following three facts : a) the suit property belonged to Chidambaram Pillai. b) Chidambaram Pillai got married to Gomathi @ Vannamuthammal and begot two daughters through her and c) during the subsistence of the said marriage, he executed Ex.A5 settling the suit property in favour of his second wife and her heirs.

6.According to the learned counsel for the appellant, marriage between Chidambaram Pillai and Vijayalakshmi had not at all been proved. This contention is without any merit. In Ex.B2 marked by the appellant, Vijayalakshmi has been described only as the wife of Chidambaram Pillai. When a document marked by the appellant himself describes Vijayalakshmi and Vannamuthammal as the wives of Chidambaram Pillai, it is too late in the day for his counsel to question her status. Ex.A5 was executed on 30.03.1959. It states that Vijayalakshmi was the second wife of the executant of Ex.A5. The appellant filed the written statement in the year 1997. Chidambaram Pillai had passed away in 1981 itself. In such circumstances, it is ridiculous to demand that the first plaintiff must prove that she actually got married to Chidambaram Pillai in 1958. In **Badri Prasad v. Director of Consolidation (1978) 3 SCC 527**, it was observed that if men and women who live as husband and wife in society are compelled to prove, half a century later, by eyewitness evidence that they were validly married, few will succeed. I therefore hold that Vijayalakshmi was very much the wife of Chidambaram Pillai, of course the character of marriage being bigamous.

7.Plaintiffs 2 to 9 have categorically asserted that they are the children of Chidambaram Pillai and Vijayalakshmi. In the written statement, the paternity of P2 to P9 has been questioned. I wondered if P2 to P9 can invoke Section 112 of the Indian Evidence Act, 1872. Section 112 is as follows :

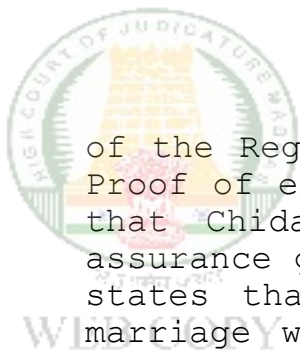


"Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

Valid marriage must be established for invoking the aforesaid presumption. In this case, the parties are Hindus. Section 5 of Act 25 of 1955 sets out the conditions for a hindu marriage. The first condition is that neither party has a spouse living at the time of marriage. Section 11 of the said Act states that any marriage solemnized in contravention of the conditions specified in clauses (i), (iv) and (v) of Section 5 of the Act shall be null and void. A bigamous marriage is regarded as null and void from the very beginning. What is void can never be valid or validated. Of course, when Section 112 was originally incorporated, there was no statutory bar against second marriage. The Hon'ble Supreme Court in **Ammathayi v. Kumaresan (AIR 1967 SC 569)** invoked the said provision in favour of the son born to through a bigamous marriage. The bigamous marriage had taken place in the year 1943 when there was no statutory prohibition against such marriages in the then Madras Presidency. After the enactment of laws prohibiting bigamy and more particularly, after the coming into force of the Hindu Marriage Act, 1955, a bigamous marriage ceased to be valid. Hence, children born through bigamous marriage cannot invoke the conclusive presumption set out in Section 112 of the Indian Evidence Act, 1872.

8. **Sham Lal v. Sanjeev Kumar (2009) 12 SCC 454** refers to the maxim **odiosa et inhonesta non sunt in lege praesumenda** (nothing odious or dishonourable will be presumed by the law). **Ashok Kumar v. Raj Gupta (2022) 1 SCC 20** approvingly quotes another maxim **pater est quem nuptiae demonstrant** (he is the father whom the marriage indicates). When the marriage between a person's mother and a man has been established, while he or she may not be able to invoke Section 112 of the Indian Evidence Act, 1872 if the marriage is bigamous, law will yet presume that that man was the said person's father and throw on the person questioning the paternity the whole burden of proving it. In this case, the burden lay entirely on the appellant to disprove the claim of paternity put forth by plaintiffs 2 to 9. This burden has not at all been discharged.

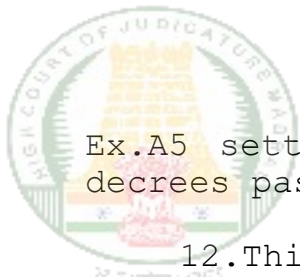
9. Next comes the vital question as to whether the settlement deed-Ex.A5 dated 30.03.1959 is valid. The original document as well as the certified copy have been marked. The execution of the document stands proved in view of the presumptions under Section 60



of the Registration Act and Section 90 of the Indian Evidence Act. Proof of execution is one thing and validity is another. Ex.A5 reads that Chidambaram Pillai had executed the same pursuant to the assurance given by him when marrying Vijayalakshmi (P1). It clearly states that Vijayalakshmi was his second wife and that the said marriage was solemnized six months earlier. The settlor and the settlee were to enjoy the suit property in common and it was to devolve absolutely on Vijayalakshmi and her heirs after the demise of the settlor. It stipulates that during the lifetime of the settlor, the settlee must amicably live with him and that if she did not do so, the settlement can be revoked.

10.As per Section 6(h) of the Transfer of Property Act, no transfer can be made for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872. As per Section 10 of the Indian Contract Act, 1872, agreements must be for a lawful consideration and with a lawful object. Section 23 of the said Act states that the consideration or object of an agreement is lawful unless it is forbidden by law. Every agreement of which the object or consideration is unlawful is void. The suit settlement deed was executed to sustain a bigamous marriage. Section 494 of IPC penalizes any person (excluding male muslims) contracting bigamous marriage. The punishment may extend for a term upto seven years. Section 40 of IPC defines "offence" as denoting a thing made punishable by the Code. What has been made punishable is obviously forbidden by law. I therefore come to the conclusion that an act of bigamy within the meaning of Section 494 of IPC is forbidden by law and hence, a settlement deed executed to sustain a bigamous marriage is void since the object is not lawful.

11.I do not find force in the contention of the learned counsel for the plaintiffs that Ex.A5 should be sustained in the light of the decision reported in **AIR 1982 Rajasthan 43 (Pyara Mohan vs. Smt. Narayani)**. This is because unlike in the Rajasthan case where the consideration was the past conduct of the beneficiary, Chidambaram Pillai executed Ex.A5 by stipulating that Vijayalakshmi must continue to live with him amicably and that he could revoke the same, if she did not do so. The courts below have proceeded on the premise that if the first wife had consented, the second marriage should be deemed as valid. Vannamuthammal was not examined as a witness by the defendants. Ex.B2 marked by them was entered into between Vannamuthammal and Vijayalakshmi. In these circumstances, the courts below came to the conclusion that Ex.A5 was sustainable. This approach is patently erroneous. When law declares that a bigamous marriage is void, it cannot be validated by the consent of the first wife. Of course, normally, it is only the first wife who can prosecute the offence of bigamy by filing a private complaint. That there was no prosecution again cannot lead to the conclusion that a bigamous marriage is valid. I therefore answer the question of law in favour of the appellant and hold that



Ex.A5 settlement deed is void. As a result, the judgments and decrees passed by the courts below will have to be interfered with.

12.This is not the end of the matter. I have already held that Vijayalakshmi was Chidambaram Pillai's second wife and that P2 to P9 are the sons of Chidambaram Pillai. As per Section 16 of the Hindu Marriage Act, there cannot be any distinction between legitimate and illegitimate children. P2 to P9 will have share in the suit property along with Vannamuthammal and her two daughters. They will have 9/12th share, while Vannamuthammal and her daughters will have 3/12th share. The appellant herein having purchased the suit property from Vannamuthammal and her daughters will only have 3/12th share. Even though the plaintiffs filed a suit for declaration and recovery of possession and I have set aside the judgment and decree passed by the trial court, I am bound to pass a decree which the facts of the case demand and which law permits. A lesser relief than what is sought for can always be passed. While denying the relief of declaration and recovery of possession to the plaintiffs, I grant preliminary decree for partition allotting 9/12th share in their favour. The share of the appellant in the suit property is 3/12. The impugned judgment and decree are modified accordingly. The plaintiffs have been fighting for their rights for more than three decades. Therefore, the petition for passing final decree shall be disposed of within eight months from the date of such filing.

13.The Second Appeal is partly allowed with the aforesaid direction. No costs.

Sd/-

Assistant Registrar(Records)

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Sub Assistant Registrar(CS)

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To

1.The Subordinate Judge, Ambasamudram.

2.The Principal District Munsif, Ambasamudram.

Copy to

The Section Officer,V.R.Section,

Madurai Bench of Madras High Court, Madurai.(2 copies)

S.A. (MD) No.407 of 2010

08.04.2022

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