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S.A(MD)Nos.1134,1196 and 1198 of 2006

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 03.02.2022

DELIVERED ON : 20.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD)Nos.1134,1196 and 1198 of 2006

and

M.P(MD)No.1 of 2006

S.A(MD)No.1134 of 2006:

Chellasamy

... Appellant/3rd Appellant/
3rd Plaintiff

Vs.

1.Manikandan
2.Pichaikaran
3.Veluchamy
4.Jaisankar (Died)
5.Ramamoorthy
6.Parthasarathy

... Respondents/
Respondents/Defendants

7.Kuppusamy

... Respondent/
1st Appellant/1st Plaintiff

8.Muthusamy

... Respondent/
2nd Appellant/2nd Plaintiff

9.J.Renuka

10.J.Rajaram

11.J.Praveen Raja

... Proposed Respondents

(R9 to R11 are brought on record as the legal heirs of deceased R4 vide Court order, dated, 17.04.2018 made in C.M.P(MD)Nos.3975 to 3977 of 2016 in S.A(MD)No.1134 of 2006)

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated, 15.06.2006 made in A.S.No.12 of 2006 on the file of Subordinate Judge, Virudhunagar confirming the judgment and decree dated 20.09.2004 made in O.S.No.267 of 1996 on the file of District Munsif, Virudhunagar.

For Appellant : Mr.M.Vallinayagam
Senior Counsel
for Mr.P.Velmurugan
For Respondents : Mr.S.Parthasarathy
Senior Counsel
for Mr.K.Govindarajan
for R1
No appearance
for R2 to R11



S.A(MD)No.1196 of 2006:

Chellasamy Naicker

... Appellant/ 1st Respondent/
1st Defendant

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Vs.

1.R.Manikandan

... 1st Respondent/
Appellant/Plaintiff

2.K.Balaji

... 2nd Respondent/
3rd Respondent/Legal
heir of the 2nd Defendant

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated, 15.06.2006 made in A.S.No.28 of 2005 on the file of Subordinate Judge, Virudhunagar reversing the judgment and decree dated 20.09.2004 made in O.S.No.61 of 2004 on the file of District Munsif, Virudhunagar.

For Appellant	:	Mr.M.Vallinayagam Senior Counsel for Mr.P.Velmurugan
For Respondents	:	Mr.S.Parthasarathy Senior Counsel for Mr.K.Govindarajan for R1 No appearance for R2

S.A(MD)No.1198 of 2006:

Chellasamy Naicker

... Appellant/Respondent/Defendant

Vs.

1.R.Manikandan

... Respondent/
Appellant/Plaintiff

2.R.Rukmani

... Proposed Respondent

(R2 impleaded vide order, dated, 05.07.2010
in M.P(MD)No.1 of 2009 in S.A(MD)No.1198 of
2006)

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated, 15.06.2006 made in A.S.No.19 of 2005 on the file of Subordinate Judge, Virudhunagar reversing the judgment and decree dated 20.09.2004 made in O.S.No.167 of 1996 on the file of District Munsif, Virudhunagar.

For Appellant	:	Mr.M.Vallinayagam Senior Counsel for Mr.P.Velmurugan
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For Respondents : Mr.S.Parthasarathy
Senior Counsel
for Mr.K.Govindarajan
for R1
No appearance
for R2

COMMON JUDGMENT

1. S.A(MD)No.1134 of 2006:

(i) The third plaintiff is the appellant.

(ii) The plaintiffs had filed a suit for permanent injunction, not to disturb their peaceful possession and enjoyment of the suit schedule properties. The suit was dismissed by the trial Court. The plaintiffs had filed A.S.No.12 of 2006 before the Sub-Court, Virudhunagar. The learned Subordinate Judge was pleased to dismiss the appeal. As against the concurrent findings, the present second appeal has been filed.

2. S.A(MD)No.1196 of 2006:

(i) The first defendant is the appellant.

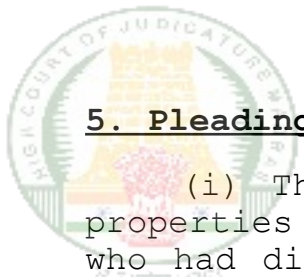
(ii) The plaintiff had filed a suit for partition claiming 4/9th share in the suit schedule properties. The suit was dismissed by the trial Court. The plaintiff had filed A.S.No.28 of 2005 before the Sub-Court, Virudhunagar. The learned Subordinate Judge was pleased to allow the appeal and granted a decree for partition. As against the same, the present second appeal has been filed by the first defendant.

3. S.A(MD)No.1198 of 2006:

(i) The defendant is the appellant.

(ii) The plaintiff had filed a suit for declaration of title, recovery of possession and other consequential benefits. The suit was dismissed by the trial Court. The plaintiff had filed A.S.No.19 of 2005 before the Sub-Court, Virudhunagar. The learned Subordinate Judge was pleased to allow the appeal and granted a decree in favour of the plaintiff as prayed for. As against the same, the defendant has filed the above second appeal.

4. Though all the suits are inter-connected and the parties are one and the same, a joint trial has not been conducted. Oral and documentary evidences have been recorded separately for each suit. However, judgments have been delivered on the same day both by the trial Court as well as by the appellate Court. Hence, these three second appeals have been tagged together in the High Court.



5. Pleadings and findings in S.A(MD)No.1134 of 2006:

(i) The third plaintiff has contended that the suit schedule properties originally belonged to his father Chinnasamy @ Ramasamy, who had died intestate. After his death, Chinnasamy's wife Lakshmi Ammal and her two sons namely, Chellasamy and Raju Naicker and a daughter by name Rama Lakshmi entered into a registered partition deed on 15.03.1972. Under the said partition deed, the suit schedule properties were allotted to the share of his brother Raju Naicker. During his lifetime, Raju Naicker has executed a Will on 06.06.1990, thereby bequeathing all the suit schedule properties in favour of the third plaintiff, namely, Chellasamy. The third defendant Manikandan claims to be a son of Raju Naicker and attempting to disturb his possession over the suit schedule properties. Hence, the present suit.

(ii) The third defendant Manikandan had filed a written statement contending that he is the son of Raju Naicker. He had further contended that the third plaintiff has illegally occupied the suit schedule properties, which were allotted to the share of his father Raju Naicker, taking advance of the fact that he was studying in college away from the town. In his written statement, he has also disputed the Will.

(iii) The trial Court after considering the oral and documentary evidence, arrived at a finding that only a xerox copy of the Will has been produced before the Court. Even in the said xerox copy, the signature of the attesor alone was marked as Exhibit A.5. The entire Will was not marked on the side of the plaintiffs. The trial Court further found that though attesor appeared for chief examination, he did not turn up for cross examination and hence, his deposition was eschewed by the Court. The trial Court further found that the plaintiffs have not established the genuineness and validity of the alleged Will, dated, 06.06.1990 and dismissed the suit.

(iv) The first appellate Court after concurring with all the findings of the trial Court, confirmed the conclusion arrived at by the trial Court and dismissed the first appeal. As against the concurrent findings, S.A(MD)No.1134 of 2006 has been filed by the third plaintiff.

6. Pleadings and findings in S.A(MD)No.1196 of 2006:

(i) The plaintiff Manikandan has contended that most of the properties of his grand-father Chinnasamy Naicker were partitioned among his sons and daughter under a registered partition deed under Exhibit A.1 dated 15.03.1972. However, the present three items of suit schedule properties were not partitioned at that point of time. The plaintiff claimed that he is the only son of the deceased Raju Naicker, who is the brother of the first defendant Chellasamy Naicker. According to the plaintiff, the second defendant is the



sister of his father Raju Naicker. The properties being ancestral properties in the hands of his grand-father, the plaintiff claimed 4/9th share in the suit schedule properties.

(ii) The first defendant had filed a written statement admitting that the suit items 1 and 2 are the ancestral properties. He further contended that the third item absolutely belongs to the first defendant. He further contended that the plaintiff's father Raju Naicker has executed a Will on 06.06.1990 bequeathing the suit schedule properties also in his favour and hence, the plaintiff is not entitled to the share as claimed by him in the plaint.

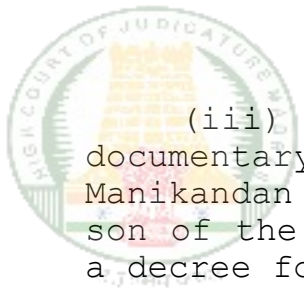
(iii) The trial Court after considering the oral and documentary evidence, arrived at a finding that the plaintiff Manikandan has not established the fact that his mother Kovammal was married to Raju Naicker and he is the legitimate son of Raju Naicker. When the plaintiff has not established his relationship with Raju Naicker, he is not entitled to the relief of partition.

(iv) The first appellate Court after re-appreciating the oral and documentary evidence, arrived at a finding that a cumulative reading of the documents filed on the side of the plaintiff would establish that the plaintiff Manikandan is the son of Raju Naicker and hence, he is entitled to the relief of partition as prayed for. The first appellate Court further found that the defendant has not produced any document or entered into the witness box to prove his case. Hence, the first appellate Court reversed the findings of the trial Court and granted a preliminary decree for partition in favour of the plaintiff.

7. Pleadings and findings in S.A(MD)No.1198 of 2006:

(i) The plaintiff has contended that the suit schedule properties were originally allotted to the share of his father Raju Naicker under a registered partition deed, dated, 15.03.1972. He is the only son of the said Raju Naicker. In view of the fact that the plaintiff was away from the town due to his education, the defendant has encroached upon the same and hence, he prayed for declaration of title and recovery of possession.

(ii) The defendant had filed a written statement contending that his brother Raju Naicker had originally married one Sulochana and thereafter divorced her. After divorce, his brother Raju Naicker started living with Kovammal, who is the mother of the plaintiff. However, even before Raju Naicker started living with Kovammal, the plaintiff was born to Kovammal through some other person. Hence, the plaintiff is not the son of Raju Naicker. The defendant has further contended that his brother Raju Naicker has executed a Will on 06.06.1990 bequeathing the suit schedule properties in his favour and he is in possession pursuant to the said Will. Hence, he prayed for dismissal of the suit.



(iii) The trial Court after consideration of the oral and documentary evidence, arrived at a finding that the plaintiff Manikandan has not established that he is the legal heir/legitimate son of the deceased Raju Naicker. Hence, he will not be entitled to a decree for declaration of title and recovery of possession.

WEB COPY (iv) The first appellate Court relied upon Exhibits A.1 to A.16 filed on the side of the plaintiff and arrived at a finding that the plaintiff has established that he is the legal heir of the deceased Raju Naicker and granted a decree for declaration of title and recovery of possession. The first appellate Court mainly relied upon Exhibit A.5, a voters list of the year 1995, which is a public document to arrive at a finding that the plaintiff has established his case. The first appellate Court further found that a suggestion has been put to the plaintiff by the learned counsel for the defendant that Manikandan was born prior to the marriage of Kovammal with Raju Naicker. This would establish that there was a marriage between Kovammal and Raju Naicker. Based upon the said findings, the first appellate Court reversed the judgment and decree of the trial Court and granted a decree for declaration of title and recovery of possession in favour of the plaintiff. As against the same, the present second appeal has been filed.

8. All the three Second Appeals have been admitted on the following substantial questions of law:

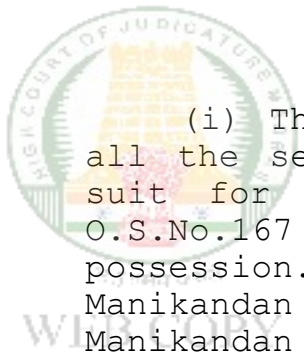
"(i) whether in the absence of any proof regarding the factum of marriage between Raj Naicker and the mother of this plaintiff, is the plaintiff entitled to the property as per Section 16(1) of the Hindu Marriage Act and also in the light of the judgment reported in 1995 1 L.W. 487 (DB)?

(ii) Whether the appellate Court is correct in reversing the judgment when there is no proof for long co-habitation by Raj Naicker and the mother of this plaintiff, in the light of the judgment reported in AIR 1992 SC 756?

(iii) Whether the presumption that the father and mother of the plaintiff lived as husband and wife will arise in the absence of any proof that they lived together under the same roof and co-habited for a number of years, especially in the light of Section 114 of the Indian Evidence Act?"

Both the learned counsel for the appellant and the respondents have advanced their arguments for all the three second appeals in common. Hence, the said common arguments are extracted as follows:

9. Submissions on the side of the learned counsel appearing for the appellant:



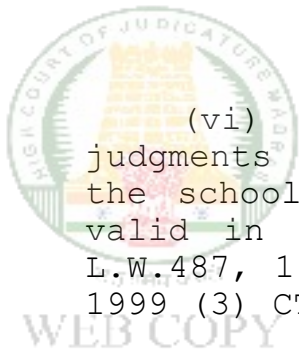
(i) The learned senior counsel appearing for the appellant in all the second appeals had contended that Manikandan has filed a suit for partition in O.S.No.61 of 2004 and another suit in O.S.No.167 of 1996 for declaration of title and recovery of possession. In O.S.No.167 of 1996, the paternity of the said Manikandan has been specifically disputed. Unless the said Manikandan proves that he is the legitimate son and the legal heir of the deceased Raju Naicker, he will not be entitled to a decree for declaration and recovery of possession of the properties which were already allotted to the share of Raju Naicker in the partition deed dated 15.03.1972.

(ii) The learned senior counsel appearing for the appellant had further contended that in a suit for partition, though the paternity has not been specifically disputed in the written statement, there is no pleading, whatsoever on the side of the plaintiff to the effect that his mother Kovammal got married to Raju Naicker. He further contended that even the name of the mother of the plaintiff has not been mentioned in the plaint.

(iii) The learned senior counsel further contended that the documents filed on the side of Manikandan in O.S.No.167 of 1996 are only school and college records. The plaintiff has also filed the voters list and school admission application. None of these documents would establish that there was a marriage between Kovammal and Raju Naicker and that Manikandan was born to them after the wedlock. He further contended that these records do not have any evidentiary value, whatsoever and they cannot be relied upon to establish the husband and wife relationship between Raju Naicker and Kovammal.

(iv) The learned senior counsel further pointed out that though there was no defence in the suit for partition in O.S.No.61 of 2004 disputing the paternity of Manikandan, an issue was framed by the trial Court to the said effect on 10.09.2004. Once an issue is framed, the entire burden is upon the plaintiff to lead evidence to the fact that Kovammal was married to Raju Naicker and the plaintiff was born to them after the said marriage.

(v) The learned senior counsel further contended that though all the three suits were tried independently, the parties were very well aware of the actual dispute between them. When the plaintiff Manikandan was very well aware of the fact that his paternity is being questioned, he should have let in evidence to establish the same. When all the suits were interconnected and the trial Court as well as the first appellate Court judgments were delivered on the same day in all the three suits, the parties were very well aware of the issue between them and the absence of pleadings on the side of the defendants in O.S.No.61 of 2004 questioning the paternity of the plaintiff Manikandan would not in any way affect the case of the defendants in the said suit.



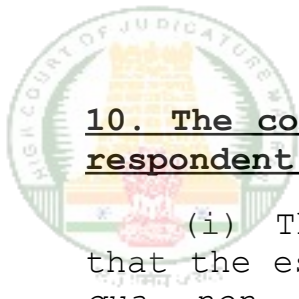
(vi) The learned senior counsel relied upon the following judgments to impress upon the Court that the certificate issued by the school and college and the community certificate will not be valid in deciding the question of factum of marriage, 1995 (1) L.W.487, 1989 (2) L.W. 197, 1994 (1) SCC 407, 1999 (1) L.W. 261 and 1999 (3) CTC 136.

(vii) The learned senior counsel further contended that when facts show that no marriage could have taken place between Raju Naicker and Kovammal by way of rebuttal evidence, the presumption under Section 114 of the Indian Evidence Act cannot be drawn. The learned senior counsel further contended that when there is no specific plea as to the form of marriage, in which the mother of the plaintiff got married to Raju Naicker, the question of invoking presumption under Section 114 of Indian Evidence act does not arise. The learned senior counsel further contended that mere living together would not confer the status of husband and wife, unless the factum of marriage is proved between Raju Naicker and Kovammal.

(viii) The learned senior counsel further contended that the first appellate Court had erroneously relied upon a suggestion put to the plaintiff in the suit for partition by the learned counsel for the defendant. The learned senior counsel further contended that the said suggestion was made to elicit the fact from the plaintiff that he was born to some other person through Kovammal and not to Raju Naicker. The said suggestion cannot in any way be construed to be admitting the marriage between Kovammal and Raju Naicker.

(ix) The learned senior counsel further contended that the decision in all the three suits rely upon the only fact that whether the said Manikandan has proved that he is the legitimate son of Raju Naicker or not. The learned senior counsel further contended that it has been specifically pleaded in the written statement in O.S.No.167 of 1996 that Raju Naicker had originally married to one Sulochana and after divorcing her, he has not re-married. Thereafter, the said Raju Naicker started a relationship with Kovammal without any marriage. However, even before the starting of relationship between Raju Naicker and Kovammal, the plaintiff Manikandan had been born to Kovammal through some other person. When there is specific defence in the written statement, the plaintiff has not let in any oral or documentary evidence to falsify the said case.

(x) The learned senior counsel further contended that the trial Court has proceeded to reject all the documents filed on the side of the plaintiff in O.S.No.167 of 1996 on the ground that these documents would not prove the marriage between Kovammal and Raju Naicker. However, without considering the evidentiary value of these documents filed on the side of the plaintiff, the first appellate Court has simply reversed the judgment and decree of the trial Court on the ground that the plaintiff has established his paternity. Hence, he prayed for allowing all the three second appeals.



10. The contentions of the learned senior counsel appearing for the respondent in all the three second appeals:

(i) The learned senior counsel for the respondent contended that the establishment of relationship between the parties is a *sine qua non* in a suit for partition. The said Manikandan has specifically pleaded that he is the son of Raju Naicker in the plaint in O.S.No.61 of 2004. In the suit, the said pleadings of Manikandan has not been specifically disputed in the written statement. When a particular fact is not specifically disputed in the written statement by the defendant, the burden is not upon the plaintiff to establish that he is the son of Raju Naicker.

(ii) The learned senior counsel for the respondent further contended that Manikandan had filed O.S.No.167 of 1996 on 25.03.1996 and he had filed O.S.No.61 of 2004 on 09.07.1996. Only thereafter, the suit for permanent injunction was filed by Chellasamy Naicker on 19.11.1996. In O.S.No.267 of 1996, the present appellant has not specifically disputed the paternity in the plaint in O.S.No.267 of 1996 and also in the written statement in O.S.No.61 of 2004. In both the said suits, the appellant had only relied upon the Will, dated, 06.06.1990 to claim title to the properties left by Raju Naicker. Only in O.S.No.167 of 1996, in the written statement, the appellant had raised the dispute with regard to the paternity of Manikandan. Hence, he had contended that it is an after thought on the side of the Chellasamy Naicker.

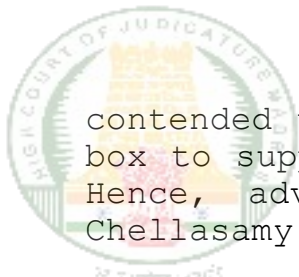
(iii) The learned senior counsel for the respondent further pointed out that all the three suits have been independently tried and judgments have been delivered on the same date both by the trial Court as well as by the first appellate Court. Since all the three suits have been independently tried, the oral evidence recorded in one of the suits cannot be relied upon in the other suit. Hence, he contended that the trial Court had erroneously relied upon the pleadings in O.S.No.167 of 1996 to non suit the plaintiff in O.S.No.61 of 2004.

(iv) The learned senior counsel further contended that when no specific pleading has been raised on the side of Chellasamy Naicker that Manikandan was not born to his brother or his brother Raju Naicker was never got married to Kovammal, the first appellate Court was right in granting a decree in favour of Manikandan.

(v) The learned senior counsel for the respondent further contended that the alleged Will dated, 06.06.1990 relied upon by Chellasamy Naicker for claiming title over the suit schedule properties in O.S.Nos.167 of 1996 and 267 of 1996, has been rejected by the Courts below. In both the above said cases, the said Chellasamy Naicker had relied upon only the Will, dated, 06.06.1990 to claim right over the properties.

(vi) The learned senior counsel for the respondent further

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contended that the said Chellasamy Naicker has not entered into the box to support his pleadings in O.S.Nos.167 of 1996 and 61 of 2004. Hence, adverse inference has to be drawn as against the said Chellasamy Naicker.

(vii) The learned senior counsel for the respondent further contended that the trial Court has unnecessarily considered the issue whether kovammal was married to Raju Nayakkar and whether they were living as husband and wife when there was no proper pleadings on the side of the Chellasamy Naicker. The first appellate Court had rightly rejected the said contentions and granted a decree in favour of Manikandan. Hence, he prayed for dismissal of all the three second appeals.

11. I have carefully considered the submissions made on either side.

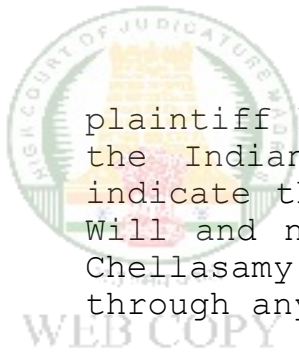
12. The suit schedule properties are the ancestral properties of one Chinnasamy Naicker, who died intestate leaving behind his wife Lakshmi Ammal, two sons by name Chellasamy Naicker, Raju Naicker and daughter by name Rama Lakshmi. After the death of Chinnasamy Naicker, his legal heirs have entered into a registered partition on 15.03.1972. In the said partition deed, the suit schedule properties covered in O.S.Nos.167 of 1996 and 267 of 1996 were allotted to the share of Raju Naicker. The above said facts are not in dispute.

13. The parties in all the three suits are having different status in each one of the suits. Hence, I proceed to refer the parties by their names and not by their status in the suit.

14. Discussion in S.A(MD)No.1134 of 2006:

(i) The said suit has been filed by Chellasamy Naicker as against Manikandan, claiming a decree for permanent injunction not to disturb his possession. The said Chellasamy Naicker had claimed that the suit schedule properties were allotted to the share of his brother Raju Naicker under a partition deed, dated, 15.03.1972. During his lifetime, he has executed a Will on 06.06.1990 through which he claimed title and possession.

(ii) The said Chellasamy Naicker has not chosen to file the original Will before the Court, but only a xerox copy was placed before the Court. The entire Will was not marked, but only the signature of the attester was marked. One of the attestors, by name, Balu was examined as P.W.2. Though he appeared for chief examination, he did not turn up for cross examination. Hence, the trial Court eschewed the witness of the attester. The Courts below have arrived at a concurrent finding that the plaintiff has not established his right through the said Will dated 06.06.1990. The Courts below have also arrived at a concurrent finding that the



plaintiff has not proved the Will in accordance with Section 68 of the Indian Evidence Act. The above narrated facts will clearly indicate that Chellasamy Naicker has not even produced the original Will and not examined even one of the attestors of the said Will. Chellasamy Naicker has not claimed any title or legal possession through any other source other than the Will.

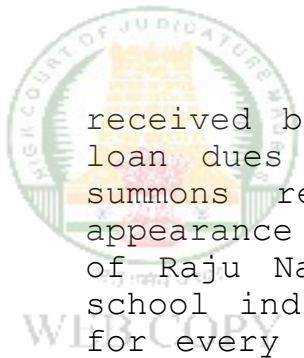
(iii) The trial Court as well as the first appellate Court have rejected the Will and proceeded to dismiss the suit for permanent injunction filed by Chellasamy Naicker. I do not find any illegality or infirmity in the judgment and decree of the Courts below in view of the facts as stated supra. All the substantial questions of law are answered as against the appellant. The second appeal is dismissed. No costs.

15. Discussion in S.A(MD)No.1198 of 2006:

(i) The second appeal arises out of O.S.No.167 of 1996 filed for declaration of title and for recovery of possession by Manikandan. The suit schedule properties in this second appeal and the suit schedule properties in S.A(MD)No.1134 of 2006 are one and the same.

(ii) The plaintiff had contended that the suit schedule properties were allotted to the share of his father Raju Naicker under a registered partition deed, dated 15.03.1972. According to the plaintiff, after the death of his father, the defendant is in possession and refusing to hand over possession of the suit schedule properties. Being the only legal heir, he is entitled to a decree for declaration of title and recovery of possession. On the other hand, the defendant Chellasamy Naicker has contended that Manikandan is not a son of his brother Raju Naicker. Originally, Raju Naicker had married one Sulochana and divorced her. Thereafter, Raju Naicker started living with Manikandan's mother, namely, Kovammal. Even before Raju Naicker started living with Kovammal, Manikandan was already born to Kovammal through some other person. Hence, Manikandan is not the legal heir of Raju Naicker. The defendant had further relied upon the Will, dated, 06.06.1990. As far as the second defence of relying upon the Will, dated, 06.06.1990 is concerned, this Court has already decided the validity of the Will in S.A(MD)No.1134 of 2006.

(iii) Let us consider the main defence of Chellasamy Naicker that Manikandan is not the legitimate son of Raju Naicker. Manikandan being the plaintiff has produced Exhibit A.2 Transfer Certificate issued in the college, which reflects his date of birth as 12.06.1972. The plaintiff has produced his Community Certificate as Exhibit A.4, which reflects that he is the son of Raju Naicker. Exhibit A.5 is the Voters List of the year 1995, which reflects that he is the son of Raju Naicker. Exhibits A.6 and A.7 are the notices



received by Manikandan from Co-operative Bank with regard to the loan dues of his father Raju Naicker. Exhibits A.8 and A.9 are summons received by the plaintiff Manikandan and others for appearance in arbitration proceedings relating to loan transactions of Raju Naicker. Exhibit A.14 is the register maintained by the school indicating admission and deletion of the names of students for every academic year. Exhibit A.15 is the application form for admitting the plaintiff Manikandan in the school, which reflects the name of Raju Naicker as father of Manikandan. Exhibit A.16 is the application presented by Raju Naicker to the school requesting for issuance of Transfer Certificate to Manikandan.

(iv) A cumulative reading of the above said documents will indicate that Manikandan was born on 12.06.1972 and his father name is reflected as Raju Naicker in all these documents. Exhibits A.3 to A.5, A.14 are the entries made in public documents made by public servants in discharge of their official duty. Hence, they are relevant under Section 35 of the Indian Evidence Act. Exhibit A.15 is an application presented by Raju Naicker for admitting Manikandan in the school. Exhibit A.16 is a requisition letter of Raju Naicker to the school for grant of Transfer Certificate to Manikandan. Since Raju Naicker is not alive as on today, these two documents are relevant as contemplated under Section 32(5) of the Indian Evidence Act. Exhibits A.15 and A.16 indicate the relationship between Raju Naicker and Manikandan.

(v) It is true that there is no pleadings in the plaint relating to the marriage of Kovammal with Raju Naicker. But the overwhelming documents presented on the side of the plaintiff will clearly discharge the initial burden upon the plaintiff. It is settled position of law the burden is upon the plaintiff to establish his title so as to recover possession of the suit schedule properties. When the defendant has disputed the relationship of Manikandan with Raju Naicker in the written statement, the burden is certainly upon the plaintiff as contemplated under Sections 101 and 102 of the Indian Evidence Act. The burden of proof as contemplated under Sections 101 and 102 of the Indian Evidence Act is the initial burden upon the plaintiff. Once the plaintiff discharges the said initial burden, the onus shifts upon the defendant to falsify the case of the plaintiff or lead evidence in order to support the facts asserted by him in the written statement.

(vi) In the present case, the defendant Chellasamy Naicker has not entered into box for reasons best known to him. The dispute in the present case relates to the relationship of Manikandan with Raju Naicker. Chellasamy Naicker being the brother of Raju Naicker, will be the all more competent to speak about the relationship or otherwise of Manikandan with Raju Naicker. Though Chellasamy Naicker has claimed that originally Raju Naicker had married one Sulochana and divorced her, no oral or documentary evidence has been placed on record to the said effect. Strangely, the defendant has chosen one



Kandasamy as a witness from his side. The said Kandasamy is not a member of the family and in fact he belongs to a different community. Nothing is forthcoming from the said D.W.1 relating to the marriage of Raju Naicker with Sulochana or the divorce thereafter. He feigns ignorance of the relationship between Raju Naicker and Manikandan. The documents filed on the side of the defendant, namely, Exhibits B.1 to B.3 are all kist receipts for the property in dispute.

(vii) The defendant Chellasamy Naicker had further contended in the written statement that the Will executed by his brother Raju Naicker on 06.06.1990 clearly speaks about Manikandan as a third party and Raju Naicker had nothing to do with him. Even the said Will has not been marked as a whole, but only the signature of the attester was marked on the side of the defendant. The oral and documentary evidences placed before the Court by the defendant clearly do not falsify the case placed by the plaintiff.

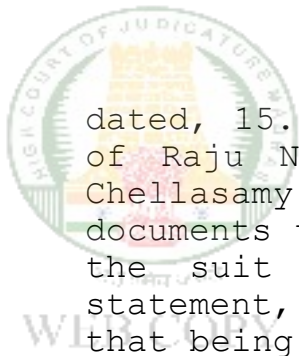
(viii) It is clear that Chellasamy Naicker has not chosen to examine himself by entering into the box. The plaintiff Manikandan is said to have lost his mother at the age of 8 and his father Raju Naicker when he was 18 years old. In the above said circumstances, the defendant Chellasamy Naicker would be in a better position to place the records before the Court to prove that Manikandan is not the son of Raju Naicker. Hence, this Court is constrained to draw adverse inference as against the defendant Chellasamy Naicker for withholding the best evidence available with him.

(ix) Even in a case where the burden of proof is upon the plaintiff, and the plaintiff has successfully discharged with the initial burden, the onus shift upon the defendant to prove his pleadings. The Hon'ble Supreme Court in a judgment reported in **AIR (1968) SC 1413 (Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Ors.)** in Paragraph No.5 as held as follows:

"5.....Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof...."

In view of the above said judgment of the Hon'ble Supreme Court and the fact that the defendant Chellasamy Naicker has not offered himself for examination before the Court, adverse inference could be drawn by this Court.

(x) Admittedly, the suit schedule properties have been allotted to the share of Raju Naicker in the registered partition deed,



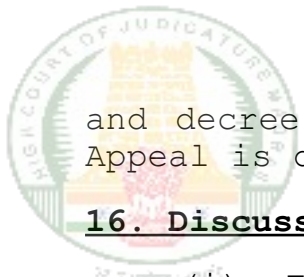
dated, 15.03.1972. Thereafter, the properties allotted to the share of Raju Naicker becomes separate property vis-a-vis his brother Chellasamy Naicker. Hence, unless Chellasamy Naicker produces the documents that would confer title upon him, he cannot claim title to the suit schedule properties. In paragraph 7 of the written statement, the defendant Chellasamy Naicker has further contended that being a blood brother, he is the legal heir of Raju Naicker. It could be seen that the said Chellasamy Naicker is attempting to claim title through various sources. In O.S.No.267 of 1996, he claimed title only on the basis of the Will, dated, 06.06.1990. Having found that it could not be established, the said Chellasamy Naicker had claimed that he is the clause II heir as a residual argument. In such an event, his sister Rama Lakshmi would also be a clause II heir. When the plaintiff has placed all the records in his possession to establish that he is the son of Raju Naicker, and the defendant Chellasamy Naicker has not produced a single document and has not even entered into the box, this Court has no hesitation, whatsoever to arrive at a finding that the Manikandan is the legal heir of Raju Naicker and hence, he is entitled to a decree for declaration of title and recovery of possession.

(xi) The trial Court has proceeded to reject all the documents filed on the side of the plaintiff on the ground that they do not establish the marriage between Kovammal and Raju Naicker. The trial Court went one step further and gave a finding that there is no proof that Kovammal and Raju Naicker had lived together. The first appellate Court reversed the said finding and concluded that Manikandan is the son of Raju Naicker.

(xii) Even in the partition deed, dated, 15.03.1972, it has been stated that both the sons and the daughters are already married. As per the school and college records, Manikandan was born on 12.06.1972 i.e., 3 months after the partition deed. Exhibit A.15 school admission application has been made by Raju Naicker on 22.06.1977. This sequence of dates would also indicate that Manikandan is the son of Raju Naicker. The defendant Chellasamy Naicker has not chosen to furnish any oral or documentary evidence to show that when Raju Naicker divorced Sulochana or when Raju Naicker started living with Kovammal.

(xiii) The main issue raised by the learned senior counsel for the appellant is that when the marriage between Kovammal and Raju Naicker had not been proved and hence, the Court cannot draw presumption under Section 114 of the Indian Evidence Act and arrived at a finding that the marriage has been proved by way of long co-habitation. In the present case, the plaintiff Manikandan has produced public records to directly confirm that he is the son of Raju Naicker. Hence, the issue of proving marriage with Kovammal and thereafter, conferring legitimacy upon Manikandan does not arise.

(xiv) In view of the above said discussion, all the substantial issues raised are answered as against the appellant. The judgment



and decree of the first appellate Court are confirmed. The Second Appeal is dismissed. No costs.

16. Discussion in S.A(MD)No.1196 of 2006:

(i) The said suit has been filed by Manikandan seeking partition of 3 items of suit schedule properties, which were not subject matter of the partition deed, dated, 15.03.1972. The paternity of Manikandan was not disputed in the written statement filed by Chellasamy Naicker. He had simply relied upon the alleged Will, dated, 06.06.1990 to claim exclusive title to the said properties. In paragraph 8 of the plaint, the plaintiff has specifically pleaded that he is the only son of Raju Naicker, which fact has not been denied in the written statement filed by Chellasamy Naicker. The defendant has not even chosen to file the Will, dated, 06.06.1990 as a document on his side. The defendant has not even chosen to enter into the box to support his pleadings. One third party, by name, Raju has been examined as D.W.1.

(ii) While the plaintiff was cross-examined by the learned counsel for the defendant, a suggestion has been put to Manikandan as follows:

"Whether it is correct to say that you were born to your mother even before your mother got married to Raju Naicker?"

(iii) The learned senior counsel appearing for the appellant had contended that the said suggestion will not in any way indicate that Chellasamy Naicker had admitted the marriage between Raju Naicker and Kovammal. The main intention of the said question was to extract the information from Manikandan that he was born to some other person. However, the learned senior counsel for the respondent had contended that the suggestion put on the side of the learned counsel for the defendant will clearly indicate that Chellasamy Naicker had admitted the marriage between Kovammal and Raju Naicker.

(iv) Let us analyse whether the suggestion put to a party by the other side counsel during cross-examination will have any evidentiary value or not. The Division Bench judgment of Gujarat High Court reported in Manupatra in **MANU/GJ/0106/2014 (Tarjubhai Narsingbhai Rathwa Vs. Stete of Gujarat)** in paragraph 31 and 32 as held as follows:

"31. Thus, from the above it is evident that the suggestion made by the defence counsel to a witness in the cross-examination if found to be incriminating in nature in any manner would definitely bind the accused and the accused cannot get away on the plea that his counsel had no implied authority to make suggestions in the nature of admissions against his client.



32. Any concession or admission of a fact by a defence counsel would definitely be binding on his client, except the concession on the point of law....."

Any suggestion put to the other side is only under the implicate authority given by a client to his advocate. A party cannot wriggle out of the consequences of such questions/suggestions citing that he has not authorized his advocate to ask such questions or put such suggestions. It is settled position of law that the advocates are always having implied authority to concede on facts of the case though not on the proposition of law. In the present case, the suggestion put by the advocate to the plaintiff Manikandan would clearly disclose that there was marriage between Kovammal and Raju Naicker. As already discussed, the date of the partition deed, the date of birth of Manikandan and the date on which he was admitted in the school will clearly disclose that the plaintiff Manikandan was born to Raju Naicker through Kovammal after marriage.

(v) The only defence in the suit for partition of the defendant is the reliance upon the Will, dated, 06.06.1990, which has been rejected by both the Courts below in O.S.No.267 of 1996 which culminated in S.A(MD)No.1134 of 2006. When the character of the properties have been admitted and the relationship of the parties have been proved by the plaintiff, the only result would be a preliminary decree for partition. The trial Court without there being any pleading on the side of the defendant, had chosen to frame an issue whether Manikandan is a legitimate son of Raju Naicker and has proceeded to arrive at a finding against the plaintiff. However, the first appellate Court has rightly reversed the judgment and decree of the trial Court and has granted a decree for partition.

(vi) In view of the above said discussion, all the substantial questions of law are answered as against the appellant. The judgment and decree of the first appellate Court are confirmed. The Second Appeal is dismissed. No costs.

17. All the three Second Appeals are dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/07/2022

Sub Assistant Registrar(CS)

Gbg



To

1.The Subordinate Judge,
Virudhunagar.

2.The District Munsif,
Virudhunagar.

3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+3 CC to M/s.P. VELMURUGAN, Advocate (SR-26680 to SR-26682[F] dated
20/06/2022)

+3 CC to M/s.K. GOVIDARAJAN, Advocate (SR-27029 to 27031[F] dated
21/06/2022)

S.A(MD)Nos.1134,1196 and 1198 of 2006
20.06.2022

_RD(04.07.2022) 17P 11C