



SA(MD)Nos.676 of 2005, etc., bacth

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

S.A.(MD)Nos.676 of 2005, 363 of 2008
and
W.P.(MD)No.5986 of 2009
and
M.P.(MD)No.1 of 2009

SA(MD)676/2005:

Rukmani Ammal

: Appellant

Vs.

1.Pem Muthayee

2.Saravanan

: Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code to call for the records relating to the judgment and decree dated 27.01.2005 made in A.S.No.54 of 2004 on the file of the District Court, Karur, confirming the judgment and decree dated 11.02.2004 made in O.S.No.331 of 1999 on the file of the Principal District Munsif Court, Karur and set aside the same.

For Appellant : Mr.Raghuvaran Gopalan
for Mr.L.Siva

For Respondents : Mr.P.Thiagarajan



SA(MD)Nos.676 of 2005, etc., bacth

SA(MD)363/2008:

1.P.Bemmuthayee

2.P.Saravanan

: Appellants

Vs.

M.Rukmani Ammal

: Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code to call for the records relating to the judgment and decree dated 27.01.2005 made in A.S.No.55 of 2004 on the file of the District Court, Karur, confirming the judgment and decree dated 11.02.2004 made in O.S.No.331 of 1999 on the file of the Principal District Munsif Court, Karur and set aside the same.

For Appellants : Mr.P.Thiagarajan

For Respondent : Mr.Raghuvaran Gopalan
for Mr.L.Siva

WP(MD)5986/2009:

Rukmani

: Petitioner

Vs.

1.The Revenue Divisional Officer,
Karur.

2.The Tahsildar,
Aravakurichi Taluk,
Karur.

3.Saravanan

: Respondents



SA(MD)Nos.676 of 2005, etc., bacth

PRAYER: Writ Petition filed under Article 226 of the Constitution of India seeking issuance of a writ of certiorari calling for the records relating to the impugned order of the first respondent dated 28.05.2009 in ref.N.K.No.B7/1109/2009 and quash the same.

For Petitioner : Mr.Raghuvaran Gopalan

For Respondents : Mr.D.Gandhiraj
Special Government Pleader
for R.1, R.2

Mr.P.Thiagarajan for R.3

COMMON JUDGMENT

The second appeals are arising out of the concurrent findings of the Courts below.

2.The appellant in S.A.(MD)No.676/2005, namely, Rukmaniammal, is the plaintiff in the suit in O.S.No.331 of 1999. She filed the suit before the Principal District Munsif Court, Karur, for a declaration and for a consequential injunction with regard to the suit schedule properties admeasuring 10 Acres 13 Cents. The



SA(MD)Nos.676 of 2005, etc., bacth

defendants, namely, Pemuthayee and her son Saravanan, have made counter claim over the entire suit schedule properties through a Will [Ex.B15]. The suit was decreed partly, by judgment and decree dated 11.02.2004, granting the decree for declaration with respect to half share (5 Acres and 6.5 Cents) to the plaintiff and holding that the second defendant, being the illegitimate child, is entitled to the other half share. With regard to the relief for injunction, the suit was dismissed that there cannot be any injunction as against the co-owner.

3. Aggrieved over the findings of the trial Court, the plaintiff preferred an appeal before the District Court, Karur, in A.S.No.54 of 2004. Similarly, the defendants have preferred an appeal before the District Court, Karur, in A.S.No.55 of 2004. The lower appellate Court, vide judgment and decree dated 27.01.2005, dismissed both the appeals, confirming the judgment and decree passed by the trial Court. Aggrieved over the same, the plaintiff has filed S.A.(MD)No.676 of 2005 and the defendants have filed S.A.(MD)No.363 of 2008.

4. Pending the second appeals, based on the observations made by the trial Court that the second defendant / Saravanan is the illegitimate child of (late) Periya Perumal @ Kodumudi Naicker, the Revenue Divisional Officer, Karur, vide



SA(MD)Nos.676 of 2005, etc., bacth

order dated 28.05.2009, has directed the Tahsildar, Karur to include the name of the second defendant in the legal heir certificate of (late) Periya Perumal @ Kodumudi Naicker. Challenging this order, the plaintiff / Rukmaniammal has filed WP(MD)No.5986 of 2009.

5.Since the issue involved is arising out of the suit in O.S.No.331 of 1999, the second appeals and the writ petition are disposed of by way of this common judgment.

6.The case of the plaintiff / Rukmaniammal is as follows:-

6.1.The suit properties admeasuring 10 Acres 13 Cents originally belonged to one Palanisamy Naicker. The said Palanisamy Naicker had two sons, namely, Periya Perumal @ Kodumudi Naicker and Chinna Perumal Naicker. The properties were jointly enjoyed by both brothers and Chinna Perumal Naicker had sold his half share [5 Acres 6.5 cents] on 20.09.1946 by a registered sale deed to one Abdul Majeed Rowther. Thereafter, Abdul Majeed Rowther's wife, Ayisha Beevi, sold the same to the plaintiff vide registered sale deed, dated 22.05.1995 [Ex.A2].



SA(MD)Nos.676 of 2005, etc., bacth

6.2.Periya Perumal @ Kodumudi Naicker had orally sold his 5 Acres 6.5 Cents to the plaintiff, directing her to discharge the mortgage debt over the said property. The plaintiff's husband, Muthusamy, discharged the mortgage debt on 13.04.1970 and the original mortgage deed dated 20.12.1945 [Ex.A3] was handed over to the plaintiff and since then the plaintiff is in peaceful possession and enjoyment of the property . Hence, she is the absolute owner of the entire suit schedule properties.

6.3.Periya Perumal @ Kodumudi Naicker had left the marital home and had consorted with another woman and later, he died on 24.04.1999. At that time, he was living with the first defendant, Pemuthayee. Pemuthayee and her son, Saravanan, claiming rights over the properties are attempting to disturb the plaintiff's possession and enjoyment and therefore, she filed the suit.

7.The case of the defendants, in brief, is as follows:-

7.1.Periya Perumal @ Kodumudi Naicker was the absolute owner of the entire suit schedule properties, admeasuring 10 Acres 13 Cents. He purchased the property under revenue sale conducted by the District Collector under the Revenue Recovery Act.



SA(MD)Nos.676 of 2005, etc., bacth

7.2.The entire suit schedule property is Manavary Punjai lands with trees and as such, no cultivation could be done. Periya Perumal @ Kodumudi Naicker had created an usufructuary mortgage dated 20.12.1945 in favour of one Abdul Wahab Rowther with respect to the entire suit schedule properties and the mortgagee was in possession and enjoyment of the entire 10 Acres 13 Cents of suit schedule properties. Later, Periya Perumal @ Kodumudi Naicker filed a suit for redemption in S.No.524 of 1993 before the District Munsif Court, Karur as against the Abdul Wahab Rowther and obtained a decree. Thereafter, on 04.03.1997, the property was delivered through the process of the Court and Periya Perumal @ Kodumudi Naicker continued to be in peaceful possession and enjoyment of the properties till his death on 24.04.1999.

7.3.During his life time, Periya Perumal @ Kodumudi Naicker executed a Will dated 28.01.1999 bequeathing the entire suit schedule properties in favour of one Muthulakshmi and the first defendant, who is his junior wife. Therefore, they have made claim over the properties.

7.4.Even during the life time of Periya Perumal @ Kodumudi Naicker, the plaintiff has filed a suit as against him in O.S.No.580 of 1997 before the District



Munsif Court, Karur, but it was not contested since the defendant died. This fact has been suppressed in the plaint.

Findings of the trial Court:-

8.1.The entire suit schedule properties absolutely belong to Periya Perumal @ Kodumudi Naicker and he purchased the properties under revenue sale conducted by the then District Collector, since the properties were in default in view of the non-payment of kist under Zaminthari land revenue system. He mortgaged the properties in the year 1945 in favour of one Abdul Wahab Rowther. He also filed a suit for redemption of mortgage in O.S.No.524 of 1993 before the District Munsif Court, Karur and got the delivery of the properties through the process of Court. Therefore, the contention of the plaintiff that half share belong to Chinna Perumal Naicker was rejected and the documents executed by Chinna Perumal Naicker in favour of Abdul Majith [Ex.A1], dated 20.09.1946 and the subsequent sale deed in favour of the plaintiff [Ex.A2], dated 22.05.1995, by one Aisha Beevi, W/o.Abdul Majith Rowther were not accepted.

8.2.The Will [Ex.B15] dated 28.01.1999 advanced by the defendants was also not accepted by the trial Court since the execution and attestation of the Will,



as required under the Act, has not been proved substantially. The original Will was not placed before the Court and the defendants have not taken any steps to produce the original Will nor they offered any satisfactory explanation as to why the original Will could not be produced. Moreover, the evidence of the attesting witnesses is also contradictory with each other and does not inspire confidence. That apart, both the attesting witnesses of the Will are having previous experience of Court proceedings. Therefore, the Will is not proved.

8.3.The first defendant claims that she is the second wife of Periya Perumal @ Kodumudi Naicker. She also admitted that she married one Lakshmana Naicker and that marriage was not dissolved in the manner known to law. Similarly, Periya Perumal @ Kodumudi Naicker did not divorce his first wife, Gengammal / plaintiff's mother. Therefore, the marriage between the first defendant and Periya Perumal @ Kodumudi Naicker is void. However, it is proved that the second defendant is the illegitimate son of Periya Perumal @ Kodumudi Naicker and the first defendant, through the documents birth certificate [Ex.B17], school transfer certificate [Ex.B18], marriage invitation card [Ex.B13] and voter identity card [Ex.B12].



SA(MD)Nos.676 of 2005, etc., bacth

8.4. Accordingly, the suit was decreed partly holding that the plaintiff is entitled for half share and that the second defendant, being the illegitimate son, is entitled for half share of the property, since the property is the self-acquired property of Periya Perumal @ Kodumudi Naicker.

9. Aggrieved over these findings, both the plaintiff as well as the defendants have preferred appeals in A.S.Nos.54 & 55 of 2004, respectively, before the District Court, Karur.

10. The learned Appellate Judge, by judgment and decree dated 27.01.2005, dismissed the appeals, confirming the judgment and decree passed by the learned Principal District Munsif, Karur, in O.S.No.331 of 1999, dated 11.02.2004. Aggrieved over the findings of the Courts below, both the plaintiff and the defendants have filed S.A.(MD)Nos.676 of 2005 & 363 of 2008, respectively, before this Court.

11. The second appeal in S.A.(MD)No.676 of 2005 is admitted on the following substantial question of law:-



“Whether the 2nd respondent would be entitled to half share under Section 16 of Hindu Marriage Act, when the first respondent has neither pleaded nor proved her marriage with Peria Perumal Naicker?”

12. Similarly, the second appeal in S.A.(MD)No.363 of 2008 is admitted on the following substantial question of law:-

“Whether the judgment and decree of the Court below is perverse on account of its misconstruction of document in Ex.B4?”

Findings of this Court:-

13. Having heard the respective Counsel on either side and on perusing the entire record, this Court feels that the following issues need to be answered:-

“i) Whether the suit schedule properties are the absolute properties of Palanisamy Naicker, as claimed by the plaintiff or the absolute properties of Periya Perumal @ Kodumudi Naicker, as claimed by the defendants?

ii) Whether the defendants are entitled for the full share of the suit schedule properties based on the Will [Ex.B15]?

iii) Whether the second defendant is entitled for half share of the suit schedule properties?”



Issue No.1:-

14.The plaintiff claims that the entire suit schedule properties belonged to one Palanisamy Naicker and he had two sons, namely, Periya Perumal @ Kodumudi Naicker and Chinna Perumal Naicker and the properties were jointly enjoyed by both brothers. Chinna Perumal Naicker said to have sold his half share [5 Acres 6.5 Cents] to Abdul Majith Rowther on 20.09.1946, by a registered sale deed [Ex.A1] and the wife of Abdul Majith Rowther, namely, Aisha Beevi, had sold the same to the plaintiff / Rukmaniammal on 22.05.1995, by a registered sale deed [Ex.A2]. The said contention of the plaintiff was rejected by the trial Court and the lower appellate Court holding that the property was purchased by Periya Perumal @ Kodumudi Naicker in a revenue sale conducted by the District Collector, as the property was in default for non-payment of kist under the Zaminthar land revenue system.

15.The said Periya Perumal @ Kodumudi Naicker has mortgaged the properties to one Abdul Wahab Rowther on 20.12.1945 with regard to the entire suit schedule properties by way of an usufructuary mortgage. The mortgage deed is marked as Ex.A3 by the plaintiff herself. In the mortgage deed itself, it has been mentioned that the properties were brought by Periya Perumal @ Kodumudi



Naicker through revenue auction for non-payment of kist and thereafter, patta [Ex.B1] was also obtained in his name.

16.Periya Perumal @ Kodumudi Naicker has also filed a suit for redemption of mortgage as against Abdul Wahab Rowther before the District Munsif Court, Karur, in O.S.No.524 of 1993 and had taken delivery of the property on 04.03.1997. Thereafter, he has also filed an execution petition in E.P.No.339 of 1996. The execution proceedings and the subsequent delivery were marked as Ex.B2 to Ex.B6. The kist receipts in favour of Periya Perumal @ Kodumudi Naicker was marked as Ex.B8. Based on the above documents, the trial Court and the lower appellate Court arrived at a conclusion that the entire suit schedule properties belong to Periya Perumal @ Kodumudi Naicker / the plaintiff's father.

17.Even in the cross examination, the plaintiff had also admitted that the entire suit properties belong to her father, Periya Perumal @ Kodumudi Naicker only and he mortgaged the property. Moreover, she has filed a suit in O.S.No.580 of 1997 as against her father, Periya Perumal @ Kodumudi Naicker, but failed to prosecute that suit in view of the demise of her father. The plaint in O.S.No.580 of 1997 was also marked as Ex.A27. Therefore, it has to be presumed that the



properties are self acquired properties of Periya Perumal @ Kodumudi Naicker alone.

18.The patta stands in the name of Periya Perumal @ Kodumudi Naicker. Though the plaintiff claims that the properties were in her possession, she has not produced any kist receipts or adangal extract in support of her claim. The defendants have produced the kist receipts in the name of Periya Perumal @ Kodumudi Naicker. Therefore, there is no reason to interfere with the findings of the Courts below and the suit properties are the absolute properties of Periya Perumal @ Kodumudi Naicker and being his daughter, the plaintiff is entitled for a share in the properties.

Issue No.2:-

19.The first defendant claims that she is the wife of Periya Perumal @ Kodumudi Naicker and the second defendant was born to them. She claims title over the suit schedule properties through a Will, dated 28.01.1999 [Ex.B15]. She also marked the family ration card of Periya Perumal @ Kodumudi Naicker [Ex.B9], their voter identity cards [Ex.B10 to Ex.B12], birth certificate and school transfer certificate of the second defendant [Ex.B17 & Ex.B18].



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20.The first defendant in her evidence admitted that she was married to one Lakshmana Naicker and claims that on the date of marriage itself, she left her matrimonial home and was living with Periya Perumal @ Kodumudi Naicker for more than 32 years. She is aware that Periya Perumal @ Kodumudi Naicker was having a wife, namely, Gangammal and the plaintiff was their daughter. Admittedly, the marriage between Periya Perumal @ Kodumudi Naicker with Gangammal was not dissolved in the manner known to law. Similarly, the marriage between the first defendant and Lakshmana Naicker was also not dissolved in the manner known to law. Therefore, the marriage between Periya Perumal @ Kodumudi Naicker and the first defendant is not legally valid. Since she is not the legally wedded wife, she cannot claim any right over the properties.

21.However, she claims title over the properties through the document Will [Ex.B15] said to have been executed by Periya Perumal @ Kodumudi Naicker on 28.01.1999 in favour of the second defendant and one Muthulakshmi. But the original Will [Ex.B14] dated 28.01.1999 was not placed before the trial Court and no sufficient explanation was offered by the defendants for non-production of the original Will.



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22.The Hon'ble Supreme Court in the decision in ***J.Yashoda v. K.Shobha Rani***, reported in **(2007) 5 SCC 730**, has held as follows:-

“9. ... Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section.”

23.***In Re Rakesh Mohindra v. Anita Beri and Others***, reported in **(2016) 16 SCC 483**, the Hon'ble Supreme Court has held as follows:-

“15. ... The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted.”

24.Here, the original Will was not placed before the Court. The reason offered by the defendants is that they missed the original Will, when they brought the same to produce before the Court, which is not satisfactory. They have not taken any steps to obtain a certified copy of the Will from the Registration



SA(MD)Nos.676 of 2005, etc., bacth

Department, nor they have even attempted to examine any officials from the Department in this regard.

25. Though the Will is a registered document and the attestors were also examined as DWs.2 & 3, the Will is under suspicion. The reason is that both the attesting witnesses [DWs.2 & 3] are witnesses in several Court proceedings and they have also admitted the same in their cross examination. That apart, their evidence is also contradictory with each other. One of the witnesses claims that the document was signed by Periya Perumal @ Kodumudi Naicker and there was a confusion amongst themselves as to whether the document was signed or the thumb impression of Periya Perumal @ Kodumudi Naicker was affixed. The alleged Will is in favour of the second defendant and one Muthulakshmi. But the said Muthulakshmi is not a party to any of the proceedings and she has not attempted to prove or claim anything.

26. Periya Perumal @ Kodumudi Naicker died on 03.05.1999 and this Will was said to have been registered three months prior to his death. The plaintiff has disputed the Will and the defendants have failed to discharge their onus in proving the signature of the Executant. Periya Perumal @ Kodumudi Naicker is said to



have executed the Will in his old age, just three months prior to his death and that too, when he was in the custody of the defendants. The condition of the testator is not clear and there is no reason assigned for bequeathing the properties in favour of one Muthulakshmi, a distant relative of the testator. The manner in which the Will has been executed creates a strong doubt with regard to its veracity.

27. *In Re Kalyan Singh v. Chhoti and Others*, reported in **(1990) 1 SCC 266**, the Hon'ble Supreme Court has observed as follows:-

“21. In H. Venkatachala Iyengar v. S.N. Thimmajamma [1959 Supp 1 SCR 426] Gajendragadkar, J., as he then was, has observed that although the mode of proving a will did not ordinarily differ from that of proving any other document, nonetheless it requires an element of solemnity in the decision on the question as to whether the document propounded is proved as the last will and testament of departed testator. Where there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Where there are suspicious circumstances, the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator.”



28.The Will is therefore shrouded in suspicion. The defendants, who brought the Will, failed to discharge their initial onus to prove the execution of the Will. Therefore, they cannot claim any share based on this Will and there is no reason to interfere with the findings of the Courts below.

Issue No.3:-

29.The first defendant claims that she is the wife of Periya Perumal @ Kodumudi Naicker and they lived together for more than 32 years. She has also produced the ration card of Periya Perumal @ Kodumudi Naicker, their voter identity cards, the marriage invitation card of the second defendant, the birth certificate and the school transfer certificate of the second defendant. The plaintiff, in her plaint, has stated that her father was living with another woman in his last days. She has also admitted the same in her examination. The defendants have also marked the birth certificate of the second defendant that he was born to Periya Perumal @ Kodumudi Naicker. The documents produced by the defendants substantiate that the first defendant and Periya Perumal @ Kodumudi Naicker lived together and the second defendant was born to them. Though the first defendant cannot be treated as a legally wedded wife, the second defendant can be treated as an illegitimate son of Periya Perumal @ Kodumudi Naicker.



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30. ***In Re Revanasiddappa and Others v. Mallikarjun and Others***, reported in (2011) 11 SCC 1, the Hon'ble Supreme Court has held as follows:-

“33. ... But after amendment, Section 16(1) stands delinked from Section 11 and Section 16(1) which confers legitimacy on children born from void marriages operates with full vigour even though provisions of Section 11 nullify those marriages. Such legitimacy has been conferred on the children whether they were / are born in void or voidable marriage before or after the date of amendment.

... ..

39. ... We are constrained to differ from the interpretation of Section 16(3) rendered by this Court in Jinia Keotin [(2003) 1 SCC 730] and, thereafter, in Neelamma [(2006) 9 SCC 612] and Bharatha Matha [(2010) 11 SCC 483] in view of the constitutional values enshrined in the Preamble of our Constitution which focuses on the concept of equality of status and opportunity and also on individual dignity. The Court has to remember that relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage. This is the crux of the amendment in Section 16(3). However, some limitation on the property rights of such children is still there in the sense their right is confined to the property of their parents. Such rights



SA(MD)Nos.676 of 2005, etc., bacth

cannot be further restricted in view of the pre-existing common law view discussed above.”

31. Therefore, the second defendant, being the illegitimate child of Periya Perumal @ Kodumudi Naicker, is entitled for a share in the suit schedule properties and as such, there is no reason to interfere with the findings of the Courts below in this regard, as well.

32. In view of the foregoing discussions and reasonings, this Court does not find any error in the judgments of the Courts below warranting interference. Accordingly, both the second appeals stand dismissed.

33. In view of the judgment passed in the second appeals, the writ petition, which was filed questioning the issuance of Periya Perumal @ Kodumudi Naicker's legal heir certificate by including the name of the second defendant as his illegitimate child, is also dismissed.

There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

Index : Yes / No
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29.04.2022



SA(MD)Nos.676 of 2005, etc., bacth

B.PUGALENDHI, J.

gk

To

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