



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 20.04.2022

CORAM

THE HONOURABLE MS.JUSTICE R.N.MANJULA

A.S(MD).No.85 of 2018

WEB COPY

1. Saravanan
2. Subbulaxmi

... Appellants/Plaintiffs

Vs.

- 1.Dhanam
2. Loganathan
3. Gunavathi

... Respondents/Defendants

Prayer : This Appeal Suit is filed under Section 96 of the Civil Procedure Code against the judgment and decree dated 02.12.2016 made in O.S.No.174 of 2009 on the file of the court of I Additional District Judge (PCR), Tiruchirappalli.

For Appellants : Mr.K.Prabhakar

For Respondents : Mr.R.Devaraj

J U D G M E N T

This Appeal Suit has been preferred challenging the judgment and decree of the learned I Additional District Judge (PCR), Trichy, dated 02.12.2016 in O.S.No.174 of 2009.

2. The appellants are the plaintiffs; the suit is filed for partition and separate possession along with consequential injunction and for future profits; the suit properties and other properties are ancestral properties of one Veerappa Naicker and he died intestate leaving behind his two sons namely, Rengappa Naicker and Karuppasamy Naicker and they inherited the suit properties and enjoyed them; Karuppasamy Naicker had two sons and two daughters; the names of the sons and the daughters are Vellaisamy, Loganathan, Dhanam and Gunavathy; there was a family partition, which took place on 31.03.1960 between Veerappa Naicker, Rengappa Naicker, Karuppasamy Naicker and the sons of Karuppasamy Naicker along with the wife of Rengappa Naicker; however, the partition was not acted upon; on 05.06.1962, re-partition was made under a registered partition deed between themselves; in the said partition, 'C' schedule properties were allotted to Vellaisamy; Veerappa Naicker was allotted with 6 cents land in 'F' schedule with a building; 18 cents in 'F' schedule with buildings in the same 'F' schedule was allotted jointly to Vellaisamy and Loganathan; 'B' schedule property was allotted to the

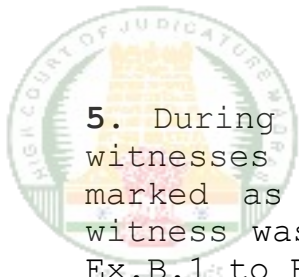


share of Karuppasamy Naicker, who is the father of Vellaisamy; 'E' schedule properties were allotted to Subbammal; after the death of Karuppasamy as one of the legal heirs of Karuppasamy Naciker, Vellaisamy is entitled to $\frac{1}{4}$ share in the shares of his father; the plaintiffs are the wife and son of the deceased Vellaisamy; taking advantage of the death of Vellaisamy, his brothers denied the shares to the plaintiffs; hence, the plaintiffs have filed the suit for partition and separate possession;

3. As per the written statement of the defendants they are the siblings of Vellaisamy and other children of Karuppasamy Naicker; the defendants 1 to 3 contested the suit by stating that the first plaintiff was not born out of the wedlock between the deceased Vellaisamy and the second plaintiff; it is true that the second plaintiff was born to Vellaisamy at some point of time; the second plaintiff developed illegal intimacy with one Duraisamy leaving the company of Vellaisamy shortly after the marriage; since she eloped with Duraisamy her own brother Moorasamy gave a police complaint and police arrested Duraisamy; even in the year 1978, Vellaisamy filed an Original Petition for divorce on the ground of adultery against the second plaintiff and got a decree for desolution of marriage; the plaintiff never claimed any interest in the suit property during the life time of Vellaisamy; they did not attend the funeral rites of Vellaisamy; the plaintiffs have no *locus standi* to file the suit; after getting divorce from the second plaintiff, Vellaisamy married one Selvi in the year 1989; out of his marriage with Selvi, he gave birth to two sons and one daughter; the legal heirs of Vellaisamy are necessary parties to the suit and the suit is bad for non-joinder of parties as well; since there is no cause of action for the suit, the same should be dismissed.

4. On the basis of the above pleadings the learned trial Judge has framed the following issues:

- 1. Whether the plaintiffs are entitled for permanent injunction in respect of 'A' schedule property?*
- 2. Whether the plaintiffs are entitled for permanent injunction in respect of other properties as sought for?*
- 3. Whether the plaintiffs are entitled to a preliminary decree for partition of $\frac{1}{4}$ share in the 'B' schedule properties ?*
- 4. Whether the plaintiffs are entitled to a preliminary decree for partition of $\frac{1}{2}$ share in the 'B' schedule properties ?*
- 5. Whether the plaintiffs are entitled for future mesne profits as prayed for?*
- 6. To what other reliefs the plaintiffs are entitled to?*



5. During the course of trial, on the side of the plaintiffs, four witnesses were examined as P.W.1 to P.W.4 and six documents were marked as Ex.A.1 to Ex.A.6. On the side of the defendants, one witness was examined as D.W.1 and twenty five document was marked as Ex.B.1 to Ex.B.25.

6. At the conclusion of the trial and on considering the materials available on record, the learned trial Judge has dismissed the suit. Aggrieved over that, the plaintiffs have filed this appeal.

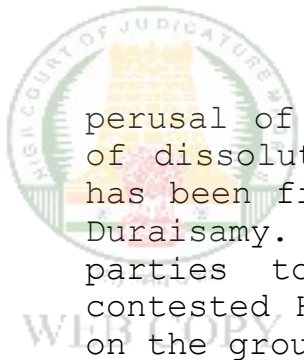
7. The learned counsel for the appellants/plaintiffs submitted that the judgment in H.M.O.P.No.34 of 1978 was obtained through impersonation, which would not take the second appellant/second plaintiff's character of legally wedded wife; the decree passed in the matrimonial litigation for divorce cannot be taken as the proof of paternity of the first plaintiff; it is further submitted that in the matrimonial proceedings, there was no specific issue framed in respect of the paternity of the first plaintiff; in the said judgment, there is no observation about the legitimacy of the first plaintiff.

8. The learned counsel for the respondents/defendants would submit that the second plaintiff had developed illicit intimacy with one M.Duraisamy and left Vellaisamy even within 4 or 5 months after the marriage; having suffered the decree for divorce on the ground of adultery, the second plaintiff neither preferred an appeal challenging the above said order nor filed any suit to declare that the first plaintiff is the son born to her through Vellaisamy; all along her life subsequent to divorce she had chosen to live away from Vellaisamy by accepting the findings of the judgment rendered in H.M.O.P.No.34 of 1978; the plaintiffs have not filed any reply statement denying the said judgment on the ground that the same was obtained by fraud, collusion or by impersonation; since there is a presumption under Section 114-E of Indian Evidence Act, the plaintiffs failed to prove that the said judgment was obtained by committing fraud on the court by impersonation.

9. Points for consideration:

- 1) *Whether the first plaintiff is considered to be the son of late Vellaisamy and has locus stand to file the suit for partition?*
- 2) *Whether the judgment and decree of the trial court is fair and proper?*

10. The fact that the suit properties belonged to Vellaisamy as his share in the joint family properties is not denied. While the first plaintiff is claimed to be the son of the deceased Vellaisamy, the defendants denied his status and his entitlement to the suit properties as the legal heir of Vellaisamy. It was admitted that Vellaisamy was originally married to the second plaintiff. However, their marriage got dissolved by virtue of Ex.B.1, the judgment of the



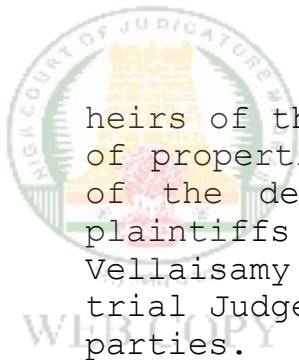
perusal of Ex.B.1, it is seen that Vellaisamy has sought the relief of dissolution of marriage on the ground of adultery. The petition has been filed against the second plaintiff and her alleged paramour Duraisamy. The order has been passed on merits after allowing both parties to let-in evidence. The second plaintiff had actively contested H.M.O.P.No.34 of 1978 and suffered the decree for divorce on the ground of adultery against her.

11. It has been observed that her erstwhile husband Vellaisamy could not have had access to her to give birth to the first plaintiff. It has been categorically observed by the court in the judgment made in H.M.O.P.No.34 of 1978 that Vellaisamy has proved that Child Saravanan was not born to him. The second plaintiff did not challenge the above said order and it had attained finality. Both the plaintiffs have never crossed the life of the deceased Vellaisamy during his life time. Vellaisamy had married another woman subsequent to his divorce and gave birth to three children. The above facts and materials would serve as solid proof to prove that the first plaintiff was not born to the deceased Vellaisamy.

12. It is claimed by the second plaintiff that the order in H.M.O.P.No.34 of 1978 was obtained behind her back and she did not contest the suit. According to the second plaintiff, some one had impersonated in her name and the judgment for dissolution of marriage was obtained by playing fraud on the court. It is difficult to believe that any other woman not related with Vellaisamy would come forward to mention her name in divorce proceedings filed on the ground of adultery. It is to be noted that the Ex.B.1 - judgment of the Sub Court Karur was of the year 1981 and hence, it is a document which is more than 30 years old. The authenticated copy of the judgment itself is a sufficient proof to show its legal character and binding nature on the parties to the litigation as per Section 41 of the Indian Evidence Act.

13. Despite there was no specific issue as to the paternity of the first plaintiff in H.M.O.P.No.34 of 1978, the fact remains that the ground of adultery is proved. Further, the court had observed that the husband Vellaisamy had proved that the first plaintiff was not born to him because of his lack of access to the second plaintiff at the relevant point of time. The defendants had successfully proved the same by producing the copy of the judgment made in the earlier matrimonial proceedings between Vellaisamy and the second plaintiff in H.M.O.P.No.34 of 1978. Through the conduct of the second plaintiff it is proved that the first plaintiff was not the son born to the deceased Vellaisamy and that the marriage between Vellaisamy and the second plaintiff was not in subsistence now. Under such circumstances, the plaintiffs have got no *locus standi* to file the suit for partition by claiming themselves as the legal heirs of the deceased Vellaisamy. **Thus, point No.1 is answered.**

14. Subsequent to divorce, Vellaisamy married one Selvi and got three children through her. Selvi and her children alone can be the legal



heirs of the deceased Vellaisamy. In a suit for partition, in respect of properties of Vellaisamy, no one else other than the legal heirs of the deceased Vellaisamy can be interested persons. But the plaintiffs have not chosen to implead the legal heirs of the deceased Vellaisamy as parties to the suit. Hence, it is right for the learned trial Judge to hold that the suit is bad for non-joinder of necessary parties.

15. The learned counsel for the appellants cited the judgments reported in **Balamani and Murugesan Vs. S.Balasundaram** reported in **2010(1) LW 601** and in **Sabasthi Nadar Vs. Savurimuthu Nadar and another** reported in **1998 (2) CTC 403** in support of his contention that the non-joinder of necessary parties cannot be the reason for dismissing the suit for partition. because the parties can be impleaded in the final decree proceedings. But, those are the cases in which relationship between the parties and their respective entitlement to the suit property are not disputed. In the case in hand, the very *locus standi* of the plaintiffs is disputed on the ground that the first plaintiff was not the son born to the deceased Vellaisamy and the marriage between the second plaintiff and Vellaisamy was not in subsistence.

16. Under such circumstances, it is obligatory on the part of the plaintiffs to prove the fundamental facts about their entitlement for heirship to the deceased Vellaisamy and then claim the relief of partition. Since the appellants/plaintiffs have failed to prove their legal status as the son and the wife of the deceased Vellaisamy, the learned trial Judge is right in dismissing the suit filed for partition. In my considered view, the judgment of the trial court does not require any interference. **Thus, point No.2 is answered.**

In the result, this Appeal Suit is dismissed and the judgment and decree of the learned I Additional District Judge (PCR), Trichy, dated 02.12.2016, made in O.S.No. 174 of 2009 is confirmed. No costs.

Sd/-

Assistant Registrar (CS.III)

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Sub Assistant Registrar(CS)

To

1.The I Additional District Judge (PCR), Trichy.



2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+1 CC to M/s.R. DEVARAJ, Advocate (SR-20213[F] dated 21/04/2022)

+1 CC to M/s.K. PRABHAKAR, Advocate (SR-20657[F] dated 22/04/2022)

A. S (MD) No. 85 of 2018

20.04.2022

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