



WEB COPY



AS Nos.891 of 2012 & 203 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and
THE HONOURABLE MR.JUSTICE **N.SENTHILKUMAR**

A.S.No.891 of 2012 & 203 of 2019
and MP No.1 of 2013 in AS No.891 of 2012

Kavitha ... Appellant in AS 891/2012
Respondent in AS 203/2019

Vs

1. V. Damodaran

2. Thamizhselvi

3. Thamizharasi

4. Saraswathi

5. Thamizharasan

6. Thamizhselvan ... Respondents in AS 891/2012
Appellants in AS No.203/2019

These appeals are filed under Section 96 of the Code of Civil Procedure,

AS No.891 of 2012: to set aside the judgement and decree of the learned Additional District Judge (Fast Track Judge-II), Cuddalore, dated 19.07.2011 partly dismissing the suit by judgment dated 19.07.2011 in



AS Nos.891 of 2012 & 203 of 2019

OS No.109 of 2010.

WEB COPY

AS No.203 of 2019: to set aside the judgement and decree dated 19.07.2011 made in OS No.109 of 2010 on the file of the Additional District Judge (Fast Track Court No.II) Cuddalore, with regard the judgment and decree that the D5 & D6 have no right in the B & C schedule property and the entitlement of 1/3 share of the plaintiff in the B & C Schedule property and allow the First Appeal.

For Appellants : Mr.R.Gururaj, Appellant in AS 891/12
& Respondent in AS 203/19

For Respondents : Mr.P.Gunaraj, Respondents in AS 891/12
& Appellants in AS 203/2019

COMMON JUDGEMENT

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

AS No.891 of 2012 is by the plaintiff in OS No.109 of 2010, a suit for partition laid by her claiming 1/3rd share in the suit 'B' to 'E' Schedule properties.

2. According to the plaintiff, the properties were ancestral properties inherited by the first defendant Damodaran under a Will dated



AS Nos.891 of 2012 & 203 of 2019

29.02.1972 executed by his father Varadarasu Kounder. It is the contention of the plaintiff that under the Will Damodaran was given a life estate and the properties were to be taken absolutely by the children of Damodaran on his death. It is the further contention of the plaintiff that one Kanagambaram Ammal, widow of one of the sons of Varadarasu Kounder viz. Ramachandran, was given a life estate in some other properties and on her death, those properties would devolve on Damodharan and Krishnan other two sons of Varadarasu Kounder.

3. It was pleaded that Kanagambaram Ammal also died on 28.09.2011 and therefore, the plaintiff would be entitled to 1/3rd share in those properties also which were shown in Schedule 'B' and 'C' to the plaint. As regards the properties shown in Schedule 'D' and 'E', it was the contention of the plaintiff that those properties were acquired out of the income from the 'B' and 'C' Schedule properties and therefore, they also assumed the character of joint family properties. Though the plaintiff impleaded defendants 4, 5 and 6 in the suit, she described the fourth defendant as the concubine of Damodaran and defendants 5 and 6, who are the children as the children of concubine of Damodaran. According to her, since there was no valid marriage between the fourth defendant and



AS Nos.891 of 2012 & 203 of 2019

Damodaran, the defendants 5 and 6 would not be entitled to inherit as children of Damodaran.

4. It was also the contention of the plaintiff that the fourth defendant Saraswathi was living with Damodaran even during the subsistence of the marriage between Damodaran and the plaintiff's mother viz. Thilagavathi, since there was no marriage, defendants 5 and 6 would not be entitled to the benefits of Section 16 of the Hindu Marriage Act.

5. The suit was resisted by the the first defendant Damodaran contending that the suit 'B' and 'C' Schedule properties are his self-acquisitions, inasmuch as they belonged to his father Varadarasu Kounder and he under the Will dated 29.02.1972 bequeathed it to his children and therefore, those properties cannot assume a character of joint family properties. It was also contended that the suit itself is premature, inasmuch as the plaintiff would not get any right to the properties so long as the first defendant, viz. the life-estate holder was alive. Damodaran also contended that he had married Saraswathi in the year 1976 at the Thiruchendur Temple and she being a legally wedded



AS Nos.891 of 2012 & 203 of 2019

wife, the defendants 5 and 6 would inherit as his children in view of

Section 16 of the Hindu Marriage Act, though a specific reference was not made to Section 16 of the Hindu Marriage Act. The other defendants adopted the written statement of the first defendant.

6. At trial, the plaintiff was examined as P.W.1 and Exhibits A1 to A19 were marked. The first defendant Damodaran was examined as D.W.1 and Exhibits B1 to B9 were marked.

7. The learned Trial Judge on a consideration of the evidence concluded that the properties are not ancestral properties since they were bequeathed by Varadarasu Kounder under the Will dated 29.02.1972. As per the recitals in the said Will on the death of Damodaran, his children would take the property. The learned Trial Judge concluded that the defendants 5 and 6 would not be heirs, inasmuch as the marriage between Damaodaran and Saraswathi was not a valid marriage. On the said conclusions, the learned Trial Judge granted a decree for partition in respect of the 'B' and 'C' schedule properties alone which were covered by the Will with a rider that the plaintiff could seek a final decree after the death of Damodaran. The suit stood dismissed with reference to the



AS Nos.891 of 2012 & 203 of 2019

other properties.

WEB COPY

8. Aggrieved by the dismissal of the suit with reference to 'D' and 'E' schedule properties, the plaintiff is on Appeal. The defendants 1 to 6 are on Appeal aggrieved by the decree granted by the Trial Court declaring the 1/3rd share of the plaintiff in 'B' and 'C' Schedule properties alone.

9. We have heard Mr.R.Gururaj, learned counsel appearing for the appellant in AS No.891 of 2012 (plaintiff in the suit) and the respondent in AS No203 of 2019 and Mr.P.Gunaraj, learned counsel appearing for appellants in AS No.203 of 2019 and the defendants in AS No.891 of 2012.

10. While Mr.R.Gururaj, learned counsel appearing for the appellant/plaintiff would vehemently contend that since the marriage between Saraswathi and Damodaran has not been proved, defendants 5 and 6 would not be entitled to claim even as illegitimate children. According to him, Section 16 of the Hindu Marriage Act could be invoked only when a marriage is proved and such marriage is found to be



AS Nos.891 of 2012 & 203 of 2019

void in view of Section 11 of the Hindu Marriage Act. In the absence of proof of marriage, Section 16 cannot be invoked.

11. He would also submit that the testator had specifically stated that the children of Damodaran would take the absolute estate on the death of Damodaran and that word children must be confined only to legitimate children and will not include illegitimate children. In support of his submission, the learned counsel would rely upon the judgment of the Hon'ble Supreme Court in *N.Krishnammal v. R.Ekambaram and others*, reported in *1980 (1)MLJ 11(SC)*.

12. Contending contra, Mr.P.Gunaraj, learned counsel appearing for the appellants in AS No.203 of 2019, defendants in the suit, would contend that Damodaran having admitted the marriage between him and Saraswathi, there was no further requirement to prove the marriage. He would also submit that even if there is no direct evidence for the marriage, the Court can presume a marriage on the basis of long cohabitation and on the evidence that is before the Court which would go long way to show that defendants 5 and 6 are the children of Saraswathi born through Damodaran.



AS Nos.891 of 2012 & 203 of 2019

WEB COPY

13. According to Mr.P.Gunaraj, once it is found that the defendants 5 and 6 are the children of Damodaran born through Saraswathi, in view of Section 16 of the Hindu Marriage Act, despite the fact that the marriage between Saraswathi and Damodaran being invalid, the sons would inherit an equal share in the properties of Damodaran. The learned counsel would also rely upon the judgment of the Hon'ble Supreme Court in *S.P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi and others* reported in *1994 (1) SCC 460*, in support of his submission that a presumption of a valid marriage could be drawn in respect of the second marriage also. He would also draw our attention to the judgment of the Hon'ble Supreme Court in *Parayankandiyal Eravath Kanapravan Kalliani Amma v. K.Devi and others*, reported in *(1996) 4 SCC 76*, wherein the Hon'ble Supreme Court has again pointed out that a second marriage can be presumed.

14. We have considered the rival submissions.

15. The following point arises for determination in the Appeal:

Whether the defendants 5 and 6 would



WEB COPY



AS Nos.891 of 2012 & 203 of 2019

be entitled to a share in the suit properties as legitimate sons under Section 16 of the Hindu Marriage Act.

Point:

16. The first defendant Damodaran has filed a written statement admitting a marriage between him and Saraswathi. No doubt, the marriage happened during the subsistence of the marriage between Damodaran and Thilagavathi, mother of the plaintiff. Section 16 of the Hindu Marriage Act, which was introduced in 1976, reads as follows:

16. Legitimacy of children of void and voidable marriages.—

(1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 , and whether or not a decree of nullity is granted in respect of



WEB COPY



AS Nos.891 of 2012 & 203 of 2019

that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been



AS Nos.891 of 2012 & 203 of 2019

incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

16.1. The object of the enactment of Section 16 has been held to be a laudable object by the Hon'ble Supreme Court in ***Parayankandiyal Eravath Kanapraavan Kalliani Ammal v. K.Devi and others***, reported in ***(1996) 4 SCC 76***. While considering the reform sought to be achieved by Section 16, the Hon'ble Supreme Court in the said judgment had observed as follows:

“Legitimacy is a matter of status: Illegitimate children are children as are not born either in lawful wedlock, or within a competent time after its determination. It is on account of marriage, valid or void, that children are classified as legitimate or illegitimate. That is to say, the social status of children is determined by the act of their parents. If they have entered into a valid marriage, the children are legitimate; but if the



AS Nos.891 of 2012 & 203 of 2019

parents commit a folly, as a result of which a child is conceived, such child who comes into existence as an innocent human baby is labelled as illegitimate. Realising this situation, Parliament enacted Section 16 of the Hindu Marriage Act. The object of Section 16 was to protect legitimacy of children born of void or voidable marriages.”

16.2. This laudable Object sought to be achieved by introduction of Section 16 cannot be defeated by adopting a very narrow interpretation of the documents or the provision itself. The issue as to whether a second marriage could be a matter of presumption had daunted the Courts for some time before it was settled by the Hon’ble Supreme Court in ***S.P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi and others.*** The Hon’ble Supreme Court had held that a marriage during the subsistence of a previous marriage can be a matter for presumption.

16.3. In the case on hand apart from the admission by the first



AS Nos.891 of 2012 & 203 of 2019

defendant, the father that he had married Saraswathi at the Thiruchendur

Temple in the year 1976, there is also evidence to show that the defendants 5 and 6 were treated as sons by the first defendant. In fact Ex.B2 which is executed in the year 1981 in favour of the fifth defendant Thamizharasan describes him as son of Damodaran and he is represented by the first defendant as his guardian. Again Ex.B4 dated 13.05.1987 is in favour of defendants 5 and 6, wherein also the first defendant Damodaran is described as their father and guardian. Exhibit B5 is of the year 1991 which also contains a similar description. Exhibit B7 is another Sale Deed under which Damodaran has purchased the property in his capacity as a guardian and father of his minor children viz. defendants 5 and 6. Exhibit B8 is another Sale Deed dated 02.02.1996, wherein Thamizharasan and Thamizhselvan, viz. defendants 5 and 6 had purchased the property and in the said Sale Deed also they are described as sons of Damodaran, the first defendant. These documents would go long way to show that defendants 5 and 6 were always treated as children of Damodaran.

16.4. Mr.Gururaj, learned counsel would submit that while he is not denying the paternity he is only denying their legitimacy and



AS Nos.891 of 2012 & 203 of 2019

therefore, the fact that they are described as children of Damodaran would by itself cannot confer legitimacy on them under Section 16 in the absence of proof of marriage. On the facts proved in this case, in our opinion, the written statement of D.W.1 and his evidence would be sufficient to conclude that there was a valid marriage between the first defendant and the fourth defendant. May be the marriage is invalid since it was performed during the subsistence of the marriage between first defendant and Thilakavathi, the mother of the plaintiff. That by itself would not render the children born to them as illegitimate children.

16.5. Mr.Gururaj, learned counsel would contend that Section 16 confers a right on illegitimate children only on the property of the father and therefore, they will not qualify as children to get a right under the Will. This argument is stated only to be rejected. We have extracted Section 16 of the Hindu Marriage Act, Section 16 confers the legitimacy on all children born out of void or voidable marriage. Subsection 3 of Section 16 only confines the right to succeed to the father's estate. By operation of Subsection (1), defendants 5 and 6 become legitimate children of Damodaran. As per Ex.A1 Will on the death of Damodaran, the properties are to be taken equally by all the children of Damodaran.



AS Nos.891 of 2012 & 203 of 2019

Once we conclude that defendants 5 and 6 are the legitimate children of Damodaran, they would automatically be entitled to a share as children of Damodaran under the Will itself.

16.6. Mr.Gururaj, learned counsel would rely upon the judgment of the Hon'ble Supreme Court in *N.Krishnammal v. R.Ekambaram and others*, reported in *1980 (1) MLJ 11*, wherein the Hon'ble Supreme Court had held that once the document describes heirs they will include only legal heirs and not others. We have no quarrel with the proposition of law laid down by the Hon'ble Supreme Court in the cited case. However, we find that the effect of Section 16 of the Hindu Marriage Act was not gone into in the said case and it did not in fact arise at all. Therefore, we do not think that the judgment in *N.Krishnammal v. R.Ekambaram and others*, would be treated as a precedent to deny the status of legitimacy to defendants 5 and 6.

16.7. As we had already pointed out the Hon'ble Supreme Court itself has in *S.P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi and others*, cited *supra*, held that the second marriage can be a matter of presumption also. We find very strong evidence, in the form



AS Nos.891 of 2012 & 203 of 2019

of an admission by the first defendant, is available in the case on hand, which cannot be disbelieved. We therefore find that the Trial Court was not correct in denying a share to defendants 5 and 6, to that extent the judgment of the Trial Court needs interference.

16.8. In fact a recent judgment of the Larger Bench of the Hon'ble Supreme Court in *Revanasiddappa and another v. Mallikarjun and others*, reported in **2023 SCC Online SC 1087**, had concluded that Section 16 confers a statutory legitimacy on children born out of void marriages. In doing so, the Hon'ble Supreme Court has held as follows:

74. ... (i) In terms of sub-section (1) of Section 16, a child of a marriage which is null and void under Section 11 is statutorily conferred with legitimacy irrespective of whether (i) such a child is born before or after the commencement of Amending Act, 1976; (ii) a decree of nullity is granted in respect of that marriage under the Act and the marriage is held to be void otherwise than on a petition under the enactment;



WEB COPY



AS Nos.891 of 2012 & 203 of 2019

(ii) *In terms of sub-section (2) of Section 16 where a voidable marriage has been annulled by a decree of nullity under Section 12, a child 'begotten or conceived' before the decree has been made, is deemed to be their legitimate child notwithstanding the decree, if the child would have been legitimate to the parties to the marriage if a decree of dissolution had been passed instead of a decree of nullity;*

(iii) *While conferring legitimacy in terms of sub-section (1) on a child born from a void marriage and under sub-section (2) to a child born from a voidable marriage which has been annulled, the legislature has stipulated in subsection (3) of Section 16 that such a child will have rights to or in the property of the parents and not in the property of any other person;*



AS Nos.891 of 2012 & 203 of 2019

The other clauses are not relevant to our purposes. In view of the above dictum, the argument of Mr.Gururaj is unacceptable. We therefore conclude that the defendants 5 and 6 would inherit under the Will as children of Damodaran.

17. The Appeal in AS No.203 of 2019 is therefore **allowed**, the preliminary decree granted by the Trial Court is modified and it is held that the plaintiff would be entitled to only a 1/5th share in the suit 'B' and 'C' schedule properties, in other respects the judgment and decree of the Trial Court are confirmed. Appeal in AS 891 of 2012 will stand **dismissed**. Considering the relationship between the parties, we do not impose costs. Consequently, the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.) (N.SENTHILKUMAR, J.)
08.11.2023

jv

Index : No
Internet : Yes
Speaking order
Neutral Citation: No



WEB COPY

To



AS Nos.891 of 2012 & 203 of 2019

1. The Additional District Judge
(Fast Track Judge-II),
Cuddalore.
2. The Section Officer,
V.R.Section,
High Court.



WEB COPY



AS Nos.891 of 2012 & 203 of 2019

R.SUBRAMANIAN, J.
and
N.SENTHILKUMAR, J.

jv

A.S.No.891 of 2012 & 203 of 2019
and MP No.1 of 2013 in AS No.891 of 2012

08.11.2023