



S.A(MD)No.62 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON	08.11.2023
PRONOUNCED ON	08.12.2023

CORAM

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

S.A(MD)No.62 of 2021
and
C.M.P(MD)No.747 of 2021

A.Gandhimathi ... Appellant/Respondent/Plaintiff

vs.

Kamu Ammal ... Respondent/Appellant/Defendant

PRAYER:- Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the learned II Additional Subordinate Judge, Tiruchirappalli passed in A.S.No.103 of 2013 dated 18.07.2017 reversing the well considered judgment and decree of the learned I Additional District Munsif Court, Tiruchirappalli passed in O.S.No.1275 of 2007, dated 21.01.2013.

For Appellant :Mr.M.Vallinayagam,
Senior Counsel, for
Mr.P.Arun Jayatram

For Respondent :Mr.R.Rajaraman



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JUDGMENT

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Challenge is made to the judgment of the learned II Additional Subordinate Judge, Trichirappalli in A.S.No.103 of 2013 in and by which, the learned II Additional Subordinate Judge, reversed the judgment of the I learned Additional District Munsif, Trichirappalli in O.S.No.1275 of 2007.

2. The appellant as plaintiff filed the suit seeking the relief of declaration of title in respect of suit properties in her favour and for the consequential relief of injunction against the respondent/defendant from interfering with the possession and enjoyment of the suit properties.

3. The case of the appellant/plaintiff in brief is as follows:

The deceased Kamatchi Kunguli and his wife Meenambal have no issues. They assumed the plaintiff as their daughter as she was looking after them as a daughter. The plaintiff treated the aged couple in the hospital and at house. Kamatchi Kunguli died on 19.07.2004 and the plaintiff performed all the funeral ceremonies and all other related ceremonies using her own money. Similarly, she had taken care of Meenambal. Meenambal had executed a Will in favour of the plaintiff. When Meenambal died on 13.06.2005, plaintiff performed all the funeral



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ceremonies spending her own money. The defendant in an unauthorized manner, claims the suit properties stating that she is the second wife of the deceased Kamatchi Kunguli. In the said circumstances, the suit was filed.

4. The respondent/defendant filed a written statement denying the averments made in the plaint. It is the case of the defendant that she married Kamatchi Kunguli with the consent of Meenambal as per Hindu Rites and customs in the presence of relatives of the defendant and Meenambal. From the date of marriage till the death of Kamatchi Kunguli, they had been living as a husband and wife and the defendant was a dutiful wife along with Meenambal. Kamatchi Kunguli treated the defendant and Meenambal equally and they lived under one roof. The defendant is an innocent illiterate woman and she has been continuously threatened by the plaintiff and her men to grab her properties. After the death of Kamatchi Kunguli, family elders had partitioned the family properties of Kamatchi Kunguli into two equal shares and it was reduced into writing on 12.09.2004. There is no issue for Kamatchi Kunguli and Meenambal. After the death of Kamatchi Kunguli and Meenambal, this defendant had inherited the properties as a whole and is in possession and enjoyment of the suit properties. All the revenue records and electricity receipts stand in her name. The Will alleged to have been



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executed by Meenambal in favour of the plaintiff is a concocted and forged one. Taking advantage of illiteracy of the defendant, plaintiff had concocted the documents.

5. During the trial before the trial Court, on the side of the plaintiff, P.Ws.1 and 2, were examined and Ex.A1 to A15 were marked. On the side of the defendant, D.Ws.1 and 2 were examined and Exs.B1 to B21 were marked.

6. On considering the oral and documentary evidence, the learned trial Judge refused to rely Ex.B15, alleged family arrangement for the reason that it was not signed either by the defendant or by Meenambal and that, it has not been properly proved by examining concerned witnesses. However, the learned trial Judge found that Ex.A6 Will alleged to have been executed by Meenambal in favour of the plaintiff was proved in the manner known to law. In this view of the matter, the learned trial Judge, had decreed the suit as prayed for.

7. In the appeal filed against this judgment by the defendant in A.S.No.103 of 2013 the learned Appellate Judge concurred with the finding of the learned trial Judge that Ex.B15 cannot be relied by the defendant. However, the learned Appellate Judge found that Ex.A6 is a



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concocted document for the reason that the Will had come into existence under suspicious circumstances.

8. The learned Appellate Judge found that the defendant is the second wife of Kamatchi Kunguli. However, she is not the Class-I legal heir as per Hindu Succession Act, 1956. The suit properties would devolve on the legal heirs on the death of Meenambal as per Section 15 of the Hindu Succession Act. The final conclusion was that the suit properties neither belong to the plaintiff nor to the defendant. The legal heirs, who are entitled to the suit properties have to be decided by appropriate litigation under Section 15 of the Hindu Succession Act. On the said reasoning, the learned Appellate Judge allowed the appeal and set aside the judgment and decree of the trial Court. In the said background, the plaintiff has filed this second appeal.

9. This Court framed the following substantial questions of law for consideration in this second appeal:

“i) Whether the judgment and decree of Lower Appellate Court is in conforming of the Order 41 Rule 31 of C.P.C.?”

ii) Whether the Will in Ex.A6 dated 12.09.2004 was proved as per Section 68 of the Indian Evidence Act?



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iii)Whether the illegitimate wife has legal right

to question the Will in Exhibit A6 dated 12.09.2004?"

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10. The learned counsel for the appellant submitted that even as per the case of the respondent, she is not the legally wedded wife of Kamatchi Kunguli for the reason that it is specifically pleaded in the written statement that she had married Kamatchi Kunguli when Meenambal was alive and with the consent of Meenambal. Assuming that such a marriage had happened, it is impermissible under Hindu Marriage Act, 1955 and it is a void marriage. Therefore, the defendant cannot claim any right in the suit properties. The plaintiff was treated as daughter by Kamatchi Kunguli and Meenambal and therefore, Meenambal had executed Ex.A6-Will in favour of the plaintiff. The plaintiff is the daughter of Kamatchi Kunguli's elder brother Andi and she is Class-II heir to Meenambal. When it is claimed by the defendant that there was a partition and that was reduced into writing through Ex.B15, that document was rejected by both the Courts below for the reason that the document is inadmissible and not proved in the manner known to law.

11. However, the finding of the First Appellate Court despite examining P.W.2-Attestor to Ex.A6-Will that the Will is shrouded by suspicious circumstances and therefore, it is not proved and it is a concocted document, is against the evidence available. The reasons given



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by the learned Appellate Judge that the Will was not registered, is not a legally acceptable finding for the reason that the Will is not required to be registered. The alleged suspicious circumstances ie., the discrepancy in the Will with regard to the age of the attestor; that the date of execution of the Will was not referred in the pre-suit notice; are not really suspicious circumstances warranting rejection of the Will. The Will was proved in the manner known to law through P.W.2. As far as the defendant is concerned, she is a third party to the plaintiff and therefore, she is not entitled to challenge the Will. In support of his submission, with regard to proof of Will, he relied on the following judgments:

(i) In ***Meena Pradhan & Ors. vs. Kamla Pradhar & Another*** in ***Civil Appeal No.3351 of 2014***, wherein it is held as follows:

“10.....(viii) Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.

(x) One who alleges fraud, fabrication,



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undue influence etcetera has to prove the same.

However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.....”

(ii) In *S.Sundaresa Pai and Ors. vs. Mrs.Sumangala T.Pai* and another reported in 2002-3-L.W.9.

7.*Learned counsel for plaintiff-Respondent 1, supporting the impugned judgment also laid strong emphasis on uneven distribution of the assets which, according to him, shows the suspicious circumstances in respect of the execution of the will. The uneven distribution of assets amongst children, by itself, cannot be taken as a circumstance causing suspicion surrounding the execution of the will. One son was given bulk of immovable properties; another none; another half share in one immovable property; other half being given to the plaintiff and another daughter and husband were given nothing. It is also not in dispute that some properties were given in gift to the plaintiff by her mother during her lifetime. There was nothing unnatural. Learned counsel for*



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Respondent 1 also sought to rely upon certain other circumstances which, according to him, raise suspicion about due execution of the will. It was contended that the will in question was not registered in spite of the fact that the will executed by her husband was registered. This circumstance does not create doubt about the due execution of the will. There is nothing unnatural in the will made by the husband being registered and not that of his wife. Further, DW 2, an advocate of the family who was attesting witness of both the wills, explained in his testimony that because of the litigation in respect of the will of his wife, the husband insisted that his will must be registered.”

12. Continuing his submissions, the learned counsel for the appellant submitted that there is no dispute with regard to the fact that the plaintiff is the legal heir of Meenambal under Section 15 of the Hindu Succession Act. She is entitled to share in the suit properties. She is entitled to maintain the suit for herself and on behalf of other sharers who have right to claim share in the suit properties. At any stretch, the defendant cannot claim any right in the suit properties and therefore, the learned First Appellate Judge should have confirmed the judgment of the trial Court and decreed the suit and thus, the dismissal of the suit by the learned First Appellate Judge, is not correct.



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13. In reply to these submissions, learned counsel for the respondent submitted that the plaintiff has filed the suit only for declaration of title and permanent injunction. However, from the oral and documentary evidence produced in this case, it is clearly established that the plaintiff is not in possession of the suit properties, but the suit properties are in possession and enjoyment of the defendant. The defendant is in possession of the suit properties as a second wife of Kamatchi Kunguli. The fact that the plaintiff is not in possession and enjoyment of the suit properties is clearly established from the contents of Ex.A1-Notice, wherein it is claimed that the plaintiff had taken steps for recovering all the properties from the defendant. Thus, the First Appellate Court has rightly reversed the judgment and decree of the trial Court and dismissed the suit.

14. In reply to the submissions, the learned counsel for the appellant submitted that there is no pleading with regard to the absence of prayer for recovery of possession in the written statement. The plaintiff is in legal possession of the suit properties.

15. I have considered the rival submissions and perused the records.



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16. From the materials produced ie., pleadings, oral and documentary evidence and the submissions of the learned counsel appearing for the parties, it is not in dispute that the suit properties originally belonged to Kamatchi Kunguli. Meenambal is his legally wedded wife. Even in the written statement, it is stated that the defendant married Kamatchi Kunguli when Meenambal was alive and with her consent. Section 5 of the Hindu Marriage Act, 1955, deals with conditions requisite for a valid marriage, Section 5(i) reads as follows:

“(i) neither party has a spouse living at the time of the marriage;.”

17. When dealing with void marriages, Section 11 of the Hindu Marriage Act, reads as follows:

“11.Void Marriages: Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clauses (i), (iv), and (v) of Section 5.”

18. Therefore, when it is admitted by the defendant that she married Kamatchi Kunguli when his first wife Meenambal was alive, it goes without saying that the marriage between Kamatchi Kunguli and



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defendant is a void marriage.

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19. Be that as it may, defendant produced Ex.B1 to B21 documents. From these documents, Exs.B1 and B2 are the photographs taken during a function. These photographs show that Kamatchi Kunguli was performing certain pooja along with his wife Meenambal and defendant. All the three are found with garlands and offering pooja. Ex.B3-Ration Card shows that the defendant is shown as one of the family members. Ex.B4-Voter ID Card shows that the defendant's husband is shown as Kamatchi Kunguli. Ex.B17-shows that patta in respect of the suit properties stands in her name. Other documents are produced to show that the defendant is in continuous possession and enjoyment of the suit properties. The aforesaid documents namely Exs.B1 to B4 clearly establish that the defendant and Kamatchi Kunguli had been living as husband and wife, rather they were in live-in relationship even when Meenambal was alive under the same roof.

20. Ex.B15 is claimed to be a family settlement entered into between Meenambal and defendant, after the death of Kamatchi Kunguli on 12.09.2004. A reading of this document shows that it was not signed either by Meenambal or by defendant. This document *in praesenti* creates right in respect of immovable properties and cash in favour of Meenambal and defendant. Cash of Rs.32,600/- was divided between them. However,



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this document is not registered. Therefore, this Court finds that rejection of this document as inadmissible for the reason that it does not bear the signature of Meenambal and defendant and suffers from vice of lack of registration, is right.

21. Plaintiff claims independent title in respect of suit properties on the basis of Ex.A6. As already stated, Ex.A6 is rejected by the First Appellate Court for the reasons that there is no explanation offered for affixing right thumb impression of Meenambal; there is a discrepancy in mentioning the age of Meenambal and there is no mention about the date of the Will in the pre-suit notice.

22. Ex.A6 came into existence on 12.09.2004. It is an unregistered Will. There is no doubt that a Will is not required to be registered. A Will cannot be rejected only for the reason that it is unregistered. Through this Will, Meenambal said to have bequeathed her properties in favour of the plaintiff for the reason that the plaintiff had taken care of her and her husband and she is her brother-in-law Andi's daughter. Age of Meenambal is not mentioned in the Will. Before instituting the suit, the plaintiff issued Ex.A1 notice to the Taluk Tahsildar and Tamilarasan, Village Administrative Officer. Though there is mention about the Will, the date of execution of Will is not mentioned therein.



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23. It is rightly pointed out by the learned First Appellate Judge, against the normal practice ie., instead of affixing the left thumb impression, right thumb impression of Meenambal is said to have been affixed in the document and there is no reason given for affixing right thumb impression in the Will. A reading of the evidence of P.W.1 shows that she has three sisters and one brother. She has stated that she has not produced any evidence other than the Will to show that Kamatchi Kunguli and his wife had treated her as their daughter. She admitted that she has not taken any step for obtaining patta in respect of suit properties in her name. It is her evidence that the defendant was a servant in Kamatchi Kunguli's house. She admitted that the defendant was cultivating the lands. She stated that the Will was executed in Court premises. Curiously, she stated that it was referred in the Will that Meenambal had affixed her left thumb impression, contrary to the fact that it is stated in the Will that Meenambal had affixed her right thumb impression. She admitted that the date of Will is not mentioned in Ex.A1-Notice. When she was shown the photograph, she admitted that Kamatchi Kunguli, Meenambal and defendant are found in the photograph and that photo was taken while performing housewarming ceremony.



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24. The evidence of P.W.2 shows that the defendant was living with Kamatchi Kunguli under one roof. P.W.2 admitted that defendant was seen in Ex.B1 Photograph along with Kamatchi Kunguli and Meenambal. It appears that this photograph was taken when Kamatchi Kunguli had celebrated a housewarming ceremony. He also admitted that even after the death of Kamatchi Kunguli, Meenambal and defendant had lived in the same house. It is his further evidence that during her lifetime, Meenambal was in possession and enjoyment of the suit properties and after her death, the defendant was enjoying the suit properties.

25. The evidence of P.W.2 further shows that the plaintiff had played active role in the execution of Will. Plaintiff had alone introduced an Advocate for the execution of the Will and she gathered the details of the properties. Plaintiff had alone given instructions to the Advocate with regard to the execution of the Will and she had given papers for the execution of the Will. P.W.2's evidence clearly demonstrate that the plaintiff had taken active participation in execution of Ex.A6 Will. Plaintiff claims that she had taken care of Kamatchi Kunguli and Meenambal during their medical treatment and stayed in the house by spending her own money. In support of this claim, there is no iota of evidence produced. Therefore, active participation of the plaintiff in execution of the Will, discrepancy ie., as to why right thumb impression of Meenambal was



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obtained instead of left thumb impression and omission to mention the date of Will in Ex.A1 notice, certainly create a genuine suspicion with regard to the execution of the Will. Therefore, this Court is of the view that the learned First Appellate Judge has rightly rejected the Will.

26. When the documents relied on by the appellant and the defendant ie., Ex.A6-Will, Ex.B15 Family Arrangement, cannot be relied, the properties of Kamatchi Kunguli have to be claimed only by way of inheritance. It is not in dispute that the plaintiff is Kamatchi Kunguli's elder brother Andi's daughter and therefore, she is a Class-II legal heir under Section 15 of the Hindu Succession Act. But the fact remains that she is not the only heir of Andi. She has three sisters and one brother. They are not parties to the suit.

27. Suit is laid for declaration of title and permanent injunction on the basis of Ex.A6 Will. When Ex.A6 will is rejected, it is to be seen that, who is entitled for the suit properties on the basis of inheritance. Defendant's marriage with Kamatchi Kunguli is a void marriage. She was kept as a concubine or in a live-in-relationship with Kamatchi Kunguli.

28. When there is an ample evidence to show that the defendant and Kamatchi Kanguli had lived as a husband and wife, she cannot be



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considered as a stranger to the family. A person who is in live-in relationship is entitled for maintenance.

29. The Hon'ble Apex Court in **Amireddi Rajagopala Rao v. Amireddi Sitharamamma, AIR 1965 SC 1970**, has held that women kept in concubinage is entitled to get maintenance. The relevant extract is as follows:-

“4. The claim of an Avaruddha Stree or woman kept in concubinage for maintenance for her lifetime against the estate of her paramour rested on the express text of Mitakshara, Chapter 2, Section 1, Vs. 27 and 28 read with V. 7. In Bai Nagubai v. Bai Monghibai [(1926) ILR 50 Bom 604, 614, (PC)] , where the man and the woman were Hindus and the paramour was governed by the law of the Mayuka, Lord Darling said:

“providing the concubinage be permanent, until the death of the paramour, and sexual fidelity to him be preserved, the right to maintenance is established; although the concubine be not kept in the family house of the deceased”.

6. A concubine was not disqualified from claiming maintenance by reason of the fact that she was a Brahmin. The claim of a concubine who was a respectable woman of the Brahmin caste and her illegitimate sons for maintenance was allowed in Hargovind Kuari v. Dharam Singh [(1884) ILR



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6 All 329].we are satisfied that the claim of the respondents for maintenance cannot be defeated on the ground that the first respondent was a Brahmin and her paramour was a Sudra.”

30. The Hon’ble Madras High Court in **P. Visalakshi Amma v. Director of Schools Higher Education, 2014 SCC OnLine Mad 839** has observed that a second wife or concubine is entitled to maintenance. The relevant extract is as follows:-

“21. The parliament to protect the interest of women, who end up as a second wife or a concubine as a result of long living with a male companion, has enacted the Protection of Women from Domestic Violence Act, 2005. ...

22. ... The purpose of enacting such a law could only to make way for a maintenance for not only a legally wedded wife but also to a second wife or concubine.”

31. From the analysis of above judgments, it can be seen that the law is well settled to the effect that second wife or concubine or women in live-in relationship are entitled to claim maintenance provided she satisfies certain essentials as laid out by Hon’ble Supreme Court.

32. In the case on hand, though the second marriage of defendant is void as under Hindu Marriage Act, she satisfies the essentials



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as laid out by Hon'ble Supreme Court, to claim maintenance. Thus, she can challenge Ex.A6 -Will.

33. It is submitted by the learned counsel for the appellant that even in the absence of Ex.A6 Will, the plaintiff can maintain the suit for herself and on behalf of her sisters and brother, who are also the legal heirs of Meenambal under Section 15 of the Hindu Succession Act. When the suit is laid on the basis of Ex.A6 claiming independent title, this submission of the learned counsel for the appellant that one co-owner can maintain a suit on behalf of other co-owner, cannot be accepted in the absence of proper pleadings.

34. That apart, this Court finds that the plaintiff has not produced any evidence to show that she is in actual possession and enjoyment of the suit properties. On the other hand, the documents produced by the defendant clearly establish that she is in possession and enjoyment of the suit properties. It is confirmed by the contents of Ex.A1 notice wherein it is claimed that the plaintiff has taken steps for recovering the properties of Kamatchi Kunguli and his wife.

35. When the plaintiff is not in possession of the suit property, filing of suit claiming that she is in possession of the suit property is not



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correct. Thus, the learned First Appellate Judge has rightly concluded by saying that the parties, who are entitled to have shares in the suit properties under Section 15 of the Hindu Succession Act, have to initiate a separate legal proceedings. In the facts and circumstances of the case, this Court is of the view that this finding is just and appropriate.

36. In view of the aforesaid reasons, this Court answers the substantial questions of law as follows:

i)The judgment and decree of the First Appellate Court is in confirmation with Order 41 Rule 31 of C.P.C;

ii)Ex.A6 Will dated 12.09.2004 is not proved in the manner known to law;

iii) Though the defendant is the illegitimate wife, in view of the cohabitant with Kamatchi Kunguli for a long time as a husband and wife, she is entitled to get maintenance, this Court answers that she has right to question Ex.A6-Will. In view of this finding, the judgments relied on by the learned counsel for the appellant, are not applicable to the facts and circumstances of the case.



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38. In fine, this Court confirms the judgment and decree of the learned II Additional Subordinate Judge, Tiruchirappalli passed in A.S.No.103 of 2013, dated 18.07.2017 and this second appeal is dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

08.12.2023

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Index:Yes/No

NCC:Yes/No

To,

- 1.The II Additional Subordinate Judge,
Tiruchirappalli.
- 2.The I Additional District Munsif Court,
Tiruchirappalli.
- 3.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court, Madurai.



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