
(2000) 01 MAD CK 0038
In the Madras High Court
Case No : S.A. No. 410 of 1991

Chinnammal and 8 others

APPELLANT

Vs

Elumalai and 4 others

RESPONDENT

Date of Decision : 14-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23
Hindu Marriage (Amendment) Act, 1956 — Section 16, 5

Citation : (2000) 2 CTC 214 : (2000) 2 DMC 278 : (2000) 2 LW 782

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : Mrs. Mala Rukmani, for the Appellant; Mr. V. Nicholas, for the Respondent

Judgement

1. This appeal is directed against the judgment of learned subordinate judge, Chengalpattu in A.S.No.80 of 1989 in reversing that of learned

District Munsif, Chengalpattu in O.S.No.335 of 1981. The defendants 1 and 5 to 11 are the appellants in the above appeal.

2. The suit was filed for directing the partition of the suit properties into 16 equal shares and to allot 9 shares to the plaintiff and to direct the

defendants to pay mesne profits from the date of the plaint till the delivery of the plaintiff's share. According to the plaintiff, he is the son of one

Palayam through his first wife/Pattammal. The 12th defendant is the daughter of Palayam and Pattammal. Pattammal died in 1966 and thereafter,

the said Palayam married the first defendant as his second wife. The defendants 2 to 6 are the children of the first defendant. The seventh

defendant is the younger sister of the first defendant. Palayam was having illicit intimacy with the seventh defendant. She was not married to

Palayam and cannot in law be the legally wedded wife. The defendants 8 to 11 are the illegitimate children of the seventh defendant through

Palayam. The plaintiff and Palayam constituted members of a joint family and the properties described in the schedule are the ancestral properties

of Palayam and the plaintiff. Therefore, the plaintiff, as a co-parcener, was entitled to 1/2 share in the properties. The family was still joint. While

so, Palayam, in collusion and in conspiracy with the defendants 1 and 7, appears to have created a fraudulent settlement deed in favour of the

defendants 1 to 7. The plaintiff had obtained a registration copy of the settlement deed. The recitals therein are false and fraudulent. The plaintiff

also denies the execution, the truth and the validity of the settlement deed. In spite of the repeated demand for partition, Palayam did not effect

partition and thereupon, a notice was issued on 4-5-1980. There was no reply to the notice. Palayam died on 20-1-1981. The plaintiff finds it

difficult to live jointly with the defendants and hence, the present suit.

3. In the written statement filed by the defendants, it was contended that the seventh defendant was the legally wedded wife of Palayam and

defendants 8 to 11 are legitimate children of the seventh defendant through Palayam. The first defendant became sick after giving birth to the

second defendant and she was not able to manage the family and there was no one to look after the family of Palayam. Therefore, the first

defendant suggested that seventh defendant may be taken as the third wife of Palayam and with the consent of the first defendant and all the

relations, the seventh defendant was married to Palayam. The said form of marriage was recognised in the community as a long established custom.

It was further contended that the plaintiff and Palayam did not constitute any joint family. The suit properties are not ancestral joint family

properties. They are the self-acquired properties of Palayam. He had validly executed a registered settlement deed in favour of the first defendant

and the seventh defendant. The settlement deed was accepted and acted upon by the defendants 1 to 7. They have also taken possession of the

properties and they are paying kist. It was further contended that even during the life time of Palayam, he has purchased certain properties, which

are his separate properties. But after the death of Pattammal, the plaintiff took possession of those items of the properties and he was in enjoyment

of the same. He was fully aware that the properties were purchased only by Palayam and Palayam alone was entitled to those items. But, he was not in good terms with his father and he had picked up quarrel with Palayam several times. There was a family arrangement in the year 1967 soon after the death of Pattammal and from that date, the plaintiff was living separately as a divided member of the family. It is only in view of hostile attitude of the plaintiff, Palayam had executed a registered settlement deed. The settlement deed was valid and binding. There was no basis for the allegation that Palayam and defendants land 7 had colluded with others. The plaintiff never lived with his father. He did not even spend any amount for the death of his father. At the time of the death of Palayam the plaintiff was a divided member and therefore, he was not entitled to claim any share.

4. On the basis of the said pleadings and evidence, the trial Court on a consideration of the entire dispute, held that the seventh defendant was not the legally married wife of Palayam. The trial Court further held that all the properties other than the properties standing in the name of first and seventh defendants and Pattammal, belonged to the joint family and that the settlement deed executed by Palayam in favour of seventh defendant in respect of the joint family "properties, cannot bind the plaintiff. "The family arrangement alleged to-have been effected in the year 1967, as pleaded by the defendants, was also disbelieved. However, the trial Court held that the properties belonging to Pattammal on her death in 1966, had been inherited by Palayam, plaintiff and 12th defendant and consequently, defendants 1 to 6 along with 12th defendant, had their respective shares, but, those properties had not been included in the suit. On the contrary, the plaintiff had pleaded that they were Pattammal's property, which plea could not be sustained. On the basis of the said findings, the trial Court rejected the suit. But the appellate Court, however held that the suit properties were joint family properties of Palayam. Having said so, the appellate Court went further to hold that the properties purchased under Ex.B-1 were self-acquired properties of Palayam. As regards the properties in the name of Pattammal, the appellate Court held that those properties belonged to Pattammal and. with the result, the plea of the defendants that Pattammal's properties should have been included in the suit properties, was

rejected. The appellate Court ultimately allowed the appeal and decreed the suit for partition as prayed for. Hence, the present second appeal by

the first defendant and defendants 5 to 11.

5. Though both sides have advanced arguments on the merits of the appeal, inasmuch as this appeal requires to be remanded to the appellate

Court, as a result of its erroneous approach of having decreed the suit in its entirety, contrary to its own finding, I refrain from referring to the

submissions on the merits of the appeal.

6. It was submitted on behalf of the appellants that the suit was also bad for partial partition in not having included the properties belonging to

Pattammal and that the appellate Court had ignored that Pattammal had predeceased Palayam and therefore, Palayam would be one of the heirs

and on his death, the first defendant and her heirs would be entitled to their respective shares, which fact has been ignored by the appellate Court.

7. Though learned counsel for the respondents seeks to justify the findings rendered by the appellate Court, he agrees that even though the self-

acquired properties and the ancestral properties were identified, the decree had been erroneously passed covering all the properties.

8. As regards the share claimed in Pattammal's properties learned counsel for the respondents contends that partition of Pattammal's share can be

effected only by separate suit and cannot be clubbed, in the present suit. He also contends that even though Palayam might have inherited, a share

of the properties belonging to Pattammal, those properties can be inherited only by the plaintiff, being the son of Pattammal and not by the first

defendant or the other defendants.

9. Learned counsel for the appellants also advanced arguments in an attempt to sustain the legality of the marriage of the seventh defendant. It was

contended that a presumption of marriage would arise, as a result of long cohabitation, even though there may be no positive evidence of marriage.

Reliance was placed on the following judgments in support of the said submission:

(i) AIR 1994 133 (SC) (ii) Seerangammal (Died) v. E.B. Venkatasubramanian, 1987 (100) L.W.58 (iii) Sarangapani & 8 others v. Varadhan & 6

others, 1994 (2) L.W.125 and (iv) Kumari Baghyavathi Vs. Smt. Llakshmikanthammal (deceased) and others, .

10. I am unable to agree with the contention of learned counsel for the appellants. There is a distinction between proof of marriage and validity of marriage. The proof of marriage can be achieved, by direct evidence of the marriage ceremony or registration of marriage or by circumstantial evidence, one of the circumstances being long cohabitation and living together. But, a marriage which is questioned on the ground of being subsequent to and during the subsistence of an earlier marriage, could not, by any stretch of argument or imagination, be sanctified or validated by any length of cohabitation or living together. After the advent of Tamil Nadu Hindu (Bigamy Prevention and Divorce Act, 1949 and Hindu Marriage Act, 1955, the second marriage during the subsistence of the first marriage is totally void, illegal and opposed to public policy. No amount of pleading or proof of custom or consent by wife can validate such a marriage. All the four decisions cited by learned counsel for the appellants deal with cases where the relationship between the man and the woman in the respective cases, was long before the coming into force of the said enactments. In the present case, the first wife herself died only in the year 1966, after which, the first defendant was married. It was during the subsistence of the marriage with the first defendant, Palayam is alleged to have married and lived with the seventh defendant. Therefore, the alleged, marriage with seventh defendant could never acquire legal status. To hold otherwise, would be putting premium on persons who violate the law to the detriment of the legally wedded wife and the legitimate children. Every individual, in an orderly society, has to go by the basic rules and there could be no question of any sympathy towards a person who willingly hurts others knowing fully well that the marriage during the subsistence of another marriage, would be illegal. The position of the children born out of such relationship is no doubt tragic to be sympathised with and the law has taken care of them by enacting Section 16 of the Hindu Marriage Act, 1955, which, not only removes the stigma of illegitimacy but also entitles them to equal share in the individual and self-acquired property of their father. It is true that in this case, their entitlement has not been considered and I therefore hold that the defendants 8 to 11 are entitled to equal shares along with the other children of Palayam as regards the self-acquired properties of Palayam. The rejection of their claim in toto as held by the Courts below, cannot be sustained.

11. But, in respect of other points raised before me, suffice it to say that the appellate Court, even though, found that some of the properties were individual and self-acquired properties of Palayam, nevertheless decreed the suit in its entirety without excluding such of those properties. The decree thus granted cannot be sustained. The correctness or otherwise of the legality of the claim of the defendants to include the properties of Pattammal, should also be examined. With the result, the appeal requires to be remanded to the appellate Court for rendering proper decision on all aspects including proper identification of the self-acquired properties of Palayam and the ancestral properties and all other points arising for consideration.

12. The only issue of fact on which both the Courts have concurrently agreed is that there was no proof of any valid marriage between Palayam and the seventh defendant. The said finding is confirmed, but, at the same time, it is held that the defendants 8 to 11 are entitled to equal share along with the other children of Palayam in respect of his individual and self-acquired properties.

13. All other issues are left open to be considered by the appellate Court and to be decided on merits.

14. With the result, the above second appeal is remanded to the appellate Court for re-consideration in the above terms. The appellate Court is directed to dispose of the appeal within a period of three months from the date of receipt of a copy of this judgment along with the records. No costs.