

(1996) 07 MAD CK 0109
In the Madras High Court

Lakshmi Ammal alias Pinnayel and Others

APPELLANT

Vs

Pappathi Ammal and Another

RESPONDENT

Date of Decision : 03-07-1996

Acts Referred:

Hindu Marriage Act, 1955 — Section 16

Citation : (1997) 1 MLJ 543

Hon'ble Judges : Raju, J

Bench : Division Bench

Judgement

Raju, J.—The above second appeal has been filed by the defendants in O.S. No. 529 of 1974 on the file of the Court of District Munsif, Karur, who succeeded before the trial court but lost before the first appellate court. The suit was for possession as also past and future profits and directing the defendants to deliver possession and for costs. The case of the plaintiffs before the trial court was that the suit property belonged to one Venkatarama Reddiar ancestrally; that the said Venkatarama Reddiar married the first plaintiff according to the Hindu customs and rites; that there was no issue for them for pretty some time which was the cause for disruption of family harmony and that the same resulted in the execution of a maintenance release deed by the first plaintiff on 10.8.1943 in favour of her husband Venkatarama Reddiar marked as Ex. B-1. It was claimed that the said maintenance release deed was not acted upon and, subsequently they lived together as husband and wife and in or about 1948 or 1949, the second plaintiff was born to them and later on the said Venkatarama Reddiar developed illegal intimacy with the first defendant and the second defendant was born to them. It is also the case of the plaintiffs that thereafter he drove the first plaintiff out of the house and did not provide maintenance at all and the defendants 3 and 4 are the minor daughters of the first defendants. The said Venkatarama Reddiar admittedly died intestate on 9.1.1973 and in the light of the above stated facts, it was claimed that the plaintiffs are the only heirs of the deceased Venkatarama Reddiar who are entitled to the suit properties by succession and the defendants have no manner of right to succeed to late

Venkatarama Reddiar. Since the defendants, according to the plaintiffs, have no manner of right to succeed to late Venkatarama Reddiar, but they are in possession and enjoyment of the entire suit properties, right from the death of Venkatarama Reddiar. The plaintiffs sought to recover the suit properties and also for the relief of past and future mesne profits. Notices have also been exchanged between the parties prior to the filing of the suit.

2. The defendants filed a written statement in which it was virtually admitted that the said Venkatarama Reddiar married the first plaintiff as also the circumstances which resulted in the execution of the maintenance release deed between the first plaintiff and late Venkatarama Reddiar. But at the same time, the defendants plea was that the claim of the plaintiffs that the maintenance release deed was not acted upon or given effect to is incorrect and since there was no issue for the parties to the original marriage for a pretty long time, the provision for maintenance came to be made to the first plaintiff and immediately thereafter, the first plaintiff was living separately and leading a life of her own and the second plaintiff could not be considered to have been born out of lawful wedlock. The defendant also contended that immediately after the release deed dated 10.8.1943, Venkatarama Reddiar married the first defendant according to the rites and customs of the community and defendants 2 to 4 are born out of their lawful wedlock and the challenge made to the relationship of the defendants with the deceased Venkatarama Reddiar is false and incorrect. Reliance was also placed on the factum of partition between the late Venkatarama Reddiar and the second defendant treating the second defendant to be his son under a registered partition deed marked as Ex. B-2 and the subsequent actual physical possession and enjoyment of the properties by the respective sharers as per the partition deed. In the said circumstances, the defendants claimed that the plaintiffs were not entitled to any relief. The quantum of mesne profits claimed was also disputed by the defendants.

3. On the above claims and counter claims, the parties have adduced oral and documentary evidence before the trial court. On considering the materials placed before the trial court, learned trial Judge by his judgment and decree dated 11.10.1979 held that the maintenance release deed dated 10.8.1943 marked as Ex. B-1 was not acted upon and therefore, the second plaintiff is a legitimate son of Venkatarama Reddiar. On the other issues, learned trial judge held that the marriage between the said Venkatarama Reddiar and the first defendant took place in or about 1944 and therefore, the first defendant was the legally wedded wife of late Venkatarama Reddiar and the defendants 2 to 4 are the legitimate issues born out of lawful wedlock. It was further held that the registered partition deed marked as Ex. B-2 cannot bind the second plaintiff since he happened to be a legitimate son and the properties being ancestral, the share due to the second plaintiff cannot be denied. The court in that context, held that the second defendant cannot claim the properties merely on the basis of the partition covered by Ex. B-2. While relegating the claim of mesne profits to separate proceedings, learned trial Judge held that the first plaintiff was entitled to 1/36

share and the second plaintiff was entitled to 7/18 share in the suit properties and to claim for - recovery of possession cannot be granted and the only remedy if at all for the plaintiffs was to file a suit for partition of the suit properties and for possession of their respective shares with mesne profits. Hence the suit was dismissed as not maintainable as framed.

4. Aggrieved the plaintiffs pursued the matter on appeal before the Sub Court, Karur in A.S. No. 101 of 1980. Learned Subordinate Judge, on a consideration of the very materials on record and re-appreciating the evidence as it appealed to him came to the conclusion that the marriage of the first defendant with the late Venkatarama Reddiar took place only after 1949 namely in 1952 and that being a bigamous marriage which is void in law the first defendant cannot claim the status of a legally wedded wife and the children born of such marriage cannot be the legitimate heirs of late Venkatarama Reddiar who can claim to succeed to the estate of late Venkatarama Reddiar. In view of the above, the judgment and decree of learned trial Judge came to be set aside by learned first appellate Judge by his judgment and decree dated 26.2.1982 and the suit came to be decreed as prayed for. Aggrieved, the defendants have filed the above second appeal.

5. The appeal came to be dismissed for non prosecution on account of the lapse on the part of the counsel or the parties to appear on the day when it was listed and called before court. Subsequently, today by a separate order, the order of dismissal for non-prosecution came to be set aside and the appeal came to be restored for hearing and the matter was heard at considerable length today.

6. Mr. Parthasarathy, learned Counsel appearing for the appellants while elaborating the question of law framed at the time of admission as to whether the lower appellate court was right in ignoring the claim of defendants 2 to 4 having regard to Section 16 of the Hindu Marriage Act as amended by Act 68 of 1976, contended in the forefront that the finding of the learned first appellate Judge about the point of time or the date of marriage cannot be considered to be one in accordance with law or based on relevant or acceptable evidence and that therefore, the learned first appellate Judge committed a grave error in interfering with the well considered decision of the learned trial Judge. In the alternative, it was also Contended that notwithstanding even the finding that the marriage of the first defendant with late Venkatarama Reddiar was a void marriage, the provisions of Section 16 ought to have been applied and it was wrong on the part of the learned first appellate judge to have held that the defendants would not be entitled to any right or share in the properties left behind by Venkatarama Reddiar.

7. Per contra Mr. P. Madhavan, learned Counsel appearing for the plaintiffs - respondents in this appeal invited my attention to the findings of the learned first appellate Judge and contended that the said findings recorded in an appreciation of the oral and documentary evidence on record justifies the conclusions of the learned first appellate Judge and if that be the position, there is no scope for

interfering with the same in this second appeal and consequently, the appeal has to be rejected as having no merits.

8. Both learned Counsel appearing on either side invited my attention to some of the decisions of this Court as well as the Apex Court to which a reference may be made before dealing with the merits of the claims made in this second appeal. Learned Counsel appearing on either side also invited my attention to some of the decisions on the scope and applicability of Section 16 of the Hindu Marriage Act, 1955 with reference to a void marriage held prior to the date of commencement of the Act. In my view, having regard to the view I intend taking on the other issue relating to the factum of marriage and the relevant point of time of such marriage between the first defendant and late Venkatarama Reddiar, it would be unnecessary for me to advert to those other decisions and initially I confine my consideration to the question of factum of marriage and the time of such marriage. Strong reliance has been placed by learned Counsel for the appellants, on a recent decision of the Apex Court in Ranganath Parmeshwar Panditrao Mali and another Vs. Eknath Gajanan Kulkarni and another, Their Lordships of the Supreme Court while reiterating the principles laid down in the earlier decision reported in AIR 1994 133 (SC) , held as follows:

In view of the rival stand of the parties the first question that arises for consideration is whether merely because the factum of marriage has not been established, was it open for the lower appellate Court as well as the High Court to set aside the finding of the trial Judge, which finding was based on not only arising out of the legality of a presumption from the fact of living together as husband and wife but also the admission of defendant No. 1 that Shevantabai was residing with Pandit in the Wada in village for long years and the plaintiff No. 1 is son of Shevantabai? It is no doubt true that a finding arrived at on a question of fact by the lower appellate court or the High Court is not ordinarily interfered with by this Court under Article 136 of the Constitution. But if such finding is recorded by non-consideration of some vital piece of evidence or admission of the adversary, then this Court will be fully justified in interfering with the finding in question. In the case in hand, the consistent evidence being that Panditrao and Shevantabai were living together for long years as husband and wife and plaintiff No. 1 is their son and the defendant also admitted the aforesaid fact but contended that there had been no valid marriage between Panditrao and Sheventibai, a legal presumption does arise, though the presumption is rebuttable and this presumption has not been rebutted by the defendant. It has been held by this Court in the case of AIR 1994 133 (SC) that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two. But the presumption is rebuttable. The High Court, committed, an error of law in recording a finding that the presumption would arise only if the factum of marriage is proved. We are afraid if factum of marriage is proved, the question of raising presumption does not arise. The lower appellate court on the other hand has merely entered into the arena of conjecture and surmises by interfering with

the finding of the trial Judge without considering the relevant and material evidence on the point. In this view of the matter findings arrived at by the lower appellate Court as well as by the High Court on the question of relationship of Panditrao and Shevantabai cannot be sustained in law. In our considered opinion a legal presumption arises on the admitted fact that they were living together as husband and wife and the said presumption has not been rebutted. We would accordingly set aside the findings of the High Court as well as the findings of the Additional District Judge on this score and restore the finding of the trial judge on this core and hold that Shevantabai was the wife of Panditrao and plaintiffs having been begotten by Shevantibai from Panditrao are the legal heirs over the property of Panditrao and would succeed to the said property.

9. Learned Counsel for the respondents relied upon the decision in *Mohan v. Santha Bai Animal* (1989) 2 L.W. 197 wherein the learned Judges of a Division Bench had observed that the recitals in the birth extract register and the school certificate per se are not sufficient to establish the marriage when it is disputed. It may be seen from the full text of the decision of the Division Bench that the case before them was one where there were indisputable documents which were marked in evidence in which the woman concerned has specifically recited by referring herself in the document that she was the which is equivalent to the term "concubine" and that by virtue of such relationship she be got children, whose status was also in dispute. It is in the teeth of such admitted relationship, strong proof of marriage by other substantive material was insisted upon and it is in that context only it was considered that the recitals in the birth extract register and school certificate were not per se sufficient. The other materials made available in the said case were analysed by the learned Judges of the Division Bench and found to be not sufficient in law to warrant a presumption of marriage. Therefore, certain observation made in the said decision alone cannot be read out of context to insist upon such requirement as laid down in the said decision as a must, and as an invariable manner of proof, de hors the individual facts and circumstances of the case.

10. Further reliance was placed by learned Counsel for the respondents on the decision reported in *Subbarayapillai alias Subbaraya Manthiri v. Lakshmiammal and Ors.* (1993) 2 L.W. 559. The said decision though also dealt with a disputed claim of second marriage, the very claim projected being that such second marriage was contracted in the year 1954 and therefore, the learned Judges of the Division Bench considered that it could not be a valid marriage in the teeth of the Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949). On the other aspect relating to the applicability of Section 16 of the Hindu Marriage Act, 1955, the learned Judges have come to the conclusion that Section 16 of the Hindu Marriage Act, 1955 would be applicable only to a marriage that took place after 1955 Act came into force and not to a void or voidable marriages prior to the commencement of the said Act. The learned Counsel for the appellant while contending that it is not the correct position appealed to me to refer the correctness of the same for consideration of larger Bench. Had it been necessary

for me to deal with that aspect also, which in view of my finding on the other issue becomes wholly unnecessary, in this case, I would have necessarily referred the matter to a larger Bench for an authoritative consideration of the matter since in my view, the said decision proceeds upon a thorough misunderstanding of the relevant scope of the provisions the basic and essential principles of construction of a remedial and social legislation as also the object and the evils sought to be remedied by Parliament by enacting the said amendment to Section 16 of the Act. I desist from doing so, as noticed earlier, since this appeal could be safely decided on the nature of finding to be recorded on the first issue about the factum of marriage and the course of time of such marriage and particularly if it be that the claim of the defendants are correct without undertaking an exercise on the scope of Section 16 or the correctness of the decision of the said Division Bench.

11. As for the issue relating to the factum of marriage of the first defendant with late Venkatarama Reddiar and the point of time as to when it was celebrated or contracted was concerned, the courts below have come to diametrically opposite conclusions, in that, as against the finding of the learned trial Judge that the said marriage was considered to have been contracted in or about 1944, learned appellate Judge held that the said marriage would have taken place only after 1949 and that too in 1952. Learned trial Judge has chosen to place reliance for his conclusion on the admission made by the first plaintiff herself about the factum of marriage and the further admission made by P.W. 2 himself regarding the point of time that after the execution of Ex. B-1 which is the maintenance release deed, the Late Venkatarama Reddiar, married the first defendant according to the customs of the community. Reliance was also placed by learned trial judge. On the birth extract relating to the second plaintiff and also the partition deed executed between the late Venkatarama Reddiar and the second defendant and the evidence of D.W. 2 and D.W. 3. On the other hand, learned first appellate Judge has chosen to place reliance upon the birth extract said to relate to the first defendant marked as Ex. A-8 and the birth extract, said to relate to the second defendant marked as Ex. A-7. From the above and taking into account the some stray statements of D.W. 1 and D.W. 2 learned first appellate Judge makes a mathematical calculation by computing with reference to such statement the year and purports to fix the point of time of marriage of the first defendant with late Venkatarama Reddiar in 1952. The question for consideration in the context of the varying conclusions of both the courts below and the contentions of learned Counsel appearing on either side could be as to whether the learned first appellate Judge was right or justified in interfering with the findings of the learned trial Judge for the reasons assigned by him or the materials relied upon therefor. As noticed earlier, I have been taken through at length by the respective counsel appearing on either side to the relevant portions of the judgment supporting the stand of either of the parties as also the evidence of the witnesses on which the courts below chose to place reliance to come to their own conclusions. Learned first appellate Judge, in my view, committed a

grave error in completely overlooking the specific admission of P.W. 2 with reference to the point of time of marriage in dispute. There is not attempt even made by the learned first appellate judge to explain away the admission notwithstanding the fact that strong reliance has been placed on the said admission by the learned trial Judge. That apart, the learned first appellate Judge has chosen to undertake a mathematical calculation of years with reference to events mentioned by some witnesses to fix the year of marriage with particular reference also to the birth certificates of D-1 and D-2 marked as Exs. A-8 and A-7 respectively. The said documents came to be marked only through the clerical Assistants working in the respective offices of the Sub Registrars. Admittedly, there was no attempt to summon the original registers but only copies were summoned and the contents of the documents Exs. A-8 and A-7 by themselves do not disclose any names of the either of the defendants and therefore cannot have any reference to either D-2 or D-1, without any material or oral evidence to connect them with those documents. As a matter of the fact, I find that P.W. 1 was put to searching cross examination on the relevancy of the same and she was unable to properly correlate the same to D-1 and D-2. Apparently, that is how, no serious weight has been given to the same by the learned trial Judge but at the same time, it passes beyond comprehension, as to how the first appellate judge chose to jump to the conclusion in paragraph 9 of his judgment that Ex. A-7 relates to the second defendant and Ex. A-8 relates to the first defendant. Such presumption on mere surmise cannot be a substitute for legal proof. It is with reference to the dates contained in Exs. A-7 and A-8, learned first appellate Judge purport to calculate and work out the dates by applying pure mathematics ignoring the other relevant evidence on record to fix the marriage of the first defendant with late Venkatarama Reddiar in the year 1952. That apart, learned first appellate Judge also totally ignored the evidentiary value of Ex. B-1 to fix the nature of relationship as also the factum of marriage. A careful consideration of the relevant materials as also the very deviation of the learned first appellate Judge would go to show that even the plaintiffs could not succeed in proving their claim that there was no marriage between the first defendant and late Venkatarama Reddiar and if at all doubts have been raised by the plaintiffs with reference to the date of such marriage and this aspect has been lost sight of by learned first appellate Judge to some extent.

12. Further, learned first appellate Judge failed to apply his mind and give due weight and effect to the admission of the plaintiffs themselves both in the plaint and also in the evidence that misunderstanding developed between the first plaintiff and late Venkatarama Reddiar only on the ground that there were no issues and that it is only under such circumstances, the maintenance release deed marked as Ex. B-1 came to be executed in the year 1943 apparently to facilitate the marriage of another woman by Venkatarama Reddiar. If that be the position, it is unnatural to even assume that from 1943 late Venkatarama Reddiar would have waited to marry the 1st defendant till 1952 and would not

have contracted the marriage immediately thereafter. If the second plaintiff was born in the year 1948 or 1949 there was hardly any need or scope for Venkarama Reddiar to contract a second marriage in 1952 after the birth of a son, particularly when the very case of the plaintiffs was that the misunderstanding was only on account of the absence of children and not on account of any other reason or that late Venkatarama Reddiar was fed up or disenchanted with the first plaintiff. Therefore, the first appellate court has miserably failed, in my view, to apply proper reason to the consideration or analysis of the materials in a judicious manner as is expected of a first appellate court before upsetting the well settled findings recorded by the trial court on the basis of evidence referred to and relied upon by the said trial court. Though as a court of first appeal, learned first appellate judge had co-extensive powers with that of the trial court in re-appreciating the evidence, he could not afford to ignore vital and relevant materials adverted to by the learned trial judge and the reasons assigned by the trial judge to justify his conclusions and findings and refer merely to some aspects of the matters or materials of his choice alone and come to his own conclusions by drastically differing from the findings recorded by the learned trial judge. On the other hand, a duty and an obligation is cast upon the first appellate court to come to grips and grapple with the findings and the reasons assigned therefore by the learned trial Judge and demolish the same before coming to a contra conclusion. Learned first appellate Judge, in my view, in this case, has gone on an error in setting aside the well merited findings of the learned trial judge in arriving at his own findings on the possible date of the marriage, merely on surmise, and assumptions that Exs. A-7 and A-8 relate to defendants 1 and 2. On an overall comparison of the two judgments of both the courts below, I am of the view that the findings recorded and conclusions arrived at by the learned trial judge are more in conformity with the evidence on record and in tune with the legal principles to be kept into consideration in adjudicating an issue in an endeavour to find out the factum of time of marriage as laid down in the latest pronouncement of the Apex Court in Ranganath Parmeshwar Panditrao Mali and another Vs. Eknath Gajanan Kulkarni and another, , that the perfunctory approach and consideration undertaken by the learned first appellate Judge by ignoring the relevant and vital materials on the point in issue before him. For all the reasons stated above, I opt for the judgment of the trial court which applied the correct principles of law to the case on hand and the evidence on record and consequently set aside the judgment and decree of the lower appellate court rendered without an objective or judicious consideration of the issues arising and the materials in their proper perspective, and restore the judgment and decree of the learned trial Judge. As a consequence, it would be for the parties to work out their shares as pointed out by the learned trial judge in properly framed proceedings for partition and possession of their respective shares. The second appeal is therefore allowed. No costs.