
(1994) 07 MAD CK 0055
In the Madras High Court
Case No : Appeal No. 163 of 1983

Nagalakshmi and Another

APPELLANT

Vs

Thirugnanasambandam alias Gnanam and Others

RESPONDENT

Date of Decision : 12-07-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Evidence Act, 1872 — Section 108

Citation : AIR 1995 Mad 120

Hon'ble Judges : Govardhan, J

Bench : Single Bench

Judgement

1. Defendants 1 and 2 are appellants.

2. The averments in the plaint are as follows :

The B Schedule properties in the plaint belonged to one Subramania Vaithiyar who died intestate on 14-12-1970. Most of these properties were

his ancestral properties and some were acquired by him with the aid of the income from the ancestral properties. The plaintiff is the son of

Subramania Vaithiyar through his first wife Sivakami. After the death of Sivakami. Subramania Vaithiyar married the third defendant as his second

wife and fourth defendant is their daughter. Out of compulsion by his father, the plaintiff married the first defendant who is the sister's daughter of

his father. The first defendant was leading a wayward life. She did not mend herself in spite of advice given by the plaintiff, Subramania Vaithiyar

and his sister. The second defendant who is the son of the first defendant was not born to the plaintiff and the plaintiff disputes his legitimacy. The

plaintiff left Mayavaram where he was residing with his father in 1958 and was employed as a Mechanical Fitter in Nagarjuna Sagar Project in

Andhra Pradesh. Then he went to Mysore State and was employed as a Driver at Ambika Nagar in Mayood District. On seeing the advertisement

in the Tamil Daily ""Dhinanthanthi"" in 1970 that his father passed away, he wrote letters to his relatives and also to the first defendant. There was no

reply. The plaintiff came to Mayavaram on 29-8-1980. His return was not relished by the defendants. The plaintiff was also beaten by defendants

2 and 6 on 10-11-1980 and was driven out of the house. They have taken the baggage brought by him. A complaint lodged by him to the police at

Mayavaram was of no avail. The plaintiff learned that after the death of Subramania Vaithiyar in 1970 intestate, in the year 1975, defendants 3, 4

and 5 filed a suit against the defendants 1 and 2 for partition of the B schedule properties, in this suit in O.S. No. 75/1975, before the Subordinate

Judge, Mayavaram and obtained a decree. In the final decree passed in January, 1979, the defendants 3 and 4 were allotted 1/3rd share and the

defendants 1 and 2 were allotted 2/3. The said suit has been filed on the footing that the plaintiff is civilly dead on account of the fact that he was

not heard of for more than seven years. The proceedings in O.S. No. 75/1975 will not affect the rights of the plaintiff. On the death of Subramania

Vaithiyar intestate, the plaintiff will be entitled to one third of the half share of Subramania Vaithiyar since the entire properties which are ancestral

belonged to Subramania Vaithiyar and the plaintiff. The defendants 1 and 2 have no manner of right whatsoever in the suit properties. The plaintiff

must be deemed to be in joint possession of the B schedule properties along with defendants 3 and 4. He is entitled to partition and separate

possession of 2/3rd share in the B schedule properties. In case the Court holds that the decree in O.S. No. 75/1975 is binding on the plaintiff, then

also, the plaintiff is entitled to possession of the properties, allotted to defendants 1 and 2 since the allotment in favour of defendants 1 and 2 was

only in lieu of the plaintiff's share in the joint family properties. Defendants 5 to 9 are tenants. Hence the suit.

3. The first defendant has filed a written statement contending as follows : The plaintiff is not her husband. He is an impostor making a false

personation as if he is the son of Subramania Vaithiyar and husband of the first defendant. The husband of the first defendant has named the child

born to the first defendant-his wife as Panneerselvam. They were living amicably till 1960. The husband of the first defendant viz.,

Thirugnanasambandam developed mental aberration and left the house and was not known for more than seven years from 1960 and he was

presumed to be dead. A co-owner of Subramania Vaithiyar by name Purushothaman filed O.S. No. 2/1965 a Partition suit and he has been

allotted a share in the family property. He has squandered his entire share allotted to him. Defendants 3 and 4 obtained a decree in O.S. No,

75/1975 filed by them, for partition in respect of their share in the family property of Subramania Vaithiyar. Even though mesne profits amounting

to Rupees 2977/- was directed to be paid by defendants 3 and 4 to defendants 1 and 2, the defendants 3 and 4 have not furnished required non-

judicial stamps for engrossing final decree regarding mesne profits. Purushothaman who had squandered all the properties allotted to him, has set

up the plaintiff as if he is the son of Subramania Vaithiyar in order to blackmail this defendant and her son. Since there is ill-feeling between the

defendants 1 and 2 on the one part and the defendants 3 and 4 on the other part, defendants 3 and 4 are conniving with him.

4. It is false to state that the plaintiff was working in Nagarjuna Sagar Project for some years and then employed in Ambika Nagar till July, 1980.

He is an impostor. He would have filed a suit even during the lifetime of Subramania Vaithiyar. If the plaintiff was the son of Subramania Vaithiyar,

he would have rushed to Mayavaram and taken steps to establish his rights in the properties of Subramania Vaithiyar immediately after seeing the

advertisement in ""Dinathan thi"" on 29-12-1970. The conduct of the plaintiff reveals that he is not the son of Subramania Vaithiyar. It is false to state

that the first defendant was leading a wayward life and the second defendant is not son of Thirugnanasambandam husband of the first defendant.

Thirugnanasambandam had admitted the legitimacy of his son in all the letters written by him. The plaintiff is not entitled to any share and the suit is

liable to be dismissed.

5. The fourth defendant filed written statement contending briefly as follows: Defendants 3 and 4 are entitled to 2/3rd share. Deceased Subramania

Vaithiyar was dealing with the properties as his self-acquired properties and it has been held to that effect in O.S. No. 2/1965, The defendants 3

and 4 are entitled to 1/3rd share in the remaining properties. They are not in possession of any other properties in the plaint. Defendants 1 and 2

alone are realising the income and are liable to render accounts to defendants 3 and 4.

6. The seventh defendant had filed a written statement stating that he is a tenant under defendants 1 and 2.

7. On the above pleadings, the parties went for trial and the learned Subordinate Judge has held that the plaintiff is the son of Subramania Vaithyar

and he is entitled to partition and separate possession of his 2/3rd share in the B schedule properties and he has relegated an enquiry regarding

mesne profits to a separate proceedings under Order 20, Rule 12 of Code of Civil Procedure.

8. Aggrieved over the same, the defendants 1 and 2 have come forward with the appeal.

9. The point for consideration is :

Whether the plaintiff is not entitled to partition and separate possession as per the decree of the trial Court ?

10. Point : The plaintiff has filed the suit for partition and separate possession of the 2/3rd share in the B schedule properties contending that they

are the ancestral properties of his father and properties acquired by his father from out of the income from the ancestral properties and that the

defendants 3 and 4 who are his father's second wife and daughter are entitled to the remaining 1/3rd. According to the plaintiff, even though he

was not willing to marry the first defendant, who is the daughter of his father's sister, he had to marry her out of compulsion by his father and he

was not living with her as husband and wife as she was leading an immoral and wayward life and the second defendant was not born to the first

defendant through him. According to the plaintiff, he had left his native place Mayiladuthirai some time in 1956 and was working as a labourer in

Nagarjuna Sagar Project in Andhra Pradesh for some years and then, he was working as a Driver in Ambika Nagar in Mavood District,

Karnataka State till July, 1980 and when he returned to his native place, he found that the defendants 1 and 2 are in enjoyment and possession of

the properties belonging to his father and therefore, he has filed the suit. It is also the case of the plaintiff that the defendants 3 and 4 have filed a

suit in O.S. No. 75/1975 for partition of the properties of his father Subramania Vaithiyar and in that suit, his share was allotted to the defendants 1

and 2 on the presumption that he is dead on account of not being heard of for more than seven years and that the decree passed in O.S. No.

75/1975 is not binding on him. The delendants 1 and 2 resisted the suit by contending that the husband of the first defendant viz.,

Thirugnanasambandam was not heard of for more than a decade and the plaintiff is not the husband of the first defendant and he is only an

impostor set up by one of their relations by name Purushothaman who wants to grab the property in the possession of the defendants 1 and 2.

11. The learned Subordinate Judge before whom the trial was conducted, accepted the case of the plaintiff that he is the son of Subramania

Vaithiyar and granted a decree for partition and separate possession as prayed for by the plaintiff. The contention of the defendants 1 and 2 that

the plaintiff is not the husband of the first defendant but only an impostor has not been accepted by the learned Subordinate Judge. Mayiladuthurai.

Therefore, before proceeding further, it is necessary for us to recollect the established principles of law with regard to the presumption u/s 108 of

the Evidence Act. It has been held in Huseinny J. Bhagat and Another Vs. Life Insurance Corporation of India, Madras, as follows :

Section 108 of the Evidence Act no doubt lays down a presumption under law that where the question is whether a person is alive or dead and it

is proved that such person had not been heard of for seven years by those who could normally have heard of him if he had been alive, the burden

of proving that such person is alive is shifted to the person who affirms it.

It is also laid down in the decision reported in Shailesh N. Shah Vs. The Regional Commissioner, Employees Provident Fund, as follows :

When it is proved that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the

burden of proving that such a person is alive is on the person who affirms it.

From the above decision, we have to gather that it is for the plaintiff who claims that he is the real Thirugnanasambandam son of Subramania

Vaithiyar to prove the same.

12. In order to discharge this burden, the plaintiff has examined as many as four witnesses on his behalf. According to P.W. 1 the plaintiff, even

though he married the first defendant in 1954, since her conduct was not alright, he had gone to Mappillaiuppam five or six months after the

marriage and in 1957, he went to Madras stayed there for a month and then went to Andhra Pradesh to work in Nagarjuna Sagar Project. From

this, we can infer that the plaintiff had left his native place only because of the immoral conduct of his wife whom he had married against his Will, it

has also been stated by him that one male child was born to the first defendant and he Was given the name ""Selvam"". This evidence would show

that according to P.W. 1 he has nothing to do with the child born to the first defendant. During cross-examination, he would say that after he spent

four or five months in Mayavaram after marriage, he went to Mappillaikuppam stayed there for 2 1/2 years and at that time, the first defen-dant

was not living with him. According to P.W. 1, he was in Mappillaikuppam till 1957 and then he went to Nagarjuna Sagar Project and came to

Mayavaram only in 1980. He would also say that he came to know of the death of his father one month after the same through one of his co-

workers and he had seen Ex. A-3 publication in Dhinathanthi in which it has been stated that the defendants 1 and 2 are awaiting his arrival. He has

also stated that there was no enmity between him and his father. But, he admits that he did not make any attempt to go to Mayavaram even after

seeing the publication. The evidence of P.W. 1 during cross-examination throws considerable doubt on his claim that he is the real person. It is

highly improbable that a son who had left his father, wife and junior mother, did not even attempt to go to his native place even after realising that

his father was dead, nearly 13 years after his leaving the family. It does not appear to be a conduct of a normal person. P.W. 1 would also state in

his cross-examination that he does not know the extent of the properties owned by his father and the income from the said properties. When the

plaintiff claims that the entire B schedule properties are the ancestral properties of his father and properties purchased-from out of the income from

the ancestral properties, the evidence of P.W. 1 during cross-examination that he does not know the extent of the properties owned by his father

and the income from them, would drive us to the conclusion that the case of the plaintiff that the B schedule properties are the ancestral properties

of his father cannot be true or P.W. 1 does not know anything about the properties owned by Subramania Vaithiyar. It leads us to the inference

that P.W. 1 cannot be the real person. During cross-examination, it is admitted by P.W. 1 that from out of the income of his father, he can lead a

comfortable life at Mayavaram and yet he was doing cooly work in Mysore for Rs. 3/- to Rs. 5/- per day and was suffering. This evidence of

P.W. 1 also would show that it is not the normal conduct of a reasonable person. It is more so since according to P.W. 1, there is no dispute or enmity between himself and his father.

13. I have already observed that P.W. 1 had stated that the male child born to the first defendant was not his son. The first defendant as D.W. 1,

has categorically stated that the second defendant was born to her out of the wedlock with Thirugnanasambandam the son of Subramania

Vaithiyar. She has also categorically stated that P.W. 1 the plaintiff is not her husband and he is an impostor. There is no dispute that

Thirugnanasambandam was residing at Mappillaiuppam for some time and at that time, the first defendant was not living with him. Ex. B-3 is a

letter written by Thirugnanasambandam in which he has addressed the first defendant as ""Dear Naga"" and has written that he would take her with

him after Panguni of 1956 until then, she need not worry. He had also advised the first defendant to take care of the comforts of the child. This

letter would show that the claim of P.W. 1 that out of compulsion he had married the first defendant and went to Mappillaiuppam since he does

not want to live with the first defendant and the child was not born to him cannot be true, since this letter shows that it was written by a person who

would normally write a letter to his wife. Ex. B-4 is another letter written by Thirugnanasambandam to the first defendant in which also he has

written that he is very eager to know the welfare of the child. In this letter also, he had addressed the first defendant as ""Dear Nagam"" and assured

her that he would come on the second day to take her to Mappillaiuppam and conveyed his anxiety to know the welfare of the child. Ex. B-5 is

another letter written by Thirugnanasambandam and in this letter, he had addressed the first defendant as ""Vernacular matter omitted Ed."" and

claimed himself to be ""Vernacular matter omitted Ed."" The two Tamil words ""Vernacular matter omitted Ed."" and ""Vernacular matter omitted Ed.

in this letter would show that the claim of the plaintiff that the first defendant was leading a wayward life, cannot be true. So also, the claim of the

plaintiff that he was not living with the first defendant as husband and wife also cannot be true. In this letter also, he had asked his wife to write the

welfare of the child even though he had scolded her for certain things which she had done against his Will. Ex. B-6 is a letter by

Thirugnanasambandam to the first defendant in which he has given reasons for not writing to the first defendant earlier to it and in this letter he had

advised the first defendant to bring up Selvan without allowing him to weep and without allowing him to cry and without causing him any

inconvenience. He had also asked the first defendant to read over this letter to his son Selvam. In Ex. B-7 letter, Thirugnanasambandam had asked

the first defendant to bring up Selvam as an intelligent boy and expressed his desire to know the welfare of the son. All these letters by

Thirugnanasambandam husband of the first defendant would show that Thirugnanasambandam was treating his wife first defendant as his beloved

wife and was very eager to know the welfare of the child also and he was giving advice also to his wife to bring the boy as an intelligent boy. It can

not be the conduct of a person who would suspect that the male child born to his wife was not born to him as claimed by the plaintiff in this case.

These letters also show that the claim of the plaintiff that the first defendant was leading a wayward life also cannot be true since he had addressed

his wife with love and affection and was assuring to take her to his place within a few days of writing the letters. Ex. B-9 is a letter written by

Subramania Vaithiyar to his son Thirugnanasambandam not to demand money from him and advising him to behave properly. In this letter, the

father has found fault with the son to the effect that the son had not realised the value of the jewels and spending the amount by selling the jewels

would only bring shame and he had advised his son to realise the mistakes committed by him. This letter only probalised the case of the first

defendant that her husband left Mayavaram when his father found fault with him for having sold the jewels and he was not heard thereafter. We

have already observed that Thirugnanasambandam who had left Mayavaram in 1957 did not come back is not disputed. The plaintiff claims to be

the son of Subramania Vaithiyar and he also admits that even after seeing the paper publication made by the defendants 1 and 2 inviting him to the

family on account of the death of Subramania Vaithiyar, he did not return to his native place and had come to Mayavaram only in 1980. The

plaintiff who claims that he has written letters to the fourth defendant has not proved the same. In the above circumstances, the whereabouts of the

husband of the first defendant viz., Thirugnanasambandam was not known for more than seven years cannot be disputed.

14. We have already seen that u/s 108 of the Evidence Act, it is for the person who claims that a person who is believed to be dead is alive, to

prove the same. When the case of the plaintiff and his letters to his wife are considered, we have to hold that the plaintiff has come forward with a

false version that his wife was leading a wayward life and the first defendant was not born to him and therefore, he had been to Nagarjuna Sagar

Project in Andhra Pradesh Mysore State for more than 20 years and this could only be to grab the properties in the hands of the defendants 1 and

2 as claimed by them. The plaintiff having failed to prove that he is the real Thirugnanasambandam, his claim for partition cannot at all be upheld.

15. Apart from the evidence of P.W. 1, there are three other witnesses also to speak that the plaintiff is Thirugnanasambandam. P.W. 2 is the

sister of Subramania Vaithiyar. She would state during chief examination that two years after their marriage, Thirugnanasambandam had left and his

whereabouts are not known and he did not come even when his father died. She would admit during cross-examination that she knew

Purushothaman and his sister has been given in marriage to her son. There is a relationship on account of this marriage between Purushothaman

and P.W. 2. According to the first defendant, Purushothaman has set up this plaintiff to make a false claim. Therefore, much reliance cannot be

placed on the evidence of P.W. 2 when she says that the plaintiff is real Thirugnanasambandam. P.W. 3 is son of P.W. 2 and his evidence also has

to be rejected on the same ground. P.W. 4 is an Advocate's Clerk and he claims that he was a class-mate of Thirugnanasambandam. But this

claim is not convincing and acceptable since it is admitted by him that in his Office vakalath has been filed on behalf of defendants 3 and 4. But he

also states that he does not know the suit between the defendants 1 and 2 on the one hand and the defendants 3 and 4 on the other hand. When

this Advocate's clerk claims that a vakalath has been filed on behalf of defendants 3 and 4 his claim that he does not know the suit between the

defendants 1 and 2 on the one hand and the defendants 3 and 4 on the other hand, it would show that he is not prepared to speak the truth.

Therefore, his claim that Thirugnanasambandam was his classmate and the plaintiff is Thirugnanasambandam cannot be accepted at all. It is thus

seen that the evidence let in on behalf of the plaintiff has not shown that the plaintiff is the real Thirugnanasambandam,

16. Even though it is not necessary for the defendants to prove that the plaintiff is not Thirugnanasambandam, the evidence of D.W. 1 who is the

wife of Thirugnanasambandam would show that the plaintiff is an impostor. Whatever may be the misunderstanding and grievance against each

other between a wife and a husband, it is highly improbable for a Hindu wife to contend that a particular person is not her husband so long as there

was no divorce between them. Therefore, the claim of D.W. 1 that the plaintiff is not her husband has to be given due weight. She had also

exhibited the letters which I have referred earlier and has given the reason why her husband had left the family. The trial Court has found fault with

the evidence of D.W. 1 stating that she is giving different reasons for her husband leaving the family. Whatever may be the reason for

Thirugnanasambandam to leave the family, the evidence of D.W. 1 cannot be rejected on the ground that there is discrepancy since we are not at

the question as to who is at fault. The fact remains that for some reason or other, Thirugnanasambandam husband of the first defendant had

deserted his wife and son and left his family sometime in 1957 and was not heard thereafter. Therefore, the presumption u/s 108 of the Evidence

Act, has to be necessarily drawn that Thirugnanasambandam is not alive and the plaintiff cannot be the said Thirugnanasambandam. When once we

come to this conclusion, the claim of the plaintiff that he is entitled to partition and separate possession of the properties of his father on the ground

that they are the joint family properties of his father and himself has to be negatived. In that view. I am of opinion, that the judgment and decree of

the trial Court holding that the plaintiff is entitled to partition and separate possession of 23rd share in the B schedule properties, are liable to be set

aside. I therefore, hold that the plaintiff is not entitled to partition and separate possession as per the decree of the trial Court.

17. In the result, the appeal is allowed setting aside the judgment and decree of the trial Court and dismissing the suit with costs throughout.

18. Appeal allowed.