
(1997) 04 MAD CK 0135
In the Madras High Court
Case No : S.A. No. 2072 of 1983

Palsamy Nattanmai and two others

APPELLANT

Vs

Vadamalai Ayee (Died) and another

RESPONDENT

Date of Decision : 30-04-1997

Acts Referred:

Hindu Marriage Act, 1955 — Section 16

Citation : (1997) 04 MAD CK 0135

Hon'ble Judges : A. Raman, J

Bench : Single Bench

Advocate : V. Natarajan, for the Appellant; S. Sampathkumar for Mr. V. Balasubramanian, for the Respondent

Judgement

A. Raman, J.—The plaintiffs in O.S. No. 1388 of 1980 on the file of the District Munsif Court, Dindigul, are the appellants. The suit was filed by the plaintiffs for partition of plaintiffs' 17/18 shares in the suit properties. The plaintiffs' case is as follows: The suit property comprised in S. No. 1029/2 situate in the Village of Ayyampalayam of an extent of 4.14 acres belonged to Palaniyandi Nattanmai. Muthuveera Nattanmai, Subbiah Nattanmai and Nallathambi Nattanmai are his sons. Valliammal is the wife of Muthuveera Nattanmai. Valliammal and Muthuveera Nattanmai died issueless. The second son of Palaniyandi Nattanmai namely, Subbiah Nattanmai had four wives. They are Achammal, Pappammal, Ochammal and Vadamalai Ayee, the first defendant in the suit. Mounagurusamy, father of the second plaintiff and Palaniyandi, the third plaintiff are sons born to Subbiah Nattanmai and Ochammal. The other two wives Achammal and Pappammal had no issues. The first plaintiff is the son of Nallathambi Nattanmai. On the death of the sons of Palaniyandi Nattanmai, the plaintiffs and the first defendant were in joint possession of the suit properties. As the first defendant was the eldest member of the family, patta was transferred to her name and she has been paying the kist and managing the property. The parties lived under the same roof and only recently the first defendant began to live separately. There is also a Samathi of Subbiah Nattanmai in the portion of the suit property. The first

plaintiff has 9/18 shares while plaintiffs 2 and 3 each entitled to 4/18 shares and the remaining one share belongs to the first defendant. The first defendant is attempting to dispose of the property taking advantage of the fact that title deeds are in her favour. A notice was also issued to which she had not sent any reply. The suit property has been sold to the second defendant. Hence he is impleaded in the suit. As the second defendant had applied for the lay-out of the suit property to the third defendant, he is also added as the defendant.

The third defendant remained absent and was set ex parte.

2. Defendants 1 and 2 filed a written statement pleading as follows:-

The plaintiffs have no share in the suit property. The paternity of the plaintiffs is questioned by the defendants. Subbiah Nattanmai married only the first defendant and had no other wives. The three brothers, namely, Muthuveera Nattanmai, Subbiah Nattanmai and Nallathambi Nattanmai divided their properties long ago, and the suit property came to the share of Subbiah Nattanmai and Nallathambi Nattanmai. Nallathambi Nattanmai sold a portion of the property allotted to him to Subbiah Nattanmai in 1925. The first defendant purchased the same property in the year 1934. Nallathambi Nattanmai sold away the remaining portion in the year 1948. Thus, she has become the absolute owner of the property. She is in undisturbed possession of the property. One Subban Chettiar obtained a decree in S.C. No. 366 of 1931 against Subbiah Nattanmai and brought part of the property for sale in execution proceedings. The first defendant preferred a claim and it was dismissed. Pater she filed a suit and obtained a decree. The first plaintiff is not the legitimate son of Nallathambi Nattanmai. The plaintiffs and the first defendant were never in joint possession of the suit property. As the person absolutely entitled to the property, the first dependant is entitled to execute a sale. Accordingly, she sold the property in favour of the second defendant for valuable consideration, excluding 14 cents wherein the samathi of her husband is situate. After the sale, the second defendant is in possession. Even otherwise, she prescribed title to the suit property by adverse possession. The suit is not maintainable.

3. An additional written statement was filed by defendants 1 and 2 containing the following averments:-

The properties were partitioned even before 1917. One Vellayammal, the wife of common ancestor Palaniyandi was given an extent of 3 Kulis and 13 annas share in the southern extremity of the suit property for her maintenance, an extent of 3 kulis and 8 annas share immediately north of this was allotted in favour of Nallathambi and northern most extent of 3 kulis and 8 annas share in favour of Subbiah Nattanmai. The other brother Muthuveera Nattanmai was allotted some other property south property. Nallathambi Nattanmai mortgaged the portion allotted in his favour of Alagin Chettiar and subsequently he sold away the item in favour of Subbiah Nattanmai. On the same day Subbiah Nattanmai mortgaged both his portion of the land and the portion purchased from Nallathambi

Nattanmai in favour of one Thiru-mala Chettiar and subsequently Subbiah Nattanmai sold away to the first defendant the portion of the property purchased by him from Nallathambi Nattanmai. After the death of Velliaimmal, the mother, the portion of the property allotted in her favour for maintenance was inherited by Subbiah Nattanmai and Nallathambi Nattanmai. They partitioned their extent among themselves and Nallathambi got the southern half extending to one kuli 14 annas and two paise and Subbiah Nattanmai an equal extent in the north. Nallathambi Nattanmai sold away his interest in the property in favour of the first defendant in 1948. Earlier, he mortgaged the same in favour of the first defendant. Thus, two sales of 1934 and 1948 by which the first defendant purchased the entire share of Nallathambi Nattanmai in the suit property. Her title was recognised in O.S. No. 231 of 1942. The first defendant has dealt with the property as her absolute one and she raised loan on the property from Co-operative Society, Ayyampalayam. Subbiah Nattanmai died in 1962 and she inherited his remaining interest in the suit property as his sole heir.

4. The plaintiffs filed a reply statement reiterating the contentions and further stating that the first plaintiff is the legitimate son of Nallathambi Nattanmai, that the third plaintiff and Mounagurusamy are sons of Subbiah Nattanmai. As the family was heavily indebted and to shield away the property from the clutches of creditors several sale deeds were executed by Subbiah Nattanmai and Nallathambi in favour of the first defendant. The transactions are not supported by any consideration. Subsequently the debts due from the family were discharged by both Subbiah Nattanmai and Nallathambi Nattanmai. After the discharge of the debt the first defendant was taken into confidence and no reconveyance taken from her. As she is the eldest member of the family patta was taken in her name and plaintiffs have been paying kist through her. The property has never been partitioned among the forefathers of plaintiffs.

5. On the above pleadings the trial court framed eight issues and Exhibits A.1 to A.6 were marked on behalf of the plaintiffs' side while the first defendant's side Exhibits B.3 to B.39 were marked. The third plaintiff examined as P.W.1 and another witness as P.W.2. Defendants 1 and 2 were examined on the defendants' side as D.Ws.1 and 2. Learned District Munsif decreed the suit for partition and declared the shares of plaintiffs 2 and 3 as $\frac{1}{3}$ each in an extent of 3 acres 33 cents. Aggrieved by the said decision, the defendants preferred an appeal to the District Court, Dindigul, in A.S. No. 96 of 1983. The District Judge allowed " the appeal and dismissed the suit. Hence, this appeal.

6. The points for determination in this appeal are:

- (i) Whether the plaintiffs 2 and 3 are legitimate grand-son and son respectively of Subbiah Nattanmai
- (ii) Whether the sale-deeds executed by Subbiah Nattanmai in favour of the first defendant was nominal?

7. The points on the question of partition, we have Ex.B1 registered Othi deed

executed by Nallathambi Nattanmai to Alaginsami Chettiar on 16.5.1917. Muthuveera Nattanmai, Subbiah Nattanmai and Nallathambi Nattanmai are three brothers and they are sons of Palaniyandi Nattanmai. In the Othi deed Ex.B1 it is stated in the description of the property, while giving the boundaries, the northern boundary is given as Subbiah Nattanmai's share of the land and the southern boundary is given as the land allotted to the mother Vellaimmal for her maintenance. Ex.B2 is the sale deed dated 25-2-1925 executed by Nallathambi Nattanmai to Subbiah Nattanmai. The fact that one of the brothers has sold the property to the other brother would show that there has been a partition. Even otherwise in the description, it is clearly stated that the property was ancestral property and was obtained towards the share of the vendor in the partition. Even in this document, one of the properties lying on the southern side is described as property allotted to his share in the partition the fact that the property has been dealt with by the concerned in their own right the relevant documents will show that parties were dealing with the properties as their own. This conduct is the proof of partition. Ex.B6 is the another registered mortgage deed dated 25.2.1925 executed by Subbiah Nattanmai in favour of Thirumalu Chettiar. Here also definite recital is made about the factum of partition and allotment of the property to him in the partition. On 2.10.1947 a registered Othi deed under Ex.B26 was executed by Nallathambi Nattanmai. Here also the property allotted to the share of other brother is referred to as one of the boundaries. When Nallathambi Nattanmai sold the property to the defendant under Ex.B27 on 14.10.1948. such clear recitals are given with regard to the boundaries stating and indicating about the partition. Therefore, in view of the documentary evidence available in this case, it is futile for the appellants to contend that there was no division among the three brothers.

8. Now the status of the plaintiffs to claim partition is the other point to be decided. According to the plaintiffs, Subbiah Nattanmai had four wife's and that Ochammal is the third wife. She had two sons namely, Mounagurusamy and Palaniyandi. The third plaintiff is Palaniyandi and the second plaintiff is the son of Mounagurusamy. Per contra the first defendant would plead that she was the only wife of Subbiah Nattanmai. Subbiah Nattanmai himself has executed a sale in favour of Mounagurusamy and Palaniyandi under Ex.B39 on 28.4.1934. Here it is specifically stated that Ochammal is a concubine of Subbiah Nattanmai. Subbiah Nattanmai himself has described Ochammal, grand mother of the second plaintiff and mother of the third plaintiff as a concubine. The son of Ochammal is a party to the document. Therefore, it is not possible to uphold the status of plaintiffs 2 and 3. In this connection, learned counsel for the appellants would rely upon the decision reported in *Sivagnana Vadivu Nachiar v. Krishnakanthan* (89 L.W. 706) for the proposition that once the section directs that the children born of marriage declared to be void shall be deemed to be legitimate children, notwithstanding the decree of nullity, there would be no boggling about the deeming provision, and we should take it as a fact that they were legitimate from their birth. But this ruling cited by the learned counsel is

not at all applicable to the facts of the present case. It is not a case where any marriage is admitted or proved. There is homing to show that Subbiah Nattanmai and Ochammal went through any form of marriage. Therefore, only if it is proved that there was a marriage between Subbiah Nattanmai and Ochammal, then alone the application of Sec. 16 of the Hindu Marriage Act would arise. The mere fact that in the suit filed by Subbiah Chetti in O.S. No. 136 of 1933 on the file of the District Munsif's Court, Dindigul, the father of the second plaintiff and the third plaintiff has been described as the son of Subbiah Nattanmai, cannot give room to contend that they are the legitimate sons. It is not disputed that Mounagurusamy and Palaniyandi were born to Ochammal through Subbiah Nattanmai in a concubinage. We are now concerned with the status of the parties. Only if it is proved that there was a marriage between Ochammal and Subbiah Nattanmai and if for any reason the marriage is held to be invalid then alone the offspring's of such marriage under Sec. 16-B of the Hindu Marriage Act, can be held to be the heirs to the father. But here, the base for such a contention has not been laid. In other words, it is not established that there was any marriage as such between Subbiah Nattanmai and Ochammal. On the other hand, Subbiah Nattanmai has himself described Ochammal as only his concubine. To the document Ex.B.39 Mounagurusamy and Palaniyandi (third plaintiff), the two sons born to Subbiah Nattanmai of such concubinage with Ochammal, are the parties. Therefore, this contention would also fail.

9. Now coming to the question of possession, we have got a consistent course of conduct proving the dealing of property by the first defendant as her own and the enjoyment of the property by the first defendant. As rightly pointed by the lower Appellate Court, the trial Court without any evidence, has chosen to accept that Exs.B4 and B27 transactions made with a view to place the property beyond the reach of the debtors. If at all, it is only proved that there were debts as evidenced by Ex.B6 and A.6 at that time. Ex.A6 is a certified copy of the suit register showing that there was a mortgage deed. It further shows that the hypotheca was sold to the decree-holder for Rs. 1903/-and full satisfaction was recorded. Therefore, the debts under Ex.A6 and B6 were not in existence after the execution of Ex.B4 and Ex.B39 sale deeds. Hence, it is futile for the plaintiffs to contend that to avoid the mortgage of Ex.B6 proceeding against the properties comprises in Exs.B.4 and B.39 were executed. Ex.B.6 debt is a debt on the mortgage. Thus, it was a secured property. Therefore, there was no necessity for sale of the property. It is not proved that there were any other debts existing at that time. Therefore, the contention of the plaintiffs that as there were debts, Exs.B4 and B27 were executed, is without any basis. As I have already pointed out that we have got documents to show that the first defendant has been in possession and enjoyment of the property and dealing with the property, when the properties were brought for sale the first defendant filed an application to raise the attachment and when the same application was dismissed she filed a suit O.S. No. 231 of 1942 and obtained a decree against Subbiah Chettiar and Subbiah Nattanmai. Exs.B8 and B9 are Zamin Pattas standing in the name of the

first defendant while Exs.B10 to B25 are kist receipts for continuous period from 1949. Patta also shows that even Subbiah Nattanmai was alive, the patta stood only in her name. As against that the plaintiffs have not produced any document to prove that they have been in enjoyment of the property and they have the right or have dealt with the property in any manner. Therefore, it is clear that the lower appellate Court has properly appreciated the evidence placed on record, while the trial Court has entered into certain surmises without any basis.

The lower Appellate Court has considered all aspects of the case and has come to the right conclusion that there is sufficient material to prove that there was a partition prior to 1917 among the three brothers and that the plaintiffs 2 and 3 are not the legitimate grandson and son of Subbiah Nattanmai respectively and that the first defendant is the owner of the property. Therefore, it follows that the plaintiffs are not entitled to any relief. Consequently, the appeal has to be dismissed as devoid of merits. In the result, the Second Appeal is dismissed with costs confirming the judgment and decree of the lower appellate Court.