

(2013) 03 MAD CK 0001
In the Madras High Court
Case No : S.A. (MD) No. 1246 of 2006

S. Vedaraj Pillai (died) and Others

APPELLANT

Vs

Meyyammai and Another

RESPONDENT

Date of Decision : 25-03-2013

Acts Referred:

Citation : (2014) 1 CTC 619

Hon'ble Judges : B. Rajendran, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B. Rajendran, J.—As against the concurrent findings of the Courts below, the Appellant is before this Court. The deceased Plaintiff is the

Appellant herein. Pending the Appeal, the Appellant died and his legal representatives are impleaded as the Appellants 2 to 7 in the Second

Appeal. The Appellant/Plaintiff originally filed the Suit claiming that he and his brother, namely, one Durairaj Pillai, are the owner of the Suit

property in question. The said Durairaj Pillai died intestate. There is no legal heirs for him. The Plaintiff's father is one Soosaiya Pillai and his

brother is Chinnasamy Pillai and the said Chinnasamy Pillai died intestate in a Foreign Country and his legal heirs have never come to India.

Therefore, according to him, the Appellant/Plaintiff and his father has been in continuous possession and enjoyment of the Suit property. The said

Suit property is a house property bearing Door No. 18 and its house Receipt Number is 207 and he has been paying the House Tax also. He

would also assert that if at a later point of time, the legal heirs of the said Chinnasamy Pillai claims any title or share of the property, he is willing to

do so.

2. It is further stated in the Plaint that the Defendants 1 & 2 are the husband and wife. The First Defendant has got the Sale Deed, dated 7.7.1993,

from one Lourdhumari. However, according to the Plaintiff, she has no right over the Suit property in question. The said Lourdhumari is not the

wife of the said Durairajpillai. Based on the said Sale Deed, the Defendants are claiming that the said Lourdhumari is the vendor of the property.

According to him, the Door No. 18 is the Suit property and he has got possession of the property. Later on, in 1993, when the Plaintiff was not in

town, the Defendants had encroached the property. He made a Complaint on 19.6.1999 as against the Defendants stating that they had

encroached his property, as they have no right over the property in question. Hence, the Plaintiff has filed the Suit stating that he is the owner of the

property and for recovery of possession of the property.

3. The Defendant has filed a Written Statement specifically denying that the name of the father of the Plaintiff stating that it is wrongly furnished by

the Plaintiff. The Plaintiff, with an ulterior motive has furnished the name of his father as Sussiahpillai @ Surabba Pillai whereas the Plaintiffs father

name is Surabba Pillai and he is not the direct brother of the said Durairaj Pillai. Therefore, he has fraudulently stated that he is the son of

Sussiahpillai. The correct number of the Suit property is Door No. 25 corresponding to the old No. 17 and the original Door No. 19 at the time of

the purchase by these Defendants. According to the Defendants, the description of the property is correct. The marriage between the said

Lourdhumari and the said Durairajpillai took place as early as 6.2.1975 in Saint Mary's Church, Cathidral, Madras. After the death of Durairaj

Pillai, Lourdhumari became the absolute owner of the property in question. From her, the Defendants had purchased the property way back in

7.7.1993 for a valuable consideration and pursuant to the same, they have been in possession and enjoyment of the Suit property. Since the

Plaintiff is not the brother of Durairaj Pillai, the Appellant herein can claim no right over the property. Further, these Defendants never trespassed in

the Suit property. The Court fees paid by the Plaintiff is also not correct. Even at the time of 1993, the value of the market price of the Suit

property is 728,200/-, whereas, he has paid market value for Stamp duty for the

Suit property is only ` 2,000/-. Hence, prays for the dismissal of the Suit.

4. The Suit was tried before the lower Court. P.W. 1 was examined on the Plaintiffs side and D.W. 1 was examined on the Defendant's side. Exs.

A.1 to 17 and B.1 to 21 were marked on behalf of them respectively. After elaborate arguments, the Lower Court dismissed the Suit. Aggrieved

against the same, the Plaintiff filed an Appeal in A.S. No. 104 of 2001. The Appeal was also met with the same fate. Against the dismissal of the

Appeal, the present Second Appeal has been filed by the Appellant.

5. In this Second Appeal, the main contention of the learned Counsel for the Appellants is that even though he has admitted that he is not the actual

brother, but, he is a cousin brother, then, he became the kindred and entitled to a share of the Suit property in question. He went one step ahead

stating that even if it is proved that the said Lourdhumari is the wife of the deceased Durairajpillai, as per the Indian Succession Act, she will have

only half share of the property in question and therefore, she cannot sell the entire property. Eventually, the Court should have decreed only half

share of the property for Lourdhumari. Hence, she would claim that the Suit should not have been dismissed in toto, but, at least decreed half of

share to the Plaintiff and the Appellants herein.

6. Learned Counsel for the Respondents brought to the notice of the Court that here is the case that the Plaintiff has not come with the clean hands.

His allegation in the Plaint is that he is the own brother of Durairaj Pillai. He has gone to extent of changing the father's name. But, in the cross-

examination he has categorically admitted that he is not the brother of Durairaj Pillai. During the first time, in the cross-examination, he would state

that he is only the cousin brother of the said Durairaj Pillai. He has also admitted that there are other kindred in the family and he has known about

them that he even name them. Still, he has not chosen to implead them in the Suit, nor filed a Suit for Partition, but, filed a Suit for declaration.

Even, the Plaintiff went to the extent of denying the marriage of Lourdhumari, in spite of the fact that the Respondents have produced the Marriage

Certificate and even after the cross-examination, he never ever changed the character of the Plaint.

7. If partition is to be claimed, in all fairness, he should have impleaded the

other kindred and other properties. In the case on hand, neither the parties are impleaded nor the other properties are impleaded in spite of the stand taken by the Defendants. Therefore, in the absence of proper parties, the request of the Plaintiff cannot be accepted on any count. Further, he wants declaration that he is the absolute owner of the Suit property in question. When he has no right or title, rightly the Courts below dismissed the claim of Appellant/Plaintiff and that cannot be read-judicated by the Appellants herein. Since the questions of fact have already been decided by the Courts below, no interference is required at the hands of this Court. Furthermore, the Sale Deed has come into force even in the year 1993 itself. He has not chosen to set aside the Sale Deed nor he has paid proper Court fees even for the valuation of the property.

8. It should also be taken into account that the Suit is filed belatedly, namely, in the year 2001. Even the alleged trespass is not at all proved. When the Complaint alleged to have been given in the year 1996, but the Suit was filed only in the year 2001. No reasons stated for approaching the Court with huge delay. Therefore, the Suit itself is not maintainable. Further, the Suit filed by the Plaintiff is not for partition. The non-impleading of other kindred is fatal to the case. Therefore, rightly the Courts below decreed the Suit in favour of the Respondents/Defendants. Hence, they prayed for dismissal of this Second Appeal.

9. Heard both parties.

10. By consent, this Second Appeal is taken up. At the time of admission, the following questions of law were framed:

Whether the Judgment and Decree of the Courts below are perverse on account of its misconstruction of documents exhibited on the side of the

Appellant in Exs. A.1 to A.4 as well as Ex. B.1?

11. At the time of argument, learned Counsel for the Appellants raised another additional substantial question of law, which is as follows:

Whether the Courts below are right in determining that the Plaintiff has no right in the Suit property, whereas Durairaj Pillai who is the original

owner of the Suit property, being a Christian died intestate leaving no lineal descendants and the Plaintiff being a kindred to Durairaj Pillai, the

Plaintiff is entitled to a share in the Suit property u/s 33(b) of the Indian Succession Act, 1925?

12. The only argument put forward at the stage of the Second Appeal is that no doubt it is the concurrent findings of the Courts below and the Suit

property belonged to Durairaj Pillai and there is a valid marriage between the said Durairaj Pillai and the said Lourdhumari, who sold the property

to the Respondents/Defendants. But, the learned Counsel for the Appellant would contend that the marriage has not been proved. She would

further contend that u/s 33(b) of the Indian Succession Act, 1925, the widow of Durairaj Pillai derives only half share in the property and the

Appellants/Plaintiffs is one of the second cousin of the said Durairaj Pillai and also one of the kindred and therefore, in the Suit, the Appellants have

also a right. But, when this Court goes through the findings as well as the pleadings through out, he has never stated that he is the cousin brother of

the said Durairaj Pillai. Even he went to the extent of changing his father's name. For better conclusion, it is useful to refer the cross-examination of

P.W. 1, wherein, he has categorically admitted the following portion:

13. On reading of the evidence, it is crystal clear that the Plaintiff knowing very well that he is not the owner of the property in question nor he has

any title over the property has dare enough to state that he is the absolute owner of the Suit property. Now, after the concurrent findings, he

changes a stand, that though the Appellants are not entitled for declaration, they can claim as a kindred, so that they are entitled to share. Even if

the said contention is accepted, neither the Appellants had chosen to implead the other kindred nor taken any steps in this regard so far. In this

case, even the Appellants know the other kindred and even, he names them and he is also aware of them very well. In spite of the all these things,

he has not impleaded or alter the Suit one for partition at the relevant point of time. Therefore, the present argument that he is kindred at this length

point of time can never be accepted, since much water has already flown. In any event, the present prayer sought for by him is not acceptable nor

maintainable.

14. In fact, the document produced by him in the Suit are pertaining to his property in the eastern side, which is exhibited in the Trial Court and the

tax receipts also denotes the same. He has not produced any document that he is in possession and enjoyment of the Suit property in question.

Even the door number has not been properly explained by the Plaintiff Appellants

and the tax receipts produced by them do not represent for the present Suit property. Whereas B.1, the Sale Deed dated 7.7.1993, has been exhibited in favour of the Respondents/Defendants. In order to strengthen the case on the side of the Respondents/Defendants and also to prove the marriage between Durairaj Pillai and Lourdhumari, Ex. B.21 is also produced, (that is the register from the concerned Church). After these happening, now, learned Counsel for the Appellants admits that if Lourdhumari is the wife of the said Durairaj Pillai, then he wants to claim the benefit under the Indian Succession Act and thereby, the Plaintiff/Appellants are claiming half share.

15. Here is the case, the Plaintiff has not even stated when Durairaj Pillai died. The marriage between Durairaj Pillai and Lourdhumari has taken place long back in the year 1975. Thereafter, they have been living together and enjoying the property. Now, after six years since the Sale Deed executed, the Plaintiff/Appellants has come forward with the Suit with a prayer for declaration that he is the absolute owner of the property. He does not challenge the Sale Deed. Therefore, rightly, both the Courts below have rightly come to the conclusion that the Suit is bad for non-joinder and therefore, it is not maintainable and dismissed the claim for declaration that the Plaintiff/Appellants are not the absolute owner of the property. When the Plaintiff has not come to the Court with clean hands, especially, giving the false statements in regard to his father name and also stating that he is the own brother of the said Durairaj Pillai, definitely, the Suit is not maintainable in law and consequently, the Judgment and Decree of the Courts below is not at all perverse. Ultimately, there is no misconstruction of documents exhibited on the side of the Appellants in Exs. A1 to A.4 (tax receipts). The Sale Deed has been properly considered by the Courts below and rightly decreed the Suit in favour of the Respondents.

Hence, the first question of law is answered against the Appellants herein.

16. In view of the foregoing reasons, I do not interfere with the reasoned orders of the Courts below. Hence, this Second Appeal is liable to be dismissed. Before doing so, as far as the additional question of law is concerned, this is not a Suit for partition. Infact, the Plaintiff claims declaration u/s 33(b) of the Indian Succession Act at this length point of time. As per the said Act, in the case on hand, if there is no children, the

wife will have half share and the Plaintiff, like the case of the Appellants herein, will half share. However, the Plaintiff/Appellants have to prove that they are the kindred and thereafter, they have to bring the other kindred also on record. Here is the case, as stated above, in the findings of the Courts below, it can be seen that he has clearly admitted that he is not the own brother of the said Durairaj Pillai. Thereafter, he claims that he is only a cousin brother. Unless he proves that he is the cousin brother and he is the kindred, even this question of law will have no legs to stand. Further, till date, he has not amended the Plaint, as one for partition. Even if it is considered to be a partition Suit, non-impleading of necessary parties is fatal to the case. Therefore, it is answered against him. In the result, the question of law as well as the additional questions of law are answered against the Appellants. Hence, this Second Appeal is dismissed. No costs.