

(2016) 11 MAD CK 0151
In the Madras High Court
Case No : S.A. No. 1210 of 2002

Thanammal

APPELLANT

Vs

M. Madhavi

RESPONDENT

Date of Decision : 02-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Hindu Adoptions and Maintenance Act, 1956 — Section 5, Section 9(4)
Specific Relief Act, 1963 — Section 34, Section 37, Section 38

Citation : (2017) 1 MLJ 371

Hon'ble Judges : Mr. S.S. Sundar, J.

Bench : Single Bench

Advocate : Mr. M.S. Suresh Kumar, Advocate, for the Respondent No. 1 in S.A. No. 1210 of 2002; Mr. M.S. Suresh Kumar, Advocate, for the Respondent Nos. 1, 2, 4 to 6 in S.A. No. 958 of 2003; Mr. K. Sreekumaran Nair, Advocate, for the Appellant in S.A. No. 958 of 2003

Final Decision : Allowed

Judgement

Mr. S.S. Sundar, J. - S.A. No. 958 of 2003

The second plaintiff in the suit in O.S. No. 696 of 1993 on the file of the Second Additional District Munsif Court, Nagercoil, is the appellant in this second appeals.

2. The suit in O.S. No. 696 of 1993 was filed by one Ganapathi Pillai for declaration that he is the real owner in possession of suit "A" and "B" schedule properties and that the Will dated 08.01.1983 is a void document and for a consequential injunction restraining the defendants from trespassing into the suit properties. Since the plaintiff died during pendency of the suit, the second plaintiff came on record on her plea that she is the second wife of the deceased first plaintiff. It is only the appellant namely the second plaintiff in the suit who prosecuted the suit further.

3. The case of the original plaintiff namely Ganapathi Pillai is that he is the owner of suit "A" schedule properties, since he purchased the plot "A" schedule

properties with his money in the name of his first wife Smt. Muthammal. Though Ganapathi Pillai admitted that the suit "B" schedule properties belong to one Chinnammal, the mother of his first wife, it is his case that suit "B" schedule property was gifted to him by his mother-in-law Smt.Chinnammal. He also pleaded that his father-in-law and Chinnammal were so affectionate to him and that his father-in-law had bequeathed all his assets to Ganapathi Pillai as per Will dated 13.08.1964.

4. Though Ganapathi Pillai admitted that the first defendant was brought by him and gave her in marriage to the second defendant by giving jewels, cash and other movables, the first defendant, according to him, on the ill-advice of her father-in-law, obtained a Will from his mother-in-law Smt. Chinnammal on 08.01.1983 in respect of both "A" and "B" schedule properties in a fraudulent manner. The Will dated 08.01.1983 was described by Ganapathi Pillai as a fraudulent one which was executed when Smt. Chinnammal was not in a sound disposing state of mind. He attacked the Will as one which was not voluntarily executed and further stated that the said Chinnammal was very weak in health and that she had no memory or power of thinking. His case was that she had practically lost her eye sight and hearing.

5. The suit was contested by the defendants. The first defendant claimed that she is the adopted daughter of the first plaintiff namely Ganapathi Pillai and that she is entitled to the plaint "A" schedule properties, as a legal heir of her mother Smt. Muthammal. According to the first defendant, Smt. Chinnammal had bequeathed all her properties namely the suit "B" schedule properties and also the suit "A" schedule properties to her under a Will dated 08.01.1983.

6. After the death of Ganapathi Pillai, on 06.01.1994, the first defendant claimed that she was the only remaining legal heir entitled to the suit properties. The first defendant also specifically pleaded that the second plaintiff, namely, the appellant herein is not the legally wedded wife of the first plaintiff, namely, Ganapathi Pillai and that the second plaintiff cannot be the legal wife of the Ganapathi Pillai since her marriage with her original husband one M. Raman of Esanthimangalam is still alive. It is also the specific case of the first defendant that Late Ganapathi Pillai is estopped from questioning the validity of the Will, as he had accepted the Will dated 08.01.1983 by executing a sale deed along with the first defendant in respect of one of the items mentioned in the Will.

7. The suit was dismissed by the trial Court holding that the Will executed by Chinnammal on 08.01.1983 under Ex.B2 is valid and acted upon. The trial Court also pointed out that the marriage of the appellant with one Raman was not dissolved, even though the appellant deposed that the marriage of the appellant with her previous husband one Raman was dissolved in the manner which is recognised by custom.

8. The contention of the plaintiff as the second wife of Ganapanty Pillai was disbelieved by the trial Court, as she had failed to prove her marriage with

Ganapathi Pillai. The trial Court also found that the document Ex.B2 namely the Will dated 08.01.1983 executed by the said Chinnammal was acted upon and that the appellant has no right to question the Will that was executed by the mother-in-law of Ganapathi Pillai in favour of the first respondent. The trial Court also found that the Will under Ex.A8, alleged to have been executed by Ganapathi Pillai on 27.12.1993 in favour of the appellant is not proved giving various reasons. The trial Court found that the Will under Ex.A8, dated 27.12.1993 does not contain the signature of Ganapathi Pillai but it contained only the thumb impression which creates doubt about the execution, as the executor, namely, Ganapathi Pillai, was a retired Teacher and not a layman. Further, it was also admitted in the course of evidence by P.W.1/appellant herein that Ganapathi Pillai was not in good health at the time of executing the Will. Since the Will under Ex.B2 which is proved gave only life estate to Ganapathi Pillai, the trial Court was of the view that the first respondent is the absolute owner of the suit properties as a legatee of the Will and that the second plaintiff/appellant has no right in the suit properties. The Court also found that the appellant has no locus standi to ask for cancellation of the Will under Ex.B2 which was accepted earlier and acted upon by Ganapathi Pillai himself. Aggrieved by the judgment and decree of the Trial Court, the appellant herein filed an appeal in A.S.No. 25 of 1999 on the file of Principal District Court, Nagercoil. Along with the appeal, the appellant also filed an application in I.A.No. 91 of 2001 under Order 6, Rule 17 CPC r/w. 151 C.P.C. to amend the plaint. In the amendment petition, the appellant seeks to include the prayer that she is entitled to the suit "A" schedule properties on the basis of the Will alleged to have been executed by Ganapathy Pillai in her favour on 27.12.1993 and for the correct description of third item of "A" schedule property by referring to the sub division number. The appellate Court dismissed I.A.No.91 of 2001 on the ground that the amendment if allowed would change the nature of case and that there was no bona fide in filing the amendment application at the appellate stage without taking steps when the matter was pending trial.

9. The lower appellate Court considering the pleadings and evidence, came to the following conclusions:

(a) The contention of the first plaintiff (Ganapathi Pillai) that the suit "A" schedule properties were purchased by him out of his own income in the name of his first wife Muthammal is not proved by evidence. Hence, "A" schedule properties are the absolute properties of Muthammal.

(b) The second plaintiff/appellant is not entitled to claim any right in respect of the suit properties, as she is not the legally wedded wife of Ganapathi Pillai and that she is not entitled to claim any right on the basis of Ex.A8 Will dated 27.12.1993 in the absence of specific plea in the plaint.

(c) The appellate Court also found that the Will under Ex.B2 dated 08.01.1983 executed by Chinnammal in favour of the first defendant is not proved in accordance with law.

(d) The first defendant is the adopted daughter of Ganapathi Pillai and Muthammal, as the second plaintiff has admitted this in her evidence.

(e) Since the suit properties do not belong to the first plaintiff, namely, Ganapathi Pillai and the second plaintiff, namely, the appellant has not proved that she is the second wife of Ganapathi Pillai to inherit the properties of Ganapathi Pillai, the first respondent is entitled to succeed to the suit properties as the adopted daughter of Ganapathi Pillai and the suit is liable to be dismissed.

10. Heard the learned counsels on both sides.

11. At the time of admitting this Second Appeal, the following substantial questions of law were framed:

(a) In the absence of evidence that the first defendant was a Hindu and that sanction was obtained from the Court to give the first defendant in adoption as provided under Section 9(4) of the Hindu Adoption and Maintenance Act, whether the lower Court is right in holding that there was valid adoption of the first defendant by the first plaintiff?

(b) After having held that Ex.B2/Will in favour of the first defendant was not proved, whether the lower appellate Court is right in giving a decree in favour of the first defendant?

12. The appellate Court has specifically found that the adoption of the first respondent herein by Ganapathi Pillai and his first wife is established only on the basis of the admission of P.W.1. The admission of P.W.1 is not an admission of a valid adoption. The adoption in Hindu Law has to be specifically pleaded and proved so as to claim the legal right of a natural daughter. Having regard to the age of first defendant, the alleged adoption of first defendant by Ganapathy Pillai must be after 1956. As per Section 5 of Hindu Adoption and Maintenance Act, 1956, no adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in Chapter II, and any adoption made in contravention of the provisions under Chapter II shall be void. Further, an adoption which is not valid shall not create any rights in the adoptive family in favour of the adopted son or daughter. In this case, the first defendant appears to be taken from an orphanage. Though the guardian of a child have the capacity to give the child in adoption, there are other limitations. The first defendant did not care much to prove the adoption as she was referred to in Ex.B2 as the adopted daughter of Ganapathy Pillai. However, the document Ex.B2 itself was held not proved. In the present case, the Will under Ex.B2 is admitted by the deceased first plaintiff namely Ganapathi Pillai and the Will was also acted upon, as seen from the sale deed executed by Ganapathi Pillai himself along with the first respondent herein, by selling one of the properties covered under the Will Ex.B2. Hence, the Will cannot be ignored. The lower appellate Court ought to have given an opportunity to the first respondent herein to prove the Will under Ex.B2 and to prove the factum of adoption. Though the appellate Court came to the conclusion that the claim of appellant relying upon the Will

under Ex.A8 was not acceptable without pleading, the lower appellate Court failed to advert to the fact that the amendment application in I.A.No.91 of 2001 was filed only to cure this defect. The lower appellate Court dismissed I.A.No.91 of 2001 on the only ground that the proposed amendment will change the character of suit. However, having regard to the pleadings and evidence by both sides, absolutely there is no scope for treating the amendment as one which would change the character of suit. Hence, the lower appellate Court has erroneously dismissed the application in I.A.No.91 of 2001 for amendment of a plaint. This Court feels that the Will under Ex.A8, dated 27.12.1993 alleged to have been executed by Ganapathi Pillai in favour of the appellant appears to be natural and hence, an opportunity also should be given to the plaintiff to prove the Will dated 27.12.1993. The appellate Court found that there is no proper pleading regarding the Will dated 27.12.1993. The suit was filed by Ganapathi Pillai and hence, there was no occasion to plead about his own will. Though the amendment of plaint ought to have been sought for during pendency of suit, the appellate Court ought to have allowed the amendment in the interest of justice. Hence, this Court is inclined to allow this appeal and remit the matter to the appellate Court regarding the proof of adoption of first defendant by Ganapathi Pillai and the two Wills under Ex.B2 dated 08.01.1983 and Ex.A8 dated 27.12.1993 after giving opportunity to both parties to lead further evidence confining to these specific items. Since the appellant has also relied upon the Will in the connected suit in O.S.No.174 of 1997, she is also entitled to establish her right in the connected suit depends upon the findings of the lower appellate Court on the proof of Ex.A8. Order in I.A.No.91 of 2001 in A.S.No.25 of 1999 is also set aside and the amendment of plaint in I.A.No.91 of 2001 stands allowed.

S.A. No. 1210 of 2002

13. The first defendant in the suit in O.S.No.174 of 1997 on the file of the Additional District Munsif Court, Nagercoil, is the appellant in this Second Appeal.

14. The suit in O.S. No. 174 of 1997 was filed by the first defendant in the suit in O.S.No.696 of 1993 as against the appellant in this second appeal and two others for declaration of title to the plaint schedule property and for recovery of the same from the defendants. The suit was also for realisation of a sum of Rs. 5,550/- being the past measne profits with interest at the rate of 18% per annum from all the defendants.

15. The case of the plaintiff/first respondent herein is that the suit property which is a house site and house building belonged to his father Late A.Ganapathi Pillai and that after the death of her father on 06.01.1994, she is the sole legal heir. It was the further case of the plaintiff that the first defendant/appellant was residing in the house as a servant of her father Late Ganapathi Pillai and that the defendants 2 and 3 are residing as tenants in respect of two different portions of the suit house.

16. It was also the case of the plaintiff that the first defendant/appellant was

already married to one Raman of Esanthimangalam and that after the death of the plaintiff's father, the first defendant was claiming some right over the suit house and refused to vacate the suit building.

17. The suit was resisted by the first defendant/appellant on the ground that no legal relationship between the plaintiff and the deceased Ganapathi Pillai and that she is not entitled to any right in the suit property upon the death of Ganapathi Pillai on 06.01.1994. The appellant also pleaded that the plaintiffs have no right on the basis of the Will dated 27.12.1993 even though there is no plea in the plaint resting the plaintiff's claim on the basis of the Will dated 27.12.1993.

18. It is the further case of the appellant that she is the second wife of Late Ganapathi Pillai and that Ganapathi Pillai, during his life time, executed a registered Will dated 27.12.1993 in her favour. Hence, the first defendant claimed title to the suit property, as the legal heir of Late Ganapathi Pillai and as a legatee under the Will alleged to have been executed by the said Ganapathi Pillai on 27.12.1993. It was also pleaded by the first defendant/appellant that she was in possession of the suit building as absolute owner and that she is entitled to collect the rent from defendants 2 and 3.

19. The trial Court decreed the suit as prayed for after holding that the plaintiff is the adopted daughter of Late Ganapathi Pillai. Even though there was no independent witness examined to prove the factum of adoption, the trial Court presumed adoption on the basis of the Will alleged to have been executed by the mother-in-law of the said Ganapathi Pillai and the findings in the previous suit in O.S.No.696 of 1993. Though the first defendant/appellant filed an appeal in A.S.No.51 of 2001 on the file of the Additional District Court, Nagercoil, as against the judgment and decree that was passed in O.S.No.174 of 1997, the lower appellate Court also held that the plaintiff/first respondent in this appeal is the adopted daughter of Ganapathi Pillai, mainly relying upon the findings rendered in the suit in O.S.No.696 of 1993. It is pertinent to mention that the Will that was executed in favour of the appellant was not marked as a document and no one was examined to prove the fact that the appellant is the legally wedded wife of Ganapathi Pillai. In the said circumstances, the Courts below, without any proof of a valid adoption of first respondent in this appeal, as a daughter of Ganapathi Pillai, proceeded only on presumption and conjunctures to hold that the first respondent herein is the adopted daughter of Ganapathi Pillai. Since the first respondent was treated as the daughter of Ganapathi Pillai, in a Will executed by the mother-in-law of Ganapathi Pillai and in the sale deed executed by Ganapathi Pillai and the first respondent herein on 23.05.1991, the lower appellate Court came to the conclusion that the first respondent herein is the adopted daughter of Ganapathi Pillai. It is also pertinent to point out that there was no plea in the present suit regarding the manner in which the first respondent herein was adopted by Ganapathi Pillai. Merely because the first respondent herein was treated by Ganapathi Pillai as his foster daughter, it cannot be inferred that there was a valid adoption which is to be proved by

sufficient plea and documents. There was no independent witness was examined to prove the factum of adoption. P.W.1 is the husband of the first respondent and P.W.2 is the father-in-law of first respondent. Both of them are not competent to speak about the adoption. The alleged adoption, even according to the case of the first respondent in the connected appeal, took place when she was in her tender age. However, in the plaint in O.S.No.696 of 1993 which gives rise to S.A.No.958 of 2003, the said Ganapathi Pillai himself filed the plaint and admitted that the first respondent herein was an orphan and that she was taken from the convent at Srivilliputhur by him and that he brought up the first respondent herein as per the undertakings. Since the fact that the first respondent herein was brought up by Ganapathi Pillai as his foster daughter and that the family of the said Ganapathi Pillai including his wife and mother-in-law treated the first respondent herein as the adopted daughter of Ganapathi Pillai, this Court find that the matter requires re-consideration and the first respondent should be given an opportunity to prove her case to succeed to the properties of Late Ganapathi Pillai as adopted daughter of Ganapathi Pillai.

20. Since the first respondent herein is the plaintiff in the suit, the Court cannot grant a decree in favour of the first respondent merely because the appellant has not proved her case. The suit is also for recovery of possession from the appellant. In such circumstances, this Court feels that the Court below have committed serious error in treating the plaintiff/first respondent herein as the adopted daughter of Ganapathi Pillai, even without proper plea and evidence. Hence, the judgment and decree of the lower appellate Court in A.S.No.51 of 2001 is liable to be set aside. Having regard to the other circumstances and in the interest of justice, this Court is of the view that the matter has to be remitted to the lower Appellate Court.

21. In view of the findings of this Court on the issues relating to the adoption in these two second appeals and the proof of the two Wills namely, Ex.A8 and B2, this Court concludes that the above second appeals in S.A.No.1210 of 2002 and S.A.No.958 of 2003 are to be allowed by setting aside the judgment and decree of the lower Appellate Court in A.S.No.25 of 1999, dated 24.01.2003 and the judgment and decree in A.S.No.51 of 2001 on the file of the Additional District Court, Nagercoil, dated 26.04.2002 and the matters are remitted to the Principal District Court, Nagercoil, to decide the following issues, namely, -

(a) Whether the adoption of the first respondent in both the second appeals, namely, Smt. Madhavi as the adopted daughter of Ganapathi Pillai, the first plaintiff in O.S. No. 696 of 1993 is proved in accordance with law so as to enable the first respondent in these two second appeals to succeed to the properties of Ganapathi Pillai?

(b) Whether the Will under Ex.B2, dated 08.01.1983 executed by Chinnammal in favour of the first respondent in these two second appeals is valid and proved in accordance with law so as to enable the first defendant in O.S. No. 696 of 1993 to get ownership over the suit "A" and "B" schedule properties?

(c) Whether the Will under Ex.A8, dated 27.12.1993, alleged to have been executed by Ganapathi Pillai in favour of the appellant in these two second appeals is proved in accordance with law so as to claim title in favour of the appellant namely the second plaintiff in O.S. No. 696 of 1993 and the first defendant in O.S. No. 174 of 1997 in respect of the properties of Ganapathi Pillai namely the subject matter of suit in O.S. No. 174 of 1997?

22. It is made clear that the findings of the Court below as to the character of the suit property in O.S. No. 174 of 1997 as admitted by both parties cannot be reopened. In other words, the suit properties in O.S. No. 174 of 1997 is the absolute property of Ganapathi Pillai, as admitted by both parties before the Courts below. Similarly, the suit "A" schedule properties are the absolute properties of the first wife of Ganapathi Pillai. Hence, the second plaintiff in O.S. No. 696 of 1993, by proving the Will under Ex.A8 is entitled to get a share of Ganapathi Pillai, as a legatee, under the Will Ex.A8. So depends upon the proof of Ex.A8, the Courts may grant relief to the appellant even in respect of the plaint "A" schedule properties in O.S. No. 696 of 1993. Thus, the Principal District Court, Nagercoil, is directed to decide the rights of parties, namely, the appellant and the first respondent herein in the respective Second Appeals, depending upon the findings on the three vital issues framed above and render justice between the parties by granting appropriate relief in accordance with law. The parties, namely, the appellant and the first respondent are directed to appear before the Principal District Court, Nagercoil, on 14.11.2016 and the learned Principal District Judge, Nagercoil, is directed to dispose of the appeals within a period of one year thereafter, after giving opportunity to both parties to lead evidence afresh, both oral and documentary. However, the learned Principal District Judge, Nagercoil, is directed to restrict the scope of further evidence confining to the three issues above framed and to dispose of the appeals in the manner indicated above. I.A. No. 91 of 2001 in A.S. No. 25 of 1999 stands allowed and the first respondent in S.A. No. 958 of 2003 is entitled to file an additional written statement only to enable her to lead evidence relating to the issues.

23. The Second Appeals are allowed and remitted to the learned Principal District Judge, Kanyakumari District at Nagercoil, in the manner indicated above. However, there is no order as to costs.