

Lalitha, Vs. V. Arjunan

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Court : Chennai

Decided On : Apr-29-2008

Reported in : (2008)5MLJ901

Judge : M. Jaichandren, J.

Acts : [Hindu Succession Act, 1956](#); [Hindu Adoptions and Maintenance Act, 1956](#) - Sections 1C, 10 and 16; [Code of Civil Procedure \(CPC\),1908](#) - Sections 100 - Order 7 Rule 11

Appeal No. : S.A. No. 1227 of 2006

Appellant : Lalitha, ;malathi, ;A. Srinivasan and A. Prabhu

Respondent : V. Arjunan

Advocate for Def. : R.T. Shyamala, Adv.

Advocate for Pet/Ap. : K. Sukumaran, Adv.

Disposition : Appeal allowed

Judgement :

M. Jaichandren, J.

1. The second appeal has been filed against the judgment and decree, dated 25.08.2006, made in A.S. No. 575 of 2005, on the file of the II Additional City Civil

Court, Chennai, confirming the judgment and decree, dated 21.02.2005, made in O.S. No. 552 of 2002, on the file of the VIII Assistant City Civil Court, Chennai.

2. For the sake of convenience, the parties in the appeal are referred to as they have been arrayed in the original suit in O.S. No. 552 of 2002.

3. Originally, one V. Arumuga Naicker was the defendant in the suit in O.S. No. 552 of 2002. During the pendency of the appeal in A.S. No. 575 of 2005, the said Arumuga Naicker had died. Hence, the present appellants in the second appeal were brought on record as the legal representatives of the deceased Arumuga Naicker by an order, dated 23.03.2006.

4. The legal representatives of the deceased V. Arumuga Naicker, namely, the defendant in the suit O.S. No. 552 of 2002 are the appellants in the present second appeal. The plaintiff, who is the respondent herein, had filed the suit, on the file of the VIII Assistant City Civil Court, Chennai, praying for the relief of recovery of possession of the suit property from the defendant and for costs.

5. It is stated by the plaintiff that the house and the land situate at Door No. 61, Venkatesan Ali Street, New Washermenpet, Chennai-81, measuring 3600 Sq.ft, more fully described in the schedule to the plaint, had originally belonged to late Parvathiammal, Wife of Raju Naicker. Parvathiammal and Raju Naicker did not have issues. Parvathiammal had died intestate in the year 1996, leaving behind her husband Raju Naicker as her legal heir to inherit the schedule mentioned property. Raju Naicker had died intestate, on 09.09.2001.

5.1 It is the case of the plaintiff that he is the only surviving brother of late Raju Naicker. Thus, the plaintiff is the only legal heir entitled to inherit the schedule mentioned property of his brother late Raju Naicker. As the sole legal heir, the plaintiff had become the absolute owner of the suit schedule mentioned property.

5.2. The defendant is the son of late V. Venu Naicker, who pre-deceased late V. Raju Naicker. After the death of V. Raju Naicker, the defendant had illegally occupied the schedule mentioned property and started collecting the rents from the tenants therein. The defendant does not have any right, title or interest over

the schedule mentioned property. The defendant is only a trespasser. The plaintiff had issued a legal notice, on 22.10.2001, to the defendant and the tenants to hand over vacant possession of the suit schedule mentioned property. The defendant had sent a reply notice, on 05.11.2001, stating that he is the adopted son of late V. Raju Naicker.

5.3. The plaintiff had stated that the defendant, who is 52 years old, could not have been adopted at the age of 46 years. It is for the defendant to prove that he was adopted by late V. Raju Naicker and that the adoption is valid in the eye of law. Further, the defendant had claimed that there is a partition deed between V. Raju Naicker and the defendant. The alleged adoption and the partition deed are also false and the claims of the defendant regarding the adoption and the partition are false. The defendant is collecting rents from 16 tenants and the rent amount is nearly Rs. 5,000/-. Late V. Raju Naicker had never executed a Will as alleged by the defendant, as he was unconscious for more than a year before his death.

6. In the written statement filed by the defendant, the claims and the allegations made in the plaint have been denied. Prior to the death of the father of the defendant there was a partition made on 04.10.1999, under a Document No. 2856/1999, by which the defendant had been allotted a major share and a small portion had been allotted to late V. Raju Naicker. In respect of the extent allotted to him, the father of the defendant had executed a will, on 25.01.2001, in favour of the defendant. In view of the documents executed in favour of the defendant, the claim of the plaintiff that he is the only surviving brother of the late V. Raju Naicker and that he is entitled to inherit the suit property is baseless. The defendant had denied the allegations that he is a trespasser in the suit property and that he is illegally collecting the rents from the tenants in the suit property. The defendant being in lawful possession and absolute enjoyment of the suit property is entitled to receive the rents from his tenants. The plaintiff ought to have filed a suit for declaration of title, instead of a mere suit for recovery of possession. The value of the suit as given by the plaintiff is incorrect and therefore, the suit is liable to be rejected, under Order VII Rule 11 of Civil Procedure Code, 1908. Since the plaintiff had filed a frivolous suit, it is to be dismissed as devoid of merits, with costs.

7. Based on the pleadings, the trial Court had framed the following issues for consideration:

1. Whether the plaintiff alone is entitled to inherit the suit property after the death of late Thiru.V. Raju Naicker?

2. Whether the defendant is an adopted son of Thiru.Raju Naicker?

3. Whether the plaintiff is entitled to get recovery of possession of the suit property as prayed for?

8. The plaintiff had examined himself as P.W.1 and marked two documents as Exs.A1 and A2. The defendant was examined as D.W.1 and he had marked Ex.B-1.

9. The trial Court had decided issue No. 2 in favour of the plaintiff holding that the defendant had not pleaded that he is the adopted son of V. late Raju Naicker, except in the legal notice issued by him, on 05.11.2001, marked as Ex.B-1, which has also been marked by the plaintiff as Ex.A-2.

10. With regard to issues 1 and 3, the trial Court had found that the partition between late V. Raju Naicker and the defendant was admitted by the plaintiff. However, the defendant had not produced the partition deed or the Will alleged to have been executed in his favour. Unless, the defendant could prove that he is the adopted son of the late V. Raju Naicker, he could not claim any right in the property. A mere admission by the plaintiff regarding the partition will not give any right to the defendant in the suit property. Since, the defendant was not a co-sharer in the suit property on the date of the partition, the alleged partition between the owner of the property and the defendant, who was a stranger to the property, will not confer any right on him. Since the plaintiff was the only surviving legal heir on the date of the death of the late V. Raju Naicker, he is entitled to the suit property. Though, the defendant had disputed the value of the property, no documents were produced to show the actual value of the property in question. Since, there was nothing shown by the defendant to prove that the suit had been undervalued, the assessment of the plaintiff is to be accepted as correct. Thus, the

trial Court had decided the issues 1 and 3 in favour of the plaintiff and decreed the suit as prayed for, directing the defendant to deliver possession of the suit property, within a period of three months.

11. Aggrieved by the judgment and decree of the trial Court, dated 21.02.2005, the defendant had filed an appeal, on the file of the II Additional City Civil Court, Chennai, in A.S. No. 575 of 2005.

12. The defendant had filed the appeal raising various grounds. It was stated, inter alia, that the plaintiff was not the only legal heir to inherit the suit property after the death of late V. Raju Naicker. The defendant is not claiming any right in the suit property by virtue of adoption, but only on the basis of the documents executed by late V. Raju Naicker. The plaintiff is not entitled to get a decree without seeking a declaration of title. The plaintiff had not produced any evidence to show that he is the sole surviving legal heir of late V. Raju Naicker. The trial Court had erred in decreeing the suit in favour of the plaintiff on the premise that the defendant has no title to the suit property. The first Appellate Court had framed the following points for consideration.

1. Whether the plaintiff is the sole surviving legal heir of Raju Naicker?
2. Whether the defendant is the adopted son of Raju Naicker?
3. Whether the said Raju Naicker executed a Will in favour of the defendant on 25.1.2001?
4. Whether the appeal is allowable or not?

13. While considering the points raised, the first Appellate Court had found that according to the plaintiff, Raju Naicker and Parvathiammal had no issues and as such the plaintiff, being the full brother of late V. Raju Naicker, is entitled to the entire property of late V. Raju Naicker as a class (ii) heir, under the provisions of the [Hindu Succession Act, 1956](#).

13.1. On the other hand, the defendant had claimed that he is the adopted son of late V. Raju Naicker that he was entitled to the suit property as per the partition

deed and the Will. The First Appellate Court had found that the said documents had not been produced and proved by the defendant to substantiate his claims.

The first Appellate Court had also considered the contention of the defendant that the plaintiff had not prayed for the relief of declaration and had merely asked for recovery of possession. Such a relief, as prayed for, is not maintainable in law. On the other hand, it was contended by the plaintiff that when he had pleaded and proved that he is the sole surviving brother and that he is entitled to inherit the estate of late V. Raju Naicker as a Clause (ii) heir, there is no need for him to pray for the relief of declaration. Therefore, the suit for recovery of possession is maintainable in law. On considering the rival claims, the First Appellate Court had come to the conclusion that the plaintiff had pleaded in the plaint that he is the only surviving brother of late Raju Naicker and that he is entitled to inherit the property as it has been proved by his evidence, as well as by the admission of the defendant in his evidence. The defendant had failed to prove his claims by positive and admissible evidence. Thus, the first Appellate Court had confirmed the conclusions arrived at by the trial Court.

14. Aggrieved by the judgment and decree of the first Appellate Court, dated 25.08.2006, made in A.S. No. 575 of 2005, the legal representatives of the defendant in the suit O.S. No. 552 of 2002 had filed the present second appeal, on the following substantial questions of law:

Whether or not the lower Appellate Court is correct in granting the decree for recovery of possession without giving a finding that the respondent is the sole surviving legal heir of late Raju Naicker?

2. Whether the lower Appellate Court is correct in observing that there is no need for the plaintiff to seek for declaration and the respondent is entitled to file a suit for recovery of possession, when this defendant has been pleaded in his written statement that the claim of the plaintiff/respondent is without any basis and on the fact of the documents executed in favour of the defendant/appellant, the claim of the plaintiff is liable to be rejected.

15. The learned Counsel appearing on behalf of the appellants had submitted that when the plaintiff had claimed that his brother late V. Raju Naicker had died intestate leaving the plaintiff as the sole legal heir to inherit his property, the plaintiff ought to have filed the death certificate of late V. Raju Naicker before he could claim that he had become the owner of the property. From the admission made by the plaintiff (P.W.1), during his cross examination, he had admitted that the death certificate relating to late V. Raju Naicker had not been filed. It was also admitted that no legal heir certificate had been filed to substantiate his claims.

It was further stated by the learned Counsel for the appellants that the claim of the appellants regarding the issues of is adoption as well as the partition had not been specifically challenged. The date on which the defendant had entered the suit property had not been disclosed. While the plaintiff had admitted in his oral evidence that the plaint property is worth about 50 to 60 lakhs, the concerned Court ought to have called upon the plaintiff to pay the Court fee, as it was specifically pleaded in the written statement filed by the defendant.

17. The learned Counsel for the appellants had also pointed out that in spite of the interim applications filed by the plaintiff in I.A.Nos. 15935 to 15938 of 2004, being allowed by the trial Court, on 20.10.2004, to condone the delay in filing the documents and to receive the additional documents, reopen and recall P.W.1, the plaintiff had failed to avail the opportunity of marking the required documents. In spite of such lapse by the plaintiff, the first Appellate Court had relied on the unmarked documents and decided the points, raised for consideration, in favour of the plaintiff.

18. No issue was framed relating to the partition either by the trial Court, or by the first Appellate Court. Further, there is no finding by the Courts below that the plaintiff is the sole surviving legal heir. However, the burden of proof had been shifted on the defendant to disprove the claims made by the plaintiff, especially, when the defendant had not admitted that the plaintiff is the only sole surviving legal heir either, in his pleadings or in his evidence.

19. The learned Counsel for the defendants/appellants has relied on the following decisions in support of his contentions:

i) In P.S. Ratna Bai v. D.V. Ramanan alias D. Venkataramana Bhatt 1983 TLNJ 203, it has been held as follows:

Party litigant must succeed only on the basis of his own case and cannot abandon the same and fall back upon the case of opponent.

ii) In Ramasamy Moopnar v. Rathnammal and Ors. : (1976)2MLJ363 , it has been held as follows:

Where the suit is for injunction based on possession the plaintiff need not prove title. The question of title is not relevant for the purpose of considering the eligibility for injunction prayed for by the plaintiff. The plaintiff is entitled to injunction on the basis of his possession.

iii) In Arunachalam Pillai v. Ramu Mudaliar (died) and three Ors. : (1998)III MLJ573 , it has been held as follows:

Jurisdiction of Civil Court to grant relief must be based on pleadings or admission of defendant - Granting relief which does not flow from plaint or admission of defendant is in excess of jurisdiction of Civil Court.

iv) In Brahma Nand Puri v. Neki Puri : [1965]2SCR233 , it has been held as follows:

In a suit for ejection the plaintiff has to succeed or fail on the title that he establishes and if he cannot succeed on the strength of his title his suit must fail notwithstanding that the defendant in possession has no title to the property.

20. Per contra, the learned Counsel for the plaintiff/respondent had relied on the following decisions in support of her contentions:

i) In V. Ravichandran v. R.Ramesh Jayaram and Ors. 1999(1) MLJ 223, it has been held as follows:

Moreover, when there is no registered document pertaining to adoption under Section.16 of the Act, then the Court has to be very cautious and extremely alert to guard the persons against being ensnared by the unscrupulous persons who

indulge in grabbing the properties. Further, as held by the Apex Court, the plaintiff has a heavy duty to prove the ceremony of adoption, in the absence of any registered document to explain to the satisfaction of the conscience of the Court regarding such an adoption by producing accounts to show that there were expenses incurred due to the ceremony of adoption and by examining the Priest who performed the ceremony.

ii) In *Mahalingam v. Kannayyan and Anr.* : (1989)2MLJ341 , it has been held as follows:

In this case, the pleadings with regards to custom or prevalent usage in the community of the parties permitting adoption of persons who have completed the age of fifteen years is totally lacking. Equally so, evidence is lacking. Hence, the adoption of the person over fifteen years of age could not be sustained on the ground of custom and usage.

The implication of Section 16 of the Hindu Adoptions and Maintenance Act 78 of 1956 Act is: if there is any document purporting to record an adoption, and it is signed by the person giving and the person taking the child in adoption and that document is registered under any law for the time being in force and it is produced before any Court, the court shall presume that the adoption has been made in compliance with the provisions of the Act, unless and until it is disproved, when Section 16 speaks about compliance with the provisions of the Act, it has reference to the general requirements under the Act with regard to a valid adoption. The general requirements take in what has been laid down in Section 16 Clause (iv) thereof set down the requirement regarding the age of the person to be adopted as fifteen years, if the conditions as per Section 16 are satisfied, there could be a presumption also as to the satisfaction of the requirement of the age being fifteen years. But when the admitted position is that the age of the person adopted was over fifteen years, then it could only come under the exception, and the validity of such adoption could be upheld only when the custom or range applicable to parties permitting the adoption of a person over the age of fifteen years is proved and established. The simple reason is, with regard to an exception, there could not be a presumption, legal or otherwise, exception is a

departure from the formal and general requirements. An exception takes the case from the purview of general requirements. An exception must be proved and it cannot be presumed. When an exception is engrafted in the main part of the provision to the effect that no satisfaction of certain conditions the general requirements need not be invoked, the onus in regard to such exceptional condition is on the person who pleads them. An exception must be strictly construct. The presumption under Section 16 does not cover the same of an exception to the general requirements of the provisions of the Act. That is how, Section 16 must be construed, otherwise, it will tend to anomalous results. Even if there is no satisfaction of the general requirements, regarding age, court will be called upon to presume the exception. This could not be the intendment of the legal presumption under Section 16. There must be a plea and proof of the exception under custom or usage spoken to in Clause (iv) of Section 10. Unless that is made out, the exception cannot rule. There could not be a presumption of such custom or usage. Even by a bare reading of Section 16, it is not possible to spell out a theory that it dispenses with pleading and proof of the case of an exception under Section 10(iv) of the Act. As already noted, one of the four qualifications set out in Section 10 of the Act is that the person, who is to be adopted should not have completed the age of fifteen years. If there should be an exception as contemplated in that clause, certainly, there has got to be a pleading and proof of the same. By having resort to Section 16 of the Act, it is not possible to dispense with the said pleading and proof, Section 16 has no relevance at all with regard to the exception set forth in Section 10(iv) of the Act.

iii) In *Jai Singh v. Shakuntala* : [2002]2SCR431 , it has been held as follows:

Section 16 of the [Hindu Adoptions and Maintenance Act, 1956](#) envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be a presumption that adoption has been made in accordance with law. Mandate of the statute is rather definite since the legislature has used 'shall' instead of any other word of lesser significance. Incidentally, however, the inclusion of the words 'unless and until it is disproved' appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence available on record in support of

adoption. It is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession - thus onus of proof is rather heavy. Statute has allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words 'unless and until it is disproved ' shall have to be ascertained in its proper perspective and as such the presumption cannot but be said to be a rebuttable presumption. Statutory intent thus stands out to be rather expressive depicting therein that the presumption cannot be an irrebuttable presumption by reason of the inclusion of the words just noticed.

iv) In *Nagayasami Naidu and Ors. v. Kochadai Naidu and Ors.* ILR 1969 MAD 459, it has been held as follows:

The burden of proving an adoption is a very grave and serious one, as an adoption displaces the natural succession.

21. Relying on the above decisions, the learned Counsel for the plaintiff/respondent had submitted that it is for the defendant to prove by sufficient evidence that he is the adopted son of late V. Raju Naicker. The onus of proof is on the defendant, since he had claimed the right to inherit the property as the adopted son of late V. Raju Naicker, excluding the vested rights of the plaintiff in the suit property as the sole surviving legal heir of late V. Raju Naicker.

22. Further, it is not the case of the defendant that the plaintiff has surviving sisters who may claim certain rights in the suit property. It was only during the cross examination, the defendant had raised such an issue and had made a claim that he was the adopted son of late V. Raju Naicker. It was further contented that as a class (ii) heir, the plaintiff alone had the right to inherit the suit property. With regard to the value of the suit it was submitted that the value of the property in issue in the suit is to be assessed as it existed on date of the filing of the suit.

23. The plaintiff had no need to seek a prayer for a declaration as the defendant did not dispute the fact that the plaintiff is the legal heir of the deceased V. Raju Naicker. Since the plaintiff alone was entitled to inherit the property, as per the provisions of the [Hindu Succession Act, 1956](#), there was no need for the plaintiff to

file a suit seeking the relief of declaration. In spite of the fact that the plaintiff had specifically pleaded that he is the sole surviving legal heir of late V. Raju Naicker, the defendant had refuted the claims by making evasive statements, stating that the plaintiff did not plead that he is the sole surviving legal heir of late Raju Naicker.

24. In spite of the claim made by the defendant, that he was the adopted son of the late V. Raju Naicker, he had not filed any document to substantiate his claim. Though the defendant had also claimed that he had partition deed in his favour, the said document was also not produced before the Courts below. When the plaintiff had proved that he is the sole surviving legal heir of late V. Raju Naicker, the burden of proof had been automatically shifted upon the defendant to disprove the same.

25. In view of the averments made by the learned Counsels appearing for the parties concerned and on a perusal of the documents available, and on analysing the evidence recorded, this Court is of the considered view that both the Courts below have erred in decreeing the suit as prayed for by the plaintiff, merely on the basis of Ex.A-1, which is the lawyer's notice, dated 22.10.2001, issued by the plaintiff's counsel to the defendant and the reply notice issued by the defendant, on 05.11.2001, marked as Ex.A-2. The same document, dated 5.11.2001 has been marked as Ex.B-1, on behalf of the defendant.

26. Both the Courts below have also erred in not framing an issue regarding the claim of partition. Though the Courts below have held that the plaintiff is the only surviving brother of late V. Raju Naicker and that he alone is entitled to inherit the property, it has not been held that the plaintiff is the sole surviving legal heir of late V. Raju Naicker. While the defendant had filed a written statement, denying the claim of the plaintiff that he is the sole surviving legal heir of late V. Raju Naicker and when the defendant had seriously disputed the title of the plaintiff, the Courts below ought to have held that the title of the suit property is to be decided by way of a suit for declaration of title.

27. In spite of the plaintiff filing a suit for recovery of possession of the suit property, he has not produced the necessary death certificate and the legal heir

certificate to show that he is the sole surviving legal heir to inherit the property of late V. Raju Naicker. The first Appellate Court had also gravely erred in looking into the documents which were not marked, in spite of the applications in I.A.Nos. 15935 to 15938 of 2004 having been filed by the plaintiff and after the applications had been allowed by the trial Court. Once the plaintiff had failed to mark the necessary documents, the Courts below ought to have drawn adverse inference against the plaintiff in that regard. Thus, it is clear that both the Courts below have misdirected themselves in coming to a perverse conclusion.

28. Though this Court, normally, does not interfere with the factual findings of the Courts below, in rare cases, they could be interfered with in the interest of justice, as held by the Supreme Court in -----,

29. This Court while dealing with the second appeals under Section 100 of the Code of Civil procedure, 1908, could interfere with the concurrent findings of the Courts below, once it is found that the findings are perverse or they are not based on the evidence available or the conclusions have been arrived at without any evidence whatsoever. In the present case, both the Courts below have arrived at their conclusions in such a manner as would lead this Court to conclude that the judgment and decree of the Courts below are unsustainable in the eye of law.

30. In such circumstances, the judgments and decree of the Courts below are set aside and accordingly, the second appeal stands allowed. No costs.

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