

Sivasamy, Vs. Poomalai,

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Court : Chennai

Decided On : Jul-23-2008

Reported in : 2008(5)CTC294; (2009)1MLJ441

Judge : Prabha Sridevan, J.

Acts : Registration Act - Sections 57(4); Hindu Marriage Act; Madras Hindu (Bigamy Prevention and Divorce) Act. 1949 - Sections 4(1); Evidence Act - Sections 68; Succession Act - Sections 63

Appeal No. : S.A. (MD). Nos. 1618 and 1619 of 1992 and C.M.P. No. 16228 of 1992

Appellant : Sivasamy, ;manickkam and Karuppian;lakshmi (Died), ;sivasamy, ;manickkam and Karuppian

Respondent : Poomalai, ;lakshmi and Thirupathi;poomalai and ors.

Advocate for Def. : V.K. Vijayaraghavan, Adv. for ;Ramamurthy, Adv. for 1st Respondent in S.A. Nos. 1618 and 1619/1992

Advocate for Pet/Ap. : S. Sundaresan, Adv. for Appellants 1 and 2, ;M. Palanisamy, Adv. for Appellant No. 3 in S.A. No. 1618/1992, ;M. Palanisamy, Adv. for Appellant No. 4 in S.A. No. 1619/1992

Judgement :

Prabha Sridevan, J.

1. One unfortunate Masi Ambalam died on 01.11.1987. We do not know whether his end came by fair means or foul. It is evident that the parties herein including his only daughter were more interested in the suit properties than him.

2. The plaintiff, who is the first respondent, is the daughter of Masi Ambalam. She filed the suit for injunction and declaration that she is the owner of 'A' schedule property, for partition of 'B' schedule property and for injunction and alternatively for possession. Her mother pre-deceased her father. There was no other issue. Masi Ambalam died intestate. The plaintiff learnt that her father was abducted by the third defendant on 08.09.1987 and later he was reported to have died on 01.11.1987, allegedly killed by the third defendant and his henchmen. As the sole legal heir of Masi Ambalam, the plaintiff performed the Karumadi on 16.11.1987 at Tiruvayyaru. The plaintiff had also given a complaint to the Sub-Inspector of Police, Thiruvonam regarding the abduction. Masi Ambalam was in possession of the suit property till his death and after his death, the plaintiff went and took possession of her father's property. The plaintiff claimed half share in suit 'B' schedule 25 to 30,32,34,36,37,39 and 44 and 45. According to her, the defendants 1 to 5 have no title. The defendants 1 to 3 are the sons of the fourth defendant through her deceased husband one Malayappan. The fifth defendant was associating herself with Masi Ambalam for some time. She was not a permanently kept concubine of Masi Ambalam. In 1986 Masi Ambalam was very old and afflicted with blood pressure and other ailments. So, the plaintiff made a publication in Dinamalar claiming her right and stating that some persons were taking advantage of the old-age of her father to create certain documents. The plaintiff understood that some persons like defendants 1 to 5 in the name of Masi Ambalam belatedly published a repudiation in Dinamalar on 01.10.1986. There was no marriage between Masi Ambalam and the fifth defendant. The sixth defendant is an agnate of Masi Ambalam. The plaintiff claimed that she was entitled to all the properties mentioned in Plaint 'A' schedule and half undivided share in 'B' schedule along with the sixth defendant.

3. Written statements were filed by the third and fifth defendants denying the averments made in the plaint. According to the third defendant, it was the plaintiff's husband who had spirited away Masi Ambalam. He had preferred a complaint to the effect that the plaintiff's husband and his associates had abducted Masi Ambalam, and the fifth defendant had also filed a Habeas Corpus Petition. The third defendant's father died, when he was a child. Masi Ambalam had been bringing up the third defendant and his brothers and managing the family properties. Masi Ambalam performed the marriage of the plaintiff and gifted valuable jewels, etc. In fact, the plaintiff and her husband wanted Masi Ambalam to give them all the properties, which he was not willing to do. While in a sound and disposing mind, Masi Ambalam had executed a Will on 17.11.1983 and produced the same for registration on 21.01.1983. The plaintiff is not entitled to inherit the properties of Masi Ambalam. The fifth defendant, who is the second wife of Masi Ambalam, had a son who died, when he was three years old in or about 1964 and, therefore, the fifth defendant is entitled to her share in the properties of Masi Ambalam and also as the mother of her deceased son. The illness of Masi Ambalam is exaggerated. The so-called publication itself was made by the plaintiff and her associates, which has been repudiated by Masi Ambalam during his life time. The fifth defendant is entitled to half share in the properties. The fifth defendant also filed a separate written statement in which, she had stated that the plaintiff had pestered her father to give the properties, which he was not willing to do. She has given her own version of the death of Masi Ambalam. She has claimed that she is the lawfully wedded wife of the deceased Masi Ambalam.

4. The Trial Court, on consideration of the materials available on record, decreed the suit as prayed for. The Appellate Court also confirmed the same. Against that, the present second appeals have been filed and the following substantial questions of law have been framed:

1. Whether the courts below have erred in requiring proof of recitals in Ex.B.82 and B.83 ignoring the proposition of law that under Section 57(4) of the Registration Act, production of a copy will prove the contents of the documents as held in *Karuppana Gounder v. Kolandasami Gounder* : AIR1954 Mad486 ?

2. Whether the courts below erred in insisting on the proof of the form of marriage between Masi Ambalam and D.5 Lakshmi ignoring that question of presumption from long cohabitation is one mode of proof when it is not possible to prove the actual marriage having regard to the law laid down in 18 MLJ 32

3. Whether the findings of the courts below with regard to the Will under Ex.B.36 are sustainable in law when the appellant has produced evidence for the due execution of the same?

5. The learned Counsel appearing for the appellants/defendants submitted that there is enough evidence to show that the fifth defendant got married to Masi Ambalam in 1946. There is the birth certificate Ex.B.87 of the son born to Masi Ambalam and the fifth defendant, which shows that the names of father/mother are Masi Ambalam and Lakshmi. Letters have been produced to show that Masi Ambalam had treated Lakshmi as his wife and the learned Counsel also relied on : (1987)1MLJ149 (Seerangamal v. Venkatsubramanian) and : [1979]1SCR1 (Badri Prasad v. Dy. Director, Consolidation) to support his case.

6. The learned Counsel also submitted that when a Will has been executed and an attesting witness has been examined, law does not require that the doctors should also be examined and both the Courts below erred in suspecting the Will, merely because of non-examination of the doctor. The learned Counsel submitted that there is enough evidence to show that the relationship between the father and daughter was not amicable and the daughter had filed Ex.B.40 and taken other steps against the father. Therefore, the fact that he had disinherited her is not a ground to suspect the Will, especially when the relationship was strained. The learned Counsel also submitted that it is clear from Exs.A.11 and A.12, which are the repudiation statement given by Masi Ambalam to show that Masi Ambalam was duly aware of what was happening and he had consciously disinherited his daughter.

7. The learned Counsel for the first respondent/plaintiff submitted that mere living together for ten years cannot be a ground for inferring there was a marriage. Except for the electoral rolls, there is no other evidence to show 'the long cohabitation'. The learned Counsel also submitted that with regard to a second

marriage, even long cohabitation will not give rise to a presumption of marriage, because a second marriage during the life time of the first one would not be a valid marriage in any manner. The learned Counsel relied on 1989(2) LW 15 [Govindasami Padayachi (dead) v. Boorasami Padayachi (dead)], : (1970)2MLJ193 (Raghuvir Kumar v. Smt. Shanmughavadivu), 1983(1) MLJ 311 (Alagammai v. Rakkammal) and 1983 TLNJ 285 (S. Varalakshmi v. Alagammal Achi) to support his case.

8. With regard to the Will, the learned Counsel submitted that it is extremely unnatural and while the Testamentary Court ought not to be a Court of suspicion, when there are many suspicious features, then the Court is bound to take note of the same. The learned Counsel pointed out the following features around suspicion:

(a) Only to explain his presence at the time of execution of the Will. D.W.3 would say that the testator took him along to Tanjore, while he was going to a doctor. This is artificial.

(b) When there is a registration office is close by, there was no reason why the testator should want to go to Tanjore.

(c) Even assuming the testator was of the opinion that he had sufficiently provided for his daughter, the plaintiff, no explanation is given as to why no provision was made for the fifth defendant, who claims to be his wife.

(d) Though the examination of one attesting witness is sufficient, when a doubt is cast regarding the second attesting witness and it is contended that he is fictitious person, the propounder of the Will has to dispel the suspicion of the Court in this regard.

(e) When the plaintiff was far away from her father and the testator was solely in the control of the beneficiaries of the Will, then the Court ought to look at the Will more carefully.

He relied on : [1998]2SCR486 (Gurdial Kaur v. Kartar Kaur) and 1962 2 MLJ 27 (SC) (Rani Purnima Debi v. Kumar Khagendra Narayan Deb).

9. The Existence of Marriage:

Two substantial questions of law referred to above relate to the existence of marriage and the genuineness of the Will. I will first take up the question as regards the existence of marriage and to see if the Courts below had drawn the correct conclusion and for this regard, I am constrained to look at the pleadings and evidence. According to the fifth defendant, she was married to Masi Ambalam in 1946. D.W.1 had stated that the fifth defendant is the second wife and a son was born to them and died after three years. He has also stated that it is only Masi Ambalam, who took care of them. D.W.5 is the second wife of Masi Ambalam, whose marriage is now put in issue. She has stated that Ex.B.87 is the birth certificate of her son and that the marriage took place between her and Masi Ambalam. She has produced two documents Exs.B.82 and B.83, which are sale deeds executed by third parties in her favour. One is of the year 1955, where she is referred to as Masi Ambalam's wife. This is long before the dispute. The other is dated 27.06.1955 in which document also, she is stated as Masi Ambalam's wife. Ex.B.87, which is the birth certificate, also shows that the child was born to Masi Ambalam and Lakshmi. The electoral rolls have been produced to show that they were living at the same address. So, there are documents from 1955 at least, which shows that the world looked upon her as the wife of Masi Ambalam. It is true that she has stated in her evidence that when the plaintiff's mother was alive, Masi Ambalam had married her.

10. Now, I will examine the decisions cited in this regard. In 1983 1 MLJ 311 cited *supra*, it was held that when a person is already married to a woman and had a child by her, and then it is alleged that he had married another woman and there is no evidence of the woman being treated by the community as the wife of the man, no presumption of a second marriage arises by reason of long cohabitation.

11. In 1983 TLNJ 285 cited *supra*, after a detailed discussion of the Acts in force, namely the Hindu Marriage Act and the Madras Hindu (Bigamy Prevention & Divorce) Act, 1949, etc, it was concluded that the alleged marriage with the second wife was hit by Section 4(1) of the Madras Hindu (Bigamy Prevention & Divorce) Act of 1949 and it is void in law.

12. In cited supra, the Division Bench accepted the second marriage, but however the learned Counsel distinguished this on the ground that on facts, it was established that some form of marriage was celebrated, whereas in the present case, it is not there, and, therefore, that judgment would actually be adverse to the case of the appellants.

13. Finally, in 1989 (2) LW 15 cited supra, it was held that extract from births and deaths registers are relevant only with reference to the fact of date of birth and death. They do not prove the marriage between the parents referred therein and in that case, they had lived together for ten years and they had lived separately for more than that and in those circumstances, the Court refused to raise the presumption of marriage.

14. cited supra is a brief order, which deserves to be extracted, where the Supreme Court held as follows:

For around 50 years, a man and a woman, as the facts in this case unfold, lived as husband and wife. An adventurist challenge to the factum of marriage between the two, by the petitioner in this special leave petition, has been negatived by the High Court. A strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy. In this view, the contention of Shri Garg, for the petitioner, that long after the alleged marriage, evidence has not been produced to sustain its ceremonial process by examining the priest or other witnesses, deserves no consideration. If man and woman who live as husband and wife in society are compelled to prove, half a century later, by eye-witness evidence that they were validly married, few will succeed. The contention deserves to be negatived and we do so without hesitation. The special leave petitions are dismissed.

Special leave petitions dismissed.

15. In cited supra, a Division Bench has held as follows:

22. The other point taken by defendants is, if the origin was one of concubinage, it continues to be so for ever, and that once a concubinage always a concubinage. It depends upon facts and circumstances of each case. During the lifetime of a wife, an irresponsible husband may develop incestuous relationship with another woman, but if he continues the said relationship after the death of his wedded wife, and thereafter lives exclusively with the other woman treating her as his wife and begets children through her; and recognises them as legitimate children; lives together as a family for ever to the knowledge of the general public and if the documents executed by him confer rights upon them in any of his properties with unstinted intention of treating them as wife and children; then, as pointed out in the decisions above referred to, the evidence on record must be taken into account cumulatively to conclude on wifehood. Hence, for the reasons stated above, the first three aspects relied upon as if they are destructive factors, do not in any manner outweigh the other weighty materials on record in favour of first plaintiff, and which have been referred to above.

23. Regarding the contents of affidavit and written statement (i.e. items 4 and 5); being interested in the usufructuary mortgage, and being relations, they would not have tolerated in those years, a Naidu woman claiming status of the wife of a Brahmin. It is not as if that status could be derived, only if relations recognise. Outside world had treated her as wife, as found in notices by Bank (vide Exhibits A-31 and A-32), election records, Ration cards, etc., and in entries found in school records about plaintiffs 2 to 4. When he had himself recognised her as having lived with him as a devoted, sincere, faithful wife, and duration of cohabitation not being disputed; though the origin was in the nature of a concubinage; after the death of Bagirathi Ammal in 1940, for 15 long years Ranganatha had treated her as his wife, lived with her in the same house and three children were born to them and he had intended to confer upon them rights in the property. But unfortunately, as happens when entire legal aspects are not properly understood, the composition deed (Exhibit A-34) having not brought forth what was aimed at when his brother was in difficulties; plaintiffs could not derive the advantage under Exhibit A-33 will. As held in *Muthayya v. Kamu alias Kamala Ammal* (1981) 94 L.W.193 multitude of materials exist to show that Society had treated her as wife of Ranganatha. The status acquired by long cohabitation cannot also be lost.

16. In this case, the fifth defendant claimed that she got married to Masi Ambalam in 1946. It is true that she has not referred to any form of ceremony of marriage, nor she has examined anyone, who had attended the marriage. But it may be well nigh impossible for her to examine a witness on the date of suit that a marriage took place in 1946. But we have two documents of the year 1955, in which she has been referred to as the wife of Masi Ambalam. Till the date of the suit 1988, and till Masi Ambalam died in 1987, evidently there has been cohabitation between her and Masi Ambalam i.e. over 30 years. So, the judgment, which referred to mere ten years of cohabitation, will not come to the aid of the respondents, nor the judgment, which holds there is no presumption regarding a second marriage. In fact, in that judgment, there was no evidence that the community treated them as husband and wife. But in this case, the community had treated Lakshmi as Masi Ambalam's wife. In the judgment of the Division bench referred to above, wherein Paragraph-22 has been extracted, it was held that even if the association had commenced during the life time of the first wife, but the relationship continued after the death of the first wife for long number of years and the second wife had borne children, then the presumption of marriage can definitely be taken. Here in this case, even if the marriage of the fifth defendant with Masi Ambalam was in 1946 during the lifetime of the plaintiff's mother, it continued after the first wife's death till Masi Ambalam died in 1987. All gender based discriminations, all practices which affect the dignity of women are contrary to the Constitution & Convention on Elimination of All Forms of Discrimination against Women. The status of a woman who claims she is the wife and had lived as such for 40 years cannot be reduced to a mere 'association' at the instance of the plaintiff merely because she wants the property especially when the world had labelled the fifth defendant as the wife of Masi Ambalam. To deny her status would rob her of the dignity to which she is entitled to. On the materials before me and the following and , I find that the construction placed on the evidence by the Courts below is erroneous and the second substantial question of law must be answered in favour of the appellants.

17. Genuineness of the Will:

Now we come to the Will. In the Will, the testator has not only disinherited his daughter but also his wife. Therefore, we must be convinced that it is genuine. The suspicious features in the Will are the fact that the testator did not execute the Will in his place of residence. Of course, there is no presumption that merely because a Will is executed far away from the residence, it must be false. When a Will is executed and the normal course of inheritance is deviated from, the testator may naturally want to maintain some secrecy and, therefore, execute the Will away from his residence. But we have to look at the cumulative effect of the various suspicion features referred to above.

18. D.W.3 is the attesting witness. According to him, he had been taken by Masi Ambalam to Tanjore. After seeing the doctor on the way, Masi Ambalam had told him that a Will must be written and they went to a park and there, Masi Ambalam is said to have dictated the recitals to some scribe and some one told Masi Ambalam that there should be two attesting witnesses and, therefore, Masi Ambalam went and brought one Vaithiya Nathan Iyer. Thereafter, both D.W.3 and the attesting witness saw the testator signed the Will and they saw each other attesting. Four days later, the Will was registered and again the same two persons had been taken along as witnesses during the registration. It is seen from the evidence that this witness did not know the other attesting witness. He did not know whether Masi Ambalam knew the other attesting witness. A question was asked to him as to whether there is such a person as Vaithiya Nathan Iyer. D.W.1 is the third defendant, who is the beneficiary under the Will. He had denied the suggestion that D.W.3 is a close friend. He did not know the identity of the other attesting witness. The trial Court has commented upon the non-examination of the doctor, whom testator had allegedly visited before execution of the Will. It is not necessary to examine the doctor for proof of a Will, if the evidence of the attesting witness is sufficient. In this case, the examination of the doctor is not so important in the context of the mental capacity of the testator, but it would help to corroborate the narration of events leading towards the execution of the Will as spoken to by the defendant witnesses. It is here that Exs.A.11 and A.12 assume importance. Ex.A.1 is a notice given by the first respondent/plaintiff, where she claims that she is the sole heir of her father Masi Ambalam and that certain persons are attempting to create a Will or a settlement by fraud. This is denied

allegedly by the testator by Ex.A.11, which is produced by the plaintiff, where he has said that whatever is stated in Ex.A.1 is contrary to truth and that his condition of health is good. Reference to the Will at this juncture, in Ex.A.11 would have dispelled all suspicion regarding the Will. While it is true that the doctor need not have been examined, it does create a doubt in our mind as to why Masi Ambalam went suddenly to Tanjore. According to D.W.3, the execution of the Will seems to have been more on an impulse on his return from the doctor's house. Masi Ambalam seems to have said, 'let me go and execute the Will'. This is very unnatural, since execution of a Will is not done on an impulse. It is preceded by much thought and consideration as to how the property should be bequeathed. Then again, no one appears to know as to who is this Vaithiya Nathan Iyer, who is alleged to be the second attesting witness. If the evidence of the first attesting witness inspires confidence regarding the fact that the Will has been duly executed and attested by two witnesses, then the examination of the second attesting witness may not be necessary. But when there is some doubt regarding the very existence of the second attesting witness, the propounder of the Will should dispel the suspicion of the Court by proving that in fact, such a person exists, but is not available to give evidence or produce the said second attesting witness to speak about the attestation. Nothing has been done and it is very curious that even when the testator went to have the Will registered four days later, he again picked up the same Vaithiya Nathan Iyer, whose residence itself is now in doubt and about whom no one knows anything. Was the Will duly attested i.e., attested by two witnesses?.

19. In : [2002]SUPP5SCR175 (Janki Narayan Bhoir v. Narayan Namdeo Kadam), the Supreme Court has been held as follows:

9. It is thus clear that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there

be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63.

In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will.

The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

In the present case, the examination of one attesting witness is not sufficient, since the existence of the second attesting witness Vaithiya Nathan Iyer itself is in doubt and it has not been proved by the propounder to the satisfaction of the Court.

20. It is true that a Will executed far away from the residence, deviating from the normal course of inheritance need not automatically be suspected. In this case, no explanation is given as to why the testator has given his wife, who has been with him for 30 long years, only a life interest without any right of alienation. He has no doubt given some reason as to why he is not leaving anything for his daughter. But what about the wife?. The beneficiaries are only his sister-in-law's son (bfhGe;jpahs; kfd;). This creates some doubt.

21. In , the Supreme Court held that wherever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance and again in 1962 (2) MLJ SC 27, the Supreme Court held that the mere registration of the Will is insufficient to dispel the suspicion attending the due execution and attestation of the Will.

22. When the existence of the second attesting witness was put in doubt, the propounder did not do anything to dispel the suspicion of the Court and the queries, that were raised. So, the Will has not been proved to be executed and duly attested. In these circumstances, I find that the conclusion of the Courts below cannot be interfered with and, therefore, the substantial questions of law 1 and 3 are answered against the appellants.

23. In view of my finding in favour of the appellants, with regard to the second substantial question of law, the first appellant in S.A.No.1619 of 1992 (deceased)/fifth defendant is entitled to 1/2 share. Instead of driving the parties to an other suit, the decree prayed can be modified to a preliminary decree for partition to do justice to the parties.

24. The decree of the Court below is modified as follows:

There shall be a preliminary decree for partition. The plaintiff in O.S.No.56 of 1988, the daughter of Masi Ambalam and the Legal Representatives of the fifth defendant Lakshmi shall be entitled to half share each in 'A' schedule property and half share each in half of 'B' schedule property.

25. In the result, the Second Appeals are allowed in part as above. No costs. Consequently, the connected miscellaneous petition is closed.

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