

V. Rajavelu Udayar (Died) And Ors. vs Chandrasekaran And Anr. on 13 January, 1999

Equivalent citations: (1999)2MLJ453

JUDGMENT

E. Padmanabhan, J.

1. S.A.No. 210 of 1987 is directed against the judgment and decree, dated 29.11.1985 made in A.S.No. 96 of 1982 on the file of the Sub Court, Tindivanam in confirming the judgment and decree, dated 24.4.1982 made in O.S.No. 461 of 1981 on the file of the District Munsif Court, Gingee.

2. The first defendant in the suit O.S.No. 461 of 1981 who had lost before the two courts below, is the appellant in this second appeal. The first defendant died pending the appeal and respondents 2 and 3 (defendants 2 and 3) were transposed as appellants 2 and 3 as they are recorded as the L.Rs of the sole deceased appellant by order dated 5.12.1991 in C.M.P.No. 8902 of 1991.

3. S.A.No. 211 of 1987 is directed against the judgment and decree of the learned Subordinate Judge, Tindivanam dated 29.11.1985 made in A.S.No. 76 of 1982 in confirming the judgment and decree dated 24.4.1982 made in O.S.No. 481 of 1981 on the file of the District Munsif Court, Gingee.

4. The plaintiff in O.S.No. 481 of 1981 is the appellant in S.A.No. 211 of 1987. Pending the second appeal the sole appellant (plaintiff) died and respondents 3 and 4 (defendants 3 and 4) were transposed as appellants as they are the legal representative of the deceased sole appellant.

5. As the two appeals arise out of the common judgment of the two courts below, these two second appeals are being disposed of by a common judgment. Common arguments were advanced and accordingly the appeals are being disposed of by a common judgment. At the time of admission, the following two questions of law were framed by this Court in both the appeals:

(i) Whether the conclusion of the courts below that Angammal is the legally wedded wife of Rajavelu Udayar is supported by evidence? and

(ii) Whether the courts below were right in granting a decree for partition in favour of Angammal on the footing that she is the wife of Rajavelu Udayar and also as the heir of her predeceased son, applying the provisions of Section 8 of the Hindu Succession Act, 1956?

6. Heard Mr. K. Srinivasan, learned Counsel appearing for the appellants and Mr. S.V. Jayaraman, Senior Counsel appearing for the contesting respondents.

7. The suit O.S.No. 461 of 1981 has been instituted by R. Chandrasekaran seeking the relief of partition and separate possession of his 1/4th share in the suit property and for rendition of accounts with respect to the income from 15.7.1976, till a division by metes and bounds is effected and for other incidental reliefs. According to the plaintiff, the first defendant is the father of the plaintiff as well as defendants 2 and 3. The plaintiff further claims that he is the son of the first defendant through his second wife Angammal and defendants 2 and 3 are the sons of the first defendant through his first wife Sardambal.

8. It is the further case of the plaintiff that father of Rajavelu, the first defendant in the suit and his brother Manicaswamy as well as their father were members of the joint Hindu family divided the ancestral joint family properties orally the oral partition according to the plaintiff was confirmed by a subsequent deed dated 29.3.1979. Based upon the said partition, the plaintiff claimed that the suit A Schedule properties are the joint family properties of the plaintiff and the defendants 1 to 3 and B Schedule properties were purchased from and out of the income derived from the plaintiff A Schedule.

9. It was further asserted by the plaintiff that the first defendant had no independent means to acquire the A Schedule properties. The joint family according to the plaintiff also owns C Schedule movables. The plaintiff and defendants 1 to 3 are children entitled to 1/4th share and a demand was made by notice dated 22.5.1976. The first defendant had sent a reply on 7.6.1976 disputing the plaintiff's claim, besides contending that the plaintiff's mother is not the legally wedded wife of the first defendant. The plaintiff while stating that his mother was married to one Madhava Mudaliar earlier and the said Madhava Mudaliar died during year 1943 and that in the year 1943 the plaintiff's mother was married to the first defendant as his second wife according to the law then prevailing and custom. It has been further pleaded that Angammal was not the concubine and that she is the legally wedded wife and the plaintiff is the son of the first defendant through Angammal.

10. The first defendant filed a written statement while the defendants 2 and 3 remained *exparte*. The first defendant pleaded that the plaintiff is an illegitimate son and therefore he cannot claim any share in the suit property. The first defendant further pleaded that the defendants 2 and 3 are his sons through his wife Sardambal. The first defendant further pleaded that the income from the A Schedule property was not sufficient to maintain the family and out of his separate earnings from the business carried on by him, the B-Schedule properties were acquired. Therefore neither the plaintiff nor the defendants 2 and 3 have any right or a right to claim share in B Schedule property.

11. It was further pleaded by the first defendant that the properties were purchased in the name of his concubine Angammal *benami* for his benefit as the plaintiff apprehended that his brothers who remained undivided, may claim share in his properties. It was further pleaded by the first defendant that he had purchased the properties in the name of his wife Saradambal which was later disposed of for family expenses. The first defendant pleaded that the plaintiff's mother Angammal is not his legally wedded wife. Angammal was admittedly married to one Madhava Mudaliar and she was living with him till his death. After the death of Madhava Mudaliar Angammal moved to the village Kadapanandal and lived with her mother in Kadapanandal.

12. The first defendant further pleaded that Angammal developed intimacy with the first defendant from the year 1947 and since then Angammal lived as first defendant's concubine and out of concubinage, the plaintiff and his sister Sankari were born. Angammal's status is that of a concubine only. The first defendant had purchased 35 cents of land in the name of his concubine for the maintenance of the illegitimate children and that he had educated the plaintiff upto B.Ed.

13. The first defendant also pleaded that out of animosity and at the behest of his brother Manickasamy the present suit has been filed. According to the first defendant, defendants 2 and 3 alone are entitled to 2/3rd share in the A-schedule property and in the B-Schedule property neither the plaintiff nor the defendants 2 and 3 would be entitled to any share. The first defendant also pleaded that he had incurred a debt of Rs. 8,950 and a provision has to be made with respect to the discharge of the said debt.

14. The 4th defendant Angammal mother of the plaintiff on being impleaded subsequent to the institution of the suit had filed a separate written statement pleading that her husband Madhava Mudaliar died during 1940 and hence her subsequent marriage with the first defendant is valid and legal and all the issues born to her are the legitimate children of the first defendant.

The 4th defendant further pleaded that she had purchased some properties with their own funds and they are her separate properties and they are not benami purchase made by the first defendant."

15. The 4th defendant also claimed that she is entitled to be maintained by the first defendant as she had been deserted since 3 or 4 years. The 4th defendant also claimed that her daughter Sankari has to be given in marriage and provision has to be made for marriage. The 4th defendant further pleaded that another son by name Arangesan was born and he died unmarried and therefore she is entitled to the share left by her son Arangesan. On that score, the 4th defendant claimed that she is entitled to 1/5th share in the suit properties.

16. The first defendant instituted O.S.No. 461 of 1978 on the file of the Sub Court, Tindivanam which was transferred and renumbered as O.S.No. 481 of 1981. In the said suit the plaintiff Raj avelu had prayed for the relief of permanent injunction against the first defendant Chandrasekaran (plaintiff in O.S.No. 461 of 1981) Angammal (4th defendant in O.S.No. 461 of 1981) and Thirunavukkarasu as well as Ramamurthy his two sons through his first wife. It would be sufficient to state that whatever was the defence in the suit in O.S.No. 461 of 1981 is the suit in O.S.No. 481 of 1981. Even in the second suit the defendants 2 and 3, the sons of Rajavelu Udayar through his first wife remained absent and were set exparte.

17. Chandrasekaran the plaintiff in O.S.No. 461 of 1981 had filed a written statement, which is nothing but repetition and assertion of his case as set out in the plaint in O.S.No. 461 of 1981.

18. With the consent of both the parties, the suits were consolidated. Rajavelu Udayar the plaintiff in O.S.No. 481 of 1981 will be referred to as the plaintiff and Chandrasekaran the plaintiff in O.S.No. 461 of 1981 will be referred as the defendant and the other defendants will be referred as arrayed in O.S.No. 481 of 1981 for convenience. On the side of the plaintiffs Exs.A-1 to A-18 were marked.

Rajavelu Udayar had examined himself as P.W.1 besides P.Ws.2, 3 and 4. The first defendant had examined himself as D. W. 1 besides his mother Angammal as D.W.2 and one Gurusamy as D.W.3. The first defendant marked Exs.B-1 to B-15.

19. The trial court held that Angammal the second defendant is the legally wedded wife of the plaintiff Rajavelu and that Chandrasekaran the first defendant is the legitimate son of the plaintiff Rajavelu Udayar. The trial court further held that the 4th item is the separate property of Angammal and it has not been purchased benami. It was further held that the plaintiff had not established his claim of self acquisition and therefore his claim of injunction was turned down.

20. The trial court also found that all the properties are joint family properties and that Chandrasekaran is the legitimate son of Rajavelu Udayar and that the children of the Rajavelu Udayar and Angammal will be entitled to 1/5th share and Angammal will also be entitled to 1/ 5th share on the demise of her son Arangesan. The trial court granted a decree for partition of 1/5th share as against the 1/4th share claimed by the plaintiff in O.S.No. 461 of 1981 and granted a preliminary decree for partition and separate possession while it had dismissed O.S.No. 481 of 1981.

21. Being aggrieved, by the judgment and decree Rajavelu Udayar Preferred A.S.No. 76 of 1982 against the judgment and decree in O.S.No. 481 of 1981 and A.S.No. 96 of 1982 as against the judgment and decree made in O.S.No. 491 of 1981. As already pointed out Thirunavukkarasu and Ramamurthy the sons of Rajavelu Udayar through his first wife Sardambal have remained exparte and they have also not joined their father in preferring the appeal. Chandrasekaran had not preferred any cross objections in A.S.No. 76 as well as 96 of 1982.

22. The first appellate court held that Angammal is the legally wedded wife of Rajavelu Udayar and in the light of the said finding the first appellate court confirmed the judgment and decree of the trial court in both the suits. Both the appeals were dismissed. Being aggrieved, Rajavelu Udayar has preferred both the second appeals. Pending the second appeal Rajavelu Udayar died and his two sons through his first wife Sardambal namely Thirunavukkarasu and Ramamurthy were recorded as the legal representatives and transposed as appellants.

23. The plaintiff Chandrasekaran has raised objections with respect to this and claimed that he is also the legal representative and that he should also be recorded as legal representative. However, for purpose of representing this case while noting the objections, the two sons of Rajavelu Udayar, Thirunavukkarasu and Ramamurthy have been recorded and transposed. It is to be pointed out that these two persons have not chosen to appear before the trial court or the first appellate court nor they have chosen to contest the suit. In fact the said two persons have remained exparte.

24. The learned Counsel for the appellant filed typed set of papers containing of deposition of P.Ws. 1 to 4 and D.Ws. 1 to 4 as well as a copy of the Will executed by deceased Rajavelu Udayar. Mr. S.V. Jayaraman, the learned Senior Counsel appearing for the contesting respondent contended that no interference is called for with respect to the findings of the two courts below as to the status of Angammal or Chandrasekaran the son born between Rajavelu and Angammal and that Rajavelu as well as Angammal are entitled to 1/5th share. The judgment and decree of the trial court was

confirmed by the first appellate court.

25. Though the learned Counsel for the appellants took pains and took the court through the evidence both oral and documentary, sitting in second appeal, this Court in the absence of any perversity or failure to advert and consider the material evidence is unable to interfere with the concurrent findings of the courts below. Merely because another view is possible this Court will not be justified in reappreciating the evidence as the findings of the two courts below are not being challenged as perverse nor it is the contention of the learned Counsel for the appellants that the two courts below have failed to advert and consider any material portion of the evidence.

26. The two courts below have concurrently found that Rajavelu Udayar had married Angammal and their marriage is valid as it had been celebrated prior to the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949. The learned Counsel for the appellant persuaded this Court to hold that the marriage between Rajavelu Udayar and Angammal was after the coming into force of the said Act. In this respect it has been rightly pointed out by the counsel for the contesting respondents that sufficient oral evidence has been let in to establish that Rajavelu Udayar married Angammal prior to the commencement of the said enactment.

has a significant meaning.

29. Rajavelu Udayar as P.W. 1 to a larger extent admitted the status of Chandrasekaran. The documents namely Exs.B-4, B-5, B-8 and B-9 would show that Rajavelu had declared Angammal as his legally wedded wife and also admitted that Chandrasekaran is born out of such wedlock. This has been as late as 16.1.1978. The deed of purchase in favour of Angammal would also show that she has been described as the wife of Rajavelu Udayar. Rajavelu Udayar had signed the S.S.L.C. book first page of Sankari, his daughter through Angammal as seen from Ex.B-2. The birth extract of Chandrasekaran Ex.B-3 dated 7.4.1954 would also disclose the parentage of Chandrasekaran. Even prior to that an elder son was born to Angammal and Rajavelu and that has been established and accepted by the court below.

30. Exs.B-8 and B-9 as already pointed out definitely establish that Angammal is the second wife and Chandrasekaran is the son born through the second wife. At the risk of repetition it has to be pointed out that Thirunavukkarasu and Ramamurthy the two sons of Rajavelu Udayar had not challenged the status of neither Angammal nor Chandrasekaran. Thus on a consideration of the material evidence and accepting the evidence of P.Ws., the two courts below have found that the marriage between Angammal and Rajavelu was prior to the commencement of the Tamil Nadu Act VI of 1949 and Chandrasekaran is the legitimate son born out of lawful wedlock between Rajavelu and Angammal. This Court is not inclined to interfere with the said findings of the two courts below.

31. The learned Counsel for the appellant sought to rely upon the decision of the Apex Court reported in Surjit Kaur v. Garija Singh 1994 S.C. 135, Shantram v. Dagubai , P.E.K. Kalliani Amma v. K. Devi , Perumal Gounder v. Pachaiyappan , Ramayammal v. Muthammal (1914)2 M.L.J. 34, in support of his contention that the marriage between Rajavelu Udayar and Angammal is void as according to the learned Counsel for the marriage took place after the commencement of the Tamil

Nadu VI of 1949.

32. On the evidence the two courts below have held that the marriage between (sic) Udayar and Angammal was prior to the commencement of the Act and therefore it is valid. That being a factual finding, the various judgments referred to by the counsel for the appellant is not necessary to refer to the above pronouncements in detail. It would be sufficient to hold that the marriage between Rajavelu Udayar and Angammal is valid as it had been performed prior to the commencement of the Tamil Nadu Act VI of 1949 and the two courts below have chosen to accept the oral evidence with respect to the celebration of marriage. Sitting in second appeal this Court is not inclined to interfere with the said findings. As already pointed out the conduct of the parties, acceptance of the status of Angammal and Chandrasekaran by all the family members as well as by the Society as observed by the first appellate court, definitely advances the claim of Chandrasekaran and Angammal respectively being the legitimate son born out of the lawfully wedlock between Rajavelu and Angammal.

33. The first question of law has to be answered against the appellant as the marriage between Angammal and the plaintiff Rajavelu Udayar is valid as it was conducted prior to the Tamil Nadu Act VI of 1949. There is no doubt that Angammal previously married Madhava Mudaliar who died long ago and after the death of Madhava Mudaliar Rajavelu Udayar married Angammal as his second wife prior to commencement of Tamil Nadu Act VI of 1949.

34. It is not the contention of the learned Counsel for the appellant that Rajavelu Udayar could not lawfully marry Angammal, a widow on the date of his second marriage. The first question of law has to be answered against the appellant as it has been already found that Angammal a widow had married Rajavelu Udayar prior to the commencement of Madras (Bigamy Prevention and Divorce) Act, 1949 and the marriage has been proved by letting in oral and documentary evidence.

35. Rajavelu Udayar, the plaintiff in the present suit and Angammal have legally begotten not only Chandrasekaran but also another son Arangesan and a daughter Sankari. Once the marriage between Rajavelu Udayar and Angammal is held to be valid it follows automatically on the death of Arangesan his mother Angammal succeeds to the share left by Arangesan. In fact the learned Counsel for the appellant did not advance any argument with respect to the second contention. The two substantial questions of law are answered against the appellants.

36. Both the second appeals fail and they are dismissed, but without costs.

37. C.M.P.No. 18474 of 1998 has been taken out by the appellant for reception of the Will said to have been executed by Rajavelu Udayar as additional evidence in this second appeal. The petition has been filed on 8th December, 1998 just before the hearing of the appeals. As already pointed out the two sons of Rajavelu have been transposed after the death of Rajavelu Udayar. They are just representing the said estate of Rajavelu Udayar for the purpose of appeal.

38. This application is for reception of the Will said to have been executed by Rajavelu Udayar as additional evidence. As the document is sought to be filed for the first time just at the time of second

appeal at the belated stage no findings could be called for from the courts below. Further, being the last testament and Will it requires proof. For the purpose of deciding the appeals the additional evidence which is sought to be filed is neither essential nor it is required. Hence this application is rejected and liberty is given to the petitioners to produce the Will in the final decree proceedings to claim the share of Rajavelu Udayar and it would be open to the parties to prove or challenge the Will of Rajavelu Udayar and the court below shall decide the truth or genuineness of the Will and grant consequential relief according to law. In the circumstances, C.M.P. 18474 of 1998 is dismissed the petitioner in this C.M.P. is permitted to take back the original will produced.

39. In the result, both the second appeals fail and they are dismissed, but without costs.