



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on :12.06.2023

Pronounced on : 13.07.2023

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THE HONOURABLE MRS.JUSTICE N.MALA

A.S.(MD)No.91 of 2017 and CMP.(MD).No.5643 of 2018

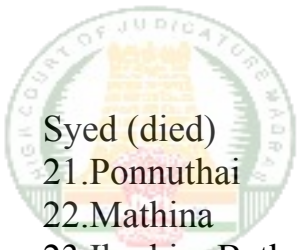
1.Abdulla
2.Noorjahan

...Appellants

Vs.

Ismail Pathuma (died)
1.Pathumuthu Johara
Mohammed Anifa (died)
2.Seeni Mathar (died)
3.Seeni Pitchai (died)
4.M.Majahar Begam
5.M.Thoulath Beebi
6.R.Syed Raviyath
7.S.Shahira Banu
8.M.Anish Fathima

Johra Beevi (died)
9.Sreenivasan
10.Ayyavu Ambalam
11.Murugan
Seeni Mathar (died)
12.Bhadhur Raja
Sethu (died)
Alagar (died)
13.Sekar
14.Parthiban
15.Sahul Hameed
Sulthan (Died)
16.Raghunathan
Mamoodha (died)
17.Rajkumar
18.Ponnusamy
19.Chellammal
Saithoon (died)
20.Raviath Beevi
Raja Mohammed (Exonerated)



Syed (died)
21.Ponnuthai
22.Mathina
23.Ibrahim Bathu
24.Mohamed Ali Jinnah
25.Murugan
N.S.Minnal Kabiba (died)
26.H.Saithoon Beevi
27.Noorjahan
28.E.Megaraj
29.N.S.Saipudeen @ Athavu
30.Samsudeen (Died)
31.Kadhar Mydeen
32.A.Samsudheen
33.Zaheer Husain
34.Mumtaj
35.Mariam Beevi
36.Minor Ramzan
37.Minor Mamsal
Minor Respondents 36 and 37 are represented through their Court Guardian Advocate
Tr.Senthil

38.Mansoor Rani
39.Asha Pirthosh
40.Amrin Birose
41.Faritha

Respondents 38 to 41 are brought on record as Lrs. of the deceased 3rd respondent vide Court order dated 25.01.2022 made in CMP(MD).No.7187/21 in AS(MD).No.91/2017

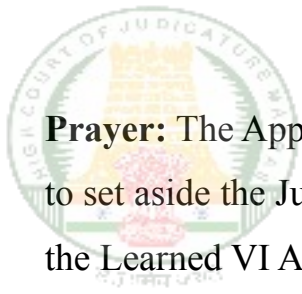
42.Kamila
43.Nazeema
44.Mohammed Illiyas

Respondents 42 to 44 are brought on record as Lrs. of the deceased 2nd respondent vide Court order dated 28.10.2022 made in CMP(MD).No.2599 of 2022 in AS(MD).No.91 of 2017

45.Abdul Roja
46.Riswana Begam
47.Mohamed Rila
48.Raikana

...Respondents

Respondents 45 to 48 are brought on record as Lrs. of the deceased 30th respondent vide Court order dated 28.10.2022 made in CMP(MD).No.8895 of 2022 in AS(MD).No.91 of 2017



Prayer: The Appeal Suit is filed under Order 41 Rules 1 and 2 r/w. Section 96 of CPC, praying to set aside the Judgment and Decree dated 05.12.2016 made in O.S.No.202/2004 on the file of the Learned VI Additional District Court, Madurai.

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For Appellants	: Mr.M.V.Venkatashesan Senior Advocate for Mr.S.Vellaisamy.
For R1	: Minor
For RR 2, 3 and 30	: Died
For RR 4 to 8 and 38 to 44	: Mr.V.Ragavachari Senior Advocate for Mr.S.A.Ajmal Khan
For R-9	: Mr.K.Prabhakar
For RR 10 to 25 & R-29 and RR 32 to 37	: No appearance
For RR 26 to 28	: Mr.Babu Rajendran
For R31 and RR 45 to 48	: Mr.P.Pethu Rajesh

JUDGMENT

This case raises interesting questions on Muslim law relating to Marriage, conversion, legitimacy and acknowledgment. Marriage at the Micro level (i.e) domestic level is the reflection of the relationship between parties and the legal incidents attached thereto. But at the Macro level it is an institution that forms the base of the family and the society.

2. Before embarking on the factual matrix of the case, I deem it fit to discuss the legal issues first. The concept of marriage, interfaith marriage, legitimacy and acknowledgment under Mohammedan law is discussed as a prelude to the legal issues arising therefrom .



3. Marriage in Mohammedan law is a contract which has for its object the procreation and the legalising of children,.Principles of Mohammedan law by Mulla- 20th Edn.

4. The Supreme Court of Pakistan in Khurshid Bibi Vs. Muhammad Amin, held that “among muslims, Marriage is not a sacrament, but is in the nature of civil contract”. The said Judgment speaks of Marriage to be in a nature of civil contract, but not purely a civil contract. Therefore as a Muslim marriage is in the nature of a civil contract, the ingredients of a valid contract like capacity to contract, proposal, acceptance and witnesses are necessary (see 251, 252)

5. There are three types of Marriages under Mohammedan law. They are Valid (Sahih), irregular (Fasid) and Void (Batil). Valid marriage is one which confirms to all the legal formalities and void marriage is one which has no legal sanctity and is still born.

Irregular (Fasid) marriage: (243 to 259)

The following marriages are considered as Irregular (Fasid) Marriage.

- 1.Marriage without witnesses.
- 2.Number of wives 5
- 3.Plurality of husbands
- 4.With a woman undergoing Iddat.
- 5.Marriage between Sunni and Shia.
- 6.Difference of Religion.

Effects of Irregular Marriage: (267)

<https://www.mhco.judiciary.gov.in/judis> An irregular Marriage may be terminated either before or after consummation by either



party, by words forming an intention to separate. An irregular Marriage has no legal effect before consummation. If consummation takes place then:-

1) Wife is entitled to Dower. 2) She is bound to observe Iddat. 3) The issue of the Marriage is legitimate. But an irregular Marriage though consummated does not create mutual rights of inheritance between husband and wife.

When there is no direct proof of marriage, marriage can be presumed. (s.268). The presumption of marriage arises in the following situations.

1. Prolonged and continual cohabitation as Man and Wife.
2. Acknowledgment of Paternity by the man subject to the fulfillment of condition of a valid acknowledgment.
3. Acknowledgment by the man of the woman as his wife.

These are the basic legal concepts which are to be borne in mind for the examination of the facts and the issues involved in the case.

Backdrop of facts:

The facts of the case succinctly stated are as follows:

6. The suit was originally filed by the 1st plaintiff against 15 defendants of whom defendants 4 to 15 were tenants of various items of suit properties. In the course of the trial several parties died and their legal heirs were impleaded. The suit property originally had one schedule, but by an amendment the 2nd schedule of property was added. The plaintiffs case was that the suit properties were the properties of her deceased brother, Mohammed Mathar. Mohammed Mathar got some of the suit properties by succession and some others were purchased by him. Mohammed Mathar died issueless on 20.08.2001, leaving the 1st plaintiff



and the 1st defendant as his only legal heirs. The 1st plaintiff is the sister and the 1st defendant is the widow of Mohammed Mathar. According to the plaintiff the 2nd and 3rd defendants were the issues of one Mangala Devi, who joined the dance troupe of Samsudeen Rowthar, the father of the 1st plaintiff. The plaintiff stated that the said Mangala Devi was a dancer by profession and was kept as a mistress by her father. The plaintiffs case was that Samsudeen Rowthar did not marry Mangala Devi and so the defendants 2 and 3 were not the legitimate children of Samsudeen Rowthar. She further stated that Mangala Devi was a Hindu, lived and died as a Hindu without any form of marriage with Samsudeen. The plaintiff referred to an earlier suit in O.S.No.461/67, filed by the step sister of Samsudeen Rowthar for partition which went upto the Hon'ble High Court in S.A.No.2252/74. The plaintiff referred to the said case only to show that the legitimacy of defendants 2 and 3 was disputed by Mohammed Mathar in that suit itself. The plaintiff therefore claimed 3/4th shares in the suit properties. The plaint narrates other facts relating to tenancy of the defendants 4 to 15 but, in my view the same need not be traversed as the core issue in the appeal is as to the entitlement of defendants 2 to 3 to the suit properties.

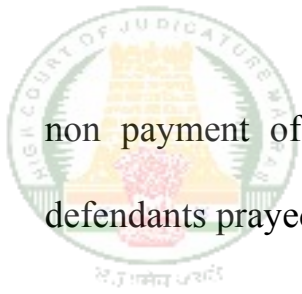
7. During the pendency of the suit the 1st defendant died and the 16th defendant who was her sister was added as her legal heir. The 16th defendant filed a counter claim in the suit claiming 1/4th share in Sub item (ii) of item 4 of the 1st schedule. According to the 16th defendant the said item of property was settled by Mohammed Rowthar to his wife vide settlement Deed dated 20.01.1986. As the 16th defendant was the only legal heir of the 1st defendant, she claimed exclusive right to the said property by way of the counter claim. During the pendency of the suit even the 16th defendant died and defendants 34 and 35 were impleaded



as her legal heirs. They claimed the share of 16th defendant vide HIBA dated 03.09.2010.

8. The 40th and 41st defendants filed a written statement stating that they had no interest in the interse title dispute between the legal heirs of Mohammed Mathar. They submitted to abide by any judgment and decree of the Hon'ble Court.

9. The suit was mainly contested by the defendants 2 and 3. The written statement was filed by the 2nd defendant and adopted by the 3rd defendant. The defendants denied that the suit properties belonged exclusively to Mohammed Mathar. The defendants stated that the suit properties originally belonged to Mohammed Ismail Rowther and his two sons Samsudeen Rowther and Kader Moideen Rowthar and that Mohammed Mathar had no share or ownership in the suit properties. The defendants specifically denied that their mother Mangala Devi was not married to Samsudeen Rowthar, that they were illegitimate children of Samsudeen Rowthar and as such not entitled to the suit properties. The defendants claimed that they were the legal heirs of the deceased Samsudeen Rowthar and as such entitled to claim all rights as legitimate children under Mohammedan Law. As regards the pleadings in the earlier suit in O.S.No. 461/67, the defendants claimed that they had no knowledge of the same as the 2nd defendant was a minor at that time. The 2nd defendant claimed exclusive ownership, share, enjoyment and possession of the suit properties. The 2nd defendant took a specific stand of a custom prevailing in the family, wherein the daughters could not own and maintain properties of the family. The defendants 2 and 3 filed two additional written statements raising among other contentions, the maintainability of the suit on the ground of non-joinder of necessary party, no cause of action,



non payment of correct Court fee and partial partition. On these and other grounds the defendants prayed for the dismissal of the suit.

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10. The trial Court framed the following issues.

1. Whether the plaintiff is entitled to preliminary decree for partition of her 3/4 share in the suit properties?
2. Whether the plaintiff is entitled to mesne profits from the suit properties?
3. Whether the plaintiff is entitled to decree for permanent injunction?
4. To what relief?

11. In the trial Court the plaintiff examined 10 witnesses and marked Ex.A.1 to A.93. The 1st defendant examined himself as D.W.1 and marked Exs.B.1 to B.20. The trial Court on the basis of the pleadings and the evidence on record found that there was no marriage between Mangala Devi and Samsudeen, that the defendants 2 and 3 were not the legitimate issues of Samsudeen, and that the defendants could not claim a right in the suit properties as legal heirs of Samsudeen. The trial Court further held that Mangala Devi did not convert to Islam, that the presumption of marriage through long co-habitation could not be invoked as the marriage between a Muslim and a Hindu woman was void and that the suit was not bad for non-joinder of necessary party. The trial Court in the light of the above findings concluded that the suit properties were enjoyed by Mohammed Mathar as his exclusive properties and as his legal heirs the 1st plaintiff and the 1st defendant alone were entitled to the same. The trial Court on the basis of an endorsement made by the plaintiff that she did not claim any relief as regards the



suit sub-item (ii) item 4 of Schedule A, deleted the same from partition.

12. Aggrieved by the judgment and decree of the trial Court, the defendants 2 and 3 have filed the above appeal.

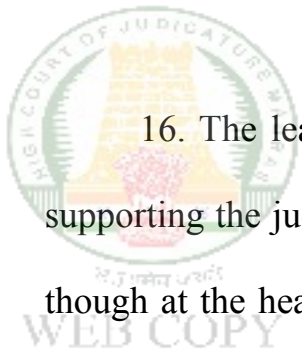
13. Voluminous oral and documentary evidences were placed on record and relied on by the learned counsels. I have sieved through the said evidence and I have confined the reference to the evidence only so far as they are relevant to the points raised in the appeal.

14. The learned counsel for the appellant raised the following points.

That trial Court erred in thinking:

1. That the properties belonged exclusively to Mohammed Mathar.
2. Mangala Devi's marriage with Samsudeen Rowthar was not proved.
3. Mangala Devi did not convert to Islam.
4. Marriage by presumption arising out of continuous co-habitation could not be raised as Mangala Devi did not embrace Islam and
5. Marriage between a Muslim and an idolatress was void under Mohammedan law.
6. That the trial Court erred in its appreciation of the oral and documentary evidence on record.

15. The learned counsel relied on some judgments in support of his case. The said judgments will be referred to in the course of the discussion.



16. The learned counsel for the respondents on the other hand filed written arguments, supporting the judgment of the trial Court. Several issues were raised in the written arguments, though at the hearing the same was confined to the right of the defendants 2 and 3 to claim a right in the suit property as legitimate children of Samsudeen.

17. The learned counsel for the respondents submitted that the case involves determination of 3 issues, which he abbreviated as C.A.M (i.e) Conversion, Acknowledgment and Marriage. The learned counsel submitted that there was absolutely no evidence on the three and hence the findings of the trial Court on Conversion, Acknowledgment and Marriage was valid and did not call for any interference in the appeal.

18. I have heard both the learned counsels and I have perused the materials placed on records, including the judgments and written arguments.

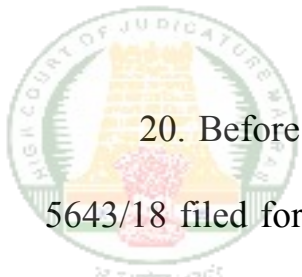
19. The points that arise for determination in this appeal are:

1. Whether the marriage between Samsudeen and Mangala Devi was proved, if not in the absence of direct evidence on the marriage of Samsudeen Rowthar with Mangala Devi, whether presumption of marriage by long co-habitation could be invoked.

2. Whether Mangala Devi converted to Islam, if not whether the marriage of Samsudeen Rowthar with Mangala Devi is void or irregular marriage.

3. Whether in the absence of acknowledgment of Paternity and legitimation of defendants 2 and 3 by Samsudeen Rowthar the defendants 2 and 3 could claim right in the suit properties.

4. To what relief are the parties entitled to.



20. Before launching on a discussion on the points arising in appeal the CMI (JIL), NO. 5643/18 filed for receipt of additional evidence is taken up first. The appellants have filed the CMP for receipt of the following documents as additional evidence.

List of

Documents

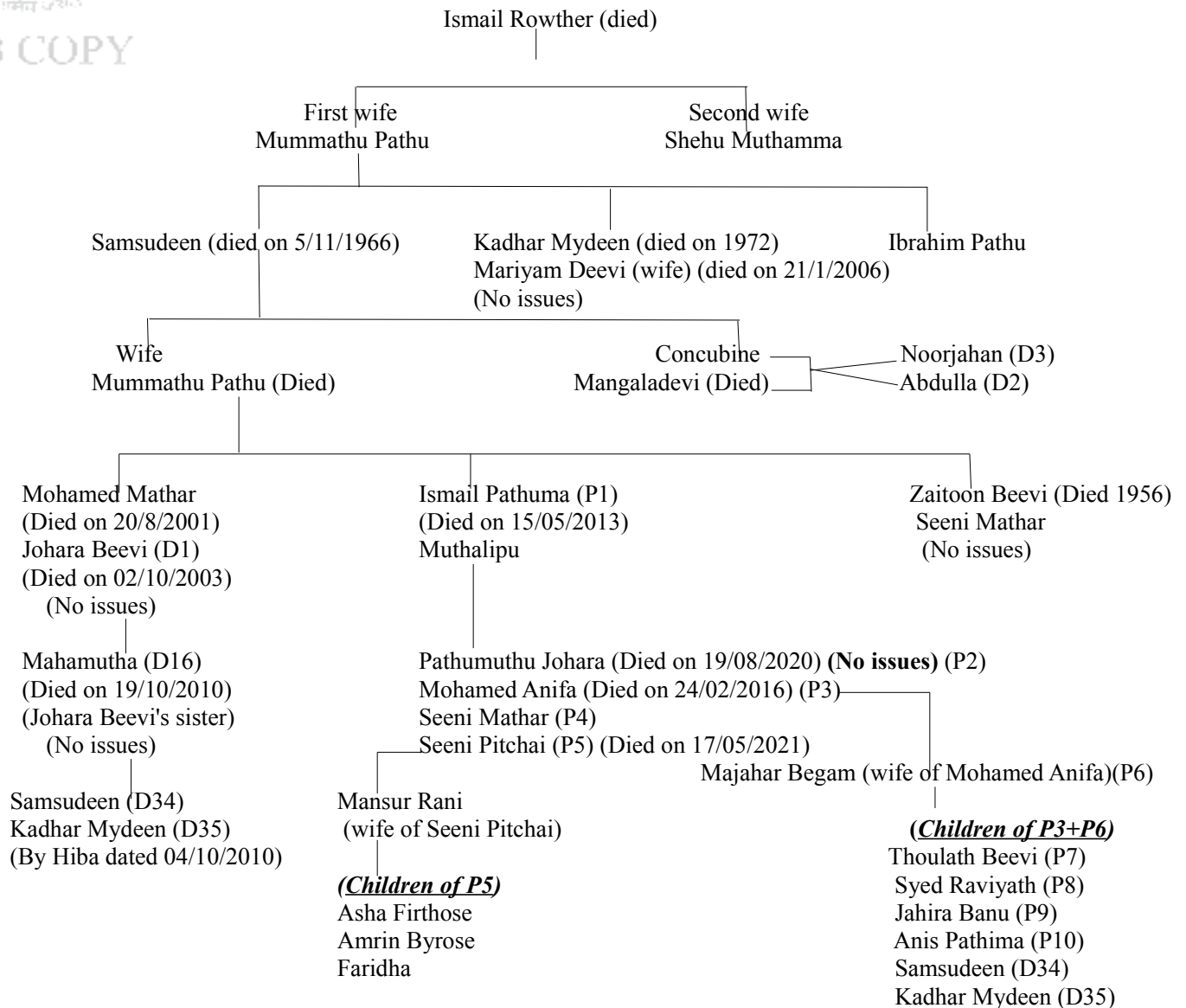
S.No	Date	Description	Remarks
1	22.06.1960	Nikha (marriage certificate issued by Jamia Masjid to 2 nd petitioner	Certified copy
2	17.05.1974	S.S.L.C. Certificate of 1 st petitioner	Original
3	16.03.1982	Sale Deed executed by petitioners Registered as Document No.369	Certified copy
4	02.07.1999	Community certificate of the 1 st petitioner	Original
5	26.08.2001	Nikha certificate issued in favour of 1 st petitioner	Certified copy
6	25.10.2001	Legal heir certificate issued by Pallivasal Melur	Original
7	15.12.2001	Burial certificate of the mother of the petitioners issued by Pallivasal Melur	Original
8	20.12.2002	Show cause notice issued by Joint Registrar of Co-operative Societies, Madurai to the petitioners	Original
9	31.01.2007	Final order passed by Joint Registrar of Co-operative Societies, Madurai in the proceedings	Original
10	07.06.2013	Final order in C.C.No. 203/03 in which 1 st petitioner was respondent	Certified copy

21. The respondents filed counter stating that the documents have no legal validity and they were not pleaded in the written statement. I have gone through the entire evidence on record and I am of the view that the additional evidence sought to be filed will assist the Court in pronouncing the judgment. Moreover no prejudice would be caused to the respondents as the documents are either official records or those maintained in the course of official functioning. Therefore the petition to receive additional evidence is allowed.



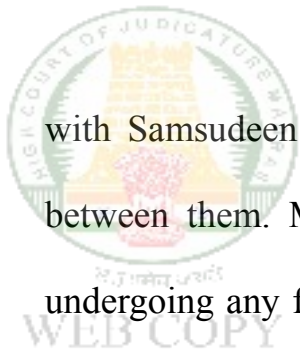
22. The issues 1 to 3 are taken up together as they are interwoven

The genealogy of the parites is given below:



23. The genealogy is not disputed. The properties according to the plaintiff belong to

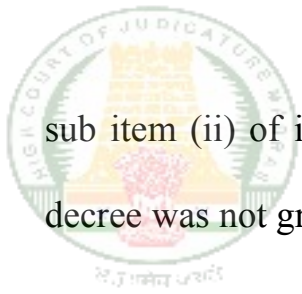
Mohammed Mathar either as his self acquisition or through succession to Mohhamad Ismail, Samsudeen Rowthar and Kader Moideen. It is the specific case of the plaintiff that the defendants 2 and 3 are not the legitimate children of her father Samsudeen Rowthar. According to the plaintiff, Mangala Devi was a dancer, who joined her father's dance troupe which used to



with Samsudeen Rowthar and so he kept her as his mistress. There was no legal marriage between them. Mangala Devi was a hindu, lived as a hindu and died as a hindu without undergoing any form of marriage with Samsudeen Rowthar. In an earlier suit filed by the step sister of Samsudeen Rowthar, the defendants mother as also the defendants 2 and 3 were shown as the wife and issues of Samsudeen Rowther, but her late brother Mohammed Mather denied the same in the written statement. The plaintiff pleaded that as Samsudeen Rowthar did not marry, Mangala Devi, the defendants 2 and 3 were not his legitimate heirs and hence not entitled to the suit properties. According to the plaintiff, she and the 1st defendant alone were the legal heirs of Mohammed Mathar, who died on 28.08.2001 and as such they were both entitled to 3/4th and 1/4th shares in the suit properties respectively. There were other issues raised regarding tenancy etc but they are not necessary for settling the present controversy.

24. The defendants 2 and 3 denied the contention of the plaintiff that their mother, Mangala Devi, was not married to Samsudeen Rowthar and that they were not the legitimate children of Samsudeen Rowthar. The defendants denied knowledge of the suit in O.S.No. 461/67 filed by Samsudeen Rowthar's step sister for partition. The defendants claimed a family custom whereunder the female members could not own or maintain properties. The defendants further denied that the properties belonged exclusively to Mohammed Mather. On these and other grounds the defendants prayed for dismissal of the suit.

25. As far as the claim of the defendants 34 and 35, who were brought on record as the legal heirs of D.16 is concerned, the plaintiff endorsed that she was not claiming any share in



sub item (ii) of item 4 of the 'A' Schedule and hence the said item was deleted and a particular decree was not granted for the said item of property.

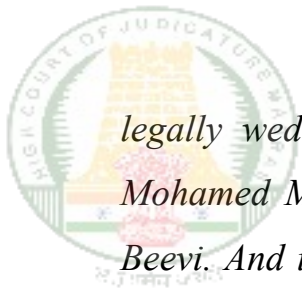
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26. In the written arguments of the respondents, the respondents have stated that absolutely no evidence was filed to prove the marriage of Samsudeen Rowthar with Mangala Devi and even in the written statement there was no specific or emphatic denial of the plaintiff allegations. I don't understand the need for emphatic denial, specific denial is mandate of law, but emphatic denial is not a requirement. The pleadings of the plaintiff with respect to Mangala Devi's marriage are raised in para 5. The said para 5 is as follows:

*“5. The father of Mohammed Mathar was one Samsudeen Rowther. The said Samsudeen Rowther died in the year 1966. He had only one legally wedded wife namely Mohammed Patthu. Through her he had one son, namely Mohammed Mathar and two daughters Ismail pathuma, the *1st Plaintiff and Jaithun Beevi. Mohammed Mathar and Jaithun Beevi died. Jaithun Beevi died issueless more than 30 years ago. Samsudeen Rowther during his life time was conducting Bombay Shows, a dance programme in the area. During that period he was keeping on Mangala Devi, a Hindu woman and a dancer by profession as concubine. The second and third Defendants were born to him through Mangala Devi. There was no legal marriage between Mangala Devi and Samsudeen Rowther. Mangala Devi, being a Hindu, lived as a Hindu and died as a Hindu without any form of marriage with Samsudeen Rowther”.*

27. The defendants 1 and 2 in their written statement in para's 5 and 7 replied as follows:

“5. It is utter false to allege that the late Samsudeen Rawther, had only one



legally wedded wife namely Mohamed Pathu and through her he had one son Mohamed Madhar and Two daughters Ismail Pathu, the Plaintiff and one Jaithun Beevi. And it is false to allege that Samsudeen Rawther during his life time, he was conducting Bombay shows a dance program in the area and during that period he was keeping one Mangala Devi, a Hindu Women and a dancer by profession as concubine. And it is further false to allege that this second and third defendants were born to him through Mangala Devi and there was no legal marriage between Mangala Devi and Samsudeen Rawther and it is false to allege that Mangala Devi being a Hindu, lived as a Hindu and died as a Hindu without any form of marriage with Samsudeen Rawther. The plaintiff has vehemently and falsely stated for the purpose of this case by hiding all the real facts of the legal marriage between the late Samsudeen Rawther and his Second wife Fathuma Beevi and also this second defendant and the third defendant are the legal and legitimate children born to the late Samsudeen Rawther and his second wife Fathuma Beevi. The plaintiff has to strictly prove the allegations alleged in para no. 5 of the plaint totally.

7. It is false to allege that though this and 3rd defendants are professing Islam Religion, they cannot claim as the legal to the deceased Mohamed Madhar and his estates. This defendant and the third defendants are the legal heirs of the deceased Samsudeen Rawther and they can claim all the rights as a legitimate child under Mohamedan Law.....”

28. Under the provisions of order 8 Rule 4 of CPC, failure to specifically deny a fact alleged in the plaint amounts to admission. That is general denial of a fact alleged will not suffice. It is to be noted that denial apart from being general denial, can be either specific, inferred and can also be non-admission of the fact alleged. If the pleadings of the defendants 1 and 2 are observed it is clear that the denial is not general but specific to the effect that the plaintiffs allegations are not admitted. Hence the submission in this regard is without force.



29. It is true that there is no direct documentary evidence of the marriage of Samsudeen with Mangala Devi. The defendant addressed two petitions to the Mutawalli, Melur Mukyudeen Andavar Periya Palli seeking information regarding the marriage certificates of the members of his family named therein. Another petition was sent through registered post for a certificate, certifying that the records from 1949 to 1959 were missing in their records. A petition was also made by the plaintiff to the same Pallivasal for a certificate regarding the marriage of his father, if any, with any woman except his mother. To the plaintiff's petition a reply was sent on 02.02.1909 under Ex.A.66 stating that on a perusal of records from 1928 to 1970, it was seen that no registration as claimed by the plaintiff was recorded. In this regard P.W.6, the Hajiyar/ Secretary of the Pallivasal was examined and his evidence is as follows:

" வா.சா.ஆ.6 அவர் இதுபற்றி எங்களிடம் கொடுத்த மனு ஆகும். அதற்கு நாங்கள் பதில் அனுப்பினோம். அந்த பதில்தான் தற்சமயம் என்னிடம் காண்பிக்கப்படும் வா.சா.ஆ.66 ஆகும். இந்த வழக்கில் பிரதிவாதியான அப்துல்லா என்பவரும் மனு கொடுத்திருந்தார். அவர் இரண்டு மனு கொடுத்திருந்தார். முதல்மனு 13.08.2009 அன்று செயலாளர் ஜமாத் என்று என்னிடம் கொடுத்திருந்தார். அதன்பின் பதிவுத்தபால் மூலமாக ஜமாத்தின் தலைவருக்கு ஒருமனு அனுப்பியிருந்தார். அவை வா.சா.ஆ.81 மற்றும் 82 ஆகும். அங்களுடைய பள்ளிவாசல் நிக்கா பதிவு புத்தகத்தில் அப்துல்லாவின் தாயாருக்கும் சம்கதீன் ராவுத்தருக்கும் திருமணம் நடந்ததாக பதிவு இல்லை.

1928 முதல் 1970 வரை உள்ள திருமண பதிவுப் புத்தகங்கள்



எங்கள் ஜமாத்தில் உள்ளதை இந்த நீதிமன்றத்தில் தாக்கல் செய்ய முடியுமா என்றால் அந்த பதிவேடுகளில் சில பதிவேடுகள் கறையான் அரித்துள்ளது. அத்துடன் என்னால் அந்த புத்தகங்களை ஆஜர்படுத்த முடியும். அந்த பதிவு புத்தகங்களை நீதிமன்றத்தில் ஆஜர்படுத்தாததற்கு காரணம் சம்கதீன் ராவுத்தருக்கும், 2ம் பிரதிவாதியின் தாயாருக்கும் திருமணம் நடந்தது. அதில் பதியப்பட்டுள்ளது என்பதால் தான் என்றால் சரியல்ல. நான் 1928 முதல் 70 வரை உள்ள நிக்கா பதிவேடுகளை பார்வையிட்டதாக சொல்லிய தகவல் பொய் என்றால் சரியல்ல. நான் இங்கு செயலாளராக பணியாற்றுவதற்கு முன்பு சென்னை, மலேசியாவில் ஆலிம் ஆக பணியாற்றினேன். என்னுடைய பிறந்த வருடம் 1973, நான் பறிப்பதற்கு முன்பு இந்த ஜமாத்தில் நடந்த குளறுபடிகள் விவகாரங்கள் பற்றி எனக்கு தெரியாது. பிச்சைகனி என்ற வாத்தியாரை தெரியும். அவர் ஜமாத் நிர்வாகத்தில் இருந்தார் என்று நான் கேள்விப்படவில்லை. அது பற்றி தெரியாது. இறந்துபோன முகமது மதார் ஜமாத் நிர்வாகத்தில் இருந்தார் என்பது பற்றி தெரியாது. வாதி, பிரதிவாதிகள் குடும்பத்தில் பிரச்சனைகள் 1967ல் இருந்து நடந்து வருகிறது என்றால் தெரியாது."

30. The evidence of P.W.6 on the records of the Pallivasal does not invoke confidence. It is clear that Ex.A.66. was issued without perusing the records. Be that as it may, it is clear that there is no documentary evidence regarding Samsudeen and Mangala Devi's marriage.

31. The learned counsel for the appellant submitted that the evidence of the plaintiff and the conduct of the parties would suffice to prove that Samsudeen Rowthar Married Mangala



Devi and through such marriage begot defendants 2 and 3.

32. The plaintiff was examined as P.W.1 and she deposed in her cross examination as follows:

03.09.2029-2 முதல் 15 பிரதிவாதிகள் தரப்பு கு.வி.

"என் சித்தப்பா என் தந்தையுடன் தான் வியாபாரத்திற்கு செல்வார். என் தந்தை பாம்பே சேவிற்காக ஒரு நடிகையை அழைத்து வந்தார் என்றால் சரிதான். அவருடன் குடும்பம் நடத்தி வந்தார் என்றால் சரிதான். ஊரில் என் தந்தையை ஒரு மாதிரி தப்பாக பேச ஆரம்பித்தார்கள். எனக்கும் அவர்மீது கோபம் ஏற்பட்டது என்றால் சரிதான். அவர் மேலூர் காத்தா பிள்ளை தெருவில் வாழ்ந்து வந்தார்கள். வேறு பல இடங்களிலும் இருந்து வந்தார்கள் என்றால் சரிதான். எனது தந்தை என்னுடைய சகோதரர் மற்றும் சித்தப்பா ஆகியோர் மற்றவர்கள் தவறாக பேசக்கூடாது என்று அந்த பெண்ணும் முறையாக திருமணத்தை முறைப்படுத்திக் கொண்டார்கள் என்றால் எனக்கு ஞாபகம் இல்லை. மேலூர் டவுன் காதியார் அவர்களும் என் தந்தைக்கும், அந்த பெண்ணுக்கும் இடையே மேலூர் மடவுன் காதியார் என் சித்தப்பாமற்றும் என் சகோதரர்களும் இருந்து திருமணம் செய்து வைத்தார்களா என்றால் அது பற்றி எனக்கு தெரியாது. அதன் பிறகு எனது தந்தையையும் அவருடைய இரண்டாவது திருமணம் செய்து வைத்ததாக சொல்லப்படும் ஷை பெண்ணையும் என் தாயார் வீட்டில் வைத்து வாழ என் தாயார் சம்மதிக்கவில்லை. எனது தாயார் தகப்பனாரும் என் தகப்பனாருடைய வீட்டிற்கு 2ம் மனைவி வந்தபோது என் தாயார் கோபித்துக் கொண்டு என் வீட்டிற்கு வந்துவிட்டார் என்றால் சரிதான். எனது தந்தை இறந்த பிறகு குடும்பத்தை நிர்வாகம் செய்ய என் அண்ணன் முகமது மதார் தான் இருந்தார்



என்றால் சரிதான். எனது தந்தை இறந்த பிறகு என் சகோதரர் அவரது மனைவி அவருடைய மாமியார் சீனியம்மாள். எனது சிறிய தாயாரின் மகன் காதர் மைதீன் அவரது மனைவி எல்லோரும் ஒன்றாக குடும்பம் நடத்தி வந்தோம் என்றால் என் சிறிய தாயார் என்று யாரும் இல்லை. இந்த 2வது என் தந்தைக்கு திருமணம் செய்விக்கப்பட்ட பெண் இல்லை. அந்த பெண்மணி தாத்தநம் பிள்ளை தெரு என தந்தைக்கும் 2வதாக திருமணம் செய்வித்ததாக கூறப்படும் பெண் பெயர் மங்கலாதேவி திருமணத்திற்கு பின் அந்த பெண் பெயர் பாத்திமா பீபி என்று பெயர் வைக்கப்பட்டதா என்றால் அது எனக்கு தெரியாது. அந்த பெண்ணுடன் கண்ணன் என்ற அப்துல் கரீமும் இந்த வீட்டில் அந்த பெண்ணுடன் இருந்து வந்தார் என்றால் சரிதான். அந்த பெண்ணுக்கு இதனை பிள்ளைகள் பிறந்தார்கள் என்று எனக்க தெரியாது. அந்த பாத்திமாவுக்கு அப்துல்லா 2ம் பிரதிவாதி பிறந்தவர் என்றால் சரிதான். நூர்ஜகான் பீபி 3ம் பிரதிவாதியும் அவருக்கு பிறந்தவர் என்றால் சரிதான்...."

33. It is very strange that when the plaintiffs case was that there was "No marriage" between her father and Mangala Devi, instead of emphatically denying the suggestion that Mangala Devi and Samsudeen's marriage was conducted by her brother and uncle, she merely gives an evasive reply that she does not know. In her further evidence she admits that the defendants 1 and 2 were born to Fathima (i.e) Muslim name of Mangala Devi. She admits that Mangala Devi's brother known as Abdul Kani stayed with her. P.W.1 in her evidence further states that when Samsudeen brought his 2nd wife home after marriage, her mother was furious and went to her (P.W.1's) home. She further states that her mother objected to the keeping of his



second wife in her home. The plaintiff admits the second marriage of Samsudeen by stating that when he brought his second wife home, her mother was furious and left her matrimonial home to stay with the plaintiff. The plaintiff's attempt to project as if the 2nd wife was not Mangala Devi does not deserve merit because it was nobody's case that Samsudeen had any contact with any other woman except his first wife and Mangala Devi. The Trial Court did not consider the vital evidence of P.W.1. Hence from the evidence of P.W.1 it is clear as crystal that Samsudeen Rowthar married Mangala Devi.

34. As referred to earlier in Mohammedan law marriage can be presumed in the absence of direct proof under 3 circumstances. One by prolonged and continued cohabitation and by acknowledgment, among other. It is to be seen if from the evidence on record a presumption of marriage can be drawn.

35. P.W.3. a childhood friend and neighbour of Mathar in his evidence stated that Samsudeen died in 1966 and during his life time from 1940 to 1955 for 15 years he was conducting "Dance show" in Melur. That Mangala Devi came as a dancer to Samsudeen's show and started living with him along with her brother and mother. After the closure of the show, he continued to live with Mangala Devi. Both in his proof affidavit and cross he admits that D.1 and D.2 were born to Samsudeen and Mangala Devi. P.W.4 also deposes that even after the closure of the 'Dance Show' Samsudeen continued to live with Mangala Devi. Almost all the plaintiff's witnesses including the plaintiff admit that Mangala Devi and Samsudeen were living together. Even the conduct of the parties and the documents on record are material to find out



the nature of relationship between Samsudeen and Mangala Devi.

1. 1960 Marriage of 2nd defendant

Samsudeen conducted the nikha of the 2nd defendant in 1960 with one Sultan, who was none else than his own sister's son. The nikha nama is filed as additional evidence in which the bride's father is shown as Samsudeen Rowthar.

2. Plaintiff in O.S.No.467/67

The defendants 2 and 3 and Mangala Devi were shown as the 2nd wife and children of Samsudeen, which was disputed by Mohammad Mathar. This was immediately after Samsudeen's death in 1966.

3. Plaintiff in O.S.No.187/90

O.S.No.187/90 was filed by Moideens wife against Mohammad Mathar, the plaintiff and defendant's 2 and 3 herein for permanent injunction. In the said suit it was clearly stated that parties 1 and 2 are sons and 4 and 5 were daughter's of Samsudeen.

4. Voters list of the years 1975 and 1988.

In the voters list for the year 1975 at Serial No.517, Ex.B.2, Mangala Devi's muslim name Fathima Bibi (Samsudeen) was given.

1. Burial Certificate

The Burial certificate dated 15.12.2001 issued by Pallivasal Metur dated 15.12.2001 clearly states that Fathima Bibi wife of Samsudeen was buried in the Kabrasthan.

2. 20.12.2002, Show cause Notice

In the said show cause notice the defendants 2 and 3 along with the plaintiff are shown as



the heirs of Mohammad Mathar. The 2nd defendant is referred as step mother's son.

3. SSLC certificate

D.2's- Father's name is shown as Samsudeen Rowthar

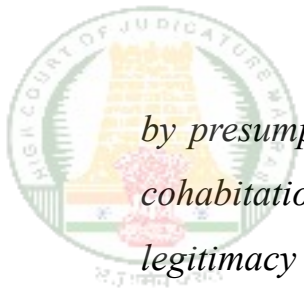
36. In the light of the above, it is clear that Mangala Devi's relationship was not that of a concubine. She was given the status of a wife and accepted as a member of the family. In this case almost all the plaintiff's witnesses state that Samsudeen and Mangala Devi lived together. They also admitted that the defendant's 2 and 3 were born to Samsudeen and Mangala Devi and that they were professing Islam. The documentary evidence also establishes that Mangala Devi converted and she was living under one roof with the other members of the family. (Voters list Ex.B.1). Her daughter was also given in marriage to Samsudeen's sister's son. Therefore a strong presumption is made out in favour of marriage between Samsudeen and Mangala Devi.

37. The learned counsel for the appellant relied on the following Judgments in support of his contention that long cohabitation gives rise to presumption of marriage.

- 1) AIR 1977 AP 152 2) 1978 (3) SCC 527 3) 1994 (1) SCC 460
- 4) 2008 (4) SCC 520 5) 2009 (9) SCC 299 6) 1999 (2) LW 404
- 7) 100 LW 58.

In AIR 1977 AP 152- The parties were Mohammedan's and the question of presumption of marriage through long co-habitation arose. In the said case the marriage between a Hindu women and a Muslim man was disputed. In the absence of direct evidence to prove the marriage, the Court relied on presumption of marriage and at para 10 stated as follows:

"10. Marriages may be established by direct proof or by indirect proof, i.e.

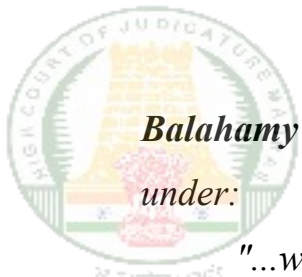


by presumption drawn from certain factors. It may be presumed from prolonged cohabitation combined with other circumstances or from acknowledgment of legitimacy in favour of a child or the fact of the acknowledgment by the man of the woman as his wife. It is true that the presumption does not apply if the conduct of the parties is inconsistent with the relationship of husband and wife. But if there is no impediment for a lawful marriage, such presumption will be raised by the aforesaid circumstances. In *abdool Razak v. Aga Mohomed* (1894) 21 Ind App 56 (PC) the Privy Council observed that if the conduct of the parties were shown to be compatible with the relation of husband and wife, every presumption ought to be made in favour of the marriage when there is lengthened cohabitation. In that case, however, it was found that the conduct was incompatible with that relation and, therefore, it was held that the presumption did not apply. In *Ghazanfar v. Kaniz Fatima*, (1910) 37 Ind app 105 (PC), as the woman was a prostitute before the marriage, the court refused to draw the presumption. But normally, cohabitation for a long time and living together as husband and wife would raise a presumption of marriage. As far as legitimacy of the child is concerned, it may be presumed from circumstances from which the marriage itself between its parents may be presumed."

I will refer to the latest judgment of the Hon'ble Supreme Court on the subject in which all the above judgments were referred to in the case of *Kattukandi Edathil Krishnan & Anr. versus Kattukandi Edathil Valsan & Ors.* reported in 2022 Live law (SC) 549. The Hon'ble Supreme Court stated the law as follows:

"15. It is well settled that if a man and a woman live together for long years as husband and wife, there would be a presumption in favour of wedlock. Such a presumption could be drawn under Section 114 of the Evidence Act. Although, the presumption is rebuttable, a heavy burden lies on him who seek to deprive the relationship of legal origin to prove that no marriage took place.

16. In *Andrahennedige Dinohamy and Anr. v. Wijetunge Liyanapatabendige*



Balahamy and Ors., the Privy Council laid down the general proposition as under:

"...where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a void marriage and not in a state of concubinage."

17. In **Mohabbat Ali Khan v. Mohd. Ibrahim Khan**, once again it was laid down by the Privy Council as under:

"The law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years."

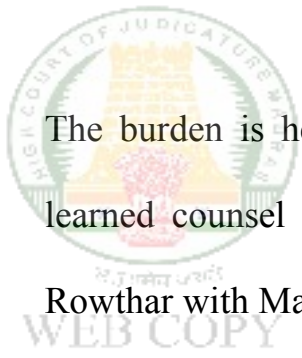
18. In **Badri Prasad v. Dy. Director of Consolidation and Others**, it was held by this Court that a strong presumption arises in favour of wedlock where two partners have lived together for long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seek to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon the bastardy.

19. In **S.P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi and Others**, this Court held as under:

"4. What has been settled by this Court is that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two. But the presumption is rebuttable. [See: *Gokul Chand v. Parvin Kumari* - AIR 1952 231 : 1952 SCR 825"]

20. Similar view has been taken by this Court in **Tulsa and Others v. Durghatiya and Others**; **Challamma v. Tilaga and Others**; **Madan Mohan Singh and Others v. Rajini Kant and Another** and **Indra Sarma v. V.K.V.Sarma.**"

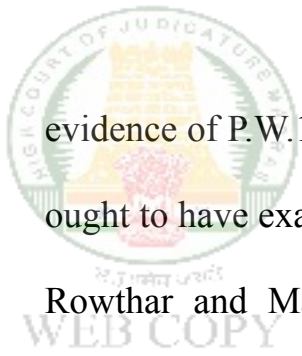
38. From the discussion of the evidence and the aforesaid Judgments, I find that a strong presumption in favour of the marriage of Samsudeen Rowthar with Mangala Devi is made out.



The burden is heavy on the plaintiff to rebut the strong presumption raised on facts. The learned counsel for the respondent raised two issues regarding the marriage of Samsudeen Rowthar with Mangala Devi and on the presumption of their marriage by long cohabitation.

39. The learned counsel for the respondent submitted that Mangala Devi was a Dancer and free woman so the marriage of Mangala Devi with Samsudeen could not be presumed, regularised or acknowledged. According to him the off springs of 'Zina' (adultery, incest, fornication) could not be acknowledged. With great respect, I have to state that it was not the case of the plaintiff herself. The plaintiff only stated that her father brought a dancer to his dance troupe developed intimacy and lived with her. The learned counsel further submitted that the presumption in favour of marriage by long cohabitation cannot be invoked in the present case, as the defendants have failed to examine any person who could speak of the relationship of Samsudeen Rowthar and Mangala Devi as man and wife from their personal acknowledgment of the family's affairs.

40. The family of Samsudeen Rowthar acknowledged the marriage of Samsudeen with Mangala Devi, which is evident from the marriage of Mangala Devi's daughter conducted by Samsudeen Rowthar himself with his own sister's son. Almost all the plaintiff's witnesses admit that the defendant's 2 and 3 were born to Mangala Devi and Samsudeen Rowthar and two were living together. It is trite in law that law leans in favour of legitimacy and frowns upon Bastardy. In the absence of any rebuttal evidence by the respondents to dislodge the strong presumption of marriage raised by plethora of documentary evidence on record as also the



evidence of P.W.1., I do not subscribe to the respondent counsels submission that the defendant's ought to have examined independent witnesses to establish the relationship between Samsudeen Rowthar and Mangala Devi. I find that Samsudeen Rowthar married Mangala Devi and therefore the defendant's 2 and 3 are the legitimate children of Samsudeen Rowthar.

41. The contention of the learned counsel for the respondent that Mangala Devi had not converted and therefore the marriage of Mangala Devi with Samsudeen Rowthar was void marriage cannot be countenanced. Firstly because, the burial certificate issued by the Melur Pallivasal, which is filed as additional document refers to Mangala Devi as Fathima Bibi, wife of Samsudeen Rowthar and also the voters list Ex.B.2. Hence it cannot be said that Mangala Devi was not converted. Secondly, the said issue was considered by the Hon'ble Supreme Court in the case of *Mohammed Salim (D) Through Lrs. Vs. Shamsudeen (D) Through Lrs.* and the Hon'ble Supreme Court held that the marriage could only be an irregular marriage and not a void marriage. The relevant paragraph is extracted below:

"Thus, based on the above consistent view, we conclude that the marriage of a Muslim man with an idolater or fire worshipper is neither a valid (sahih) nor a void (batil) marriage, but is merely an irregular (fasid) marriage. Any child born out of such wedlock (fasid marriage) is entitled to claim a share in his father's property. It would not be out of place to emphasise at this juncture that since Hindus are idol worshippers, which includes worship of physical images/ statues through offering of flowers, adornment, etc., it is clear that the marriage of a Hindu female with a Muslim male is not a regular or valid (sahih) marriage, but merely an irregular (fasid) marriage."

As noted earlier an irregular or fasid marriage has no legal effect before consummation.

<https://www.judis.nic.in/judis> But after consummation certain legal effects flow and one such effect is the legitimisation of

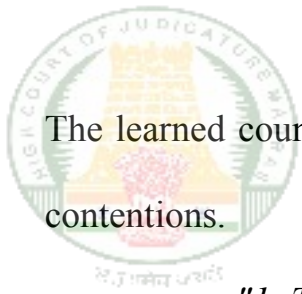


the children and their right to inheritance to the property of both parents. Our High Court in *AIR 1938 (141)*, while considering the legal effect of a fasid marriage, which in that case was a marriage by a muslim male with the sister of his wife, who was living, held that

“In view of this weight of authority we feel bound to accept the Bombay decision as being correct. While it is true that the Koran does prohibit a man marrying the sister of his wife during her lifetime, it is clear that this passage in the Koran has never been read as declaring the children of such a marriage to be illegitimate. In fact no writer on Muhammadan law has ever suggested that in the case of an invalid marriage, as opposed to a void marriage, the children are illegitimate.”

Therefore once it is held that Mangala Devi's marriage with Samsudeen Rowthar, assuming she did not convert, was irregular only, even then the marriage having been consummated, the defendants 2 and 3 would be legitimate children of Samsudeen. In the light of both the factual and legal positions I find no merit in the contentions of the learned counsel for the respondent.

42. The third contention of the learned counsel for the respondent that Samsudeen Rowthar during his life time had not acknowledged the defendant's 2 and 3 as his legitimate children deserves no merit, because as discussed earlier the evidence is crystal clear that Samsudeen Rowthar married Mangala Devi as a second wife. Further the instances referred to above also raise strong presumption of marriage of Samsudeen Rowthar with Mangala Devi. Once it is found that Mangala Devi was married to Samsudeen Rowthar the question of acknowledgment of the defendant's 2 and 3 as legitimate children by Samsudeen does not arise.



The learned counsel for the respondents relied on following Judgments with in support of his contentions.

"1. *Tagore Law Lectures- The Muhammadan Law: being a digest of the law applicable especially to the Sunis of India - pages 119 to 123*

2. *Muhammad Allahdad Khan v. Muhammad ismail Khan, (1888) X all 289*

3. *Abdool Razak v. Aga Mohamed jaffar Bindaneem, (1894) 4 MLJ 131*

4. *Syed Habibar Rahman v. Syed Altaf Ali Chowdhurry, 40 MLJ 510*

5. *Nuh Ullah Khan & Ors vs. Mohammed Shafiq Ullah Khan, (1929) 47 MLJ 522*

6. *Fatma Binti Hafidh v. The Administrator General, Zanzibar Protectorate, 1949 II MLJ 484*

7. *Rahmat Ullah and Ors v. Maqsood Ahmad and Ors, ILR 1950 allahabad 713= AIR 1952 ALL 640*

8. *Mukkattumbrath Ayisumma v. Vayyarath Pazhae Bangalayil Mayomootty Uma and Ors, 1952 II MLJ 933*

9. *Razia Begum v. Sahebzadi Anwar Begum and Ors, AIR 1958 AP 195*

10. *Pavitri v. Katheesumma, 1959 KLT 249=AIR 1959 Kerala 319*

11. *Brij Mohan Singh v. Priya Brat Narain Sinha and Ors, 1964 SCJ 140*

12. *Ganesh Narain Singh v. Jadunandan Singh, AIR 1969 Patna 82*

13. *Fathima Bi Ammal v. A.A. Mohammed Mohideen and Ors, 1971 (2) MLJ 451*

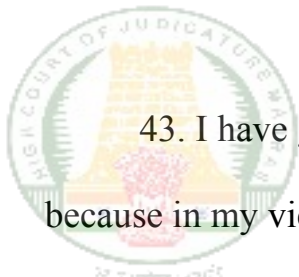
14. *Mohamed Khan Sahib v. Ali Khan Sahib and Ors, AIR 1981 Madras 209*

15. *Anish Iqbal and Anr vs. State of Rajasthan and Others, 1996 (2) Civil LJ 131*

16. *Sulaika Beevi and 6 others v. Rameeza Bivi and 10 Others, 2000 (IV) CTC 454*

17. *A. Abul Rahim v. I. Julaiga Beevi and Ors, 2001-3-L.W. 747*

18. *S.K.P.Subramaniyan and another vs - S.K.Chinnarsaj and others*



43. I have gone through the aforesaid Judgments and I am not inclined to discuss the same, because in my view the marriage of Samsudeen Rowthar with Mangala Devi is proved, not only through evidence of P.W.1 and also by presumption out of long cohabitation. Most of the judgments of the respondent's are on acknowledgment and hence not relevant because of my finding on marriage of Samsudeen Rowthar with Mangala Devi.

44. I therefore answer issues 1 and 2 in favour of the appellant. As far as issue number 3 is concerned, the same does not arise because of the findings on issues 1 and 2. As far as issue number 4 is concerned, I find that the 2nd defendant is entitled to 2/4th share and the 3rd defendant is entitled to 1/4th share in the suit properties.

In the result, the appeal is accordingly allowed. Consequently connected Miscellaneous Petition is closed. There shall be no order as to costs.

13.07.2023

dsn/sn

Speaking Order: Yes/No

Index: Yes/No

Neutral Citation: Yes/No

To
The Learned VI Additional Judge,
Madurai.



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N.MALA.,J.

dsn/sn

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15.07.2023}