

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on 28.07.2016

Judgment delivered on 01.09.2016

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Second Appeal No.1588 of 2008

1. Selvamani
2. Rajeswari
3. Rani
4. Mallika
5. Mohanraj
6. Minor Arunkumar
rep. by mother and guardian Mallika
S/o late Thangavelu @ Thavasiappan
7. Easwari
8. Pappathi @ Angammal
9. A.Ganesan
10. Rajendran
11. Chandran @ Chandrasekharan ...Appellants/Defendants 5-15
Respondents 5-15

-Vs-

1. Minor K.Gomathi
rep. by mother and guardian
Angammal @ Kannammal
2. Angammal @ Kannayal @ Kannammal ...Respondents/Plaintiffs
Appellants

Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 22.11.2006 made in A.S.No. 4 of 2006 on the file of the Additional District Court - Fast track Court No.IV, Bhavani, reversing the judgment and decree dated 03.12.2004 made in O.S.No.220 of 2000 on the file of the Principal District Munsif Court, Bhavani.

For Appellants : Mr.T.Murugamanickam

For Respondents : Mr.N.Manokaran

J U D G M E N T

The appellants are the defendants 5 to 15 in a suit for partition. The respondents herein are the plaintiffs. The trial Court dismissed the suit. The appellate Court allowed the Appeal and thereby decreed the suit.

2. The case of the plaintiffs is as follows:

a) The first plaintiff is the daughter and the second plaintiff is the wife of the first defendant. The suit property originally belonged to one Subramani Asari. He died instate leaving behind his sons namely, first to third defendants to inherit the property. Therefore, the first plaintiff being the daughter of the first defendant, is entitled to 1/5th share in the suit property along with her father. The second and third defendants are entitled to 1/6th share each. The fourth defendant is the co-purchaser of the suit property. The first defendant, was ill advised by the second and third defendants and they were attempting to deprive the first plaintiff's share in the suit property. Therefore, the first plaintiff demanded partition of the suit property. The defendants, instead of answering her claim attempted to alienate the suit property including the share of the first plaintiff. Hence, the relief of partition is sought for.

(b) Pending suit, the first defendant died on 05.08.2000 leaving the plaintiffs as his only legal representatives. Accordingly the second plaintiff was arrayed as a party in the suit along with the first plaintiff. The second defendant died on 16.08.2001 and his legal representatives were brought on record as fifth to seventh defendants. The third defendant died on 26.08.2001 and his legal representatives were brought on record as eighth to tenth defendants. The fourth defendant died on 14.07.2001 and his legal representatives were brought on record as eleventh to fifteenth defendants.

c) Pending suit, as the first defendant died, the shares of the parties have fluctuated. Hence, the plaintiffs are entitled to 1/24th share each respectively from the share of the first defendant. Thus, the first plaintiff is entitled to $1/12 + 1/24 = 3/24$ th share and second plaintiff is entitled to 1/24th share.

3. The fifth defendant filed written statement which was adopted by the sixth to fifteenth defendants. The fifth defendant is the wife of the second defendant. The case of the fifth to fifteenth defendants is as follows:

a) The first plaintiff is not the daughter of the first defendant. The plaintiffs are not the legal representatives of the deceased first defendant. The second plaintiff separated from the union of the first defendant as early as in the year 1987 and the first plaintiff was not born to the second plaintiff through the first defendant. The second plaintiff has converted to another religion and therefore, the plaintiffs are not entitled to the prayer for partition according to Hindu Law.

b) The first defendant married the second plaintiff 20 years ago and they lived together only for two years as husband and wife. Thereafter, they were not able to live together. On 10.03.1987, a Panchayat Muchalika with free consent was executed by 2nd plaintiff through which they got divorce according to their caste custom. At the time of Panchayat Muchalika, the second plaintiff was subjected to undergo medical test in which she was found, not pregnant. Pursuant to such divorce, the second plaintiff married another person, through whom only she begotten a female child, namely, the first plaintiff.

c) The said Subramani Asari and one Arumuga Asari purchased the properties on 10.02.1962 and they orally divided the same long ago. Thus, Subramani Asari became entitled to 20-1/4 acres and after his death, the property devolved upon the second defendant and his two brothers and they got 1/3rd share each and they had been enjoying the same in common. One of such brothers namely, the first defendant executed a registered General Power of Attorney on 04.07.2000 in respect of his 1/3rd share in favour of the second defendant. Subsequently, he had executed a Will on 30.07.2000 bequeathing his 1/3rd share absolutely in favour of the second defendant. Therefore, in view of the said Panchayat Muchalika and the Will, the plaintiffs have no right over the property bequeathed in favour of the second defendant. The first defendant died on 05.08.2000 and consequently, the Will came into operation.

4. Before the trial Court, the second plaintiff examined herself as P.W.1 and marked Exs.A1 to A8. On the side of the defendants, the fifth defendant was examined as D.W.1 and the other third party witnesses as D.Ws.2 to 6. They marked Exs.B1 to B25 in support of their case.

5. The trial Court, after considering the respective pleadings of the parties and the evidence let in by them, dismissed the suit by holding that the plaintiffs have not

described the suit properties properly; that the Panchayat Muchalika was executed with full consent of the second plaintiff and therefore, the same is valid; that in view of the said Panchayat Muchalika and the clinical laboratory report, it is proved that the first plaintiff was not born to the second plaintiff through the first defendant; that the birth certificate issued showing the name of the first defendant as the father of the first plaintiff cannot be accepted as the same was not issued by a competent Tahsildar; that in view of the report of the Revenue Inspector, it is seen that the second plaintiff was living with other person through whom a female child was born; that the Will executed by the first defendant in favour of the second defendant is valid.

6. Aggrieved plaintiffs, appealed against the judgment and decree of the trial Court. The first appellate Court allowed the appeal by reversing the judgment and decree of the trial Court and granted the decree in favour of the plaintiffs thereby directing that the suit properties to be divided in 12 equal shares and to allot two such shares to the plaintiffs. The first appellate Court, for arriving at such conclusion, pointed out as follows:

In the Panchayat Muchalik, the thumb impression of the second plaintiff alone is found whereas she knows to put her signature. There was no valid divorce taken place between the second plaintiff and first defendant as per the Panchayat Muchalika. The documents relied on by the trial Court to arrive at a conclusion as though the second plaintiff was living with another person, by name, Thirugnanasambam, are the documents obtained after the suit and therefore, they are not admissible. The person who issued the Laboratory Clinical Report has not been examined and therefore, such report marked as an exhibit cannot be accepted. The birth certificate marked on the side of the plaintiffs clearly indicates the name of the first defendant as the father of the first plaintiff. The Will executed by the first defendant in favour of the second defendant is not valid as the execution of such Will and its genuinity is doubtful under certain suspicious circumstances.

7. This Court, while admitting the Second Appeal raised the following substantial questions of law.

- i) Whether the marriage between the second plaintiff and the first defendant has been dissolved according to community custom under Ex.B2 Panchayat muchalika dated 10.3.1987, whether the first plaintiff who was born 509 days thereafter on 31.07.1988 to the second plaintiff can be presumed to be the daughter of the first defendant as

contemplated under Sec.112 of the Indian Evidence Act.?

ii) When Ex.B2 muchalika evidencing the dissolution of the marriage between the second plaintiff and the first defendant has not been denied by the second plaintiff, whether she can still claim that her marriage was in force till the death of the first defendant?

8. During the final hearing of the Second Appeal, the learned counsel for the appellants insisted that one more substantial question of law which was already raised in the grounds of appeal in respect of the Will is also to be considered while deciding the second appeal. The said substantial question of law reads as follows:

When the Will executed by the first defendant bequeathing his share in favour of his brother has been proved in the manner known to law, whether the plaintiffs can claim right to the first defendant's property as if he died intestate?

This Court considered the said request and the same was not opposed by the other. On perusal of such question and in order to hear the parties on that aspect as well, this Court is satisfied to raise such question also to be answered along with other questions already raised.

9. Mr.Murugamanickam, learned counsel appearing for the appellants submitted as follows:

The second plaintiff, though was living with the first defendant as his wife for some time, has however, got separated on 10.03.1987 by executing a Panchayat Muchalika indicating divorce. The medical report given on the very next day of divorce proved that the second plaintiff was not pregnant at that time. The first plaintiff, admittedly was born on 31.07.1988. Therefore, it is proved that the first plaintiff was not born to the second plaintiff through the first defendant. The birth certificate of the first plaintiff was obtained after two years from the date of birth for the purpose of filing the suit. Therefore, the same cannot be believed after executing the panchayat Muchalika on 10.03.1987. Both the second plaintiff and the first defendant jointly filed a petition for mutual consent before the competent Court in H.M.O.P.No.48/1987, though

the same came to be dismissed for default. Though it was dismissed, the fact remains that the parties were not living together. The first defendant executed a Will in favour of the second defendant in respect of the suit properties and the Will is proved by examining the attestors, namely, D.W.2 and D.W.3 and the scribe, namely, D.W.4. Therefore, as per the Will, the second defendant got the suit properties. The second plaintiff did not deny the panchayat muchalika by way of pleadings. In the original plaint, the second plaintiff was not claimed to be the wife of the first defendant anywhere. The plaint was not amended at any point of time to that effect. As per Section 112 of the Indian Evidence Act, the presumption of birth during marriage is a rebuttable one. In this aspect, the decision reported in 2001 (2) CTC 625 (Kanti Devi v. Poshi Ram) are relied on. Since the first defendant died, the burden lies on the second plaintiff to plead and prove that the first plaintiff was born to her through the first defendant. No independent witness was examined except the second plaintiff as P.W.1. When Ex.B2 Panchayat Muchalika has not been disputed through pleadings, the second plaintiff has to prove that there was co-habitation even after such muchalika. Either from the date of panchayat muchalika or from the date of filing of H.M.O.P., the first plaintiff could not have born within 280 days as she was born on 31.07.1988. Hence, there was a possibility of consummation only in the month of October 1987 only. The original birth certificate was not produced and Ex.A3 birth certificate was only a copy. Ex.B16 - ration card does not contain the plaintiffs name. Only the father of the child should inform the birth of the child. In this connection, a decision reported in Vol.24 Law Weekly 409 (Vedantachari v. Marie) and Vol.99 Law Weekly 175 (Rajambal v. Veeramuthu Udayar) are relied on. In Exs.B17 to B22 voters list also it does not find the name of the plaintiffs. Ex.B4 LIC policy does not contain the name of the plaintiffs as nominees. No School records are produced showing the first defendant as the father of the first plaintiff. Even as per the description of the second plaintiff in the affidavits filed before the trial Court, it is evident that she claims to be the wife of one Thirugnanasambandam. The first defendant, while executing Ex.B10, Power of Attorney and Ex.B11, Will, has specifically recited that he did not have any heirs or issues. Therefore, the trial Court has rightly dismissed the suit which the appellate Court has erroneously reversed.

10. Mr.N.Manoharan, learned counsel appearing for the respondents submitted as follows:

Ex.B2 Muchalika is inadmissible in evidence after the introduction of Hindu Marriage Act. Unless a customary divorce in the community for divorce is pleaded and established, no divorce as found in muchalika is valid. In this connection 2002 (1) MLJ 320 (Chandralekha v. Subramani) and 2005(9) SCC 407

(Subramani v. M.Chandrasekha) are relied on. If really muchalika was executed, it would have been stated in the H.M.O.P, Power of Attorney, Will itself. No such recitals were made in those documents. Therefore, Muchalika is not a true document. The dissolution of marriage by taking disadvantageous position of wife is not valid as held in 2016(1) CTC 249 (Vennangot Anuradha Samir v. Vennangot Mohandas Samir). The medical certificate was not proved by examining the author of such document. The birth of the 1st plaintiff was duly registered on 01.08.1988 itself. The registration of the birth was made strictly as per the procedures contemplated under the Registration of Births and Deaths Act and therefore, the birth certificate is admissible in evidence as contemplated under Section 17(2) of the said Act. The officer who issued the birth certificate need not be examined as it is a public document as held in 1981(1) SCC 560 (Harpal Singh v. State of Himachal Pradesh). The name Thirugnanasambandam as the husband of the second plaintiff found in certain affidavits filed by 2nd plaintiff is only a typographical mistake as the second plaintiff is not living with such person. The birth during marriage is always to be presumed in favour of the person claiming to have born through such parties. In this connection, the decision of the Apex Court reported in 2005(4) SCC 449 (Banarsi Dass v. Teeku Dutta) is relied on. Though the Power of Attorney is a registered document, the Will is an unregistered one. Both are brought into existence after filing of the suit. The Will is not proved as per Section 63 of Indian Succession Act and Section 3 of Transfer of Property Act. If the testator was under the care and custody of the beneficiary, the Will should be doubted and the burden is on such person to show that there was no fraud. In this connection, a decision of the Apex Court reported in 2004 (9) SCC 468 (Krishna Mohan Kul v. Pratima Maity) was relied on. In the absence of any pleadings with regard to the denial of muchalika by the second plaintiff, the Court should not doubt about the muchalika. Mere non-filing of reply statement to the written statement cannot be presumed as an admission of the statement made in the written statement. In this connection, a decision of the Apex Court reported in 2009(1) SCC 354 (K.Laxmanan v. Thekkayil Padmini) is relied on.

11. Mr.Murugamanickam, learned counsel for the appellants by way of his reply submitted that the issue involved in this case is not regarding the validity of the dissolution of the marriage and on the other hand, it is about the proof of paternity of the first plaintiff. He further submitted that muchalika and filing of H.M.O.P. are to be taken into consideration only to see as to what could have been the starting point of separate living.

12. Heard both sides. Perused the materials placed before this Court.

13. The first respondent herein as the minor represented by her next friend and mother/ guardian filed the suit for partition and separate possession. She claimed to be the daughter of the first defendant, namely, Raju @ Karuppaswamy. It is her case that the suit property originally belonged to one Subramani Asari who died instate leaving behind his three sons, who are the defendants 1 to 3 to succeed the estate and thus, she along with her father namely, 1st defendant is entitled to 1/6th share in the suit property as per Hindu Succession Act. During the pendency of the suit, the first defendant died and consequently, in the capacity as the legal heir of the 1st defendant, the mother of the minor 1st plaintiff, got impleaded herself as the second plaintiff. Consequent upon the death of the first defendant and impleadment of the second plaintiff, the plaintiffs, thus, claim jointly 2/12th shares in the suit properties.

14. The defendants contested the suit mainly by disputing the paternity of the 1st plaintiff and the Will executed by the 1st defendant in favour of 2nd defendant. According to the defendants, the 1st plaintiff was not born to the 2nd plaintiff through 1st defendant. Insofar as the relationship between the 2nd plaintiff and the 1st defendant is concerned, it is the case of the defendants that though the 1st defendant married the 2nd plaintiff 20 years ago, they lived together only for two years as husband and wife and thereafter, they got separated in pursuant to the execution of panchayat muchalika on 10.03.1987. Therefore, it is contended by the defendants that the 1st plaintiff who was born much later on 31.07.1988 to the 2nd plaintiff, cannot claim herself as the daughter of the 1st defendant. Therefore, it is contended by the defendants that the 1st plaintiff, being not the daughter of the 1st defendant, cannot seek for partition of the properties belonging to the defendants family.

15. Insofar as the claim of the 2nd plaintiff in the suit property in pursuant to the death of the 1st defendant is concerned, it is the contention of the defendants that the 1st defendant during his life time has executed a Will dated 30.07.2000 marked as Ex.B11 and bequeathed the suit property to his brother viz., 2nd defendant and therefore, the 2nd plaintiff cannot seek any share in the suit property by claiming such right through her erstwhile husband namely, 1st defendant.

16. The above are the crux of the contentions of the respective parties and they have let in evidence in support of such contentions. The trial court accepted the contention of the defendants and dismissed the suit. In other words, the trial Court found that the 1st plaintiff was not the daughter of the 1st defendant. The trial Court found that the 2nd plaintiff is

also not entitled to any relief in view of Ex.B11 Will. The Appellate Court reversed the finding and found that the plaintiffs are entitled to the relief as sought for. In other words, the appellate Court has found that the 1st plaintiff was born to the 2nd plaintiff through the 1st defendant. Insofar as the right of the 2nd plaintiff is concerned, the appellate Court doubted the genuineness of Ex.B11 Will and consequently, rejected the claim of the defendants, based on such Will.

17. It is not in dispute that the 1st defendant as one of the legal heirs of his father Subramani Asari was entitled to a share in the suit property. What is in dispute is about the paternity the 1st plaintiff and the Will executed by the 1st defendant in Ex.B11.

18. With regard to the paternity of the 1st plaintiff, the plaintiffs, in support of their case in this aspect, marked the birth certificate of the 1st plaintiff as Ex.A3 dated 18.09.2000. A perusal of the said document would show that the same was issued by the Commissioner of Gobichettipalayam Municipality on 18.09.2000 indicating that a female child by name Gomathi was born on 31.07.1988 at Government Hospital to one Kannayal as the mother and Raju @ S.Karuppannan as the father. The said certificate also indicates that the birth was registered on 01.08.1988 i.e., the very next day of the birth. Apart from this certificate, no other document is filed in support of the paternity claim of the 1st plaintiff, except the oral testimony of the 2nd plaintiff as P.W.1.

19. Mr.N.Manoharan, learned counsel appearing for the respondents/ plaintiffs submitted that Ex.A3 birth certificate having been issued by a competent authority, the same cannot be doubted. On the other hand, Mr.Murugamanickam, learned counsel appearing for the appellants contended that the said birth certificate was not proved by examining the concerned official who issued the certificate and that the plaintiffs have not stated as to who was the informant of the birth of the 1st plaintiff before such authority.

20. I have given my careful consideration to the above submissions made by the learned counsel appearing for the respective parties in this regard.

21. There is no dispute to the fact that Ex.A3 is the birth certificate issued by the competent authority. It is not the case of the defendants that the said certificate was a forged one. When such certificate issued by a public authority is marked as evidence, unless its genuinity is questioned by the other side, there is no necessity for the person who marked such document, to examine the official who issued such certificate. Therefore, there is no difficulty in accepting the genuineness

of Ex.A3 birth certificate as it was issued by the competent Birth and Death Registering Authority. But at the same time, it should be borne in mind that questioning the genuineness of a certificate is different from questioning the correctness of the information contained therein. While the former is doubting the very genuineness of the certificate, the latter is doubting the correctness of the information found in such certificate. A birth certificate issued by the competent authority, though may be genuine, still the information furnished therein is only presumed to be genuine, unless and until the correctness of such information is questioned or disputed by an interested person. Needless to say that an authority registering the Births and Deaths under The Registration of Births and Deaths Act, 1969 and issuing a certificate, is not expected to authenticate the correctness of the information furnished in such certificate. On the other hand, he can only vouch for the registration of such information as genuine. No authority will vouch for the correctness of the information nor he is competent to do so. For e.g., the authority who issued the birth certificate can at the best say that those are the information furnished to him by the informant regarding the birth of the particular child and cannot go beyond that and say that yes, it is true that the child was actually born to the persons referred to in the certificate as mother and father. Therefore, even if a birth certificate is found to be a genuine document, it does not automatically lead to a conclusion that the information furnished therein is also correct and unquestionable. If a person questions the correctness of the information furnished in the said certificate, initial burden is on him to lead evidence to rebut the presumption. If such person discharges such onus, then the burden is shifted on the person who relies on such certificate to adduce further evidence supporting the information furnished in the said certificate, like marking some other documents and examining the third party witnesses including the informant before the Registering authority. In this case, the defendants marked Exhibits such as panchayat muchalika, medical certificate, power of attorney and will of the 1st defendant to disprove the birth details contained in Ex.A3. On the other hand, the plaintiffs, except marking Ex.A3 birth certificate and examining the 2nd plaintiff as P.W.1, they did not file any other document and examined any independent witness. Needless to say that P.W.1's testimony alone cannot be taken as a conclusive evidence to decide the paternity of the 1st plaintiff, going by the other facts and circumstances of the case.

22. Learned counsel for the appellant relied on the decision reported in Vol.24 L.W.409 (Vedantachari v. Marie) in support of his contention that mere evidence of the 2nd plaintiff as P.W.1 cannot be accepted without corroboration. In the above decision, it has been observed as follows:

"In a case like the present, where the question at issue is, whether a certain man was the father of a certain child, it is prima facie improper to accept without corroboration, the mere statement on oath of the mother who asserts the paternity. It is so obviously to her personal benefit and interest to secure a father for her illegitimate child, who will relieve her of the costs of providing for his maintenance that her evidence is such a case cannot but be highly interested, and it would be unreasonable and improper for any Court to act merely on her own word without some independent corroboration of it such as will satisfy the court that her claim is true. The lower Court has recognised this principle and appears to think that such independent corroboration has been established. But it appears to me that its view is wholly unjustified.

The lower Court relies first on a Municipal record of the birth of the child. In the first place, that record is merely a record of what the counter-petitioner herself said at the time of the birth. That is clearly no independent corroboration of her present statement. Further, that record as it stands, does not clearly apply to the counter-petitioner, and her present amplification and explanation of that entry in Court so that it may now be held to apply to the counter-petitioner, is again no independent corroboration of her present evidence. The Magistrate is in error in holding that the entry was a matter which the petitioner had to explain away. It was for the counter-petitioner to give a reasonable explanation as to why she did not give the full name and description of the father of her child at the time of the birth. Consequently, the Municipal record cannot be viewed as independent corroboration. Beyond it I find no sort of corroboration. The kind of evidence that one would look for to be given as corroboration in such a case would be evidence that at or about that time when the child was conceived, the petitioner was frequenting the society of the counter-

petitioner, and had opportunities of access to her. Now, on her own evidence, it is clear that the child was conceived in Madras some time in April, 1918. I find no evidence that at or about that time, the petitioner was in her society or had opportunities of access to her.

23. At this juncture, it is relevant to note that the first plaintiff while filing the suit originally, has not stated anywhere in the plaint about the relationship of the 2nd plaintiff with the 1st defendant. She has also not specifically stated anywhere that she is the child born to the 2nd plaintiff through the 1st defendant. The defendants filed the written statement specifically denying the paternity of the 1st plaintiff by stating that 2nd plaintiff is living separately for a long time in pursuant to the execution of the panchayat muchalika granting divorce to the 1st defendant. The plaintiffs have not chosen to file any rejoinder denying those contentions. Therefore, it is seen that the plaintiffs are seeking to establish their relationship with the 1st defendant without there being any proper pleading.

24. Mr. Manoharan cited a decision reported in 2009(1) SCC 354 (K. Laxmanan v. Thekkayil Padmini) contending that mere non-pleading by the plaintiff, more particularly, the 2nd plaintiff denying the allegations made by the defendants in their written statement itself cannot be construed that they have admitted the facts pleaded in the written statement. In this case, I have already pointed out that while the plaint was filed initially by the 1st plaintiff, there was no whisper about the 2nd plaintiff or her marriage with the 1st defendant and living togetherness of the parties. Even when the plaintiffs sought to amend the plaint after the death of the defendants 1 to 3, they wanted only to implead the legal representatives of those defendants and enlarge the extent of share available to them, when, in fact, the defendants have filed their written statement denying the paternity as well as the unavailability of "access" between the 2nd plaintiff and the 1st defendant. When that being the statement made by the defendants, it cannot be contended that the filing of reply statement by the plaintiffs is not at all warranted nor such non filing does not amount to the admission of facts pleaded in the written statement.

25. The Division Bench decision of this Court reported in Vol. 99 Law Weekly 175 (Rajambal v. Veeramuthu Udayar) is relied on by the learned counsel for the appellant that entry in the birth register itself is not the conclusive proof regarding the paternity of the child, unless it is proved that the father of the child himself is the informant on the basis of which the information of the paternity of the child is entered in the

birth register. At paragraph No.39 and 40 it has been observed as follows:

39.The next set of documents would be the birth extracts. Ex.A25 is the extract of birth issued by the Sub-Registrar of Kallakurichi for the birth of a female child on 21st April, 1950. This is stated to relate to the 6th plaintiff. The evidence of P.W.1 is that Manja Muthusami Reddiar is the father. How far this is acceptable can be assessed from his own evidence. He states in cross-examination that he does not know whether Veeramuthu Udayar, his maternal grandfather, was known as Muthusami Udayar. It was his family which is known as Manja Muthusamy Udayar's family. In documents like Ex.B14 etc., Muthusamy udayar himself has signed. If Ex.B5 contains the name of Samayathu Muthusami Udayar, who is P.W.3, as brought out in evidence, certainly it cannot relate to Muthusamy, the father of the first defendant. As to who this Manja Muthusamy is clear from the evidence of D.W.1. He states that it would refer to only D.W.1's maternal grand-father and that what is stated in Ex.A25 would refer only to him and he alone. It requires to be noted that the informant is stated to be one Kulli. She is the mother of the 1st plaintiff. Exs.B6 to B9 are the other birth extracts, wherein the father's name of the child is not mentioned. The mother's name alone is mentioned. The learned Subordinate Judge, in paragraph 6 of his judgment has rendered a finding as follows:-

"There is no dispute that Exs.B5 to B9 relate to the children born to the first plaintiff. In Ex.B5, the father's name is mentioned as Samayathu Muthusamai Udayar. The informant is stated to be one Kulli who is none other than the mother of the first plaintiff."

If this be the real position, why Muthusami Udayar, the father of the children was not the informant, but it is only the 1st plaintiff or her mother Kulli or her brother?

Then again there is a vital discrepancy as to the place of birth. The evidence of P.Ws. 3 to 5 is that the first plaintiff gave birth to the children in her mother's house, while P.W.2 would state that it was only in the house of Muthusamy she gave birth to six children, while P.W.2 says that it was in the house of Rajambal. Likewise P.W.5 also would state that the children were born only in the mother's house. Why there could be such a discrepancy on this aspect, we are unable to understand. No doubt Ex.B5 discloses the tampering of the same. As to why it is interpolated is a matter for guess. The evidentiary value of the birth extract has come to be laid down in Mahadeva Rao v. Yasoda Bai. Anantharayanan, J., as he then was, has held as follows:-

"Unless it could be established by evidence that the father of the child is himself the informant, on the basis of which information the paternity of the child is entered in the Birth Register of the Local Body an extract of such birth register where the name of the informant is not filling up, cannot give rise to any presumption as to the paternity of the child in a proceeding for maintenance under S.488 of the Crl.Procedure Code.

40.Again in narayanaswami Naidu v. Kochadai Naidu, the head note reads:-

"Under S.35 of the Evidence Act (I of 1872), it is only the entry made by a public servant in the discharge of his official duties that is admissible as a relevant fact. Other particulars not strictly covered by the entries are not admissible under S.35 of the Evidence Act. The name of the child recorded in the birth registration extract was inadmissible under S.35 of the Evidence Act. The entries do not require the officer to record the name of the child. If there is other independent evidence connecting the entries, the entries and the independent evidence may supplement one another.

"If somebody who gave the information had given evidence about his knowledge of the relationship, the entry would be corroborative evidence of the evidence of that witness under S.157 of the Evidence Act, but not the entries themselves".

Therefore, these by themselves do not prove the paternity. That apart, there is no birth extract either for the 4th plaintiff or the 7th plaintiff. Why they have not been filed is not explained."

26. Per contra learned counsel for the respondents relied on the decision of the Apex Court reported in 1981 (1) SCC 560 (Harpal Singh v. State of Himachal Pradesh) wherein it has been observed that the relevant entry in the birth register is admissible under Section 35 of the Indian Evidence Act and that it is not necessary for the prosecution to examine its author. There is no quarrel about the said proposition. I have already pointed out that genuineness of the registration of birth is one thing the correctness of the information furnished therein is another thing. Here the dispute is not with regard to the genuineness of the birth certificate but the correctness of the information contained therein. Therefore, it is to be held that such certificate though admissible in evidence, cannot be treated as the conclusive proof of paternity, when such claim is disputed by the other side.

27. The defendants rely on two crucial documents namely, panchayat muchalika marked as Ex.B2 and clinical laboratory report marked as Ex.B3 to dispute the paternity. It is the contention of the defendants that the 2nd plaintiff got separated herself from the 1st defendant two years after the marriage by executing a document under Ex.B2 thereby granting divorce to the first defendant. This document is strongly opposed by the learned counsel for the plaintiffs by contending that such document cannot be construed as granting legal divorce as the parties are Hindus and the marriage can be dissolved only in accordance with the procedure contemplated under the law and not by executing panchayat muchalika. He also contended that unless there is a custom prevailing in the community and such custom is pleaded and established, the divorce as claimed by the defendants based on Ex.B2, cannot be accepted.

28. It is true that the marriage has to be dissolved only in accordance with law or the procedure recognised by law and not otherwise. But the issue herein is not about the validity of the so called divorce between the parties and on the other hand, it is about the paternity of the child, namely, the first plaintiff. At this juncture, it is also to be noted that both

the parties namely, the 2nd plaintiff and the 1st defendant jointly filed an application for divorce before the competent Court in H.M.O.P.No.48/1987 seeking divorce by way of mutual consent. The certified copy of the said petition was marked by the plaintiffs themselves as Ex.A2. The said petition was filed on 07.09.1987. However, the same came to be dismissed for default on 10.03.1988. Therefore, it is evident from Ex.A2 that the parties have decided to get separated as early as on 07.09.1987, if not on 10.03.1988, assuming that Ex.B2 muchalika cannot be taken into account. In fact, excution of Ex.B2 was proved by the defendants by examining the attesting witnesses of such document, namely, D.W.2. On the other hand, the plaintiffs have not let in any contra evidence to disprove the contents of Ex.B2.

29. Learned counsel for the respondents relied on 2002(1) MLJ 320, 2005(9) SCC 407 (Vedantachari v. Marie) and 2016(1) CTC 249 (Vennangot Anuradha Samir v. Vennangot Mohandas Samir) in support of his contention that the marriage between the 2nd plaintiff and the 1st defendant was not validly dissolved and therefore, Ex.B2 Muchalika cannot be relied on in the absence of pleading and proving any customary practice to do so. I do not think that the above decisions are relevant for consideration in this case as the issue involved herein as already stated supra, is not with regard to the validity of the dissolution of marriage between the parties. Needless to say that even assuming that there was no valid dissolution of marriage between the parties, the presumption of "access" as contemplated under Section 112 of the Indian evidence Act is a rebuttable one, if unaccessability is pleaded and proved by the other side, as has been done in this case.

30. It is contended by the defendants that pursuant to the execution of Ex.B2 on 10.03.1987, the 2nd plaintiff was subjected to medical examination to ascertain as to whether she was pregnant at that time and that the medical certificate issued and marked as Ex.B3 dated 11.03.1987 shows that she was not pregnant at that time. This contention of the defendants is opposed by the plaintiffs. Learned counsel appearing for the plaintiffs contended that Ex.B3 medical certificate cannot be relied on, as the author of the same was not examined.

31. I have given careful consideration to the above said submissions of the respective parties and perused Ex.B3 certificate. It is true that the said certificate does not contain the details of the person who has issued the said certificate except to indicate that the same was issued by one Venkateswara Clinical Laboratory. The defendants have not examined the person who issued the certificate. Hence, Ex.B3 cannot be accepted. Once Ex.B3 is held as not proved, it would only lead to a presumption of two possibilities as on that

date. The first possibility would be that the 2nd plaintiff was pregnant at that time, while the second possibility would be that she was not pregnant at that time.

32. Let us first consider the first possibility. If it is to be presumed that she was pregnant at that time, the next question that would arise is what was the age of the child at its mother's womb at that time. Absolutely, there is no pleading or evidence to that effect. Let us even presume that the 2nd plaintiff conceived just few days earlier to Ex.B3. If that could be the position, the probable month of delivery should have been in December 1987. On the other hand, admittedly, the 1st plaintiff was born only on 31.07.1988. Therefore, it is evident that the 2nd plaintiff was not pregnant as on 11.03.1987, even in the absence of Ex.A3. One may say that there is a possibility of getting conceived even after 11.03.1987. For accepting such possibility, it should be established that there was either an access or continuous cohabitation between the 2nd plaintiff and the 1st defendant even after 10.03.1987. There is no pleading or evidence to that effect except the evidence of 2nd plaintiff. As the 1st plaintiff was born on 31.07.1988, the probable time of conceiving of the child should have been in the month of October 1987. But the position that was prevailing between the parties during the month of October 1987 is evidently as the one of not living together, as they have already moved the application in the month of September 1987 itself, marked as Ex.A4, seeking for divorce on mutual consent. When an application was filed seeking for divorce in the month of September 1987, the possibility of conceiving a child in the next month cannot be presumed as a matter of routine, unless such presumption is supported by material evidence, especially when the defendants are strongly contending that the parties are living separately for several years.

33. No doubt, with regard to the paternity of a child, the just and proper parties to accept or deny such status are the so called father and mother. In this case, though the mother, namely, the 2nd plaintiff supports the case of the 1st plaintiff, the so called father, namely, the 1st defendant is not alive to be examined, as he died during the pendency of the suit. However, he had left two documents namely Ex.B10, Power of Attorney dated 04.07.2000 and Ex.B11, Will dated 30.07.2000 expressing his stand against the claim of the plaintiffs.

34. Perusal of Ex.B10 would show that the same is a registered document. The 1st defendant has specifically referred therein that he had no issues or heirs. He has also referred that his wife left him 13 years ago. Likewise under Ex.B11 Will, the 1st defendant once again reiterated that he had no issues and that his wife got separated from him and living with another

person after marrying him. Here again, the 1st defendant specifically contended that the 2nd plaintiff left him 13 years back. The recitals made in Ex.B10 and Ex.B11 by the 1st defendant indicate that the 2nd plaintiff already left the 1st defendant long ago. The plaintiffs sought to dispute the genuineness of Ex.A11 by contending that the same was obtained by taking advantage of the disability of the 1st defendant. When the 2nd plaintiff got separated from the 1st defendant, the 2nd defendant cannot be found fault in taking care of the 1st defendant, being his brother. The question of disadvantageous position does not arise in that situation. Moreover, Ex.B11 was proved in the manner known to law by examining the attesting witnesses and the scribe who have spoken about the genuineness of the Will and its execution.

35. A decision of the Apex Court reported in 2004(9) SCC 468 (Krishna Mohan Kul alias Nani Charan kul v. Pratima Maity) is relied on by the learned counsel for the respondents to contend that the defendants have to prove that there was fair play in the transaction while executing Ex.B11 Will by the 1st defendant in favour of the 2nd defendant. It is his contention that the person who is in the dominating position and in a fiduciary relationship with another has to prove the absence of fraud, misrepresentation or undue influence. At paragraph No.12, the Apex Court has observed as follows:

"....When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But when a person in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, and he has to prove that there was fair play in the transaction and that the apparent is the real, in other word, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage...."

36. I fail to understand as to how the decision would help the plaintiffs in any manner in the absence of any pleadings with regard to Ex.B11 Will, even by way of amending the plaint, especially, when the defendants have referred to the same in their written statement to claim title over the suit property. In the absence of any such pleading on the side of the plaintiffs of fraud, misrepresentation or undue influence, the question of proving the negative by the defendants does not arise.

37. One more aspect to be noted in this case is that the 2nd plaintiff claimed herself as the wife of one Thirugnanasambandam as could be seen from Ex.B14 and Ex.B15 filed in the present suit both for amending the plaint in pursuant to the death of the 1st defendant. This is sought to be explained as a typographical error. I do not think the plaintiffs have let in any evidence in support of such contention. But at the same time, it is seen that in the amended plaint, the 2nd plaintiff was described as the wife of 1st defendant. Why this discrepancy is not explained.

38. Learned counsel for the respondents/plaintiffs strongly relied on Section 112 of Indian Evidence Act 1872 in support of his contention that the birth of the 1st plaintiff during the continuance of the marriage is the conclusive proof of her paternity. In support of such contention, he relied on the decision of the Apex Court reported in 2005(4) SCC 449 (Banarsi dass v. Teeku Dutta) wherein at paragraph No.9 to 11 it has been observed as follows:

9. It was noted that Section 112 of the Indian Evidence Act, 1872 (in short "the Evidence Act") requires the party disputing the parentage to prove non-access in order to dispel the presumption of the fact under Section 112 of the Evidence Act. There is a presumption and a very strong one, though a rebuttable one. Conclusive proof means proof as laid down under Section 4 of the Evidence Act.

10. In matters of this kind the court must have regard to Section 112 of the evidence Act. This section is based on the well-known maxim pater is est quem nuptiae demonstrant (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married women is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every

person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality.

11. It is rebuttable presumption of law that a child born during lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

39. Per contra, learned counsel for the appellants contended that the presumption available under Section 112 of the Indian Evidence Act is always a rebuttable one as the defendants have pleaded and proved that there was no access to each other at any time when the 1st plaintiff could have been begotten. In support of such contention, Mr. Murugamanickam, learned counsel relied on the decision of the Apex Court reported in 2001(2) CTC 625 (Kanti Devi v. Poshu Ram) wherein at paragraph No.8 to 15 it has been observed as follows:

8. Earlier there was a controversy as to what is the true import of the word "access" in Section 112 of the Act. Some High Courts held that access means actual sexual intercourse between the spouses. However, the controversy came to a rest when the Privy Council held in *Karapaya Servai v. Mayandi*¹ that the word "access" connotes only existence of opportunity for marital intercourse. The said legal principle gained approval of this Court when a three-Judge Bench held in *Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana*² that the law has been correctly laid down therein.

9. When the legislature chose to employ the expression that a certain fact "shall be conclusive proof" of another fact, normally the parties are disabled from disrupting such proof. This can be discerned from the definition of the expression "conclusive proof" in Section 4 of the Act:

"4. 'Conclusive proof'.—When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

10. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The *raison d'être* is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

11. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

12. Whether the burden on the husband is as hard as the prosecution to prove the guilt of the accused in a trial deserves consideration in the above background. The standard of proof of prosecution to prove the guilt beyond any

reasonable doubt belongs to criminal jurisprudence whereas the test of preponderance of probabilities belongs to civil cases. The reason for insisting on proof beyond reasonable doubt in criminal cases is to guard against the innocent being convicted and sent to jail if not to extreme penalty of death. It would be too hard if that standard is imported in a civil case for a husband to prove non-access as the very concept of non-access is negative in nature. But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatized. If a court declares that the husband is not the father of his wife's child, without tracing out its real father the fallout on the child is ruinous apart from all the ignominy visiting his mother. The bastardised child, when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband.

13. In *Goutam Kundu v. State of W.B.*³ this Court after considering an early three-Judge Bench decision in *Dukhtar Jahan v. Mohd. Farooq*⁴ held (at SCC p. 427, para 22) that "this presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities".

14. In the present case the first appellate court, which is the final fact-finding court, after evaluating the entire evidence, came to the following conclusion:

"In the present case the plaintiff has examined all the evidence which he possibly could do in the circumstances. He has proved by convincing evidence, that he did not visit his village or house where the defendant was allotted

one room. He has further proved that the defendant also never visited him at Mandi where he had been living for more than 2 years before the child was born to Kamti Devi. In other words he has proved that he had no access or opportunity for sexual intercourse with Defendant 1 for more than 280 days before Roshan Lal (Defendant 2) was begotten by Defendant 1."

15. The said conclusion was reached on the strength of the evidence adduced by both sides and the first appellate court was satisfied in full measure that the plaintiff husband had no opportunity whatsoever to have liaison with the defendant mother. The finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding.

40. For proper appreciation of the above contentions of the respective counsels, it is better to understand the scope of Section 112 of the Indian Evidence Act which is extracted as hereunder.

112. Birth during marriage, conclusive proof of legitimacy.

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when it could have been begotten.

41. A perusal of the said provision of law would show that paternity of a person, who was born during the continuance of the valid marriage between his mother and any man or within 280 days after the dissolution of the marriage and when the mother remaining unmarried, shall be conclusively found that he is the legitimate son of that man, unless it is pleaded and proved that the parties to the marriage had no access to each other at any time when such person could have been begotten. Therefore, the requirement for presumption under the above said provision is that there should be continuance of a valid marriage, or, if the marriage is dissolved, he should have born within 280 days after such dissolution and the mother remaining unmarried. Either of these two requirements is mandatory and the party who seeks shelter under the above said provision should plead and

prove such requirement. On the other hand, if a party wants to dislodge such claim, he should plead and prove that there was "no access" between the parties to the marriage with each other at any time when the child could have been begotten.

42. In this case, it is seen that the plaintiffs have never pleaded and proved the above requirement in support of their claim of legitimacy of paternity of the 1st plaintiff. On the other hand, the defendants, as discussed supra, have pleaded and proved that there had been no access to each other at the relevant point of time. The Apex Court, in Kanti Devi's case has pointed out that the word "access" connotes only existence of operation for marital intercourse. No doubt, it is for the defendants to discharge their initial burden of proving that there was no "access" between the 2nd plaintiff and the 1st defendant at the relevant point of time when the 1st plaintiff could have been begotten. As I discussed supra, the defendants by adducing material evidence, namely, Ex.B2, Ex.B10 and Ex.B11 and also examining other independent witnesses have discharged their initial burden of proving that there was no "access" between the 2nd plaintiff and the 1st defendant at the relevant point of time. Once the defendants have discharged their initial burden, it is for the plaintiff to disprove such contention. In this case, the plaintiffs have not chosen to discharge such onus and on the other hand, their own document namely, Ex.A4, the proof of filing the divorce petition by mutual consent on 07.09.1987 would only strengthen the above presumption of "no access".

43. At this juncture, it is to be noted that when the paternity of a child is put into question, the Court should first find out as to whether the parties were living together at the relevant point of time either as husband and wife or living together partners. If that is established, the presumption of the "access" as contemplated under Section 112 of the Indian Evidence Act can always be drawn. On the other hand, if the parties fail to prove the 'living togetherness' as stated supra, at the relevant point of time, there is no possibility to have the presumption of "access". In other words, such "access" under such circumstances, would be only a remote possibility.

44. When two possible views are available out of which one possibility is with stronger and the other one is with weaker probabilities, the Court may decide the paternity of the child going by the view coupled with stronger probabilities. Needless to say that the question of considering the paternity of a child is a sensitive issue which has to be decided with great care and caution.

45. In this case, the wife, namely, the 2nd plaintiff has not come with categorical pleading regarding paternity. However, she has spoken to the same as P.W.1, without any further supporting evidence. The husband viz., 1st defendant died unfortunately even before the trial commenced. Though there is no specific acceptance or denial by him regarding the paternity of the 1st plaintiff by way of pleadings, as he died immediately after filing the suit, his stand is made clear through Ex.B2 Panchayat Muchalika and Ex.B11 Will against the claim of the plaintiffs which I have already discussed supra. The above stand of the first defendant is also strengthened by examining the independent witnesses who have spoken about the non access, in detail. Based on these facts and circumstances and considering the stronger probabilities against the "access", this Court has to hold that the paternity of the 1st plaintiff is not proved. Therefore, it would automatically disentitle the 1st plaintiff from inheriting the property of the 1st defendant. As I found that the Will executed by the 1st defendant in favour of 2nd defendant is also proved, the 2nd plaintiff is also not entitled to any relief.

46. Accordingly, in the light of the findings rendered above, all the questions of law raised in this Appeal are answered in favour of the appellants and consequently, the Second Appeal is allowed. Thus, the judgment and decree of the lower appellate Court are set aside and the judgment and decree of the trial Court are restored. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

vsi

To

1. The Additional District Court,
Fast track Court No.IV,
Bhavani.
2. The Principal District Munsif Court,
Bhavani.

+1cc to M/S.Murugamanickam, Advocate Sr.49594

+1cc to M/S.N.Manokaran, Advocate SR.49857

Second Appeal No.1588 of 2008

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srg 23/09/2016