

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.03.2017

DELIVERED ON : 04.04.2017

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

SECOND APPEAL No.1316 of 2000

1.Thandava Mudaliar

2.Palaniappan ... Appellants/Respondents
1 & 2/Defendants 1 & 2

Vs.

1.Saraswathy @ Sarasu

2.Minor Palaniammal
(Minor represented by next friend and
mother, the first respondent) ..1st & 2nd Respondents/
Appellants/Plaintiffs

3.State of Tamil Nadu,
rep by the District Collector,
Erode.

4.The Tahsildar,
Bhavani, Erode District. ...3&4 Respondents/3& 4
Respondents/3 & 4 Defendants

The Second Appeal is preferred, under Section 100 of C.P.C., against the judgment and decree, made in A.S.No.19 of 1998, on the file of the Court of the Subordinate Judge, Bhavani, dated 12.10.1998, reversing the judgment and decree, made in O.S.No.940 of 1992, on the file of the Court of Additional District Munsif, Bhavani, dated 31.3.1997.

For Appellant : Mr.T.M.Naveen

For Respondent : Mr.T.Murugamanickam, Senior Counsel
for Mr.V.Rajesh, for RR1 and 2

Mr.T.Jayaramaraj, Govt. Advocate
for RR3 and 4

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JUDGMENT

Two defendants (defendants 1 and 2), against whom, a suit in the Trial Court was dismissed, but reversed and decreed in the First Appellate Court, are appellants 1 and 2, respectively, before this Court in this Second Appeal.

2 It may be necessary to give a factual matrix, sans unnecessary details and particulars, for better appreciation and understanding of this judgment. I proceed to do so.

3 Factual Matrix :

(a) The nucleus of the case is one Marimuthu, son of Ramasamy Mudaliar. The undisputed fact as it exists between the parties is that Marimuthu did not have mental development commensurate with his age and therefore, was deficient qua mental development. It is also an undisputed fact as between the parties that Marimuthu went missing (though there is dispute about the date on which he went missing) and that no one heard of him thereafter.

(b) Two brothers of Marimuthu, namely, Thandava Mudali and Palaniappan (appellants 1 and 2 herein) filed a suit, being O.S.No.184 of 1991 on the file of the District Munsif Court, Bhavani, against the State, represented by its District Collector and Tahsildar and obtained a decree, dated 11.06.1991, inter-alia to the effect that Marimuthu is dead (as no one has heard of him for a required statutory period), that Thandava Mudali and Palaniappan alone are the legal heirs of Marimuthu and that they are entitled to the legal heir certificate.

(c) One Saraswathy @ Sarasu and her then minor daughter Palaniammal, claiming that they came to know about the above decree only some time in July, 1992, filed a suit in O.S.No.940 of 1992, on the file of the Additional District Munsif Court, Bhavani, inter-alia with prayers that the earlier decree in the above said O.S.No.184 of 1991 does not bind them, that they are the legal wife and daughter, respectively, of Marimuthu and that they are entitled to legal heir certificate. Interestingly, Saraswathy and her minor daughter also pleaded that Marimuthu went missing and no one has heard about him since then. In this suit, i.e., O.S.No.940 of 1992, Marimuthu's two brothers Thandava Mudali and Palaniappan were arrayed as defendants 1 and 2. The State of Tamil Nadu, represented by the District Collector, Erode and the jurisdictional Tahsildar, Bhavani were arrayed as defendants 3 and 4.

(d) After full contest and trial, the suit was dismissed by the trial court, in and by judgment and decree, dated 31.3.1997. In the suit Exs.A.1 to A.19 were marked on behalf of the plaintiffs (though in the judgments of the trial court and the

first appellate court, it has been stated that 19 documents were marked, in the list of documents typed below / at the end of the judgment of the trial court, only 18 documents were shown to have been marked). Exs.B.1 to B.10 were marked on behalf of defendants. P.W.1 to P.W.4 were examined on behalf of the plaintiffs and D.W.1 was examined on behalf of the defendants. From here on, the parties in this Second Appeal are referred to by their respective ranks in the suit in the Trial Court, viz., O.S.No.940 of 1992 (out of which, the instant second appeal arises), for the sake of convenience and clarity. Therefore, Saraswathy and her then minor daughter Palaniammal are referred to as the plaintiffs 1 and 2, respectively and as 'plaintiffs' collectively. Thandava Mudali and Palaniappan are referred to as defendants 1 and 2, respectively. The defendants 3 and 4, namely, State of Tamil Nadu, represented by its District Collector and the jurisdictional Tahsildar, Bhavani, are collectively referred to as the official defendants.

(e) The trial court non suited the plaintiffs, primarily, on the ground that the 'factum of marriage' of the first plaintiff with Marimuthu has not been conclusively proved. Aggrieved, the plaintiffs carried the matter by way of regular first appeal, under Section 96 of the Civil Procedure code, 1908 (hereinafter referred to as "C.P.C.", for the sake of brevity). This regular first appeal was taken on file, as A.S.No.19 of 1998, on the file of the Sub Court, Bhavani. The first appellate court, after a detailed hearing and after perusal of the oral and documentary evidence let in / adduced in the trial court, came to the conclusion that the 'factum of marriage' has, in fact, been proved by the plaintiffs. Primarily, on this basis, the first appellate court reversed the findings of the trial court and decreed the suit in favour of the plaintiffs, as prayed for.

(f) Aggrieved, the defendants 1 and 2 have filed the instant second appeal, namely, S.A.No.1316 of 2000 in this Court. The second appeal was admitted by this Court, on 25.9.2000, on the following two substantial questions of law :

"a)Whether the Court below was right in presuming that necessary ceremonies were performed and the marriage was a valid marriage, when even the factum of marriage between Marimuthu and 1st respondent was not proved?

b)Whether the Court below was right in proceeding on the basis that Marimuthu married the first respondent, when none of the oral and documentary evidence adduced by her establish the same?"

(g) I now proceed to examine the matter in the light of the records and submissions made at the Bar, all under the caption "Discussion" infra.

4 Discussion :

(a) As stated in the factual matrix supra, one Marimuthu, son of Ramasami Mudaliar is the nucleus of this case. The plaintiffs, in their pleadings in the trial court, would say that three months after the marriage between the first plaintiff and Marimuthu, Marimuthu went missing, on 31.8.1987 while travelling in a bus from Pongapalayam to Kunnathur. It is the further case of the plaintiffs that on 31.8.1987, when Marimuthu went missing, the first plaintiff was in the family way and she was three months pregnant. It is also pleaded by the plaintiffs that the second plaintiff, Palaniammal, (then minor), was born on 6.3.1988 and her birth certificate is Ex.A.8. It is the categorical and specific case of the first plaintiff that the second plaintiff Palaniammal was born, on 6.3.1988, out of the wedlock between the first plaintiff and Marimuthu. It is also pleaded in the trial court by the plaintiffs that they came to know some time in July, 1992 that the two blood brothers of Marimuthu (defendants 1 and 2) had filed a suit, namely, O.S.No.184 of 1991, on the file of the District Munsif Court, Bhavani and obtained a declaratory decree that Marimuthu is dead and that the two brothers alone are his legal heirs. It is further alleged by the plaintiffs in the pleadings that the defendants deliberately suppressed the marriage and the existence of plaintiffs. As a sequitur submission, the plaintiffs would also plead that it is for the purpose of suppression that they were not arrayed / added as parties to the suit O.S.No.184 of 1991 filed by the defendants 1 and 2. In this suit, as stated supra in the factual matrix, besides arraying two blood brothers, as defendants 1 and 2, the official defendants, the Collector and the Tahsildar, have been arrayed as defendants 3 and 4, as there is a prayer pertaining to the issue of legal heir certificate also.

(b) The defendants 1 and 2 entered appearance and filed a written statement. Their primary plea was that no marriage took place between the first plaintiff and Marimuthu. In other words, it is the plea of defendants 1 and 2 that the first plaintiff is not the legally wedded wife of Marimuthu. Interestingly, the defendants 1 and 2 also would plead that Marimuthu did go missing, but they only dispute the date. According to defendants 1 and 2, Marimuthu went missing on the first day of the Tamil month "Thai", in the year 1983 while on his way to Palani. In other words, according to defendants 1 and 2, Marimuthu went missing, on 14.1.1983 and that nobody has heard of him since then.

(c) As stated supra, the plaintiffs would plead that Marimuthu went missing only on 31.8.1987 and that the first plaintiff was married to Marimuthu three months prior to the said date. This means that it is the plea of the plaintiffs that the first plaintiff was married to Marimuthu some time in May,

1987.

(d) Therefore, on rival pleadings, the entire dispute got reduced to one pivotal question as to whether there was a valid marriage between the first plaintiff Saraswathy and Marimuthu some time in May, 1987. In other words, the 'factum of marriage' became the singular pivotal issue in this case. Though obvious, for the purpose of clarity, it is to be stated that if the 'factum of marriage' is proved, collaterally as a corollary, that Marimuthu did not go missing on 14.1.1983, but was available till 1987 and that he went missing only on 31.8.1987 get proved. Therefore, there is no difficulty in saying that the 'factum of marriage' is the singular pivotal question in this case.

(e) In the trial court, the plaintiffs, as stated supra, have marked as many as 19 documents, namely Exs.A.1 to A.19. Of these 19 exhibits, Exs.A.1, A.2, A.10 and A.18 pertain to 'factum of marriage'. Ex.A.1 is the paper advertisement, in 'Dhinanthi' Tamil daily, given on 9.10.1987, saying that Marimuthu went missing from 31.8.1987. Ex.A.2 is the acknowledgment slip, pertaining to family ration card. Ex.A.2 is dated 30.9.1987. Ex.A.2 clearly shows that the first plaintiff Saraswathy is the wife of Marimuthu. Ex.A.10 is an invitation card, pertaining to a Puberty function in the family, on 24.8.1986. Exs.A.18 is a photograph taken during the puberty function. Ex.A.19 is a wedding invitation card for a wedding in the family, on 10.3.1994. Exs.A.11 to A.17 are the photographs taken in various family functions and occasions, wherein the first plaintiff and Marimuthu are seen together.

(f) With regard to the oral evidence, the first plaintiff Saraswathy @ Sarasu examined herself as P.W.1 and reiterated the pleadings. One Krishna Mudaliar, maternal uncle of Marimuthu, one Mariyayi, blood sister of Marimuthu and one T.R.Arumugam, local resident of Dharmapuri, were examined as P.W.2 to P.W.4. P.W.2 to P.W.4 have spoken about the 'factum of marriage' between the first plaintiff and Marimuthu. All the three witnesses have emphatically deposed that the first plaintiff Saraswathy was, in fact, married to Marimuthu. They have been cross examined, but the cross examination is more an attempt to discredit them by imputing motives. The cross examination of P.W.2 to P.W.4 proceed on the lines that they are inimically disposed towards defendants 1 and 2 and therefore, they are deposing in the instant case. Suggestions to this effect have been put to P.W.2 to P.W.4 and the same have been denied.

(g) On the side of the defendants, the first defendant Thandava Mudali is the lone witness and he has examined himself as D.W.1. 10 documents, Exs.B.1 to B.10 were marked. Ex.B.1 is the receipt given by the police station. It is the case of the defendants 1 and 2 that this complaint pertains to Marimuthu going missing. Interestingly / intriguingly, Ex.B.1 is dated

25.3.1989. Ex.B.2 to B.10 are partition deed, house tax receipts and a 1961 sale deed. Therefore, from the exhibits marked by the defendants, it turns out that Ex.B.1 alone pertains to Marimuthu going missing.

(h) In terms of the oral evidence, the first defendant Thandava Mudali, who examined himself as D.W.1 would assert that the first plaintiff Saraswathy was never married to Marimuthu and that no such marriage took place. As a sequitur assertion, D.W.1 would assert that Marimuthu went missing on 14.1.1983, not heard of for more than seven years and that he went missing as a bachelor. Therefore, D.W.1 would depose that Marimuthu should be presumed to be dead as he went missing, on 14.1.1983 and has not been heard of for more than 7 years. It is the further case of D.W.1 that as Marimuthu, according to him, went missing as bachelor, he has no Class 1 legal heir (mother having predeceased him), himself and his blood brother, second defendant (Palaniappan), as class 2 legal heirs, alone are Marimuthu's legal heirs and that they are entitled to the property, which fell to his share being a dwelling house, in which, admittedly, the plaintiffs (mother and daughter) were living.

(i) The trial court, on analyzing the oral and documentary evidence, had returned a finding that the 'factum of marriage' has not been conclusively proved, as the exact date of marriage has not been given by any of the witness. The trial court has also returned a finding that the 'factum of marriage' has not been proved on the basis that there is no document to show that the first plaintiff lived with Marimuthu. It is obvious that the trial court has lost sight of Ex.A.2 (marked by consent), dated 30.9.1987, which is the acknowledgment slip for having received the family ration card, wherein the first plaintiff is shown as the wife of Marimuthu. The trial court has further buttressed its decision, on the basis that the exact date on which Marimuthu, allegedly, went missing has also not been clearly given by the witnesses.

(j) It is to be noted that all exhibits referred to supra have been marked by consent.

(k) The first appellate court has scrutinized Ex.A.10, which, as stated supra, is a invitation card for a puberty function. It comes to light that it is the puberty function of the defendants' blood sister's daughter. It also comes to light from the evidence that the function took place, on 24.8.1986. The first appellate court has clearly noticed that P.W.3, Mariyayi, has deposed that Marimuthu also participated in the function. Ex.A.16 photograph clearly shows that two blood brothers (defendants 1 and 2) and Marimuthu, who, allegedly, went missing in 1983, are present there. Most importantly, D.W.1, (as stated supra, the first defendant Thandava Mudali examined himself as D.W.1), has categorically admitted in his deposition that the person in the photograph Ex.A.16 is he himself and that the person next to him is Marimuthu. He has

categorically admitted this. He also admits that this function took place in Rana Marriage Hall, Erode. D.W.1, Thandava Mudali, also admits that P.W.3, Mariyayi, is his blood sister. The relevant portion of the deposition of D.W.1 runs as follows :

குறுக்கு விசாரணை .

“.....ஏ.16ல் இருப்பது நான்தான். மாரிமுத்துவம் அதில் இருக்கிறார். பக்கத்தில் இருப்பது 2வது தம்பி பழனியப்பன். திரட்டி ராணா திருமணம் மண்டபத்தில் ஈரோட்டில் நடந்தது. சாட்சி சொன்னவர் பெயர் மாரியம்மாள் (பி.3). என் தங்கை....”

(1) On closely and carefully scrutinizing these exhibits and the deposition of D.W.1, the first appellate court came to the conclusion that the averments of the defendants that Marimuthu went missing on 14.1.1983 is obviously false, because D.W.1 has categorically admitted that he is sitting next to him for the photograph, Ex.A.16, in the function on 24.8.1986. Obviously, the defendants have falsely pleaded that Marimuthu went missing, in 1983 itself to bring their complaint within the four corners of the statutory period of seven years, for which the person should be missing / not heard of for the legal presumption that he or she is dead.

(m) The first appellate court also relied heavily on the deposition of P.W.2, who is none other than the maternal uncle of the defendants. He is not just the maternal uncle of the defendants, but he is the maternal uncle of Marimuthu also. There can be no dispute or doubt that P.W.2, maternal uncle, would have certainly attended the wedding of Marimuthu with the first plaintiff. The first appellate court has noticed that the deposition of P.W.2 remains as such, without being demolished, though an attempt to challenge his deposition is made. In other words, the first appellate court has noticed that P.W.2, maternal uncle, withstood cross examination without getting derailed. The deposition of P.W.2, in the cross examination, runs as follows :

“..... வாதிக்கும், இறந்தபோனதாக சொல்லும் மாரிமுத்துவக்கும் திருமணம் எந்தக் காலத்திலும் திருமணம் நடக்கவில்லையென்றால் சரியில்லை. வாதிக்கும், மாரிமுத்துவக்கும் திருமணம் நடந்தது பொய் என்றால் சரியில்லை..... மாரிமுத்துவக்கும், சரஸ்வதிக்கும் திருமணம் நடந்ததாக கூறும் இடத்தில் நான் இல்லை என்றால் சரியில்லை.....”

(n) The first appellate court has also noted Ex.A.8, which is the birth certificate of the second plaintiff, Palaniammal. It is evident from the birth certificate that the second plaintiff was born, on 6.3.1988 and it has been categorically stated in her birth certificate that she was born out of the

wedlock between Marimuthu and Saraswathy. An attempt was made on the part of the defendants to say that this birth certificate Ex.A.8 is post suit, as it is dated 3.7.1992. It may be post suit. It may have even been applied for and obtained for the purpose of being produced in the suit, but the official respondents are very much parties to the suit and they do not dispute the authenticity or veracity of Ex.A.8. Therefore, the factum that the second defendant Palaniammal was born out of the wedlock between the first plaintiff and Marimuthu is beyond any pale of doubt.

(o) Besides the findings of the trial court and the first appellate court, notwithstanding the fact that I am writing a judgment in a second appeal, where the matter is decided on the substantial questions of law, in the course of analysis of the oral and documentary evidence, I have noticed that the police complaint regarding Marimuthu going missing produced by the defendant is dated 25.3.1989. This police complaint is Ex.B.1. No other complaint or document prior to 1989 has been produced to show that some complaint was lodged or some paper advertisement was given about Marimuthu going missing in 1983. I have taken judicial cognizance of this fact that emerges from the undisputed records before this Court.

(p) Now, on examining the substantial questions of law, on which this second appeal was admitted, as would be evident from the substantial questions of law set out supra, the second question is more factual. Both the learned counsel, namely, Mr.T.M.Naveen, learned counsel, for defendants 1 and 2 (appellants before me) and Mr.T.Murugamanickam, learned Senior Counsel, for Mr.V.Rajesh, learned counsel for plaintiffs (respondent 1 and 2 before me) fairly admit this. Therefore, a lone question of law, which again touches upon the 'factum of marriage' alone falls for consideration.

(q) Vehemently contending that there could not have been any presumption with regard to the 'factum of marriage', the learned counsel for defendants 1 and 2 (appellants before me), relied on the following five case laws:

- "(i) Surjit Kaur Vs. Garja Singh and others [(1994) 1 SCC 407];
- (ii) Shaji Vs. Gopinath [1995-2-L.W. 95];
- (iii) S.C. Shanthi Vs. P. Venkatesh [1996 (I) CTC 658];
- (iv) Sayed Muhammed Mashur Kunhi Koya Thangal Vs. Badagara Jumayath Palli Dharas Committee and others [(2004) 7 SCC 708];
- (v) Govindarasami Naidu Vs. Shanmuga Nattar and another [2007 (2) CTC 553].

(r) In 1994 Surjit Kaur's case, my attention was drawn to paragraphs 10,11 and 12 of the said judgment by the learned counsel for the appellants. On facts, that was a case, which turned on the question as to whether mere living as husband and wife confers the status as husband and wife. In my opinion, that does not help the appellants, as the fact situation here is different and it is not a question as to whether they were living together, but it is the question of whether the marriage was performed as per ceremonies and solemnized as per Hindu rites and customs, particularly as per the ceremonies prevalent in the community, to which the parties belong.

(s) With regard to 1995 Shaji's case, my attention was drawn to paragraphs 6,8 and 11. This judgment was rendered by a Division Bench of our High Court. In my view, this judgment, also does not help further the case of the appellants, as, on facts, that case pertains to a challenge to the marriage certificate and it was a case where the question as to whether all the formalities set out in Section 7 of the Hindu Marriage Act, 1955, particularly 'Saptapadi' and the factum that the marriage gets solemnized only on the seventh step being taken were all examined in great detail. In the instant case, the fact situation is different. The maternal uncle and the blood sister (P.W.2 and P.W.3) have spoken about the marriage and have clearly stated that the marriage was performed as per the Hindu rites and customs and it was solemnized as per Hindu rites and ceremonies.

(t) With regard to 1996 S.C.Shanthi's case, my attention was drawn to paragraph 8 of the said judgment. This judgment again turns on three determinants for the Hindu form of marriage, namely, Homam, Tying of Thali and Saptapadi. This judgment proceeds on Section 7-A of the Hindu Marriage Act, 1955. The relevant paragraph 8 reads as follows :

"8.The true extract of Hindu Marriage Register (Marriage Certificate) which has been marked as Ex.A-3 clearly shows that the marriage is in accordance with Section 7-A of the Hindu Marriage Act. For a Hindu Form of marriage, three essential features are necessary, viz. (i) Homam; (ii) Tying of 'thali', and (iii) 'Saptapati'. Neither R.W.2 nor R.W.3 speaks about these essential features. The respondent, in his counter, had categorically stated that the respondent and the petitioner loved each other and as a result of that, marriage, in accordance with the Hindu Marriage Act and Hindu Customary Rites, was celebrated. When he pleads that the marriage has taken place in accordance with the Hindu Customs and Rites, it is for him to establish the same. In the absence of any evidence to show that the marriage took place in accordance with the Hindu Customary Rites, it cannot be stated that it

is a valid marriage. It has been held by a Division Bench of this Court in Shaji v. Gopinath, A.I.R. 1995 Madras 161 that, even for registration of the marriage, the marriage ought to have been solemnised in accordance with the provisions of the Hindu Marriage Act. Their Lordships have held as follows:--

"11.It is clear from the above provisions that there has to be solemnisation of the marriage in accordance with the provisions of the Hindu Marriage Act before the same is registered under Section 8 of the said Act. In the present case, the uncontradicted version of the plaintiff in the plaint and the deposition is to the effect that there was no marriage of any form at any time before the registration. According to the evidence, there was only registration of marriage and either before or after the parties did not live as husband and wife".

In my view, this case also does not help the appellants as it is a matter where the parties to the alleged marriage themselves dispute the marriage. Therefore, all these determinants had to be gone into in great detail. In the instant case, as stated supra, when the maternal uncle and the blood sister have deposed that the first plaintiff was married to Marimuthu and when they have withstood cross examination without getting derailed, nothing more needs to be established, particularly when the defendants' averment that Marimuthu went missing in 1983 stands completely demolished by his admission in the witness box that he is seen in Ex.A.16 photograph in the puberty function in the family, on 24.8.1986.

(u) 2004 case (Sayed Muhammed Mashur Kunhi Koya Thangal's case), was relied on for the proposition that the plaintiffs will have to prove their case and they cannot succeed by picking holes in the pleadings of the defendants. For this purpose, my attention was drawn to paragraph 8 of the said judgment. This proposition is well settled and to my mind, it may not even be necessary to cite an authority in this regard. In the factual matrix of the instant case, I find that on discharge of initial burden by the plaintiffs, the onus shifts. The law is also well settled qua the principle that though the burden of proof does not shift from one party to the other, the onus not only shifts, but also swings like a pendulum from one end to other, depending on the initial discharge of burden of proof. In the instant case, the defendants (appellants before me) have not been able to establish that Marimuthu went missing in 1983. On the contrary, their positive averment that Marimuthu went missing on

14.1.1983 (first day of the Tamil month of "Thai") stands completely demolished by the admission of the first defendant, who deposed as D.W.1. The admission of D.W.1 that he is in the photograph with Marimuthu in the function on 24.8.1986 has been extracted and discussed in detail supra in this judgment. Therefore, this judgment is of no avail and does not help further the case of the defendants in any manner.

(v) 2007 judgment (Govindarasami Naidu's case), which has been authored by a learned single judge of this Court, was also relied on for the same principle that the plaintiff has to succeed on the strength of his or her own case and cannot attempt to succeed by picking holes in the defendant's case. For this purpose, paragraph 18 of the said judgment was read out. What I have said supra, regarding 2004 case (Sayed Muhammed Mashur Kunhi Koya Thangal's case) applies to this case also as both the cases have been cited in support of the same proposition / principle.

(w) By way of counter submissions, Mr.T.Murugamanickam, learned Senior counsel appearing for respondents 1 and 2, relied on the following five judgments :

"(i) N.Jayalakshmi Ammal and others Vs. R.Gopala Pathar and another [1995-1-L.W.10];

(ii) The Managing Director, State Express Transport Corporation Tamil Nadu Limited Vs. E.Tamilarasi [2016 (1) CTC 698];

(iii) Union of India, represented by its Secretary to the Government of India, Ministry of Finance, Department of Revenue and others Vs. Polimetla Mary Sarojini and another [CDJ 2017 APHC 108];

(iv) Shantinath Ramu Danole and another Vs. Jambu Ramu Danole and others [(1996) 11 SCC 88]; and

(v) Ranganath Parmeshwar Panditrao Mali and another Vs. Eknath Gajanan Kulkarni and another [(1996) 7 SCC 681]."

(x) N.Jayalakshmi Ammal's case [1995-1-L.W.10] rendered by the Hon'ble Supreme Court of India, E.Tamilarasi's case [2016 (1) CTC 698], rendered by a division bench of our High Court (authored by Justice V.Ramasubramanian) and Polimetla Mary Sarojini's case [CDJ 2017 APHC 108] a division bench judgment of the Andhra Pradesh High Court (also authored by Justice V.Ramasubramanian), were relied on and pressed into service for submissions on Sections 107 and 108 of the Indian Evidence Act, 1872. Relying on these three judgments, the learned Senior Counsel would contend that Section 108 of the Evidence Act is an

exception to Section 107. It was emphatically argued that while Section 107 provides the rule, Section 108 provides the exception. It was argued that once it was established that a person was alive within the last 30 years, the burden of proof that he is dead is on the person who affirms it. This is the rule under Section 107, but, if it is proved that such a person despite being alive within 30 years, has not been heard of for seven years by those, who would naturally have heard of him (if he had been alive), the burden of proving that he is alive is shifted to the person, who affirms that he is alive.

(y) I have no hesitation in following the above principle laid down in the above said three judgments by way of ratio. It only strengthens my view that the burden of proof does not shift, but the onus swings like a pendulum from one end to the other.

(z) The fact situation above would show that the defendants 1 and 2 (appellants before me) could not at all have contended that Marimuthu should be presumed dead. However, their plea has completely been demolished in the light of admission of D.W.1 in the box.

(aa) Therefore, the judgment and decree obtained by the defendants 1 and 2 (appellants before me) vide Exs.A.6 and A.7, being judgment and decree in O.S.No.184 of 1991, dated 11.6.1991, on the file of the District Munsif Court, Bhavani, certainly does not bind the plaintiffs (respondents 1 and 2 before me).

(ab) The other two judgments, namely, Shantinath Ramu Danole's case [(1996) 11 SCC 88] and Ranganath Parmeshwar Panditrao Mali's case [(1996) 7 SCC 681] were relied on regarding Section 50 of the Evidence Act, which talks about proving relationship of one person with the other.

(ac) As set out supra, P.W.2 and P.W.3 (maternal uncle and blood sister) have adequately spoken about the relationship between the first plaintiff and Marimuthu. Equally, D.W.1 (first defendant himself) has made a lethal admission in the witness box, as set out supra. Therefore, Section 50 of the Evidence Act and the ratio on the same, certainly, helps the case of the plaintiffs (respondents 1 and 2 before me) and I have no hesitation in holding that the 'factum of marriage' between the first plaintiff and Marimuthu stands proved.

(ad) With regard to respondents 3 and 4, who are the official respondents, namely the District Collector and the jurisdictional Tahsildar, Mr.Jayaramaraj, learned Government Advocate, is present. It is necessary to note that the learned Government Advocate would support the case of the plaintiffs

(respondents 1 and 2 before me) and say that the revenue authorities are inclined to grant legal heir certificate in favour of the mother and the daughter.

(ae) It was also submitted that there would be no rhyme or reason for an utter stranger / alien to intrude into a family and claim to be the wife and daughter born out of the wedlock of a man, who admittedly went missing. This submission, certainly, appeals to common sense and logic. Suffice to say this much on that aspect of the matter.

5 Conclusion :

Much has been said about the exact date of marriage not being given and not being spoken to. There cannot be any dispute that when proof beyond doubt is elusive for both parties, in a civil case, the Civil court will certainly adopt the theory of 'preponderance of probabilities' in place of 'proof beyond doubt' unlike a criminal case. Therefore, I find no infirmity, in law, in the approach of the first appellate court, which has adopted the principle of 'preponderance of probabilities' and given a finding that the 'factum of marriage' stands proved. Therefore, the lone substantial question of law, on which the second appeal was admitted, which raises the question as to whether the presumption of the court below that the marriage is valid and the 'factum of marriage' between Marimuthu and the first plaintiff stands proved, is correct, is answered in favour of the respondents 1 and 2. In other words, I answer this lone substantial question of law by saying that the first appellate court was correct in returning a finding that the 'factum of marriage' between Marimuthu and the first plaintiff (first respondent before me) stood proved. Therefore, the second appeal fails and deserves to be dismissed.

6 Decision :

The Second Appeal No.1316 of 2000 is dismissed, sustaining and upholding the judgment and decree of the first appellate court, dated 12.10.1998, in A.S.No.19 of 1998, reversing the dismissal of the suit by the trial court, vide judgment and decree, dated 31.3.1997, in O.S.No.940 of 1992.

Considering the factual matrix of the case and trajectory the litigation has taken in reaching this court, the parties are left to bear their respective costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The Additional District Munsif Court,
Bhavani.

2.The Subordinate Court,
Bhavani, Erode District.

+1 cc to M/s.V.Rajesh Advocate sr 20159
+1 cc to Special Government Pleader (CS) sr20280

S.A.No.1316 of 2000

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aa04/07/2017



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