

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2021

PRONOUNCED ON : 11.02.2021

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No. 1158 of 2008 &

M.P. No.1 of 2008

Ramasamy

S/o. Kuppusamy Gounder ... Appellant/Ist Defendant

Vs.

1. Kumar @ Saravanan

S/o. Kuppusamy Gounder

2. Arul @ Subbarayan

S/o. Kuppusamy Gounder ... Ist and 2nd Respondent/
Plaintiffs 1 & 2

3. Amirtham

Wife of Murugesan

4. Thoppachi

Wife of Dhanakoti

5. Mottachi

W/o. Adhimoolam

6. Meena

W/o. Kuppusamy Gounder ... Respondents 3 to 6/
Defendants 2 to 5

Prayer: Second Appeal filed under Section 100 of CPC, 1908 against the judgment and decree of the District Judge's court at Tiruvannamalai dated 15.02.2008 in A.S. No.43 of 2006, confirming the judgment and decree of the Principal Subordinate Judge's Court at Tiruvannamalai dated 16.10.2006 in O.S.No.396 of 2001.

For Appellant : Ms. Mythili Suresh

for Sarvabhauman Associates

For Respondents

For R1 and R2 : Mr. Prakash Babu

For R3 & R4 : Mr. J. Praveenkumar

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 15.02.2008 passed in A.S. No.43 of 2006 on the file of the District court, Tiruvannamalai, confirming the judgment and decree dated 16.10.2006 passed O.S.No.396 of 2001 on the file of the Principal Subordinate Court, Tiruvannamalai.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. The first defendant in O.S. No.396 of 2001 is the appellant in this second appeal.

4.Suit for partition and mesne profits.

5. The case of the plaintiffs as per the amended plaint, in brief, is that the plaint schedule properties are the joint family properties of Kuppusamy Gounder, the plaintiffs and the defendants and Kuppusamy Gounder inherited about 4 acres of land from his father Muthu Gounder and out of the income from the ancestral lands, he had purchased the remaining properties in his name as the manager of the joint family and all the suit properties are treated as the joint family properties of the plaintiffs and the defendants. Kuppusamy Gounder married the defendants' mother Poongole Ammal and begot the defendants and Poongole Ammal died in or about 1968. Thereafter, in the year 1971, Kuppusamy Gounder married the plaintiffs' mother Vanamayil at Tanipadi village according to Hindu Rites and customs. Out of the said lawful wedlock, the plaintiffs are born to Kuppusamy Gounder and Vanamayil and the plaintiffs' mother died about 12 years back. The daughters of Kuppusamy Gounder were married prior to 1975. Before marrying Kuppusamy Gounder, the plaintiffs' mother Vanamayil married one Raju Gounder and their marriage was dissolved as per the caste and custom in the panchayat during January 1971 and the said dissolution of marriage is evidenced by the dissolution letter executed by Raju Gounder on 27.01.1971 and the same had been attested by the panchayat and hence the marriage between Kuppusamy Gounder and the plaintiffs' mother is valid and legal one. The first plaintiff is called Saravanan, the second plaintiff is called Suburayan and the third plaintiff is called Viswanathan. However, for the reasons best known to the plaintiffs' father, their names have been changed as Kumar, Arul and Murugayyan. The plaintiffs' father Kuppusamy Gounder became unseen and his whereabouts are not known for the past two years. There was a family arrangement between the plaintiffs and the defendants about four years back in the presence of Kuppusamy Gounder and

the plaintiffs and their father Kuppusamy Gounder were residing in the house constructed by the father in Item No.22 of the suit properties and 3/4 share of the lands and the defendant is in the possession of ancestral house in Item No.23 of the suit properties and 1/4 share of the lands. It was agreed that a full pledged partition deed has to be entered into between the plaintiffs and the defendants. As per the family arrangement, the plaintiffs are tentatively in the possession of 3/4 share of the lands and the defendants are in the possession of 1/4 share of the lands. The plaintiffs got employment at Hosur and taking advantage of their absence, the defendants, with the help of the sister's husband attempted to take the forcible possession of the entire lands and prevented the plaintiffs from raising the crops and hence, the plaintiffs are constrained to issue a notice to the first defendant on 20.06.2001 and the first defendant failed to send any reply despite the receipt of notice. The first defendant had taken the possession of the entire lands during July 2001. Further according to the plaintiffs since the whereabouts of their father is not known for about two years only, he cannot be presumed to be dead and he cannot be added as the party to the suit and as and when the particulars come to the knowledge of the plaintiffs, they will add their father as the party to the suit. The first defendant is bound to account to the plaintiffs their share of income from the suit properties. Further it is averred by the plaintiffs that since the whereabouts of their father is not known for the 7 years after the filing of the suit, he is deemed to have attained civil death and the defendants 1, 2 to 5 and the plaintiffs are the legal heirs and according to the plaintiffs, they are necessitated to seek partition of their 27/40 share and also for accounting of their income by the defendants towards their respective share.

6. The first defendant resisted the plaintiffs' suit contending that it is false to state that the plaint schedule properties are the joint family properties of Kuppusamy Gounder, the plaintiffs and the defendants and also false to state that the plaintiffs are the sons of Kuppusamy Gounder. According to the first defendant it is true that Kuppusamy Gounder inherited 4 acres of land as well as the other properties from his pangalies. Kuppusamy Gounder and his pangalies had effected partition by way of the partition deed dated 24.07.1985 and from that date onwards, Kuppusamy Gounder was exclusively enjoying the properties alone. Kuppusamy Gounder had four daughters and one son, namely, the first defendant. The four daughters are Amirtham, Thoppachi, Mottachi and Meena and all are married and living with their respective husbands in their family. Kuppusamy Gounder's wife is dead. It is true that Poongole Ammal is the legally wedded wife of Kuppusamy Gounder and through her he had begotten 4 daughters and one son. It is the

first defendant who is in the possession and enjoyment of the entire suit properties. Kuppusamy Gounder had not married Vanamayil of Thanipadi village as alleged in the plaint. Vanamayil belongs to perungulathur village and not Thanipadi village. She was married to one Raju Gounder of Perungulathur village and begot a daughter to the said Raju Gounder on 07.09.1969. Subsequently, Vanamayil deserted her husband and joined Kuppusamy Gounder as a concubine. There was no marriage between Vanamayil and Kuppusamy Gounder at any point of time and they had only illicit relationship and the marriage between Vanamayil and Raju Gounder was not dissolved at any point of time and hence there could be no legal marriage between Vanamayil and Kuppusamy Gounder. The plaintiffs are not having two names as claimed in the plaint. In order to gain unlawful advantage, the plaintiffs have claimed that they have two names. The birth extract and the voters list would go to show that the plaintiffs are not the sons of Kuppusamy Gounder and the plaintiffs are not entitled to maintain the suit. No person could be deemed to attain civil death on his disappearance for only two years. All the sharers must be made parties to the suit. The plaintiffs have wantonly omitted to include Kuppusamy Gounder to avoid the disclosure of the truth. There was no family arrangement as put forth in the plaint. The plaintiffs are utter strangers to the family. The first defendant has also prescribed title to the suit properties on account of his continuous enjoyment of the same for more than 25 years by adverse possession also. As the first defendant was laid up with typhoid fever, he was unable to give reply to the notice issued by the plaintiffs. Hence the suit is liable to be dismissed.

7. In the additional written statement, the defendant would reiterate the averments already put forth by him in the written statement and further stated that the panchayat alleged in the plaint dated 21.01.1971 is false and the alleged dissolution letter in the plaint is a fabricated document and there was no dissolution of marriage as put forth in the plaint at any point of time and the dissolution letter is signed only by the husband and not by the wife. Such a dissolution is unknown to law. The dissolution letter has been fabricated for the purpose of the case. The electoral roll of Perungulathur village would go to show that Raju Gounder and Vanamayil were living together during 1975 and therefore it is false to state that their marriage had been dissolved in the year 1971 and hence the suit is liable to be dismissed.

8. In the additional written statement filed subsequently, the first defendant would plead that the plaintiffs have not come out clearly as regards the civil death of Kuppusamy Gounder in the plaint. The plaintiffs have not disclosed as to when

from Kuppusamy Gounder had been missing to raise the presumption of civil death. The defendants 2 to 5 are unnecessary parties to the suit. They have no right in the suit properties and hence the suit is liable to be dismissed.

9. The third defendant resisted the plaintiffs' suit contending that they are the daughters of Kuppusamy Gounder through Poongole Ammal and that their mother Poongole Ammal purchased certain land properties covered in the plaint and the house properties vide sale deeds dated 14.10.1953, 12.12.1956, 05.12.1957 and 18.11.1953 and the abovesaid properties were enjoyed by Poongole Ammal till her death in 1968 and it was agreed by Poongole Ammal during her life time that the said properties should be given to her daughters, as the daughters were not provided with jewels and the other articles during their marriage. In the year 1975, an oral family arrangement took place in the family between Kuppusamy Gounder, the first defendant and the defendants 2 to 5 whereunder the properties purchased by Poongole Ammal were allotted to the share of the defendants 2 to 5 and as per the same, the items 3, 15, and 22 were allotted to the defendants 2 to 5 and since then it is only the defendants 2 to 5, who are in the possession and enjoyment of the abovesaid items by obtaining the patta and paying the kists. The defendants 2 and 5 had alienated the portion of the items allotted to their share and the plaintiffs and the first defendant are aware of the same. Therefore, the plaintiffs and the first defendant are not entitled to claim any right over the properties allotted to the defendants 2 to 5. The plaintiffs' suit for partition is barred by limitation and the plaintiffs and the first defendant are also estopped by deed from claiming any right in the properties allotted to the defendants under the family arrangement and in respect of the other items of the suit properties, the defendants 2 to 5 are entitled to their legitimate share. There is no cause of action for the suit and hence, the suit is liable to be dismissed.

10. In support of the plaintiffs' case P.Ws.1 to 6 were examined, Exs. A1 to A78 were marked. On the defendants' side D.Ws. 1 and 2 were examined and Exs.B1 to B4 were marked.

11. On an appreciation of the materials placed on record, both oral and documentary, and the submissions put forth by the respective parties, the courts below were pleased to declare that the plaintiffs are entitled to 3/8 share in the suit properties and directed them to take a separate proceeding for mesne profits under Order 20 Rule 12 CPC. Aggrieved over the judgment and decree of the courts below, the second appeal has been preferred by the first defendant.

12. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

- 1) Whether the courts below are correct in law in believing Ex.A71 especially in the light of Ex.B2 and more particularly when the courts below themselves admit that there is the evidence to show the dissolution of marriage between Raju Gounder and Vanamayil?
- 2) Whether the courts below are right in passing a preliminary decree in favour of respondents 1 to 3 especially when they had failed to discharge the burden of proving the marriage between Kuppusamy and Vanamayil in the manner known to law?
- 3) Whether the courts below are right in solely relying of Ex.A71 a unregistered document in the nature of a letter to hold that the marriage between Raju Gounder and Vanamayil was dissolved especially when the respondents 1 to 3 had failed to discharge the burden of proving the prevalence of custom or practice of such divorce amongst their community?
- 4) Is not the presumption of the death of Kuppusamy Gounder by the courts below contrary to the provisions of Section 108 of the Evidence Act?

13. The suit has been laid by the plaintiffs seeking for the relief of partition and for accounting against the defendants. It is not in dispute that the first defendant is the son and the defendants 2 to 5 are the daughters of the deceased Kuppusamy Gounder. The suit properties are claimed to be the joint family properties of the deceased Kuppusamy Gounder, he having derived the same by way of inheritance and out of the income derived from the ancestral properties, he had purchased the remaining properties. As regards the character of the suit properties, the parties are not at issue as such.

14. The plaintiffs are claiming to be the sons of the deceased Kuppusamy Gounder. According to the plaintiffs, Poongole Ammal, the mother of the defendants is the first wife of the deceased Kuppusamy Gounder and she died in or about 1968 and subsequent thereto, Kuppusamy Gounder had married the plaintiffs' mother Vanamayil according to Hindu Rites and customs and out of the said wedlock, it is put forth that the plaintiffs are born to Kuppusamy Gounder. As rightly concluded by the courts below, the first defendant, who is the main contesting defendant, had not disputed the patronage of the

plaintiffs. It is found that he has also admitted during the course of evidence that the plaintiffs are the illegitimate children of Kuppusamy Gounder i.e. according to the defendant, no valid marriage took place between Kuppusamy Gounder and Vanamayil, the plaintiffs' mother. On the other hand, Kuppusamy Gounder had been keeping Vanamayil only as a concubine and therefore, the children born to Kuppusamy Gounder and Vanamayil out of the abovesaid illicit relationship cannot claim any legitimacy and therefore, according to the first defendant, the plaintiffs are the illegitimate children of the deceased Kuppusamy Gounder. In the light of the abovesaid defence put forth by the first defendant, as such, it is for the plaintiffs to establish that a valid marriage took place between Kuppusamy Gounder and Vanamayil as claimed by them. Further according to the plaintiffs, after the marriage, Kuppusamy Gounder and Vanamayil lived as husband and wife to the knowledge of the society till the demise of Vanamayil and therefore, based on the long cohabitation, the status of husband and wife amongst Kuppusamy Gounder and Vanamayil should be upheld by the court and on that footing also would contend that they are the legitimate children of the deceased Kuppusamy.

15. From the pleas put forth by the respective parties, it is found that Vanamayil had already married one Raju Gounder and according to the plaintiffs, the marriage between Vanamayil and Raju Gounder had been dissolved as per caste and custom in the panchayat on 27.01.1971 and in that connection, Raju Gounder had also given a letter of dissolution of the marriage marked as Ex.A71 and only thereafter, according to the plaintiffs, particularly, after the demise of Poongole Ammal, Kuppusamy Gounder had married Vanamayil. At this juncture, it is to be noted that Poongole Ammal and Vanamayil are sisters. Therefore, it is evident that the parties are well aware of the background of their respective status one way or the other and in such view of the matter, it is seen that, particularly when the defendant has taken the plea that the marriage between Vanamayil and Raju Gounder had not been dissolved as per law, the onus is upon the plaintiffs to establish that a valid dissolution of the marriage between Raju Gounder and Vanamayil had taken place by virtue of Ex.A71 letter.

16. The plaintiffs would also put forth the case that the whereabouts of Kuppusamy Gounder is not known for the past 7 years or more as projected in the amended plaint and therefore, according to the plaintiffs, his non appearance should be construed as a civil death and thus according to the plaintiffs, they had not impleaded Kuppusamy Gounder as a party to the proceedings. The defendants would put forth the defence that the claim of the plaintiffs that the whereabouts of Kuppusamy Gounder is not known for several years is false and only with a

view to suppress the disclosure of the truth, particularly, as regards the status of the plaintiffs, the plaintiffs have deliberately not impleaded Kuppysamy Gounder as a party to the proceedings. In such view of the matter, the plaintiffs have also to establish that the whereabouts of Kuppysamy Gounder is not known for the 7 years and more and thereby they are entitled to take the presumption as provided under Section 108 of Indian Evidence Act to hold that Kuppysamy Gounder has attained civil death as per law.

17. Inasmuch as the parties have admitted that Vanamayil had already married Raju Gounder and subsequently, by way of Ex.A71 letter, their marriage got dissolved as per the caste and custom prevailing between the parties and when the abovesaid document is seriously challenged by the contesting defendant, it is for the plaintiffs to establish the genuineness of Ex.A71 letter. On a perusal of Ex.A71 letter, it is seen that it has been signed by Raju Gounder in the presence of the panchayatars. No doubt, the plaintiffs have not examined the signatories of Ex.A71 letter as according to the plaintiffs, none of them are alive. Further it is found that as held by the courts below, Ex.A71 letter dated 21.01.1971 is a 30 years old document. The plaintiffs have examined P.W.6, Sabapathi, a retired Sub Inspector, who has identified the signature of his father Narayanasamy in Ex.A71. According to P.W.6, his father is a village maniam and his signature is found in Ex.A71. As rightly held by the courts below, no motive has been attributed against P.W.6 by the contesting defendant that he has reason to depose in favour of the plaintiffs' case. No doubt P.W.6 may not be directly aware of the circumstances under which Ex.A71 had come into existence since he is not a party associated with it directly. Considering the abovesaid factors, the courts below have proceeded to hold that Ex.A71 being a 30 years old document and one of the signatories to the document has been identified by P.W.6 and considering the recitals contained in Ex.A71 and noting that the relationship between Kuppysamy Gounder and Vanamayil had not been smooth over a long period of time for one reason or the other and their marriage was therefore, found to be unable to be continued further, accordingly found that Raju Gounder had executed Ex.A71 dissolution letter putting an end to his marriage with Vanamayil. No doubt, Vanamayil had not signed Ex.A71 letter. But, on that ground, it cannot be held straightaway that Ex.A71 letter is an invalid document. When according to the plaintiffs, by way of custom and practice prevailing in the society, Raju Gounder had chosen to dissolve the marriage by giving a letter of dissolution of marriage under Ex.A71 and it is seen that till the institution of the present suit none has challenged the same as per law and particularly when there is no material worth acceptance to hold that thereafter Raju Gounder and Vanamayil had lived as husband and

wife, in such view of the matter, in my considered opinion, the courts below are found to be justified in accepting the truth and validity of Ex.A71 dissolution letter.

18. In addition to that, the courts below have taken into consideration the evidence of plaintiffs' witnesses who are the close relatives associated with the plaintiffs and the defendants. In this connection, P.W.2, Muruga Gounder, who is the brother of Kuppusamy Gounder has deposed that as decided by the elders, after the demise of Poongole Ammal in 1968, for the welfare of the children born to Kuppusamy Gounder and Poongole Ammal, they had decided to perform the second marriage of Kuppusamy Gounder with the sister of Poongole Ammal, namely, Vanamayil and accordingly, testified that their marriage was celebrated at Thanipadi Murugar temple during 1971 and Kuppusamy Gounder took Vanamayil as his wife by tying thali on her neck. Furthermore, P.W.2 would also depose that Vanamayil has already married to one Raju Gounder and as they had not been able to cohabitate peacefully, in the presence of panchayatars, they had chosen to dissolve their marriage and thereafter as Vanamayil was living separately with her mother, following the demise of Poongole Ammal, as above pointed out, Kuppusamy Gounder had taken her as his wife for the welfare of his children and would also depose that out of the wedlock between Kuppusamy Gounder and Vanamayil, the plaintiffs are born to them. No doubt, during the course of cross examination, P.W.2 would state that he is not directly aware of the dissolution of the marriage between Vanamayil and Raju Gounder. However, considering the evidence of P.W.2 in toto, particularly, he being the brother of the deceased Kuppusamy Gounder, as rightly contended by the plaintiffs' counsel, he would be very well associated with Kuppusamy Gounder and he having knowledge about the affairs of his brother's family and accordingly when he had chosen to come forward and depose that Kuppusamy Gounder had taken Vanamayil as his second wife following the demise of his first wife Poongole Ammal and accordingly when it is further seen that thereby Kuppusamy Gounder and Vanamayil had been living as husband and wife, all put together, particularly during the said wedlock the plaintiffs having been born to them, in such view of the matter, the courts below are found to be justified in placing reliance upon the evidence of P.W.2 with reference to the abovesaid aspects, though not on the factum of dissolution of marriage between Raju Gounder and Vanamayil. P.W.3, Mani, who is the son of the plaintiffs' paternal uncle would state that Kuppusamy married Vanamayil during 1971 at Thanipadi Murugar temple and also would depose about the dissolution of the marriage between Raju Gounder and Vanamayil and would further depose that Kuppusamy and Vanamayil lived as husband and wife to the knowledge of the relatives and people at large and the villagers used to acknowledge Vanamayil as the wife of Kuppusamy and till

her demise Vanamayil lived as the wife of Kuppusamy Gounder under the same roof and therefore, considering the evidence of P.W.3, it is found that Kuppusamy Gounder had taken Vanamayil as his second wife and they have been living together as husband and wife to the knowledge of the villagers and the society at large acknowledging them as husband and wife on account of their long co-habitation. No doubt, during the course of cross examination, he has testified that he has not directly witnessed the marriage between Vanamayil and Kuppusamy Gounder. No doubt, eschewing his evidence about the factum of the marriage between Kuppusamy Gounder and Vanamayil as deposed by him during the course of cross examination, however, considering his witness in other aspects, particularly, when he is firm that Kuppusamy Gounder and Vanamayil had been living together as husband and wife over a long period of time under the same roof and they have been recognised as husband and wife by the villagers at large and in such view of the matter, the evidence of P.W.3 could be relied upon for upholding the case of the plaintiff that Kuppusamy Gounder and Vanamayil had lived as husband and wife for a long period of time and they have been acknowledged as husband and wife by the society at large.

19. P.W.4, Kasiammal would state that she knows both the plaintiffs and the defendants and would state that Kuppusamy Gounder is the husband of Poongole Ammal and Vanamayil and Vanamayil, after the dissolution of her marriage, came to the village and subsequently married Kuppusamy Gounder and they lived together and begot three children, namely, the plaintiffs. During the course of cross examination, she has also reiterated that the marriage between Raju Gounder and Vanamayil had been dissolved and Vanamayil came away from her husband when the child born to her through Raju Gounder was two months old and thus from the evidence of P.W.4, it is noted that the marriage between Raju Gounder and Vanamayil had been dissolved and thereafter they had not lived together. Similarly P.W.5, Kannusamy would also depose about the marriage between Kuppusamy and Poongole Ammal and after the demise of Poongole Ammal, Kuppusamy Gounder had married her sister Vanamayil and Vanamayil's earlier marriage with Raju Gounder got dissolved and Kuppusamy Gounder and Vanamayil lived as husband and wife. In the cross examination, he would state that he is not aware of the dissolution of the marriage between Raju Gounder and Vanamayil. Furthermore, D.W.1, the first defendant, during the course of cross examination, would admit that he knew Raju Gounder since he was his aunt Vanamayil's husband and would further state that he does not know whether Raju Gounder had separated from Vanamayil and would further admit that Vanamayil thereafter lived only with his father Kuppusamy Gounder separately and the said Vanamayil and Kuppusamy Gounder lived together in the newly constructed house and Vanamayil all along

was residing in the house and would further admit the relationship of P.W.s 2 and 3 and therefore, considering the evidence of D.W.1 as above pointed out, it is evident that Vanamayil had been living together with Kuppusamy Gounder under the same roof over a long period of time and begot the plaintiffs through their relationship and thus it could be inferred that Kuppusamy Gounder and Vanamayil had been living together under the same roof as husband and wife and accordingly as above pointed out, the plaintiffs' witnesses have also deposed that considering the relationship between Kuppusamy Gounder and Vanamayil, they have been recognised as husband and wife by the villagers at large on account of their long cohabitation and on that point it is noted, as rightly determined by the courts below, vis-a-vis the status of Kuppusamy Gounder and Vanamayil, they had been recognised as husband and wife by the society at large.

20. As far as the third defendant is concerned, who has been examined as D.W.2, she has not stated anything about the case of the plaintiffs with reference to the dissolution of the marriage between Vanamayil and Raju Gounder and subsequent thereto, the marriage between Kuppusamy Gounder and Vanamayil and the living together of Kuppusamy Gounder and Vanamayil and the birth of the plaintiffs to them during their living together. Therefore, the evidence of D.W.2, as such, would be of no use to determine the issues involved in this matter.

21. As above pointed out, considering the available materials on record, the courts below had upheld the validity of Ex.A71. The only contention raised by the defendant's counsel is, the voters list marked as Ex.B2 pertaining to the year 2003 show that Raju Gounder and Vanamayil are living together and therefore on that premise would contend that Ex.B2 belies the truth and validity of Ex.A71 dissolution letter. At the foremost, it has not been made clear by the first defendant as to whether the entries incorporated in Ex.B2 had been carried out for the first time at the time of preparing the voters list. When it is normally found that the names already entered as voters would be carried on in the subsequent voters list and accordingly, when it is seen that prior to 1971, during which period Raju Gounder and Vanamayil had been living as husband and wife, though not cordially, accordingly when there is every possibility of their names having been recorded together in the voters list prepared at that point of time and the same being carried out in the subsequent voters list marked as Ex.B2 and when there is no material to hold that the entries contained in Ex.B2 voters list had been included after taking into account the status of Raju Gounder and Vanamayil particularly after Ex.A71 letter, in such view of the matter, merely on the production of Ex.B2 voters list, it cannot be inferred

straightaway that there has been no dissolution of marriage between Raju Gounder and Vanamayil. When, as above pointed out, there is nil material on the part of the defendant that Raju Gounder and Vanamayil had lived together as husband and wife after Ex.A71 and on the other hand, when as above pointed out, there is acceptable and reliable materials on the part of the plaintiffs as well as admitted by the first defendant that it is only Kuppusamy Gounder and Vanamayil who had been living together as husband and wife under the same roof and they have also been recognised as husband and wife by the villagers at large, in such view of the matter, the voters list which came into existence during the period 2003, particularly, after the institution of the present suit laid by the plaintiffs, no safe credence could be attached to the same and in such view of the matter, the contention put forth by the defendant's counsel that Ex.B2 voters list belies the truth and validity of Ex.A71 dissolution letter, as such, cannot be countenanced.

22. The abovesaid facts had been considered by the courts below in the proper perspective and rightly rejected the defence version pointing to the same.

23. In the second appeal, the first defendant's counsel would also contend that considering the averments contained in Ex.A71 when it recites that for several years no cordial relationship had been existing between Raju Gounder and Vanamayil, on the other hand, when at the time of separation, evidence had been adduced that, Vanamayil had separated with two months old child and on that footing, would contend that the recitals contained in Ex.A71 probabilise that the dissolution letter Ex.A71 would not have come into existence really. No doubt Ex.A71 letter recites that there has been no smooth and cordial relationship between Raju Gounder and Vanamayil over a long period of time. However, till the execution of Ex.A71 letter, the marriage between Vanamayil and Raju Gounder had not been put to an end, in such view of the matter, when a child had been born to them prior to the same, on that score, it cannot be held that Ex.A71 dissolution letter had been created by the plaintiffs for the purpose of this case. As rightly concluded by the courts below, when it is seen that Ex.A71 letter had come into existence much prior to the institution of the suit nearly 30 years before the institution of the suit and when the plaintiffs have also been able to establish the signature of one of the signatories to Ex.A71, all put together, the courts below are found to be right in upholding the truth and validity of Ex.A71 dissolution letter.

24. No doubt from the materials available on record, the courts below have held that the marriage between Kuppusamy Gounder and Vanamayil at Thanipadi Murugar temple as put forth

by the plaintiffs has not been established by acceptable evidence. However, the fact remains that Kuppusamy Gounder and Vanamayil had been living together as husband and wife and out of the said relationship, the plaintiffs had been born to them and they were all living together under the same roof and when the said fact has been clearly admitted by the contesting defendant, namely, the first defendant and as held by the courts below, the first defendant has not challenged the patronage of the plaintiffs that they are not the children of Kuppusamy and all that he would state is that they are only the illegitimate children of Kuppusamy. however, when it is seen that Kuppusamy Gounder and Vanamayil had been recognised as husband and wife over a long period of time on account of their continuous co-habitation by the villagers at large and the materials placed on record as discussed by the courts below, particularly, the plaintiffs were described as the sons of Kuppusamy Gounder in various documents projected by the plaintiffs as pointed out by the courts below, namely, Exs.A59, A72 to A74, A76, A58, A62 to A64, all put together would go to show that the deceased Kuppusamy Gounder and Vanamayil had been taken only as husband and wife by the society at large on account of their continuous co-habitation and on that basis, the court would be entitled to take up the presumption that they had been living together only as husband wife following the valid marriage effected between them and the position of law would be gathered from the various decisions of the Apex Court and our High Court.

25. In the decision reported in 2010 2 CTC 622 (Kuppan v. Muniammal and another), our High Court has held that for the determination of the valid marriage, the conduct of the male would be relevant and long co-habitation and how the society treated them would be relevant and where a man and woman are proved to have lived together as man and wife, law will presume that they were living together in consequence of valid marriage and law presumes in favour of marriage and against concubinage when a man and woman co-habited continuously for number of years and in that connection our High Court placed reliance upon the decisions of the Privy Council reported in AIR 1927 PC 185 and AIR 1929 PC 135 and also relied upon the presumption that could be drawn under Section 114 of the Indian Evidence Act and the position of law has been outlined by our High Court in the abovesaid decision as follows:

Hindu Marriage Act, 1955 (25 of 1955), Section 16 - Evidence Act, 1872 (1 of 1872), Section 114 - Validity of second marriage - Presumptions under Section 114, Evidence Act - Invocation of Section 16 by defendant disputing second marriage of first plaintiff - Contention of defendant that first plaintiff was only a "Kept mistress" - Unless a valid marriage is proved

Section 16 of Act cannot be invoked - Held, for determination of validity of marriage, conduct of male would be relevant - Long cohabitation and how society treated them would be relevant - where a man and woman are proved to have lived together as man and wife, law will presume, that they were living together in consequence of valid marriage.

Evidence Act, 1872 (1 of 1872), Sections 101 to 103 & 114 - Burden of Proof - Defendant alleges that there is no valid marriage with first plaintiff - Defendant failed to prove same by adducing oral and documentary evidence - Heavy burden lies on person who seeks to prove that no marriage has taken place - Law presumes in favour of marriage and against concubinage when a man and woman cohabited continuously for number of years.

Facts: One "K" filed a suit for partition against "Q" on the ground that "K" and "Q" are the sons of "S". "K" - plaintiff claiming shares in the suit property as legal heirs of "S". "Q" - defendant resisted the claim of plaintiff on the ground that "K" cannot inherit the suit property which belongs to "S", since "K" is an illegitimate child of "S". The suit preferred by "K" was dismissed by Trial Court. Aggrieved by the dismissal of the suit "K" filed a First Appeal on the file of First Appellate Court. The First appellate court allowed the appeal preferred by "K" and ordered partition of property. Dissatisfied with the judgment of First Appellate Court "Q" filed a Second Appeal before the High Court under Section 100, C.P.C.

Held: In determining question of valid marriage, conduct of deceased would be relevant. As pointed out earlier, deceased Sadasiva Gounder had married the 1st plaintiff. It is well settled that long cohabitation and how the society treated them would be relevant. Holding that presumption of valid marriage though is rebuttable, a heavy burden lies on the person who seeks to prove that no marriage has taken place, in *Challamma v. Tilaga and others*, 2009(9) SCC 299, the Supreme Court held as under:

"11. In *Tulsa v. Durghatiya*, 2008 (4) SCC 520, this Court held:

"11. At this juncture reference may be made to Section 114 of the Evidence Act, 1872 (in short 'the Evidence Act'). The provision refers to common course of natural events, human conduct and private business. The court may presume the existence of any fact

which it thinks likely to have occurred. Reading the provisions of Sections 50 and 114 of the Evidence Act together, it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out of by the facts of a particular case.

12. A number of judicial pronouncements have been made on this aspect of the matter. The Privy Council, on two occasions, considered the scope of the presumption that could be drawn as to the relationship of marriage between two persons living together. In first of them i.e. *Andrahenndige Dinohamy v. Wijetunge Liyanapatabendige Balahamy*, AIR 1927 PC 185. Their Lordships of the Privy Council laid down the general proposition proposition that:

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

13. In *Mohabbat Ali Khan v. Mohd. Ibrahim Khan*, (1928-29) 56 IA 201; AIR 1929 PC 135. Their Lordships of the Privy Council once again laid down that:

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

14. It was held that such a presumption could be drawn under Section 114 of the Evidence Act."

12. It is also well settled that a presumption of a valid marriage although is a rebuttable one, it is for the other party to establish the same [See *Ranganath Parmeshwar Panditrao Moli v. Eknath Gajanan Kulkarni*, 1996 (7) SCC 681 and *Sobha Hymavathi Devi v. Setti Gangadhara Swamy*, 2005 (2) SCC 244]. Such a presumption can be validly raised having regard to Section 50 of the Evidence Act (See *Tulsa*, 2008(4) SCC 520]. A heavy burden, thus, lies on the person who seeks to prove that no marriage has taken place."

Similarly in the decision reported in 2011 1 SCC 141 (*Chanmuniya v. Virendra Kumar Singh Kushwaha and another*), the

Apex Court has held that there is a strong presumption in favour of marriage and a measure of social justice is to prevent vagrancy and destitution and accordingly further held that long cohabitation of a woman with a man without a valid marriage would not dis entitle the woman to claim the maintenance from the man and accordingly further held that the expansive interpretation to the term "wife" to include even those cases where a man and woman have been living together as husband and wife for a reasonable long period of time and the position of law has been outlined in the abovesaid decision of the Apex Court as follows:

A. Criminal Procedure Code, 1973 - S.125 - Maintenance in case of live-in relationship/presumed marriage/De facto marriage/cohabitation - "wife" - Interpretation - Long cohabitation without valid marriage - Entitlement of such woman to maintenance - considering that there was divergence of judicial opinion on interpretation of word "wife" in S.125, matter referred to larger Bench in light of Protection of Women from Domestic Violence Act, 2005, which gave wide interpretation to terms like "domestic abuse" and "domestic relationship" which included live-in relationship and entitles such women to reliefs under 2005 Act - Opinion expressed that a broad and expansive interpretation should be given to term "wife" to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a precondition for maintenance under S.125 Cr.PC, so as to fulfil true spirit and essence of the beneficial provision of maintenance under S.125 - Criminal Procedure Code, 1898 - S.488 - Human and Civil Rights - Protection of Women from Domestic Violence Act, 2005 - S.3 Expln. 1 cl. (iv), Ss.21, 22 and 26 - Constitution of India - Art.141 - Reference to larger Bench - Words and Phrases - "Wife".

Dwarika Prasad Satpathy v. Bidyut Prava Dixit, (1999) 7 SCC (cri) 1345; Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav, (1988) 1 SCC 530: 1988 SCC (Cri) 182; Savitaben Somabhai Bhatiya v. State of Gujarat, (2005) 3 SCC 636: 2005 SCC (Cri) 787; Marvin v. Marvin, (1976) 18 Cal 3d 660, considered.

B. Hindu Marriage Act, 1955 - S.7 - Long cohabitation - Presumption - Marital status - Respondent 1 brother of appellants husband, living in same house and by social custom they were treated as husband and wife after death of appellant's husband - Their marriage solemnised with Katha and sindur - Hence held, there is

is strong presumption in favour of marriage - Family and Personal Laws - Presumed marriage.

Piers v. Piers, (1849) 2 HL Cas 331: (1843060) All ER Rep 159: 9 ER 1118; Lt. C.W. Campbess v. John A.G. Campbell, (1867) LR 2 HL 269; De Thoren v. Attorney General, (1876) 1 AC 686 (HL); Sastry Velaider Aronegary v. Sembecutty Vaigalie, (1881) 6 AC 364: (1881-85) All ER Rep Ext 1804 (PC); Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Balahamy, AIR 1927 PC 185; Mohabbat Ali Khan v. Mohd, Ibrahim Khan, (1928-29) 56 IA 201: AIR 1929 PC 135; Gokal Chand v. Parvin Kumari.

Arising out of SLP (C) No.15071 of 2009. From the Judgment and order dated 28.11.2007 of the High Court of Judicature at Allahabad in First Appeal No.110 of 2004 and order dated 23.1.2009 in Review Application No.540 98 of 2008 (in FA No.110 of 2004)

AIR 1952 SC 231; Badri Prasad v. Director of Consolidation, (1978) 3 SCC 527; Tulsa v. Durghatiya, (2008) 4 SCC 520, relied on

C. Criminal Procedure Code, 1973 - S.125 - Maintenance of wives, children and parents - Purpose - Measure of social justice to prevent vagrancy and destitution - Criminal Procedure Code, 1898, S.488.

Jagir Kaur v. Jaswant Singh, AIR 1963 SC 1521: (1963) 2 Cri LJ 413; Nanak Chand v. Chandra Kishore Aggarwal, (1969) 3 SCC 802: 1970 SCC (Cri) 127; Capt. Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70: 1978 SCC (Cri) 508; Vimala v. Veeraswamy, (1991) 2 SCC 375: 1991 SCC (Cri) 442; Mohd Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556: 1985 SCC (Cri) 245, relied on

The abovesaid decision of the Apex Court has also been reiterated by the Apex Court in the subsequent decision reported in (2019) 11 Supreme Court Cases 491 (Kamala and others v. M.R. Mohan Kumar), wherein also it has been held that where the parties are cohabiting for a long period of years, the presumption is in favour of marriage and against the concubinage and further held that where a man resides with woman for a long period of time without fulfilling the legal requirements of valid marriage, even then he is liable to pay her maintenance and accordingly explained the position of law with reference to the same in the following manner.

Criminal Procedure Code, 1973 - S.125 - Maintenance - Grant of, where man and woman lived as husband and wife for considerable length of time - Guiding principles, summarised - In present case, long

cohabitation between woman and man led to presumption of marriage entitling maintenance for woman and children born to them.

- Board and expansive interpretation should be given to term "wife" under S.125 Cr.PC - Such interpretation is just application of principles enshrined in Preamble to Constitution, namely, social justice and upholding dignity of individual - For fulfilling true spirit and beneficial legislation of S.125 Cr.PC, strict proof of marriage not required - Proceedings are summary in nature to prevent vagrancy - It does not determine rights and obligations of parties - By some evidence if it is established that parties lived together as husband and wife, maintenance cannot be denied - Where parties cohabit for long period of years, presumption is in favour of marriage and against concubinage - However, this presumption is rebuttable presumption and burden lies on husband - If there are circumstances weakening or destroying such presumption, they cannot be ignored - Hence, where man resides with woman for long time without fulfilling legal requirement of valid marriage, he is liable to pay her maintenance - Such person should not be allowed to take advantage of legal loopholes by enjoying the de facto marriage without undertaking duties and obligations.

-Appellants contended that marriage of Appellant 1 was solemnised with respondent and from that wedlock Appellants 2 and 3 were born - Alleging that respondent married another woman during subsistence of marriage with appellant 1, and that respondent neglected and failed to maintain all appellants, proceeding under S.125 Cr.PC initiated - Respondent denied factum of marriage - After considering evidence, Family Court granted maintenance of Rs.3,000/- for appellant 1 and Rs.2,500/- to each appellants 2 and 3 - In revision filed by respondent, High Court reversed this order on ground that Appellant 1 failed to prove that she was legally wedded wife of respondent - Unsustainable of

-Held, Exts. P-1 to P-3 lead to inference that Appellant 1 and respondent were leading life as husband and wife - When Appellant 1 complained to police (as per Ext. P-9), respondent started to pay Rs.3,000/- towards maintenance - Exts. P-10 to P-13 are receipts of that payment - Ext. P-7 and Ext.P-8 are birth certificates of Appellants 2 and 3 respectively - In these certificates names of Appellant 1 and respondent appear as mother and father - P.W.2 a co-worker of respondent, spoke about Appellant 1 and respondent

residing as husband and wife - PW3 landlord of house where parties resided, deposed that respondent took house on rent stating that Appellant 1 was his wife and appellants 2 and 3 are his children.

-Thus, it is clear that appellant 1 and respondent cohabited as wife and husband leading to presumption of valid marriage - Appellants 2 and 3 are children of respondent - strict proof of marriage not required in proceedings under S.125 Cr.PC - Family Court was right in granting maintenance - High Court was not justified in interfering with this order - Hence, order passed by Family Court restored - Liberty granted to appellants to approach Family Court for enhancement of maintenance - Evidence Act, 1872 - Ss. 4, 101, 102, 103, 106 and 112 - Family Courts Act, 1984 - S.19 - Family and Personal Laws - Maintenance and Financial Provision/Alimony/Palimony - Maintenance to wife, children and parents under Ss. 125-128 CrPC - Maintenance incase of live-in relationship/presumed marriage/De facto marriage/cohabitation - words and phrases - "wife" - Constitution of India - Art. 15(3) and Preamble - Provisions of law conferring protection on women - Interpretation of, in consonance with

Dwarika Prasad Satpathy v. Bidyut Prava Dixit, (1999) 7 SCC 675: 1999 SCC (Cri) 1345; Chanmuniya v. Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141: (2011) 1 SCC (Civ) 53: (2011) 2 SCC (Cri) 666, relied on M.R. Mohankumar v. Kamala, 2009 SCC online Kar 921, reversed

Yamunabai Anantrao Adhav v. Anantrao Shivram Yadav, (1988) 1 SCC 530: 1988 SCC (Cri) 182; Sastry Velaider Aronegary v. Sembecutty Vaigalie, (1881) LR 6 AC 364 (PC); Andrahenndige Dinohamy v. Wijetunge Liyanapatabendige Balahamy, 1927 SCC online PC 51: AIR 1927 PC 185; Mohabbat Ali Khan v. Mohd. Ibrahim Khan, 1929 SCC Online PC 21: (1928-29) 56 IA 201: AIR 1929 PC 135; Gokal Chand v. Parvin Kumari, AIR 1952 SC 231; Badri Prasad v. Director of Consolidation, (1978) 3 SCC 527; Tulsa v. Durghatiya, (2008) 4 SCC 520; Savitaben Somabhai Bhatiya v. State of Gujarat, (2005) 3 SCC 636: 2005 SCC (Cri) 787, cited.

No doubt, the abovesaid two decisions of the Apex Court are rendered while considering the provisions of Section 125 of the Criminal Procedure Code. However when it is seen that the Supreme Court has upheld the presumption of validity of the marriage on the basis of long cohabitation between a man and

wife over a continuous period of time, accordingly the abovesaid principles of law outlined by the Apex Court would also be applicable to the case at hand in toto.

26. In line with the principles of law enunciated by our High Court and the Apex Court in the abovesaid decisions, the courts below have proceeded to uphold that inasmuch as the plaintiffs have established that Kuppusamy Gounder and Vanamayil had been living together as husband and wife continuously under the same roof and they have been treated and recognised as husband and wife by the villagers at large, accordingly, on that premise, rightly proceeded to presume that they had been living together as husband and wife only following the valid marriage effected between them as put forth by the plaintiffs and when the courts below are found to be justified in raising the presumption of valid marriage following long cohabitation between the male and woman as above pointed out, it is for the contesting party who has to dislodge the presumption in the manner known to law. However, when the contesting defendant, namely, the first defendant is unable to place any acceptable and reliable material to hold that Kuppusamy Gounder and Vanamayil had not been living together as husband and wife, on the other hand, would clearly admit that they had been living together under the same roof and also begot the plaintiffs and in such view of the matter, as rightly contended by the plaintiffs' counsel, the courts below are found to be justified in leaning towards the legitimacy rather than illegitimacy and the abovesaid conclusion of the courts below, in my considered opinion, do not warrant any interference in the second appeal.

27. The plea had been taken by the plaintiffs that their father Kuppusamy Gounder had not been heard of for the past 7 years or more and therefore, presumption should be taken that he had attained civil death. Considering the evidence adduced by the plaintiffs as well as the evidence of D.W.1, which has been recorded nearly 7 years after the institution of the suit, it is found that the whereabouts of Kuppusamy had not been known to either of the plaintiffs and the defendants for 7 years or more and in particular when D.W.1, the first defendant, during his testimony recorded on 20.12.2005 would admit that his father was not heard of for two years prior to the institution of the suit and till date also he has not been heard of him and his whereabouts are not known, accordingly, the courts below are found to be justified in raising the presumption as provided under Section 108 of the Indian Evidence Act on account of the position that Kuppusamy Gounder had not been heard of for more than 7 years, in the normal course of events, by which the time the person would have been naturally heard of if he had been

alive and when there is no material to dislodge the presumption that could be raised on that score, particularly, that Kuppusamy Gounder is alive as on date, in such view of the matter, the conclusion of the courts below that Kuppusamy Gounder had attained the civil death and therefore, the plaintiffs are justified in not impleading him as a party to the suit proceedings do not require interference. The above determination of the courts below is found to be based on the proper appreciation of the materials available on record as well as the position of law pointing to the same and in such view of the matter, the contention of the first defendant's counsel that the courts below have erroneously raised the presumption qua the death of Kuppusamy Gounder contrary to the provisions of Section 108 of the Indian Evidence Act, as such, cannot be countenanced.

28. Some pleas have been raised by the third defendant that certain items of the suit properties are the separate properties of their mother and that they had been allotted the said properties in the family arrangement, however, pointing to the same, as rightly concluded by the courts below, nil material is available and therefore, the courts below are found to be justified in rejecting the abovesaid defence version raised by the third defendant.

29. Considering the facts and circumstances involved in the case and the materials projected in the matter and the relationship of the parties, particularly, when it is seen that the plaintiffs are also the legitimate children of Kuppusamy Gounder and in the light of the determination of the courts below that the suit properties are the joint family properties of Kuppusamy Gounder and his children, the courts below are found to be justified in allotting the shares to the plaintiffs and the defendants as determined by them and particularly after holding that both the sons and daughters of Kuppusamy Gounder are entitled to get equal share in the suit properties. Hence, no exception could be taken in the determination of the courts below over the allotment of the shares to the parties qua the suit properties.

30. For the reasons aforestated, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the plaintiffs and against the defendants.

31. In conclusion, the judgment and decree dated 15.02.2008 passed in A.S. No.43 of 2006 on the file of the District court, Tiruvannamalai, confirming the judgment and decree dated

16.10.2006 passed O.S.No.396 of 2001 on the file of the Principal Subordinate Court, Tiruvannamalai, are confirmed. Resultantly, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

bga
To

1. The District Court,
Tiruvannamalai.
2. The Principal Subordinate Court,
Tiruvannamalai.
3. The Section Officer,
VR Section, High Court,
Madras.

+1cc to M/s.Sarvabhauman Associates Sr.7884
+1cc to M/s.K.Govi Ganesan, Advocate Sr.7967
+1cc to M/s.V.Prakash Babu, Advocate Sr.8299

S.A.No.1158 2008

srg 15/03/2021

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