



A.S.(MD)Nos.268 of 2009 and 25 of 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 02.08.2023

Pronounced on : 26.09.2023

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

A.S.(MD)Nos.268 of 2009 and 25 of 2010

A.S.(MD)No.268 of 2009

Mohandass

... Appellant/
2nd Defendant

Vs.

1. Palraj

... Respondent/
Plaintiff

2. Samudhiram

... Respondent/
1st Defendant

3. Thangabalu

4. Manikandan

5. Thanapriya

... Respondents/
Defendants 3 to 5

(Minor R3 and R4 are declared as major and guardianship of their natural guardian mother and next friend Senthamil Selvi is discharged vide Court order dated 24.06.2022 made in CMP(MD)Nos.5163, 5165 to 5167 of 2022 in AS(MD) No.268 of 2009)



A.S.(MD)Nos.268 of 2009 and 25 of 2010

(Minor R5 is declared as major and guardianship of her natural guardian mother and next friend Senthamil Selvi is discharged vide Court order dated 10.06.2022 made in CMP(MD)Nos.8813 and 9056 of 2017 in AS(MD)No.268 of 2009)

A.S.(MD)No.25 of 2010

1. Thangabalu

2. Manikandan

3. Thanapriya

... Appellants/
Defendants 3 to 5

(cause title accepted vide order of the Court dated 08.06.2009 made in M.P.(MD)No.1 of 2009 in AS(MD)SR.No.20317 of 2008)

(Minor 3rd appellant is declared as major and guardianship of her natural guardian mother and next friend Senthamil Selvi is discharged vide Court order dated 10.06.2022 made in CMP(MD)Nos.9057 and 8814 of 2017 in AS(MD)No.25 of 2010)

Vs.

1. Palraj

... Respondent/
Plaintiff

2. Samudhiram

... Respondent/
1st Defendant

3. Mohandass

... Respondent/
2nd Defendant



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COMMON PRAYER : These Appeal Suits filed under Section 96 of C.P.C., to set aside decree and judgment passed in O.S.No.10 of 2004 on the file of Additional District Court cum Fast Track Court No.2, Pattukkottai dated 22.11.2006.

(in A.S.(MD)No.268 of 2009)

For Appellant	: Mr.V.K.Vijayaragavan
For R1 & R2	: Mr.G.Prabhu Rajadurai
For R3 to R5	: Mr.M.R.S.Prabhu

(in A.S.(MD)No.25 of 2010)

For Appellants	: Mr.M.R.S.Prabhu
For R1 & R2	: Mr.G.Prabhu Rajadurai
For R3	: No appearance

COMMON JUDGMENT

These two appeal suits are directed against the judgment and decree passed in O.S.No.10 of 2004 dated 22.11.2006 on the file of the Additional District Court (Fast Track Court No.2), Pattukkottai.

2. The suit is for partition.



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For the sake of convenience and brevity, the parties herein after will be referred as per their status/ranking before the trial Court.

3. Admittedly, the plaintiff is the son of the first defendant. It is not in dispute that the suit properties were owned by one Thangaraj-father of the second defendant.

4. The case of the plaintiff is that the said Thangaraj had married one Balayee-mother of the second defendant, that since the said Balayee had left the home 35 years back and her whereabouts were not known, the said Thangaraj had married the first defendant Samudhram-own sister of the said Balayee and the plaintiff was born to them, that the said Thangaraj died on 21.07.1999 intestate, that though the plaintiff and the defendants have been enjoying some properties according to their convenience, partition was not effected by metes and bounds, that the plaintiff has sent a legal notice dated 24.04.2000 demanding partition, that the second defendant having received the notice, sent a reply with false and untenable allegation and that since the defendants have not come forward to effect



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partition, the plaintiff was constrained to file the above suit for partition and allotment of 1/3rd share in the suit properties.

5. Pending suit, the sons and the daughter of the second defendant got themselves impleaded as defendants 3 to 5 in the above suit.

6. The first defendant-mother of the plaintiff, in her written statement, has taken a stand in support of the plaintiff.

7. The defence of the second defendant is that his father Thangaraj had only one wife Balayee, that the said Thangaraj had illicit affairs with the first defendant and on coming to know about the same, the said Balayee had left the home and was living separately with her son-second defendant till 1992 and thereafter, she had left the home and her whereabouts are not known, that the first defendant is not the legally wedded wife of the said Thangaraj, that the Panchayathars had convened a meeting and divided the properties between the plaintiff and the second defendant in 1995 and on that basis, partition list was executed, that since the partition had already been taken place, the present suit for partition is not maintainable and that the plaintiff is estopped from claiming partition.



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8. The newly impleaded defendants 3 to 5-children of the second defendant have taken a new stand contrary to the stand taken by their father that the suit properties are not the separate and self-acquired properties of their grandfather Thangaraj, but on the other hand, the properties available in all the villages except Thuvaramadai are the ancestral properties, that the defendants 3 to 5 being the co-parceners are entitled to get $3/4^{\text{th}}$ shares in the suit properties along with their father-second defendant, that the first defendant is entitled to get $1/4^{\text{th}}$ share in the properties of the said Thangaraj and that the suit is liable to be dismissed.

9. The learned trial Judge, upon perusing the above pleadings, has framed the following issues:-

- 1) *Whether the plaintiff is entitled to claim $1/3^{\text{rd}}$ share in the suit properties?*
- 2) *Whether the Balayee-wife of the Thangaraj can be considered as dead?*
- 3) *Whether the first defendant is the legally wedded wife of the deceased Thangaraj?*
- 4) *Whether the suit is bad for non-joinder of necessary parties?*
- 5) *Whether the second defendant has proved his defence that there was an oral partition in December 1995 in respect of the family*



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properties between himself and the plaintiff and they have been in possession and enjoyment of the properties allotted to them under Ex.B.35?

- 6) Whether the defendants 3 to 5 are entitled to get any share in the suit properties?*
- 7) To what other reliefs, the plaintiff is entitled to?*

10. During trial, the plaintiff has examined himself as P.W.1 and one Dhanasekaran as P.W.2 and exhibited 7 documents as Ex.A.1 to Ex.A.7. The first defendant has examined herself as D.W.1 and exhibited 34 documents as Ex.B.1 to Ex.B.34. The second defendant has examined himself as D.W.2 and 3 other witnesses Chellaiah, Rajendran and Kaliyamoorthy as D.W.3 to D.W.5 respectively and exhibited 22 documents as Ex.B.35 to Ex.B.56.

11. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the impugned judgment and decree dated 22.11.2006 holding that the said Balayee is presumed to be dead for all legal purposes, that the first defendant is the legally wedded wife of the said Thangaraj and that the oral partition alleged by the second defendant was not proved, has granted



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preliminary decree declaring that the plaintiff and the defendants 1 and 2 are entitled to get 1/3rd share each in the suit properties. The second defendant, aggrieved by the said judgment and decree, has preferred the appeal in A.S.(MD)No.268 of 2009. The defendants 3 to 5-children of the second defendant, challenging the very same judgment and decree, have preferred another appeal in A.S.(MD)No.25 of 2010.

12. The learned counsel appearing for the second defendant would submit that the trial Court erred in declaring 1/3rd share to the plaintiff and the first defendant, when the marriage between the first defendant and the said Thangaraj purported to have been solemnized in the year 1964 was not proved and only if the marriage is proved, heirship and entitlement to the properties of the said Thangaraj would accrue to the plaintiff, that the second defendant's mother Balayee was alive and available in the year 1964 as per the pleadings of the parties and since the said Balayee was alive in the year 1964, allotment of share to the first defendant alleged to be the second wife does not arise, that the first defendant has not proved her marriage with the said Thangaraj and nobody was examined in this regard to prove the marriage, that even assuming that the first defendant



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was having cohabitation with the said Thangaraj, that joint living would not entitle her to claim presumptive marriage as law presumes long cohabitation for the first marriage alone, that the trial Court has failed to see the collusion between the plaintiff and her mother-first defendant in trying to claim share or snatch the estate of the said Thangaraj and in the absence of any legally acceptable documents, the marriage pleaded by the first defendant with the said Thangaraj was a myth and should not have been accepted, that the relationship even if proved between the first defendant and the said Thangaraj that could be illicit intimacy or concubinage only, that even according to the plaintiff and the first defendant, the said Balayee left the residence 35 years ago and the suit was filed in the year 2001 and hence, the said Balayee should have left the residence in the year 1966 and as already pointed out, according to them, the second marriage had taken place on 13.07.1964 and at that time, the first marriage of the said Thangaraj was in subsistence and that therefore, the first defendant is not entitled to get 1/3rd share in the suit properties.

13. The learned counsel appearing for the second defendant would further submit that since the first defendant had no independent income, the finding of the trial Court that some of the properties are self-acquired



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properties of the first defendant is not correct, that the trial Court has failed to see that there was an earlier partition in December 1995 at the instance of Panchayathars and partition list was also executed and that therefore, the present suit for partition is legally not maintainable.

14. The learned counsel appearing for the plaintiff and the first defendant would submit that the plaintiff has pleaded in his plaint that the said Balayee left approximately 35 years ago and as such, the period of 35 years cannot be interpreted literally, that the marriage between the first defendant and the said Thangaraj held on 13.07.1964 cannot be said to have taken place during the subsistence of the first marriage, that the first defendant and the said Thangaraj have been in long cohabitation from the year 1973 till the death of the said Thangaraj in the year 1999 and as such, the Hon'ble Apex Court and this Court have held in number of cases that long cohabitation amount to marriage, that long cohabitation between them can be proved from Ex.B.1-sale deed dated 29.10.1973, in which, the first defendant mentioned as wife of the said Thangaraj, that the passport of the first defendant also carries the name of the said Thangaraj as husband of the passport holder, that Ex.B.33 and Ex.B.34 are the letters



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written by the second defendant to the first defendant and wherein, the second defendant has mentioned the first defendant as his mother and therefore, the second defendant is estopped from making a claim that the first defendant did not marry his father, that the said Balayee abandoned everyone in the family, when the second defendant was a four year old child and it was the first defendant, who had nourished him with proper love and care, food and shelter and the same can be evident from EX.B.33 and Ex.B.34, that the first defendant and the said Thangaraj had married and been in cohabitation for many long years with the knowledge of general public and even assuming without admitting the marriage between them was not proved, long cohabitation between them can be taken into consideration and the same presumes marriage and that the second defendant has admitted in his reply notice under Ex.A.5 that the first defendant is the wife of his father Thangaraj and as such, he is estopped from disputing marital status of the first defendant.

15. The learned counsel appearing for the defendants 3 to 5 would only reiterate the contentions raised by the learned counsel appearing for the second defendant.



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16. The points for determination are :

- 1) *Whether the trial Court erred in rendering a finding that the first defendant is the legally wedded wife of the said Thangaraj, despite showing that the plaintiff and the first defendant have not produced any evidence to prove the marriage and even assuming that the marriage was allegedly held on 13.07.1964, the said Thangaraj's first wife Balayee was very much alive and was available at that time and as such, the said marriage has to be taken as a void marriage?*
- 2) *Whether the trial Court erred in giving a finding that the second defendant has failed to prove the oral partition effected between himself and the plaintiff before the Panchayathars and the consequent execution of Ex.B.35-partition list, despite proving the same through the evidence of D.W.3 to D.W.5 and Ex.B.35?*
- 3) *Whether the first defendant is the second wife of the said Thangaraj?*
- 4) *Whether the second defendant has proved the alleged oral partition effected in December 1995 and the consequent execution of Ex.B.35-partition list between the plaintiff and the second defendant?*
- 5) *Whether the impugned judgment and decree dated 22.11.2006 passed in O.S.No.10 of 2004 is liable to be interfered with?*
- 6) *To what other reliefs, the parties are entitled ?*



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Points 1 to 6:

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17. Though the defendants 3 to 5-children of the second defendant, in their written statement, have taken a new stand that the suit properties are the ancestral properties, which is contrary to the stand of their father, have not chosen to adduce any evidence to show that their grandfather Thangaraj was possessing ancestral properties and that the other properties were purchased from the income derived from the ancestral properties. As already pointed out, the second defendant has specifically admitted the case of the plaintiff and the first defendant that the suit properties are the self-acquired properties of his father Thangaraj.

18. It is the specific case of the plaintiff and the first defendant that the said Thangaraj's first wife Balayee had left the home 35 years ago, when the second defendant was a four year old boy, that since the whereabouts of the said Balayee were not known, the said Thangaraj had married the said Balayee's sister-Samudhram, first defendant on 13.07.1964 and that thereafter, the first defendant and the said Thangaraj have been living as husband and wife continuously till the death of the said Thangaraj on 21.07.1999.



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19. It is their further case that the said Thangaraj along with the plaintiff and the defendants 1 and 2 were residing in the same home and that after the marriage of the second defendant, he left the home and started to reside in Thuvaramadai village along with his wife.

20. But it is the specific defence of the second defendant that his mother Balayee is the only wife of the said Thangaraj, that the first defendant had illicit relationship with the said Thangaraj and that after coming to know about their relationship, the said Balayee left the home and started to reside separately along with the second defendant till 1992.

21. The main defence of the second defendant is that the marriage alleged by the first defendant with the said Thangaraj on 13.07.1964 was not proved, that even assuming for arguments sake that the marriage was held as alleged by the first defendant, the said Thangaraj's first wife Balayee was very much alive and available at that time and that therefore, the marriage is to be held as void.

22. No doubt, as rightly contended by the learned counsel appearing for the second defendant, the first defendant, in her evidence, would say



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that her marriage was solemnized in the husband's house in the presence of Kathirvel, Mookkaiyan Achari and Chinnaian, who were their family elders and that all of them are no more. The first defendant, in her evidence, would further say that their marriage was solemnized as per Hindu Customs and Rites, but the same was not elaborated. As rightly pointed out by the learned counsel appearing for the second defendant, neither the plaintiff nor the first defendant has examined any person from their village to prove the first defendant's marriage. But, as rightly contended by the learned counsel appearing for the plaintiff and the first defendant, the first defendant has produced ample evidence to show that she was called and treated as the wife of the said Thangaraj, more importantly, the second defendant has sent a reply notice under Ex.A.5 dated 15.05.2000 in response to the pre-suit notice sent by the plaintiff under Ex.A.2 dated 24.04.2000, whereunder, the second defendant has specifically admitted that the first defendant is the wife of his father Thangaraj. It is not in dispute that the said Thangaraj was working in Singapore. In the reply notice, the second defendant has specifically stated that his father has sent the money earned by him at Singapore and directed his wife Samudhram to purchase the properties and accordingly, she has



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purchased the properties in the name of the said Thangaraj and in her name and that since she had no independent source of income, the properties purchased in the name of Samudhiram are only to be considered as joint family properties and the relevant portion is extracted hereunder for better appreciation:-

□எமது கட்சிக்காரர் தகப்பனார் சிங்கப்பூர் சென்று
சம்பாத்தியம் செய்தது உண்மை. எமது கட்சிக்காரர்
தகப்பனார் சம்பாதித்த பணத்தை தன்னுடைய
மனைவியான சமுத்திரத்திற்கு அனுப்பி சொத்துக்கள்
வாங்க சொல்லி இருக்கிறார்.□

23. As rightly observed by the learned trial Judge, in Ex.B.1-sale deed dated 29.10.1973, the first defendant has been described as the wife of the said Thangaraj. As rightly pointed out by the learned counsel appearing for the plaintiff and the first defendant, in Ex.B.2-revenue record, Ex.B.3 to Ex.B.25-kist receipts and Ex.B.26 and Ex.B.27-house tax receipts, which were for the period between 1973 and 1999, the first defendant has been shown as □த.சமுத்திரம்□wherein□த□ would refer to□தங்கராஜ்□. It is evident from Ex.B.28-passport of the first defendant that the first defendant has been shown as “Thangaraju Samuthiram”. The



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said Thangaraj has executed a power of attorney deed before the notary public at Singapore in favour of his wife Samudhiram to conduct the case pending in O.S.No.563 of 1986 and the same is very much evident from Ex.B.29 dated 10.04.1987. As rightly pointed out by the learned counsel appearing for the plaintiff and the first defendant, the first defendant has been shown as the wife of the said Thangaraj in Ex.B.30 and Ex.B.31 and the said Thangaraj has sent letters to the first defendant from Singapore under Ex.B.32 to Ex.B.34. As rightly pointed out by the learned counsel appearing for the plaintiff and the first defendant, though they are not admitting Ex.B.35-partition list, which was mainly relied on by the second defendant, in that document the plaintiff and the second defendant were referred as sons of the said Thangaraj. As rightly contended by the learned counsel appearing for the plaintiff and the first defendant, considering the evidence of the plaintiff and the first defendant and the documents referred above, it can easily be presumed that the first defendant and the said Thangaraj had been in long cohabitation as husband and wife for a period between 1973 and 1999 till the death of the said Thangaraj.

24. The learned counsel appearing for the second defendant would contend that the presumption of marriage cannot be drawn merely on the



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ground of prolonged cohabitation of the couple, that neither the plaintiff nor the first defendant has produced any strong evidence to prove the alleged marriage between the first defendant and the said Thangaraj and that in the absence of any evidence to prove the factum of marriage, the first defendant cannot be considered as legally wedded wife of the said Thangaraj and in support of his contentions, he relied on the following decisions;

(i) *AIR 1994 SC 135 (Surjit Kaur Vs. Garja Singh and others):*

“Reliance placed on Charan Singh case' is not correct because that will apply only if the widow were to marry the brother of the husband. But, here Gulaba Singh was a stranger. As rightly contended by the respondent, mere living as husband and wife does not, at any rate, confer the status of wife and husband. In B.S. Lokhande case (AIR 1965 SC 1564), it was laid down that the bare fact of the man and woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before the society as husband and wife and the society treats them as such. The following extract is useful for this purpose.

"Prima facie, the expression 'whoever ...



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marries' must mean 'whoever ... marries validly' or 'whoever ... marries and whose marriage is a valid one'. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.'"

(ii) 2006 2 LW 844 (Smt.Seema Vs. Ashwani Kumar):

“As is evident from narration of facts though most of the States have framed rules regarding registration of marriages, registration of marriage is not compulsory in several States. If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor



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regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. That being so, it would be in the interest of the society if marriages are made compulsorily registrable. The legislative intent in enacting Section 8 of the Hindu Act is apparent from the use of the expression "for the purpose of facilitating the proof of Hindu Marriages".

As a natural consequence, the effect of non registration would be that the presumption which is available from registration of marriages would be denied to a person whose marriage is not registered.

Accordingly, we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnized."

(iii) 2022 2 LW 140 (M.Thenmozhi and another Vs. Sudarsan and others):

"20. The peculiar factual position in the present case is that the children of G.Prabhavathi, the plaintiffs though were accepted as children of A.Paramasivam they were born in 1985



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and 1987 before the marriage. Unless there was a marriage in any acceptable form between A.Paramasivam and G.Prabhavathi (plaintiffs' mother) before the birth of plaintiffs, the plaintiffs cannot be treated as legitimate children for the purpose of claiming any right to inherit the property of the deceased father. It is well settled that illegitimate son of a male Hindu is not entitled to any share in the property of father. This position is not changed by Section 16. Only the children of a valid marriage, despite the said marriage being null and void shall be legitimate children to inherit the properties of parents.

21. Learned counsel appearing for appellants relied upon the judgment of a learned Single Judge of this Court in the case of Kalaiammal and others Vs. Chenniappa Gounder and others reported in 2014 (1) MWN (Civil) 28. It is held that a person cannot claim presumption of marriage between a male and female by long co- habitation, when one of them is already married and the marriage is subsisting. This legal position has been accepted by this Court in several cases and the judgments of this Court have also been quoted with approval by the Hon'ble Supreme Court.

.....

26. When the 2nd marriage is prohibited under any statute or customary law, this Court finds that the issue is settled that there is no presumption of a second marriage.”



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25. In the first decision, the appellant therein has taken a stand that she was the legally wedded wife of Gulaba Singh, who had contracted karewa form marriage with her, but no such custom was pleaded and by observing that that is not the case of widow's remarriage to the husband's brother as Gulaba Singh was a totally stranger, the Hon'ble Supreme Court dismissed the appeal, confirming the judgment of the High Court.

26. In the second decision, the Hon'ble Supreme Court, by observing that registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage and that it would be in the interest of the society if marriages are made compulsorily registrable, directed the State and Central Governments to notify the procedure for registration and to invite objections from the public and thereafter, to issue appropriate notifications bringing the Rules into force.

27. In the third decision, the learned Judge of this Court, taking note of the admissions of the plaintiffs that they were born even before their



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parents had martial relationship and that there was no legitimate relationship between their mother and father as husband and wife at the time of their birth, has held that Section 16 of the Hindu Marriage Act does not give legitimacy to the plaintiffs to get a share in the property of the father or to get a declaration that the plaintiffs and the first defendant are the son and daughters of the deceased A.Paramasivam.

28. In order to counter the said arguments, the learned counsel appearing for the plaintiff and the first defendant would submit that the factum of continued cohabitation as husband and wife to the knowledge of the world is made out, the failure to prove marriage would not stand in the way of presumption being drawn under Section 114 of the Evidence Act and relied on the decision of the Hon'ble Division Bench of this Court in ***Seerangammal (died) and others Vs. E.B.Venkatasubramanian and others*** reported in **100 LW 58** and the relevant passage is extracted hereunder:-

“24. Yet another plea of defendants is that, marriage ceremony as claimed in para 12 of plaint having not been established, the presumption under Section 114 of the Evidence Act cannot exist. Failure to establish by legal



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evidence, about. ceremonies was due to the fact that they took place inside the family house and in the presence of selected relatives and well-wishers of Ranganatha. To prevent publicity and with an obvious, aim of preserving prestige, secrecy had been maintained. No invitations were printed. Under such circumstances, her inability to prove the marriage and more so when Ranganath's relations who could alone speak about it are antagonistic and aim at getting at the property; this failure to sustain a form of marriage attempted by her would not act as a bar against her from invoking Section 114 of the Evidence Act. This is neither a conflicting nor an alternative plea put forth, but one mode off proof adduced but not established due to special circumstances obtaining where such acts are committed by men aimed at benefiting themselves. Factum of continued cohabitation as husband and wife to the knowledge of the world thus made out, the failure to prove marriage would not stand in the way of presumption being drawn.”

29. Recently, I had an occasion to consider a similar issue as to whether the long cohabitation as husband and wife, though never married or marriage was not proved, marriage can be presumed in ***A.S.No.335 of 1998 dated 07.08.2023*** and the relevant passages are extracted hereunder:-



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*“36. To begin with the decision of Privy Council in the case of **A.Dinohamy Vs. W.L.Balahamy** reported in **AIR 1927 PC 185**, their Lordships of the Privy Council have held that where a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved that they were living together in consequence of a valid marriage and not in a state of concubinage and the relevant portion is extracted hereunder:*

"The parties lived together for twenty years in the same house, and eight children were born to them. The husband during his life recognized, by affectionate provisions, his wife, and children, The evidence' of the Registrar of the District shows that for a long course of years the parties were recognized as married citizens, and even the family functions and ceremonies, such as, in particular, the reception of the relations and other guests in the family house by Don Andris and Balahamy as host and hostess--all such functions were conducted on the footing alone that they were man and wife. No evidence whatsoever is afforded of repudiation of this relation by husband or wife or anybody."



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37. *The Privy Council has once again in **Mohabbat Ali Khan Vs. Mohd.Ibrahim Khan** reported in AIR 1929 PC 138, held that the law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years.*

38. *The Hon'ble Supreme Court in **Gokal Chand Vs. Parvin Kumari** reported in AIR 1952 SC 231, has specifically observed that continuous cohabitation of a man and woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.*

39. *In **Badri Prasad Vs. Deputy Director of Consolidation and others** reported in (1978)3 SCC 527, the Hon'ble Apex Court has held that a strong presumption arises in favour of wedlock where two partners have lived together for long spell as husband and wife and that although the presumption is rebuttable, a heavy burden lies on him who seek to deprive the relationship of the legal origin.*

40. *The Hon'ble Supreme Court in **S.P.S.Balasubramanyam Vs. Suruttayan alias Andali***



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***Padayachi and others** reported in (1994)1 SCC 460, has held that what has been settled by this Court is that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two, but the presumption is rebuttable.*

*41. In **Tulsa and Others Vs. Durghatiya and Others** reported in (2008)4 SCC 520, the Hon'ble Supreme Court referring to the decisions of the Privy Council and the other decisions above referred and also taking note of Sections 50 and 114 of the Indian Evidence Act, has held 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 by the facts of a particular case.*

*42. In **Chellamma Vs. Tilaga and Others** reported in (2009)9 SCC 299, the Hon'ble Apex Court has taken the same view following its earlier decision in Tulsa's case above referred.*

*43. In **Dhannulal and Others Vs. Ganeshram and Others** reported in (2015)12 SCC 301, the Hon'ble Supreme Court, by referring to the decisions referred above, has held as follows:*



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“15. It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin. In the instant case, instead of adducing unimpeachable evidence by the plaintiff, a plea was taken that the defendant has failed to prove the fact that Phoolbasa Bai was the legally married wife of Chhatrapati. The High Court, therefore, came to a correct conclusion by recording a finding that Phoolbasa Bai was the legally married wife of Chhatrapati.

*44. The Hon'ble Supreme Court in **Kattukandi Edathil Krishnan and Others Vs. Kattukandi Edathil Valsan and Others** reported in **AIR 2020 SC 2841**, after referring to the earlier two decisions, has held that it is well settled that if a man and a woman live together for long years as husband and wife, there would be a presumption in favour of wedlock. and such a presumption could be drawn under Section 114 of the Evidence Act and that although, the presumption is rebuttable, a heavy burden lies on him who seek to deprive the*



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relationship of legal origin to prove that no marriage took place.

45. The settled legal position reiterated by the Hon'ble Supreme Court is squarely applicable to the case on hand. As already pointed out, in the case on hand, there is ample evidence to show that the first defendant and the ninth defendant have cohabited for a long time. It is not the case of the plaintiff that his father had lived with the ninth defendant secretly. But on the other hand, the tenth defendant has proved that the first defendant had been living with his mother – ninth defendant, openly, continuously and with the knowledge of everyone in the locality including the plaintiff. Consequently, a presumption can be raised in favour of their marriage from their long cohabitation. But the plaintiff, having heavy burden to prove that no marriage had taken place, has not adduced any evidence or materials to rebut the presumption drawn. Moreover, it is pertinent to note that law leans in favour of legitimacy and frowns upon bastardy.

46. As already pointed out, the first defendant had been treating the ninth defendant as his wife throughout, lived together, along with the children born to the ninth defendant in the house adjacent to the plaintiff's house and that too for a period of more than 25 years. Considering the above, as rightly contended by the learned Senior Counsel for the appellant, the plaintiff cannot be allowed to canvass an



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argument that there was no marriage, but only concubinage.

Hence, this Court has no hesitation in drawing the presumption that there was a marriage between the first defendant and the ninth defendant and as a necessary corollary which follows that the defendants 10 to 13 are their legitimate children.”

30. In the case on hand also, as already pointed out, there is ample evidence to show that the first defendant and the said Thangaraj have cohabited for a long time. It is pertinent to note that the second defendant has not disputed the factum that the plaintiff was born to his father Thangaraj through the first defendant. It is not the case of the second defendant that his father had lived with the first defendant secretly. As rightly contended by the learned counsel appearing for the plaintiff and the first defendant, the first defendant has proved that she had been living with the said Thangaraj openly, continuously and with the knowledge of everyone in the locality including the second defendant. But the plaintiff, having heavy burden to prove that no marriage had taken place, has not adduced any evidence to rebut the presumption drawn. As rightly observed in the above judgment, law leans in favour of legitimacy and frowns upon bastardy.



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31. Now coming to the next contention of the second defendant that even assuming that the marriage was proved, the same cannot be considered as a valid marriage as his mother Balayee was very much alive at that time. No doubt, as rightly pointed out by the learned counsel appearing for the second defendant, the plaintiff in his plaint and the first defendant in her written statement have alleged that the said Balayee had left the company of her husband 35 years ago and the plaint was presented on 18.01.2001 and 35 years is deducted, the period would come to 1966.

32. The learned counsel appearing for the plaintiff and the first defendant would submit that 35 years period pleaded in the plaint cannot be interpreted literally and should be given a liberal view as the term “approximately” was used, that since the said incident had taken place long back, it is impossible to exactly remember the date and that therefore, the marriage between the first defendant and the said Thangaraj held 35 years back cannot be said to have taken place during the subsistence of the first marriage.

33. The learned counsel appearing for the plaintiff and the first defendant would further submit that even assuming that the marriage had



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taken place during the subsistence of the first marriage, the said Balayee was presumed dead in the year 1973 after the expiry of 7 years as per the calculation of the second defendant and even then, the first defendant and the said Thangaraj have been in long cohabitation from the year 1973 till the death of the said Thangaraj in 1999 and that the Hon'ble Apex Court and this Court have held in number of cases that long cohabitation would amount to marriage.

34. As rightly observed by the learned trial Judge, though the second defendant, in his written statement, has alleged that his mother was with him till 1992, in evidence, he would say that his mother was with him till 1995. As rightly observed by the learned trial Judge, except the ration card for the period 1987 – 1992, the second defendant has not produced any iota of materials to show that he was residing with her mother Balayee at the relevant point of time. The first defendant, in her evidence, would say that when her husband was in Singapore, there arose an issue that the wife of the second defendant got pregnant even before their marriage and as per the direction of her husband, she had conducted their marriage and got it registered and that she had signed in the marriage registration. When the same was pointed out to the second defendant during his cross-



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examination, he would admit the said factum. Even according to the second defendant, his marriage was held in 1988. As rightly pointed out by the learned counsel appearing for the plaintiff and the first defendant, if the second defendant was with his mother Balayee till 1992, he has not offered any reason or explanation as to why the first defendant has arranged his marriage instead of his mother Balayee. Considering the entire evidence available on record, the finding of the trial Court that the said Balayee had left 35 years ago and as such, she was presumed to be dead and that the first defendant is the second wife of the said Thangaraj cannot be found fault with and this Court is in entire agreement with the findings recorded by the trial Court.

35. Now turning to the oral partition alleged by the second defendant, according to him, partition was already effected in their family in December 1995 under Ex.B.35 and it has become final and that the plaintiff and the first defendant have been in possession and enjoyment of the properties allotted to them. In the written statement, the second defendant has specifically stated that the Panchayat was conducted by Rajathambi, Naduvikottai late Chellaiah, Selvaraj and Uthamanathan, but



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he examined Chellaiah, Rajendran and Kaliyamoorthy as D.W.3, D.W.4 and D.W.5 respectively to depose about the alleged partition. The learned trial Judge, after elaborately considering the document under Ex.B.35 by observing that it is legally not admissible document, as that the same was not even stamped nor registered and that the same does not contain the date in which the same was executed, has come to a decision that the same cannot be looked into. Even according to the second defendant, his father Thangaraj has not taken part in the Panchayat. It is not the case of the second defendant that his father had also subscribed his signature in Ex.B. 35. Moreover, when the said Thangaraj, the admitted owner of the suit properties was very much alive, this Court is at loss to understand as to how the plaintiff and the second defendant can partition the properties before the Panchayathars. Even assuming for arguments sake that there was an oral partition and the consequent execution of Ex.B.35, since the owner was not a party, the same cannot be considered as a valid and binding partition.

36. As rightly observed by the learned trial Judge, the defendants 3 to 5 being the children of the second defendant have to get their shares



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from the share to be allotted to the second defendant. Since the plaintiff and the defendants 1 and 2 being the class 1 heirs, they are entitled to get 1/3rd share each in the suit properties. Hence, there is nothing to interfere with the judgment and decree of the trial Court. Consequently, this Court concludes that the appeal suits are devoid of merits and the same are liable to be dismissed.

37. Considering the other facts and circumstances and the relationship between the parties, this Court further decides that the parties are to be directed to bear their own costs and the above points are answered accordingly.

38. In the result, the Appeal Suits are dismissed and the judgment and decree passed in O.S.No.10 of 2004, dated 22.11.2006 on the file of the Additional District Court (Fast Track Court No.2), Pattukkottai stands confirmed. The parties are directed to bear their own costs.

26.09.2023

NCC : Yes/No
Index : Yes/No
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K.MURALI SHANKAR,J.

csn

To:

1. The Additional District Court (Fast Track Court No.2),
Pattukkottai.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

Pre-Delivery Order made in
A.S.(MD)Nos.268 of 2009 and 25 of 2010

Dated : 26.09.2023