

(1982) 06 MAD CK 0018
In the Madras High Court
Case No : Appeal No. 581 of 1977

Alagammal and Others

APPELLANT

Vs

Rakkammal

RESPONDENT

Date of Decision : 18-06-1982

Acts Referred:

Evidence Act, 1872 — Section 114

Succession Act, 1925 — Section 213, 228, 270, 57, 63

Citation : AIR 1982 Mad 354 : (1991) 2 MLJ 86

Hon'ble Judges : Ratnam, J

Bench : Single Bench

Advocate : M. Srinivasan, for K.R. Thiagarajan and S. Shahul Hameed, for the Appellant; G. Subramaniam, for K. Venkatasami and K. Govindarajan, for the Respondent

Judgement

1. Defendants I to 5 in O. S. No. 32 of 1976, Sub Court, Sivaganga, are the appellants in this appeal. The respondent herein instituted that suit as

an indigent person for a declaration that as heir" to her father Velu Ambalam, she is entitled to the suit properties and for recovery of possession of

those properties from the appellants. The respondent claimed that she is the daughter of late Velu Ambalam and one Karupayee (P. W. 5) who

were married and to whom the respondent was born on 3-11-1943, at Amaravathi Pudur, where all of them were living together till 1950.

According to the case of the respondent, the first appellant, whose children are appellants 2 to 5, was the daughter of the sister of Velu Ambalam.

and she was brought into the family to be of assistance but later Velu Ambalam developed intimacy with her as a result of which appellants 2 to 5

were born. There was no marriage between Velu Ambalam and the first appellant, according to the respondent. The further case of the respondent

was that due to the instigation of the first appellant, she and her mother Karupayee (P. W. 5) the legally wedded wife of Velu Ambalam, were driven out of the house some time in 1950 and a few years thereafter Karupayee (P. W. 5) married one Subbiah Ambalam of Ariyakudi, who also later died. The respondent stated that she lived with her maternal grandmother for some time and on her death, the respondent had been living with her maternal aunt. On the death of Velu Ambalam on 27-3-1973, according to the respondent, she was his only legal heir and, therefore, she became entitled to all the properties which belonged to her father Velu Ambalam. The respondent also claimed that B Schedule Properties stood in the name of the first appellant, they were really acquisitions benami in her name by Velu Ambalam. Claiming that she is the sole heir to her deceased father Velu Ambalam, the respondent laid the suit for a declaration that A and F Schedule properties in the plaint belong to her as heir to Velu Ambalam and also for recovery of vossession of the same from the appellants and for mesne profits.

2. On behalf of appellants 3 to 5, who were defendants 3 to 5 in the suit, the first appellant filed a written statement and this was adopted by the second appellant, who was the second defendani in the suit. The first appellant stated that Karupayee (P. W. 5) was not the legally wedded wife of the deceased Velu Ambalam and that the respondent was not his daughter. The driving" out of Karupayee (P. W. 5) and the respondent from the house by the first appellant was denied. The first appellant claimed that she is the legally wedded wife of Velu Ambalam and that the other appellants, namely, appellants 2 to 5. are the legitimate children born to her through Velu Ambalam out of such lawful wedlock. The details of the properties given in the plaint were stated to be not correct. As regards B Schedule properties, the first appellant claimed those properties to be her absolute properties, but that the rest of the properties belonged to Velu Ambalam. The appellants also set up a will dated 19-12-1965 stated to have been executed by Velu Ambalam under which he bequeathed all his Properties to the children of the first appellant appointing her and others as executors, and, therefore, they claimed that the respondent will not be entitled to any of the properties of Velu Ambalam either as his heir or even otherwise.

3. On the aforesaid pleadings of the parties, the learned Subordinate Judge framed the following issues and additional issues for trial-

1. Whether the plaintiff's (respondent's) mother Karupayee was the legally wedded wife of Velu Ambalam and plaintiff (respondent) was born to

them?,

2. Whether first defendant (first appellant) was married to Velu Ambalam and even if the marriage is true, is such marriage valid?

3. Whether plaintiff (respondent) is the sole heir to Velu Ambalam?

4, What are the properties left by Velu Ambalam?

5. To what relief if any is the plaintiff (respondent) entitled?

Additional issue framed on 16-12-1976:-

6. Whether the will dated 19-12-1965 executed by Velu Ambalam propounded by defendants (appellants) is true and valid?

4. Before the lower court, on behalf of the respondent Exs. A-1 to A-6, were marked and P-Ws. 1 to 5 were examined, while, on behalf of the

appellants, Exs. B. 1 to B. 6 were filed and D. Ws. 1 to 3 were examined. On a consideration of the oral as well as the documentary evidence,

the court below found that a valid marriage between Velu Ambalam and Karupayee (P. W. 5) had been established and that the respondent was

born to them out of such lawful wedlock. In considering the question of the marriage of the first appellant to Velu Ambalam, the court below found

that there was no acceptable evidence of any marriage between the first appellant and Velu Ambalam and that such a marriage could not also be

presumed from the cohabitation of the first appellant with Velu Ambalam and the begetting of children. as the evidence established clearly a valid

marriage between Velu Ambalam and Karupayee (P. W. 5) Dealing with the truth and validity of the Will dated 19-12-1965 stated to have been

executed by Velu Ambalam, the court below found that the Will in question was a foreign will and that the obtaining of a probate in a foreign

country would not be a sufficient and that, therefore, in the absence of obtaining letters of administration from a competent court in India, the Will

will not have any effect as against the respondent, who had been -proved to be the daughter and sole heir of Velu Ambalam. Regarding the

properties of Velu Ambalam, it was found by the Court below that there was no evidence of benami acquisitions by Velu Ambalam in the name of

the first appellant in relation to the B schedule properties apart from a bare averment to that effect in the plaint and that, therefore, those properties will not be available to the respondent as properties belonging to Velu Ambalam. Likewise, as regards the properties comprised in schedules C and E. no evident was let in to show the availability of those properties and consequently only the rest of the properties comprised in A-1 and A-2 schedules were held to belong to Velu Ambalam and also available. In view of the status of the respondent as the sole heir and daughter of the deceased Velu Ambalam. she was declared entitled to and recover possession of A-1 and A-2 schedule properties only and accordingly the suit was decreed in part. The relief of mesne profits prayed for by the respondent was negatived. It is the correctness of this decree that is challenged by the appellants in this appeal while. the respondent has preferred the Memorandum of Cross Objections in so far as the decree of the court below did not grant her the relief of mesne profits.

5. Mr. M. Srinivasan, the learned counsel appearing on behalf of the appellants, contended that there is no acceptable evidence regarding the marriage between Velu Ambalam and Karuppayee (P.W. 5) and that, therefore the conclusion of the court below is erroneous. In this connection, the learned counsel pointed out that the evidence of P.Ws. 1 and 4 accepted by the court below is not reliable, as they were persons brought by one Srinivasan the maternal uncle of the respondent, who was conducting the case on her behalf. It was also stated that it was strange that no attempt was made to bring about a mediation between Velu Ambalam and Karuppayee (P.W. 5) when disputes arose between them owing to the first appellant having come into the house-hold and this would also establish according to the learned counsel for the appellants, that there was no marriage between Velu Ambalam and Karuppayee (P.W. 5) and that they were also not living as man and wife. Attention was also drawn to the circumstance that the entry in Ex. A-1 was not made by P.W. 1 and that that entry has not been established to relate to Velu Ambalam. It was also the endeavour of the learned counsel for the appellants to show that Ex. A-2 the birth register extract of the respondent herein, no doubt referred to the birth of a daughter to Velu Ambalam and Karuppayee, but that the first appellant was also known as Karuppayee and Ex. A-2

referred to a female child born to Velu Ambalam and the first appellant, who later died as shown by Ex. B-1, and, therefore, the respondent

cannot claim the properties of Velu Ambalam as his heir. In this connection, the learned counsel for the appellants relied upon the decisions in

Nagayasami Naidu and Others Vs. Kochadai Naidu and Others, and Hazara Singh Vs. Attar Kaur, and pointed out that the entries in Ex. A-2

would not by themselves be conclusive, unless supplemented by other evidence and that, in this case, there was no such evidence and, therefore,

the entry in Ex. A-2, cannot be relied upon to establish that the respondent was the daughter of Velu Ambalam and Karupayee (P.W. 5).

6. On the other hand, the learned counsel for the respondent drew attention to the specific case of the respondent as set out in paragraph 3 of the

plaint to the effect that Velu Ambalam married Karupayee (P.W. 5) and that after the marriage both of them were living together and the

respondent was born to them on 3-11-1943 in Amaravathi Pudur and that they were all living together in that place till 1950 as members of one

family. According to the learned counsel for the respondent, P.Ws. 1, 2 and 4 had attended the marriage between Velu Ambalam and Karupayee

(P.W. 5) and their evidence is entitled to acceptance, especially when that evidence had been accepted by the court below and no reasons have

been stated as to why their evidence ought not to be accepted. It is also further pointed out by the learned counsel for the respondent

that there is absolutely nothing to discredit the evidence of P.Ws. 2 and 4 as regards the marriage of Velu Ambalam with Karupayee (P.W. 5). The

entries in Ex. A-1 according to the learned counsel for the respondent corroborate the evidence of P.Ws. 1, 2 and 4, to the effect that Velu

Ambalam was married to Karupayee (P.W. 5), and that a daughter was born to them. It is also further pointed out that Ex. A-2, admittedly re

lates to the daughter born to Velu Ambalam which had been registered by P.W. 1, after enquiry and that, therefore, it is established beyond doubt

that the respondent is the daughter of Velu Ambalam born to him and Karupayee (P.W. 5). The learned counsel would allow to submit that even if,

according to the appellants, Ex. A-2 refers to a daughter of Velu Ambalam, then it was for the appellants to show that the first appellant is

Karupayee referred to therein and also that Ex. B-1 relates to the demise of the child born to Velu Ambalam and the first appellant which has not

been done, as Ex. B-1 was marked only in the course of the cross-examination of P.W. and there is nothing therein to show the names of the

parents of the deceased child. It is also further contended that the child whose death is registered under Ex. B-1 is shown to be of 2 years at the

time of its death on 10-9-19N and, therefore, obviously it could not have any reference whatever to the child whose birth has been registered

under Ex. A-2. The absence of any suggestion to P.W. 1 that Ex. B-1 relates to the child referred to in Ex. A-2 is also strongly relied upon..

7. The first and the foremost question that has to be decided is, whether there was a marriage between Velu Ambalam and Karupayee (P.W. 5).

In this connection, the evidence that has been placed before the court by the respondent is that of P.Ws. 1, 2, 4 and 5 and the enumeration register

Ex. A-Y, and the certified extract from the register of births under Ex. A-2 relating to the birth of the respondent. As against this, D.Ws. 1 and 3

would claim that there was no marriage between Velu Ambalam and Karupayee (P.W. 5), but that there was only one marriage between Velu

Ambalam and the first appellant Alaganimai alias Karupayee. Necessarily, therefore, the oral evidence has to be scrutinised in the light of the

documentary evidence to ascertain which version is true and more probable.

8. P-W 1 at the relevant time, was the Headman of Ariyakudi group which included Amaravathi Pudur village, where Velu Ambalam was residing.

He would state that Ex- A-1 which is the ration account signed by the concerned officer would show the names of the members of the family of

Velu Ambalam, which includes that of P.W. 5 as well as the respondent herein P.W. 3. He has clearly-stated that he attended the marriage of Velu

Ambalam with Karupayee (P.W.,5) and also that the respondent was born in 1943. Regarding the entry of the birth of the respondent under Ex,

A-2, P.W. 1 has stated that he made the entries on information received from the Thalayar after verification and the girl whose birth had been

registered by him is the daughter of Velu Ambalam and Karupayee (P.W. 5). In the course of his cross-examination, he has reiterated that the

respondent was born to Velu Ambalam and Karupayee (P.W. 5). He would also say that there were two Velu Ambalams, one of whom was M.

Velu Ambalam, who died and that he does not know whether he had a child by name Rakkammal. Ex. B-1, according to P.W. 1, relates to the

death of a female child of the name V. Rakkamma. In the course of his further cross-examination, P.W. 1 has stated that Velu Ambalam was adopted in 1935-36 and got married at Saras!, Datti in 1936-37 and that the birth of the only child to Karupayee (P.W. 5) was registered by him after enquiry. He would also admit that Karupayee (P.W. 5) is his Panga's daughter and that after marriage there were misunderstandings between Velu Ambalam and Karupayee (P.W. 5) and later Karupayee (P.W. 5) married one Subbiah Ambalam of Ariyakudi. A suggestion that the respondent is not the daughter of Velu Ambalam that Karupayee (P.W. 5) is not the wife of Velu Ambalam, but that the first appellant alone is the wife, has been denied by him. P.W. 2 is a resident of Amaravathi Pudur and belongs to a different caste. He has given evidence about his having known Velu Ambalam and his wife Karupayee (P.W. 5) and also the respondent as their daughter. Velu Ambalam, according to P.W. 2, owned lands adjacent to his. He would also speak to his having attended Velu Ambalam's marriage with Karupayee (P.W. 5) and the birth of the respondent to them. He has stated that he does not know whether the first appellant had married Velu Ambalam. In the course of his cross-examination, he had reiterated the marriage between Velu Ambalam and Karupayee (P.W. 5) 40 years back. He also admitted owning substantial properties. P.W. 4 is another Pangali of Velu Ambalam and he has stated that he attended the marriage of Velu Ambalam with Karupayee (P.W. 5) and also that the respondent was born to them. He would deny any marriage between the first appellant and Velu Ambalam. He would further state that Velu Ambalam and Karupayee lived for about 3 years and the respondent was born to them and thereafter the first appellant was brought which gave rise to misunderstandings resulting in P.W. 5 and the respondent being driven out. His further evidence is to the effect that Velu Ambalam was a close relation of his and that he had also gone to Malaya and was living at a distance of 40 miles from the place where Velu Ambalam was staying. In the course of his cross-examination he would reiterate Velu Ambalam's marriage with Karupayee (P.W. 5) and their living as husband and wife for 2 or 3 years and the birth of the respondent and their coming over to Amaravathi Pudur. He is positive that the name of the first appellant is not Karupayee. P.W. 5 is Karupayee herself and she has spoken to the marriage between Velu Ambalam and herself.

and also the birth of the respondent to them. She would state that the first appellant who was none other than the sister's daughter of Velu

Ambalam was brought to do the household work, but that Velu Ambalam later developed intimacy with her as a result of which misunderstanding

arose which resulted in her being driven out of the house. She would state that the respondent was entrusted to her mother to be looked after and

that she married again. In the course of cross-examination RW. 5 had denied that Rakkammal referred to in Ex. B-1 is her daughter, who died in

1950. She has also stated that Velu Ambalam was giving out that he had married the first appellant. A suggestion that the first appellant gave birth

to Rakkammal who died in 1950, was denied by her.

9. As against this evidence, the first appellant examined as D.W. 1, has stated that her name is Alagammai alias Karupayee and that her maternal

uncle Velu Ambalam married her when she was 15 or 16 years old and Velu Ambalam was 11 years older than herself. The marriage according to

her was 6 years after the adoption and the birth of the daughter was in the next year, and on her death, the second appellant was born. She is

Positive that no steps were taken to record these births and deaths. She would deny that Karupayee (P.W. 5) is the wife of Velu Ambalam and

that the respondent is their daughter. In the course of cross-examination D.W. 1 admitted that there was no record to show that she was also

known as Karupayee. She has stated that Velu Ambalam did not marry P.W. 5 and that they did not live as man and wife. She would speak to

the adoption of Velu Ambalam by his sister though she would say that the year of adoption is not known, She would add that the year of her

marriage is not known to her and that no invitations were issued for the marriage. She would reiterate that a child was born the year after the

marriage but that the year of the birth of the child is not known. She would claim that the first child was alive for 7 or 9 years and after its death;

five children were born to her. She reiterated that there was no record of any of the births or death. She denied that the respondent was the

daughter of Velu Ambalam and that she was a heir of her father. D.W. 3 is the elder brother of Velu Ambalam. He would speak to the adoption of

Velu Ambalam, and his marriage 30 or 35 years back. According to him, two - years after his marriage, the marriage of "Velu Ambalam took

place, He would depose that the first appellant Alagammai was also known as Karupayee and that he was present at the time of the marriage

between Velu Ambalam and the first appellant, which was celebrated according to cast6 rites. According to him his relations had also come to

attend the Marriage. He is Positive that Karupayee (P.W. 5) was not married to Velu Ambalam and that the respondent is not the daughter of

Velu Ambalam. In the course of cross-examination, D.W. 3 has admitted that there are no records to show that the first appellant Alaaammai was

also known as Karupayee. He would further admit that the year of marriage of Velu Ambalam with Alagammai is not known, though a child was

born the year after the marriage. According to him, no invitation cards were issued for the marriage and others who had attended the marriage are

all alive. No letters were sent to relations, according to D.W. 3, regarding the marriage of Velu Ambalam with Alagammai. D.W. 3 would also add

that Velu Ambalam did not marry Karupayee (P.W. 5) and that he does not know whose daughter the respondent is.

10. P.W. f is a disinterested -person well acquainted with Velu Ambalam and he has produced Ex. A-1, which is the ration account and had also

entered the birth of the respondent under Ex. A-1 on 3-11-1943. He has clearly spoken to the marriage between VeluAmbalam and P.W. 5 in

1936-37. P.W. 5 in his Pangali"s daughter. There is nothing which improbabilises the evidence of P.W. 1, either with reference to his having

attended the marriage between Velubalain and Karupayee (P.W. 5) having entered the birth of the dent under Ex. A.2 on 3-11-1943, verifying the

information received the Thalayari Pechimuthu, who after his res-ponafter from had since died, no motive has been attributed to P.W. 1. Nothing

has been stated as, to why the evidence of P.W. I should not have been accepted. His evidence is clear and cogent and clearly establishes the

marriage between Velu Ambala and P.W. 5 at Sarasipatti. The evidence Of P.W. 2 who owned lands adjacent to that of Velu Ambalam is

convincing and he is also a person who had attended the marriage of VeluAmbalam with Karupayee (P.W. 5) and who is acquainted with the birth

of the respondent to them. He is a person of substance and even as against P.W. 2 nothing has been suggested which would render his evidence

regarding his having attended the marriage of Velu Ambalam with Karupayee (P.W. 5) and the birth of the respondent to them unacceptable. P W

4 is a Pangali of Velu Ambalam and Velu Ambalam was -related to him as his paternal uncle Rakkappan's son and his evidence is also to the

effect that he attended the marriage of Velu Ambalam with Karupayee (P.W. 5) and that the respondent is the daughter born of such marriage. It

has no doubt been elicited in the cross-examination of P.W. 4 that he had been convicted for the consumption of arrack. But that does not detract

from the truth of his version as a close Pangali of Velu Ambalam who had attended the marriage. Thus, the evidence of P.Ws. 1, 2 and 4 clearly

establishes the marriage between Velu Ambalam and P.W. 5 and also the birth of the respondent to them.

11. The Plea of the appellants that there is no evidence regarding the marriage between Velu Ambalam and P.W. 5 is thus without substance. P-

Ws. 2 and 4 are Pangalis who had attended the marriage and P.W. 2 is an utter stranger who also attended the marriage and in the absence of

anything against the acceptance of their testimony, their evidence has got to be accepted. It is also seen that the documentary evidence

corroborates this evidence in this case. Ex. A-I" is the enumeration register relating to the village in the Ariyakudi group and this has been prepared

in the year 1"944. Entry No. 311 therein relates to Velu Ambalam, It has also been verified and initialed by the concerned officer on 14-12-1944.

Therein, the members of the family of Velu Ambalam have been shown as Karupayee, Kanthan and Rakkammal, P.W. I's evidence is to the effect

that Karupayee referred to therein is Velu Ambalam's wife and Rakkammal is none other than the respondent and that Kanthan was the servant of

Velu Ambalam. Though P.W. 1 would say that Karupayee was not described as the wife of Velu Ambalam as such, yet, by reason of her name

having been entered in the appropriate column, her relationship as the wife of Velu Ambalam is made out. It may be that Ex. A.1 had not been

produced from proper custody. But even so, it must be remembered that it has been produced by the concerned village Headman, who was in

charge of the village in the year 1944, when there was no reason whatever for anybody, more so for a public officer to have made any false entries

therein. Ex. A.2 shows that the birth of a female child on 3-11-1943 has been, registered. Under column 8, father's name has been shown as Velu

Ambalam, son of Rakkapan Ambalam, while the mother's name under column 9 has been entered as Karupayee. The informant's name is

Pechimuthan. With reference to the entries in Ex. A-2, it has already been seen, that even the counsel for the appellants had not disputed the name of the father as Velu Ambalam, though the first appellant would claim that it related to a child born, to her through Velu Ambalam but "later died. If the reference in Ex. A-2 to Velu Ambalam is correct, then it is for the first appellant to establish that Karupayee, referred to therein is herself. It is not the stand of the first appellant in her written statement that she was also known as Karupayee. it has already been seen how in the evidence of the first appellant, examined as D.W. 1, she had clearly admitted that no steps were taken either to record the births or the deaths and also that there was no record to show that her name is Karupayee. If, therefore, even according to D.W 1, the birth or the death of the children were not recorded and there was no record to show that her name is Karupayee, then the irresistible conclusion is that Ex. A-2 refers to the only Karupavee. who is P.W. 5 and the entry therein relates only to the respondent. It is necessary in this connection to advert to the stand taken by the appellant in relation to the entries under Ex, A-2 in the light of Ex. B-1. The entry relating to the birth- of a daughter to Velu Ambalam and Karupayee (P, W. 5) under Ex. A-2, was made by P.W. 1 after verification of the details. Ex. B-1 according to the appellants, related to the death of the child whose birth was recorded under Ex, A-2, and that, according to them, was the first daughter born to Velu Ambalam and the first appellant. It has earlier been seen from the admission of D.W. 1 that births and deaths had not been recorded and, therefore, "in the light of her own evidence Ex. B-1 cannot refer to the child born to Velu Ambalam and the first appellant, whose birth has been registered under Ex. A-2. and who subsequently died which had been registered under Ex. B-1. A-part from this, it is curious that the names of the parents of Rakkammal whose death has been registered under Ex. B-1 has not been given at all and, therefore, there is no knowing whether Rakkammal whose name is found in Ex. B-1 was actually the daughter of the first appellant and Velu Ambalam as claimed by the appellants. In addition, it is seen that the child whose death has been registered under Ex. B-1 is stated to have been two years old at the time of its death. Therefore, that child must have been born in 1948 or so. It is seen from the evidence of D.W. 1 that 6 years after the adoption of Velu Ambalam the marriage had taken place. The

evidence of P.W. 1 is to the effect that the adoption of Velu Ambalam was in 1936 of D.W. 1 is to be accepted, then Velu Ambalam should have

married the first appellant some time in 1942 and her specific evidence is that the child was born the next year of her marriage, that is, in 1943 and

died later. If that be so, the child should have been 7 years old at the time of his death and not 2 years as stated in Ex. B-1. There is thus an

inconsistency in the oral testimony of D.W. 1 and Ex. B-2. From the foregoing it is evident that the child whose birth has been registered in Ex.

A-2 is not the same child whose death has been registered in Ex. B-1. This would establish that the appellants are merely attempting to take

advantage of the name Rakkarnmal found in Ex. B-1 and spin out a possible defence on that basis which has not been established at all. The Court

below was quite justified. therefore in concluding on the basis of the evidence of P.Ws. 1, 2 and 4 and also the entries in Exs. A-1 and A-2, that

Velu Ambalam had married Karupayee (P.W. 5) and that the respondent herein was the daughter born out of such wedlock.

12. It now remains to consider the question of the marriage of the first appellant with Velu Ambalam. It must be noticed that P.W. 1 has stated that

Velu Ambalam was married to Karupayee (P.W. 5) sometime in 1936-37 and that the first appellant was only a concubine of Velu Ambalam.

P.W. 2 would state that he does not know whether the first appellant was married to Velu Ambalam. P.W. 3, a close Pangali of Velu Ambalam,

has clearly stated that the first appellant was not married to Velu Ambalam P.W.5 has given evidence as regards the circumstances under which

the first appellant came to the household of Velu Ambalam and how subsequently Velu Ambalam developed illicit intimacy with her, Even in the

course of her cross-examination P.W. 5 has stated that Velu Ambalam was giving out that he had married the first appellant. The evidence of the

first appellant examined as D.W. 1, as regards the marriage between her and Velu Ambalam is not very convincing. Though in the course of chief

examination D.W. 1 has stated that 6 years after the adoption of Velu Ambalam she was married to him, she was not in a position to give either the

year of adoption of Velu Ambalam or the year of her own marriage with Velu Ambalam. It is the further evidence of D.W. 1 that no invitations

were given for her marriage with Velu Ambalam. D.W. 3, who is none other than the brother of Velu Ambalam, was frank to confess that the year

of marriage of the first appellant with Velu Ambalam is not known and that no invitation cards for the marriage between the first appellant and Velu

Ambalam had been issued. Though according to D.W. 3 other persons who had attended the marriage are alive, none of them had been examined.

He also admitted that there was no letter to the relations regarding Velu Ambalam's marriage with the first appellant. In short, the evidence in

relation to the marriage between the first appellant and Velu Ambalam is only the oral evidence of D-Ws. 1 and 3, It is strange that D.W 9. 1 and

3 are unable to even recall the year of marriage of Velu Ambalam with the first appellant. It is stranger that though other persons who had attended

the marriage of Velu Ambalam with the first appellant are stated to be alive, no independent witness had been examined on behalf of the appellants

to establish the marriage between the first appellant and Velu Ambalam. No invitations for the marriage between the first appellant and Velu

Ambalam had been sent to anybody. D.W. 3 would even go to the extent of saying that no letters even were sent to the relations regarding the

marriage of the first appellant with Velu Ambalam. It is surprising that the marriage between the first appellant and Velu Ambalam should have

been conducted in such a secret manner, the reasons for which are not known. In the normal course one would expect invitations to be sent not

only to close relations but also other outsiders and intimation with reference to the marriage to others as well. The evidence of persons who had

attended the marriage would be a strong circumstance to establish the celebration of marriage between the first appellant and Velu Ambalam. In its

absence, it is rather difficult to accept the case of the first appellant that she was married to Velu Ambalam six years after his adoption, when even

the year of adoption and marriage do not clearly appear from her evidence. The conclusion is, therefore, irresistible that there was no marriage

between the first appellant and Velu Ambalam.

13. The question of drawing a presumption in favour of marriage between the first appellant and the deceased Velu Ambalam may now be

considered, As regards this, the learned counsel for the appellants contended that the recitals in the will Ex. B-2, executed by Velu Ambalam on

19-12-65 describe the first appellant as his wife and she has also been referred to as Alagammai Ammal alias Karupayee Animal and that this

would establish that the first appellant was known by both the names and was also the wife of Velu Ambalam. The circumstance that the first

appellant and Velu Ambalam had been living together as man and wife and had brought forth appellants 2 to 5 as their children was strongly relied

upon for the purpose of drawing a presumption that such cohabitation was pursuant to a marriage between the first appellant and Velu Ambalam.

Reliance in this connection was also placed by the learned counsel for the appellants upon the decision in *Rajagopal Pillai and Others Vs. Pakkiam*

Ammal and Another, ; Rajagopal Pillai and Others Vs. Pakkiam Ammal and Another, ; Raghuvir Kumar and Another Vs. Shanmughavadivu and

Others, and Badri Prasad Vs. Dy. Director of Consolidation and Others, . In meeting this argument, the learned counsel for the respondent con

tended that the non-mention of the name of PW 5 or that of the respondent as the wife or daughter of Velu Ambalam in his will or the mention of

the first appellant as the wife of Velu Ambalam in the will would not be decisive, especially when the very will is being questioned and further the

evidence adduced on behalf of the appellants does not probabilise the marriage between the first appellant and Velu Ambalam. In addition, it is

also pointed out that there is no acceptable independent evidence of any marriage having been celebrated between the first appellant and Vele

Ambalam and having regard to the marriage between Velu Ambalam and Karupayee (PW 5) which has been established on the evidence to have

taken place in 1936 or 1937, there cannot be any presumption in favour of a second marriage by the cohabitation of the first appellant with Velu

Ambalam. In this connection, the learned counsel for the respondent relied upon the decisions in *S. A. 592 of 1921: (1924) 46 MLJ 8 Dalavayi*

Nagarajamma Vs. State Bank of India and Others, and Kumarayya Chettiar v. Cheyyalachi, 1972 TLNJ 464.

14. It is true that law does not favour concubinage, but that the presumption is in favour of a marriage when a man and a woman are shown to

have cohabited continuously for a long number of years, though such a presumption is a rebuttable one and can be destroyed or weakened by the

presence of other circumstances. It has already been found on the evidence that there was a marriage between Velu Ambalam, and Karupayee

(PW 5). The question is, whether in view of this, the presumption of a marriage between Velu Ambalam and the first appellant can be drawn

merely from their having cohabited as man and wife, even though there is no evidence adduced in proof of a marriage. In this case, there are certain circumstances which not only militate against the drawing of such a presumption, but even negative the same. Velu Ambalam had already been married to Karupayee (PW 5) and she had given birth to a daughter, the respondent herein, on 13-11-1943. It is the evidence of DW 1, that persons who would have normally attended the marriage, if such a marriage had taken place, had not been examined and other persons, who would have been invited to attend the wedding, if such a marriage had taken place, were not invited or intimated. No evidence of the first appellant having been treated by the community as the wife of Velu Ambalam has been made available. Excepting for the solitary instance in 1965 in the will Ext. B. 2, which is also questioned by the respondent, there had been no occasion of any acknowledgment by Velu Ambalam that the first appellant is his wife. The aforesaid circumstances coupled with the facts that Velu Ambalam had already been married to Karupayee (PW 5) would totally destroy the presumption in this case. No doubt, the decisions relied on by the learned counsel for the appellants would all support the drawing of such a presumption because the law does not favour concubinage. But such a presumption is rebuttable presumption and not an absolute one, more so in the Present case because Velu Ambalam had been already married to Karupayee (PW 5). In such case, it has been pointed out in S. A. 592 of 1921: (1924) 46 MLJ 8 that the presumption of a marriage from repute arises only where the evidence shows that the parties were living together for a sufficiently long period and were treated as husband and wife by their relations and the public, but that where a man had already married a woman and had children by her, there is no Presumption that another lady with whom he is said to have lived is his wife or his children by her are legitimate. To similar effect is the decision in Dalavayi Nagarajamma Vs. State Bank of India and Others, . Therein, it is pointed out that no doubt the presumption of law is in favour of marriage and against concubinage, but where a person is already married, no presumption of a second marriage arises by reason of long cohabitation. In the present case apart from the fact that the circumstances pointed out earlier considerably weaken the drawing of such a presumption, there is really no scope for such a presumption at all.

15. The learned counsel for the appellants next contended that Velu Ambalam had executed a will under Ex.B.2 dated 19-12-1965 bequeathing

the properties in favour of the appellants herein and that the execution of the will had also been found by the court below and. therefore, the

respondent ought to have been non-suited on this ground. As part of this submission, the learned counsel for the appellants stated that no probate

in respect of the will of Velu Ambalam is required to be obtained, as under S. 213(2) of the Indian Succession Act the Provisions of Sec. 213

would apply only in the case of wills made by any Hindu, Buddhist, Sikh or Jain falling under clauses (a) and (b) of S. 57 of the Indian Succession

Act. In this case. according to the learned counsel the will executed by Velu Ambalam would not fall either within clause (a) or clause (b) of S. 57

and there is therefore no scope for invoking S. 213(1) of the Indian Succession Act, which requires a probate in order to establish rights under a

will in a court either as executor or legatee. In addition, it was the further submission of the learned counsel for the appellants that S. 228 of the

Indian Succession Act does not compel the obtaining of a Probate and that, therefore, the court below was in error in holding that the will under

Ex. B. 2 will have no effect as against the respondent, who has been established to be the heir of Velu Ambalam. The decision in *Manasingh*

Vs.Amadkunhi ILR (1894) Mad 14, was stated by the learned counsel for the appellants to have been rendered prior to the Passing of the Indian

Succession Act and would, therefore, be inapplicable. The learned counsel for the appellants also relied upon the decisions in *Sohan Singh v- Bhag*

Singh, AIR 1934 Lah 599; *Pevi bai v. Motumal Kalachand*, AIR 1937 Sind 84; *Blackwood and Sons Ltd. and Others Vs. A.N. Parasuraman*

and Others, ; and *Bhaiya Ji Vs. Jageshwar Dayal Bajpai*, .

16. In meeting these contentions, the learned counsel for the respondent would submit that Ex. B. 2 having been executed outside India, it may not

fall within S. 57(a) or (b) of the Succession Act, but that does not however mean that rights to property either as an executor or legatee under a

will can be asserted before or recognised by courts here without the obtaining of a probate under Sec. 213 of the Succession Act, or even without

at least a resealing of the probate obtained before a foreign court under S. 228 of the Succession Act. In this connection reliance was placed by

the learned counsel for the respondent on Blackwood and Sons Ltd. and Others Vs. A.N. Parasuraman and Others, ; and at page 424 para 65,

and Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and

Others, . It was also further pointed out that in this case the Probate proceedings culminating in Ex. B. 4 had been commenced and continued after

the exchange of notices between the parties and the institution of the suit by the, respondent and under those circumstances, no reliance can be

placed on those proceedings. The mere obtaining of a probate, according to the learned counsel for the respondent, would not suffice to dispense

with the proof of the will and reliance in this connection was placed on the decisions in Ram Lal - v. Chanan Dass, AIR 1938 Lah 349, and

Bamapada Ghosh Vs. Satish Chandra Sur, . Even on the footing that no probate or an ancillary probate is necessary, the learned counsel for the

respondent argued that the appellants have to establish the will Ex. B. 2 and that the evidence of the attester DW 2 does not prove the execution

or attestation of Ex. B. 2. Attention was drawn in this connection to the several circumstances in the evidence of DW 2 which would render

improbable his claim that he was present in Malaya and saw the execution of Ex. B. 2 by Velu Ambalam and attested the same.

17. In reply, the learned counsel for the appellants reiterated that S. 213(2) of the Succession Act is clear and unless the case was one which was

covered by clauses (a) and (b) of S. 57, there was no need for a probate at all and submitted that the truth of the will as shown by the obtaining of

a probate cannot be belittled because the proceedings were taken after the institution of the suit. A further point was also raised that the evidence

of DW 2 regarding the execution of the will by Velu Ambalarn is unassailable and that the recitals in the will fully support the case of the appellants

and, therefore, the respondent should be non-suited.

18. While the appellants claim that they are entitled to the properties by reason of the will Ex. B. 2 dated 19-12-1965, stated to have been

executed by Velu Ambalam the respondent would assert that the will has not been proved. The testator Velu Ambalarn died on 27-3-1973. After

the death of Velu Ambalam, the respondent had issued a notice claiming the properties of Velu Ambalarn as his heir and that was under Ex. A. 3

dated 4-7-1973, which had been received by the first and the second appellants on 5-7-1973, as shown by Exs. A. 4 and A. 5. Ex. A. 6 dated 17-7-1973 is the reply notice sent by appellants 1 and 2 to the respondent. wherein they have set up the will Ex. B. 2 dated 19-12-1965. The respondent herein, on 23-1-1974. had filed O. P. 4 of 1974, which was later, converted into O. S. No 77 of 1974 and in the course of that suit, she had made a claim to the properties of the deceased Velu Ambalam as his sole daughter and heir. It is in the light of the aforesaid facts that the obtaining of the probate by the appellants under Ex. B. 4 on 5-11-1974 has to be considered. A perusal of Ex. B. 4, which is only a Photostat copy shows that the will-dated 19-12-1965 had been -proved before the foreign court on 4-8-1974. It is evident that the obtaining of a probate by the appellants under Ex. B. 4 was long subsequent to the exchange of notices between the parties under Exs. A. 3 and A. 6 and also after the institution of the suit on 23-1-1974 without any notice whatever to the respondent. It may be that if the respondent had been put on notice, she might have even contested the proceedings for grant of probate. But that was not done for reasons best known to the appellants, even though the appellants had by then knowledge not only of the execution of the will by Velu Ambalam but also the claim of the respondent herein as the sole heir entitled to succeed to the properties of Velu Ambalam ignoring the will Ex. B. 2. The obtaining of a probate by the appellants after the institution of the suit and in the circumstances set out above cannot strengthen their case regarding the will executed by Velu Ambalam.

19. The scope of Ss. 57 and 213 of the Succession Act (hereinafter referred to as the Act) may now be considered. The Act is intended to consolidate the law applicable to intestate and testamentary succession. In Part VI of the Act are enumerated the provisions relating to testamentary succession. Under S. 57 of the Act, the provisions of Part VI set out in Schedule III are made applicable, subject to restrictions and modifications to wills and codicils made by Hindus, Buddhists, Sikhs or Jains under certain circumstances. Clauses (a), (b) and (c) of S. 57 of the Act relate to different classes of wills. Clause (a) applies to those will and codicils made on or after 1-9-1870 within specified boundaries in the Presidencies of Bengal, Madras and Bombay. Clause N similarly related to those wills and codicils which, though made outside the limits

enumerated under S. 57(a), proceeded to deal with immovable properties situated within those limits. Clause (c), introduced by Amending Act

XVIII of 1929, was intended to apply provisions of Part VI with reference to all wills and codicils made on or after 1-1-1927, in any part of the

then British India. It is thus seen that the primary object of S. 57 of the Act is only to make applicable provisions of Part VI of the Act to certain

classes of will. Prima facie, therefore, Section 57(a) and (b) of the Act would be applicable only with reference to wills executed within India.

Section 213 of the Act, on the other hand, prohibits recognition of rights as an executor or legatee under a will without the production of a probate

and sets down a rule of evidence and forms really part of the procedural requirement of the law of the forum. Construed in this manner, though it

may be that wills executed outside India may not fall within the scope of S. 57(a) or (b) of the Act nevertheless, in order to enable the court to

recognise the rights claimed under such a will, the obtaining of a probate of the will under which the right is claimed would be essential. In other

words, in cases which would fall under S. 57(a) and (b) of the Act the obtaining of a probate would be necessary, if the court is called upon to

recognise rights to properties claimed or asserted either as an executor or as a legatee under the will executed in India. With reference to wills

executed outside India, in respect of which a foreign probate has also been obtained, the requirement of S. 213(1) of the Act would] be satisfied

by obtaining under S. 228(1) of the Act an ancillary probate or what is termed in English Law as the resealing of the probate. Otherwise, the

procedural requirement of the lex fori enacted under S. 213(1) of the Act may not be satisfied and if it is only with a view to enable parties claiming

under a will executed outside India to make claims with reference to properties situated in India, the procedure under S. 228 of the Act has been

prescribed. If this is not so, then as the probate obtained in respect of a will executed in a foreign country would be operative only within that

country, persons entitled to other properties under the will, which are situate outside the country where the will was executed and the probate also

was obtained, would be left without any means to assert their rights there to it must also be remembered that S. 228 of the Act is really in the

nature of an enabling provision and when read with S. 270 of the Act, permits the obtaining of an ancillary probate. Section 270 of the Act is

enacted on the principle that the presence of personal property of the deceased would be sufficient foundation of jurisdiction for purposes of

granting probate. If, therefore, S. 213 of the Act requires the production of a probate as a procedural requirement before recognition of the rights

to property by court under either as an executor or a legatee and if S. 228 read with S. 270 -of the Act further provide for the obtaining of an

ancillary probate in respect of wills executed and probated outside India for the purpose of enabling the executors and legatees to assert rights to

the estate of a deceased in India, then the requirement as to the obtaining of a probate in this case in the shape of an ancillary probate cannot be

stated to be unnecessary in view of S. 57(a) and (b) of the Act. In *Bhaurao Dadajirao v. Lakshmi Bai* ILR(1896) 2 Bom 607, the testator was a

subject of Baroda State and the will was also executed at Baroda. But the testator had left immovable properties in Belgaum. On an application for

probate made before the District Judge, Belgaum under S. 56 of the Probate and Administration Act of 1881 (corresponding to S. 270 of the

Succession Act), it was dismissed holding that the proper place to prove the will was Baroda. On appeal it was pointed out that Sec. 56 of the

Probate and Administration Act 1881 is general in nature and is irrespective of the place where the will was executed or of the nationality of the

testator on the place of his domicile. It is, therefore, obvious that in this case also, on the basis of S. 270 of the Act, it would be open to the

appellants claiming under the will to make an application for an ancillary probate and obtain the same and it cannot, therefore, be stated that the

Procedural requirement under S. 213 of the Act cannot be complied with. That this is so is supported by the decision of *Rajagopala Aiyangar, J.*

in *Blackwood and Sons Ltd. and Others Vs. A.N. Parasuraman and Others*, . In that case, rights in a copyright were sought to be asserted on the

basis of two wills probated in England. Section 213 of the Act was pleaded as a bar. In dealing with this plea, the learned Judge pointed out that

that wills in those cases did not fall either u/s 57(a) or (b) of the Act, but nevertheless S. 213 of the Act constituted a rule of evidence containing a

procedural requirement of *lex fori* and that S. 213 of the Act primarily concerned itself with wills of Indian nationals and those executed in India,

but S. 229 of the Act was in the nature of an extension of that rule requiring the obtaining of a probate and enabled the granting of an ancillary

probate in the case of foreigners. It was also further pointed out that S. 213 of the Act must also take in an ancillary probate which can be granted

under Sec. 228 of the Act, as otherwise, S. 213 of the Act cannot be construed to contemplate a probate which no court in India can issue as

regards a foreign will, which has also been probated by a foreign court. After pointing out these aspects, the learned Judge non-suited the Plaintiffs

on the ground that the plaintiffs should have obtained an ancillary probate under Sec. 228 of the Succession Act and consequently, their failure to

produce such a probate is a bar to the enforcement of such right in the suit under S. 213 of the Succession Act. That decision will squarely apply

to the facts of this case as well. The reliance placed by the learned counsel for the respondent on the decision in *Mrs. Hem Nolini Judah* (since

deceased) and after her Legal Representative *Mr. Marlean Wilkinson Vs. Isolyne Sarojbhashini Bose and Others*, is of no assistance to him as

in that case the impact of S. 57(a) and (b) on S. 213 read in the light of Ss. 228 and 270 of the Act did not arise for consideration and further the

parties therein do not appear to be Hindus to whom S. 57 of the Act may apply. Therefore, the appellant's failure to obtain an ancillary probate

under S. 223 of the Act would be fatal to their claim under the will Ex. B. 2, a probate in respect of which had been issued by a foreign court

under Ex. B. 4.

20. Even on the footing that no probate is necessary, the question whether the will had been established to have been executed by *Velu Ambalarn*

has to be considered as the original will Ex.B.2 is before court and the evidence of the attestator DW 2 has also been made available. Though the

court below was of the opinion that the evidence of DW 2 would establish the execution of the will Ex. B. 2, yet, there are certain circumstances in

his evidence to which attention has been drawn, in the light of which, his evidence has to be assessed, DW 2 is one of the two attestors to Ex. B. 2

and the other attestor, *Masilamani*, has not been examined. The evidence of D.W. 2 is to the effect that he is a native of *Pirannialai* and has been

working as an accountant in *Kasia Pilla's* shop at *Malafya*, wherein *Karaikudi Masilarnani* also worked. He would state that he was residing at

No. 126 *Jalat Maharani Street* and that he went to *Malaya* in 1956 and returned finally in 1974. The testator *Velu Ambalam* according to D.W. 2,

was staying in the same house and was having a money lending business at door No. 18 in the same street. In December 1965, according to DW

2, a will was executed by Velu Ambalam. A Tan-alian advocate wrote the will, according to D.W. 2, and that was when Velu Ambalam signed, he

and Masilamani were present and both of them are stated to have attested the will in the presence of Velu Ambalam. In the course of the cross-

examination D.W. 2 admitted that though he had a passport for having gone to Malaya, he had not brought it. He admitted that there was no

record to show that he was living in Jalal Maharani Street and that he has no letters addressed to him at that place. D.W. 2 further frankly admitted

that there is no material to show that Velu Ambalam also lived in Jalal Maharani Street and also that he had business in that street. D-W. 2 stated

that he did not know who was consulted as regards the will, but that the will had been written already and he was also called for attesting it since

he was a friend of Velu Ambalam. D.W. 2 was unable to give the name of the lawyer in whose office Ey- B-2 was written. Though he would state

that the lawyer's clerk read out the terms of the Will, he admitted that neither the advocate nor his clerk signed the Will. D.W. 2 finally admitted

that he was disniissed from Kasia Pillai's shop for having misappropriated funds and that he had given his properties to Kasign1lai to make good

the amounts misappropriated.

21. The aforesaid evidence of DW 2 raises very serious doubts about his presence in Malaya at the time of the execution of the Will Ex, B 2 D. W

.2 has admitted having a passport to show his movements, but that has not been made available. Though he had stated that Velu Ambalam and he

were resuing at No. 126, Jalal Maharani Street and that Velu Ambalam had money-lending business at door No. 18 in the same street no

inaterials, have been produced in support of that, Apart from this, it is the clear admission of D.W. 2, that there are no records to show his living in

Jalal Maharani Street and that there is also no material to show that Velu Ambalam lived in the same street or carried on business. Thus, the living

of D.W. 2 and Velu Ambalam in the same house and thereby their becoming friends which led to the request by Velu Ambalam to attest Ex. B-2

have not been established at all. That Velu Ambalam was there at that time has not been proved by appellants and nothing prevented the

production of the passport of Velu Ambalam, to show whether he was in Malaya in December 19 65. No reasons have been given for the non-

examination ad Masilarnani. Even the name of the advocate who is said to have drawn up the Will is not known to D.W. 2. If really the Will had

been drawn up in the manner spoken to by D.W. 2, then he must have in a position to give at least the name of the lawyer. The advocate or his

clerk who is stated to have read out terms, of the Will have not appended their signature to the Will, That the testimony of D.W. 2 is unacceptable

and unreliable is made clear by his candid admission that he had misappropriated funds while working in the shop of Kasia Pillai and he had given

his properties also towards those amounts. The Will also, contains certain doubtful features. It is rather strange that the tester did not even know

the age of the first appellant and of his two daughters. It is usual to give some reasons for the execution of the Will, as for instance, the ill-health of

the testator or the other similar reasons. It is found that no such thing is mentioned in the Will. Above all. it is not clear from. the evidence as to why

Velu Ambalam was particularly anxious to disinherit the respondent herein who was none other than his own daughter. This is strikingly unnatural

That D.W, 2 had been called by Velu Ambala for attesting the Will because he happened to be a friend of his has not been established and.

therefore, the further evidence of D-W. 2 to the effect that as a friend of Velu Ambala he went and attested the document in the office: of an

unknown lawyer is very difficult to accept. The cumulative effect of these circumstances considered in the light of the very unsatisfactory evidence

of D.W. 2 would lead to the conclusion that Ex. B-2 has not been, shown to have been duly executed by Veku Ambalam and attested by D.W. 2,

and, therefore- the appellants cannot, on the basis of such a Wilt claim rights to the properties of Velu Ambalam .The conclusion of the court

below that no rights would be available to the appellants on the strength of the will Ex B-2 therefore quite justified.

22. In the memorandum of cross-objections filed by the respondent the only point that is urged by her learned counsel is that having de creed the

suit for recovery of possession instituted by the respondent in relation to A-1 and A-2 Schedules, the court below had declined to grant the relief

of mesne Profits. A perusal of the judgment of the court below reveals that this matter has completely escaped its attention. No reasons have been

given as to why the respondent is not entitled to mesne profits as claimed by her. The failure of the court below to award a decree for mesne profits in favour of the respondent is, therefore, erroneous.

23. In the result, the appeal fails and is dismissed and the Memorandum of cross-objection is allowed. There will be no order as to costs in the appeal as well as the Memorandum of cross-objections.

24. Appeal dismissed.