

(1987) 09 MAD CK 0009
In the Madras High Court
Case No : S.A. 3 of 1979

Govindasami Padayachi (dead) and Others	APPELLANT
Vs	
Boorasami Padayachi (dead) and others	RESPONDENT

Date of Decision : 11-09-1987

Acts Referred:

Evidence Act, 1872 — Section 32(6), 55

Citation : (1987) 09 MAD CK 0009

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : B. Mothilal Jain and Mr. P. Jayaraman, for the Appellant; B. Rajagoplan, for the Respondent

Judgement

Srinivasan, J.—The only question which arises in this second appeal is whether the plaintiff in the suit was the husband of Chinnammal alias

Chinna Pillai (sic) (Chinnponnu), who was admittedly a sister of the defendants and to whom the suit properties belonged. Though the question is

one of fact, I find it necessary to interfere with the finding of the lower appellate Court which has reversed that of the trial court, as in my view, the

judgment of the lower appellate Court is perverse in the sense that no normal person could have arrived at that finding. The learned appellate Judge

has ignored the weight of preponderating circumstances proved or admitted to exist in this case and relied heavily upon a document which is not

evidence in law besides being influenced by inconsequential matters. The plaintiff came to court with a prayer for recovery of possession of the suit

properties with mesne profits alleging that he married the sister of the defendants by name Chinnammal alias Chinna Pillai about 40 years prior, to

the suit according to Hindu sastras and that they were living together at

Kulasekharanallur in Kumbakonam taluk and a son was born to them on 12-7-1941, but died within two years. It is the case of the plaintiff that he shifted his residence to Alangudi and was residing with his wife for sometime there and again shifted back to Kulasekharanallur. According to the plaintiff, his wife used to go often to the suit village and live in a separate house. The suit properties were purchased by her with her own funds earned by vending milk and cultivating some lands in pannai. The plaintiff claimed that on the death of his wife on 12.7.1976 he became entitled to the properties as her sole heir. According to him, the defendants who were residing separately trespassed upon the suit properties and taken away the movables detailed in the notice issued prior to the suit. Reserving his right to take separate proceedings for recovery of movables, the plaintiff confined his relief to recovery of immovable properties with profits.

2. The defendants contested the claim of the plaintiff on the ground that their sister never got married to anybody and much less to the plaintiff.

According to them, all the allegations made in the plaint are baseless and false and that the properties were purchased from out of the joint earnings of the defendants and their sister. It was claimed that Chinnaponnu had only 1/3rd share in the suit properties.

3. The trial Court rejected the evidence let in by the plaintiff in support of his claim of marriage with Chinnaponnu and held that he was not the husband of Chinnaponnu and he could not claim as her legal heir. On the question whether the suit properties were joint properties of the defendants and Chinnaponnu, the trial Court found against the defendants and held that the suit properties were the exclusive properties of Chinnaponnu. The suit was dismissed as the plaintiff's claim as the heir of the deceased Chinnaponnu was negated.

4. On appeal, the learned Subordinate Judge of Mayuram held that the evidence adduced by the plaintiff was acceptable and sufficient to prove his marriage with Chinnaponnu. Consequently, it was held that the plaintiff was the sole heir of the deceased Chinnaponnu and entitled to recover the properties from the defendants with mesne profits. For arriving at this conclusion the learned appellate Judge has relied on Ex.A1, the certified extract from the Register of Births maintained by the Sub Registrar, Kuttalam. It

relates to the birth of a male child on 12.7.1941. In the column relating to the name of the mother, the name is entered as Chinna Pillai. The entry found in the column relating to the name of the father is "Sembiya Poosi's son-in-law Boorasamy Poosi" Poosi is colloquial equivalent to Padayachi. The plaintiff gives evidence as P.W.2, that Ex.A1 relates to the birth of a male child to him and the sister of the defendants. The learned appellate Judge has taken the view that the document proves clinchingly the lawful wedlock of the plaintiff and Chinna Pillai. He observed as follows- The authenticity of this document cannot be disputed. Practically, the defendants cannot have any say for this document. This is a very clinching document, which is directly in favour of the plaintiff's case that he had married Chinna Pillai in the year 1938 and brought forth a male child in 1941, during this lawful wedlock and that lived for 1-1/2 years and then died. The factum of the death of the child is immaterial. Suffice it to say that a male child was born to the couple Boorasamy Padayachi and Chinna Pillai, as evidenced by from Ex.A1.

5. Before considering the legal aspect of the matter, it has to be pointed out that the learned appellate Judge has failed to consider the suspicious features of the document which stare on the face of one who cares to look into the document. It is really surprising that the learned Judge has overlooked the strange description found in the column relating to the name of the father. Usually, one will find only the name of the father of the child being entered therein, Sometimes, in order to identify the person, the name of his father might be mentioned; but that itself is very rare. It is quite unusual and abnormal to describe a male in this part of the country as the son-in-law of so and so. Such a description can never be found either in the official or unofficial documents. In the column relating to the father's name, when Boorasami Padayachi is described as Sembiya Padayachi's son-in-law, that itself creates a suspicion that the entry has been brought into existence with ulterior motive. It is stated that the informant who registered the birth of the child was Sembiya Padayachi himself. No doubt, there is some evidence to the effect that Jambulinga Padayachi, father of the defendants was also called as Sembiya Padayachi. The certified extract has been obtained only on 17.9.1976, a few days prior to the filing of the suit. There is scoring off in column 1. The plaintiff has

not made any attempt to explain the suspicious circumstances

referred to above. Assuming that Ex.A1 is an unimpeachable document relating to the birth of a child to Boorasami Padayachi and Chinna Pillai

that will not be evidence in law to prove the marriage of the plaintiff and Chinna Pillai.

6. A Division Bench of this Court has in *Nagayasami Naidu v. Kochadai Naidu* 81 L.W. 436=I.L.R. 1969-1-Mad.459 , pointed out that only

entries made by a public servant in the discharge of his official duties will be admissible under S.55 of the Evidence Act and other particulars which

are not covered by such entries are not admissible in evidence. In *Gurusami Nadar Vs. Irulappa Konar and Others*, Varadachariar, J. observed

that at- best it is safe to rely upon the birth and death register extracts only with reference to the fact of death and the date of birth. Recently in

Rajambal v. Veeramuthu Udayar 99 L.W. 175, a Division Bench of this Court held that the entries in the birth register do not prove by themselves

the paternity of a child. Learned counsel for respondents 4 and 5 who are brought on record as legal representatives of the deceased first

respondent fairly concedes that Ex.A1 cannot be treated as evidence in support of the marriage of the plaintiff and Chinna Pillai and that he does

not support that part of the reasoning of the learned Appellate Judge. In view of the said concession, it is unnecessary to discuss the matter any

further. But, it has to be pointed out that Ex.A1 has considerably influenced the view of the learned Judge and his judgment is thus vitiated.

7. The only other evidence relied upon by the learned appellate Judge in support of his conclusion is the oral evidence of P.Ws.1 and 2. P.W.1 is a

resident of Alangudi village. He gives evidence to the effect that about 30 years prior to his giving deposition the plaintiff and his wife Chinnaponnu

were living in a site belonging to him and that they lived there for about 7 or 8 years. P.W.1 proceeds to state that when they were living in his site,

the plaintiff's wife became pregnant and she gave birth to a child at Murugamangalam in her father's house. According to him, the plaintiff and his

wife continued to live with the child in the his site and the child died about one or two years later. Thereafter they went to their own place, viz.,

Kulasekaranallur in Kumbakonam taluk. In the cross examination P.W.1 stated that for the first time, he saw the plaintiff in or about 1938 when he

came and requested for the site being given to him for his residence. He asserts that there was a "paguthi chit" (rent deed). In further cross

examination P.W.1 states as follows-"I know the marriage of the plaintiff. We did not attend the marriage. He came to my site only after marriage.

I have seen his wife. He told me about his antecedents. Murugamangalam is at half a mile from Alangudi. The name of plaintiff's wife is

Chinnaponnu I do not know her brothers and sisters. I do not know her father. I do not know who were born with Chinnaponnu. When my site

was given to them on rent, she did not have a child. When she was living in my house, no child was born to her there. They lived there for seven or

eight years. Thereafter they went to their place. The plaintiff told me before going. His wife did not tell me. Thereafter, I never saw the lady. I do

not know the year in which Chinnaponnu died. I did not see whether Chinna Ponnu had a thali, I did not notice. I did not attend the celebration for

the birth of the child. The plaintiff himself told me about the child born to him. I never met the plaintiff after he left my place." The learned appellate

judge, has accepted the evidence of P.W.1 on the ground that he is entirely a stranger to the family and he belongs to a different caste from that of

the plaintiff and that he could have no motive to give false evidence. Strangely, the learned appellate Judge relies upon the fact that the witness

identified the plaintiff in court as if that was a circumstance which would go to prove the veracity of the witness. The significant fact that is omitted

to be taken note of by the learned appellate Judge is that the evidence given by P.W.1, is contrary to the averments found in the plaint. The plaintiff

had alleged in the plaint that a child was born when he was living with his wife at Kutasekaranallur and died within two years and thereafter they

shifted their residence to Alangudi. P.W.1's evidence is to the effect that the child was born only after the plaintiff came to live in his site. Though

the witness asserted that there was a rent chit, that has not been produced before court. There is absolutely no record to substantiate the case that

the plaintiff was living in the site belonging to the witness for rent. Even if the discrepancies in the periods mentioned by the witness are overlooked,

one thing is clear that the witness does not connect the plaintiff with the sister of the defendants. The sum total of the evidence of P.W.1, if

accepted to be true, would only lead to the conclusion that the plaintiff lived with one Chinna Ponnu as husband and wife. Nowhere in his evidence

P.W.1, states that the wife of the plaintiff was the sister of the defendants or the daughter of Jambulinga Padayachi, the father of the defendants. He

admits his ignorance that he did not know the father, brothers and sisters of Chinna Ponnu.

8. The other witness examined by the plaintiff is P.W.3 who is a resident of Kulasekaranallur to which village the plaintiff belongs. He states that

the marriage took place at Kulasekaranallur about 40 years prior to his deposition and that the plaintiff lived with his wife for about two years in

that village and went to Alangudi thereafter. He claimed to have attended the obsequial ceremonies of Chinna Ponnu. He admits that he is related

to the plaintiff and the latter is in the position of his elder brother. In the cross-examination he states that he did not know whether Chinnaponnu

was living alone or with her father and that he did not know the brothers of Chinna Ponnu. Apart from the fact that P.W.3 is related to the plaintiff,

his evidence also is not sufficient to prove that the plaintiff had married the sister of the defendants. The learned appellate Judge has taken the view

that the relationship of the plaintiff and P.W.3 will not be a ground to discard his evidence. That may be so, but the acceptability of the evidence

has to be considered by weighing it along with the other circumstances of the case. Even in his chief examination P.W.3 states that he heard that a

child was born. He had nowhere stated in his evidence that he was personally aware of the birth of the child or that he had seen the plaintiff and his

wife with that child. His evidence is also to the effect that the child was born after the plaintiff left for Alangudi. That is again contrary to the case set

out in the plaint. The plaintiff as P.W.2 has stated that in his evidence that a child was born to him in the next year after the marriage. According to

P.W.3, the plaintiff and his wife were living in Kulasekaranallur for two years after the marriage. If that is true, the child should have been born

even when the plaintiff was living in Kulasekaranallur, which was the case set out in the plaint. But, that case was given up by the plaintiff in the

course of the evidence and all the three witnesses speak as if the child was born only after the plaintiff shifted to Alangudi. The learned appellate

Judge is clearly wrong in accepting the evidence of P.W.3, without considering the aforesaid circumstances. The learned Judge has chosen to

accept the evidence of P.W. 2, the plaintiff himself, as true as it has been corroborated by that of P.W.1 and 3. P.W.2 has stated in his chief

examination that he was working under P.W.1, for salary, which was paid in kind, by way of 3-1/2 kalams of paddy. He also admits that there

was a rent chit fixing the rent at one and a half rupees per month. Significantly P.W.1 has not stated that the plaintiff was working under him for

salary. P.W.2 claims to have lived with his wife at Murugamangalam the place of his wife. Immediately he goes back on that and states "No. 1 was

only going and coming".

9. One part of the reasoning of the learned appellate Judge for accepting the case of the plaintiff is in these terms;

But it should be noted that it is not known as to why the plaintiff should come forward with a false case as if he is the husband of the deceased

Chinnaponnu. It is not also the case of the defendants that Chinnaponnu lived with the plaintiff not as a legally wedded wife, but as a concubine or

in some such capacity. But, on the other hand, the definite case of the defendants is that Chinnapillai was never married and that she remained

unmarried throughout her life. If that be so, how could the plaintiff come forward with a false case as if he was married to Chinnaponnu.

One will have to strive in vain to understand the logic of the learned Judge. If this is a correct process of reasoning, every suit has to be decreed in

favour of the plaintiff. Unfortunately, the learned Judge has forgotten the elementary principle that the truth or correctness of depositions given by

witnesses in any case has to be ascertained by considering them in the background of admitted or proved circumstances of the case and the

conduct of the parties. One significant fact in this case which has been overlooked by the courts below is that the woman who is alleged to have

lived with the plaintiff did not live with him for long. Admittedly she left him without any reason, lived separately earned income by her own

exertions and purchased properties of her own. According to P.W.1, they were living together for about seven or eight years in Alangudi and left

the place and thereafter he never met them. According to P.W.2 he was living in the site belonging to P.W.1 for about ten or fifteen years. As

regards his wife's desertion, he speaks in these terms-

I went to Kulasekaranallur from Alangudi. From there my wife went to her father's house. I called her. She stated that we should live in her

father's place. But, we came to Alangudi as we did not want to live there.

Thereafter, she went to her father's house. She lived in a separate house in her father's village. I used to go there often.

Apart from the fact that this does not coincide with the evidence given by P.W.1, this goes to show that the plaintiff's wife left him when they were

living at Alangudi. P.W.1 does not speak about P.W.2's wife leaving the husband and living separately. P.W.3 is completely silent about this

aspect of the matter and he does not say any thing about the separation of the husband and wife. The evidence of P.W.2 makes it clear that he is

completely ignorant about the purchases made by his wife. If really P.W.2 had married the woman with whom he was living and she had left him

without any reason, one would expects P.W.2 to speak about any attempts made by him or by the relatives of the woman concerned to bring them

together if there was a lawful wedlock and a child was brought forth out of that wedlock. The normal human conduct would be for the relatives of

the concerned parties to effect a conciliation and made an attempt to bring the husband and wife together as they did before. There is no whisper

by the plaintiff or any of his witnesses that any such attempt was made. There is no explanation by the plaintiff as to why Chinnaponnu left him at

all. It is clear from the evidence that she never joined him before her death. In fact, he says that he heard of her death only two weeks after it took

place. He says that he heard that she died when she went to a temple and that she was cremated. He admits that he does not know who cremated

her. If the plaintiff had married Chinnaponnu or Chinna Pillai and lived with her as husband and wife, their conduct would certainly he been

different. This circumstance has to be taken along with the description of Chinnaponnu found in the various documents filed by the defendants.

Ex.B1 to B6 are registered documents comprising sale deeds and mortgage deeds relating to the suit properties. In all these document,

Chinnaponnu had been described as the daughter of Jambulinga and not the wife of Boorasami Padayachi. If there was a marriage between

Boorasami and Chinnponnu, she would have certainly been described as the wife of Boorasami. Even if there was some dispute between the

husband and wife, no woman in this country would like to give up her status as wife unless it was put an end to by a process known to law. In fact,

the plaintiff has filed the registration copies of two sale deeds to which

Chinnaponnu was a party as Ex.A3 and A4. The originals of those documents are marked as Ex.B4 and B.5. Ex.B15 is a pass book for the savings account with the City Forward Bank Ltd., Kuttalam, bad by Chinnaponnu alias Chinnapillai. There again, she is described as daughter of Jambulinga. Similarly, Ex.B15 to B22 describe her as the daughter of Jambulinga. There is not a single document in which Chinnaponnu has been described as the wife of Boorasami Padayachi, the plaintiff. The learned appellate Judge has a sweeping observation rejected the evidence afforded by Ex.B4, B5, B16 and B18 to B22, in these terms-

I do not find any merit in this contention, simply because Chinnaponnu had not described herself as the wife of the plaintiff but as the daughter of Jambulinga Padayachi in all these documents, the factum of marriage between the plaintiff and Chinnaponnu the subsistence of that marriage until and unless got dissolved as known to law and the status of the plaintiff as her husband cannot at all be erased. This finishes the documentary evidence on the defendant's side.

To say the least, the reasoning is fallacious if not perverse. Actually, the learned Judge has put the cart before horse. The learned Judge has overlooked that before coming to the conclusion that there was a marriage between the plaintiff and Chinnapillai, the documents relied upon by the defendants viz., Ex. B4, B.5, B.15 and B18 to B22, should be considered and weighed against the evidence let in by the plaintiff in his support.

The learned Judge has chosen to reject the evidence of P.Ws.1 to 3 in view of the "unimpeachable evidence of P.Ws.1 to 3" (to use the language of the learned Judge). It is not necessary for me to place any reliance on the evidence of D.Ws.1 to 3. The discussion found above is sufficient to hold that the plaintiff has failed to prove that the deceased Chinnaponnu was his wife. The evidence let in by the plaintiff can if at all prove that he was living with Chinnaponnu for some years. That will not be sufficient to lead to the inference of a marriage between them.

(Paras 10 and 11 omitted as they relate only to evidence-Ed.)

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12. Learned counsel for respondents 4 and 5 invited my attention to the decision of a Bench of this Court in Krishnaveniammal v. Premavathi 99

L.W. 921. In that case, there was overwhelming evidence which established that

the man and woman concerned were living as husband and wife continuously from 1945. The Bench held that the trial court was right in drawing an inference of valid marriage from that continuous cohabitation.

Learned counsel for respondents 4 and 5 relied upon the following passage in that judgment in which the Bench quoted an earlier Division Bench decision of this court--

As to when such presumption can be drawn has been laid down by a Division Bench of this Court reported in *Rajagopal Pillai v. Pakkiammal* 81 L.W. 200, the following observations have been made--"Learned counsel for the appellant took us through the entire oral evidence in an effort to make out that the quality and quantity of the evidence adduced on the side of the plaintiffs is unsatisfactory and insufficient to warrant a finding that a marriage (legal and factual) had taken place between the first plaintiff and Arumugham. The oral evidence of the witnesses examined on the side of the plaintiffs was criticised as being interested useless and untrustworthy, the substance of the argument being that if such a marriage has actually taken place, far better and more acceptable evidence would be available, we are not inclined to accept these submissions. They proceed upon a totally wrong perspective of approach. The marriage state being chief foundation on which the superstructure of society rests, "presumption of the marriage arising from cohabitation of spouses is a very strong presumption. Where a man and a woman had lived together as man and wife, the law will presume, until the contrary is proved, that they were living together by virtue of a legal marriage and not in concubinage. This presumption of law is the strongest of legal presumptions and is not lightly to be repelled by the mere balance of probabilities and the evidence repelling that presumption must be strong, distinct and satisfactory. Every intendment is made in favour of a marriage de facto and the more distinct, the date of the marriage, the more readily is the presumption drawn, based upon cohabitation and repute. The weight of the presumption gets strengthened when it is proved that the party whose marriage question distinctly intended to marry and went through a form of a marriage with that intent and also subsequently lived together as man and wife and were esteemed and reputed as such by those who knew them. The presumption still exists, even when there is no positive evidence of any marriage having taken place.

Reference may be made to the following statement of law in 19

Halsbury's Laws of England, page 812, paras 1323 and 1324--"Presumption from cohabitation:- Where a man and woman have cohabitated for

such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will

generally be presumed, though there may be no positive evidence of any marriage having taken place, and the presumption can be rebutted only by

strong and weighty evidence to the contrary."

13. In *Badri Prasad v. Dy. Director of Consolidation and others* 91 L.W. 140 (S.C.) (S.N.), it was observed thus by Krishna Iyer, J. speaking for

the court as follows-

For around 50 years, a man and a woman as the facts in this case can unfold, lived as husband and wife. An adventurist challenged to the factum

of marriage between the two, by the petitioner in this special leave petition, has been negated by the High Court. A strong presumption arises in

favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy

burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy. In this view,

the contention of Sri Garg, for the petitioner, that long after the alleged marriage, evidence has not been produced to sustain its ceremonial

processes by examining the priest or other witnesses deserves no consideration. If man and woman who live as husband and wife in society are

compelled to prove half a century later, by eye witness evidence that they are validly married, few will succeed. The contention deserved to be

negated and we do so without hesitation.

The same is the position here as well. Therefore, the learned trial Judge when he concludes, that the second defendant is the legally wedded wife of

Natesa, we have absolutely no reason to differ from him and as rightly held by him, if a statement relates to marriage or adoption between persons

deceased and is made in any will or it refers to the affairs of the family and it was made before the question in dispute was raised under S. 32 (6) of

the Evidence Act, it becomes a relevant piece of evidence.

14. Neither the decision of the Bench nor the decisions referred to therein would apply to the facts of the present case. In this case, the evidence

let in by the plaintiff would, if accepted, make out that the plaintiff and Chinnaponnu were living together for a maximum period of ten years which is much less than the period during which they admittedly lived apart. Of course, if marriage is proved by other evidence any length of separation between the spouses would have no effect. But, when the court is required to infer a marriage from the factum of cohabitation, the long period of unexplained separation is a material and relevant factor to be taken note of before any finding is given. The absence of any evidence of neighbours or local residents to prove that the plaintiff and Chinnaponnu were recognised and accepted as man and wife is a factor which cannot be ignored. On the facts of this case, it is not possible to raise the presumption of marriage from the joint living of plaintiff and Chinnaponnu even if such joint living is considered to have been proved. In the circumstances, I have no alternative but to set aside the judgment and decree of the learned Subordinate Judge of Mayuram and restore the judgment and decree of the trial court. The second appeal is allowed with costs.