
(1984) 08 MAD CK 0002
In the Madras High Court
Case No : App. No. 121 of 1978

Krishnaveni Ammal and another

APPELLANT

Vs

Premavathi and 4 others

RESPONDENT

Date of Decision : 07-08-1984

Acts Referred:

Evidence Act, 1872 — Section 32(6)

Citation : (1984) 08 MAD CK 0002

Hon'ble Judges : Swamikkannu, J;Mohan, J

Bench : Division Bench

Advocate : T.R. Rajagopalan and T.R. Rajaraman for the 1st applt., Mr. D.K. Srinivasagopalan for the 2nd applt, for the Appellant; B. Rajagopalan for 1st Respt., Mr. S. Basil Philip for 2nd Respt., Mr. V.N. Krishna Rao for 3rd Respt., M/s. G.P. Krishnan, G.K. Selvarajan and C. Mani for 5th Respt., for the Respondent

Final Decision : Dismissed

Judgement

Mohan, J.—Defendants 1 and 5 are the appellants before us in this appeal, which arises out of O.S No. 221/69 on the file of the Court of

the subordinate Judge of Vellore. The said suit was filed by the first respondent-plaintiff for partition of the suit properties into two equal shares and

for allotment of one such share to the plaintiff, for possession of the same and to direct the defendants to account for the profits from the plaint

schedule properties. The averments in the plaint are short. The plaintiff is the adopted daughter of one late Natesa Mudaliar. The said Natesa

Mudaliar died on 13th September, 1969 leaving behind him his heirs, viz., the plaintiff, the adopted daughter of Natesa Mudaliar, and his widow,

the first defendant. Both of them are entitled to an equal share in all the assets of late Natesa Mudaliar. Natesa Mudaliar was doing extensive

business and he was also doing partnership business in printing press under the

name and style of Prabath Press and a film distributing business

under the name and style of "Ambiga Pictures" at Vellore. He had 34% share in the Prabath Press business and a half share in the said film

business. He died intestate leaving behind him the plaintiff and the first defendant as his heirs. Natesa Mudaliar was a licensed drinker and he was

not always in his senses. Natesa Mudaliar till the marriage of the plaintiff in 1966 did not leave any document disposing of his properties. But she

has been intimated in the reply notices, dated 11th October, 1969 and 16th October, 1969 that Natesa had executed a will in favour of the

defendants. But the said will is a forgery and not a true document. It was not executed in a sound and disposing state of mind. The second

defendant is not a heir entitled to inherit the estate of Natesa Mudaliar and she is not legally wedded wife of Natesa Mudaliar; but was only his

kept mistress and hence she cannot be called as a heir in any sense. Since she was claiming some right to the estate of Natesa, second defendant

has been impleaded as a party, so that there could be an effective adjudication. Natesa appeared to have insured his life for a sum of Rs. 1,000

and another sum of Rs. 10,000 and defendants 1 and 2 are the nominees. They are trying to take away the money. At the time of the marriage of

the plaintiff, Natesa executed a registered deed of adoption dated 28th July, 1965, (Ex A1) acknowledging the fact that the plaintiff is the adopted

daughter. In fact, it was Natesa along with the first defendant, who performed the marriage of the plaintiff. The third defendant claims to be a

creditor of late Natesa Mudaliar and is trying to draw the insurance premium which had been matured. Defendants 4 and 5 also lay a claim to a

portion of the estate of late Natesa Mudaliar under the forged will. Therefore they have been impleaded as defendants to the suit. In items 1 and 2

of the plaint schedule, the seventh defendant as a partner along with Natesa claimed that he was in possession and enjoyment of the share of

Natesa in respect of those two items and he appeared to have made some compromise or arrangement with defendants 1 and 4 and the deceased

second defendant, which is not valid and binding on the plaintiff. When a partition was demanded under Ex. A4 dated 19th September, 1969, the

request was not acceded. Hence, the suit.

2. In the written statement of the first defendant, the adoption of the plaintiff

was denied. It is equally denied that there was any deed of adoption as claimed by the plaintiff. No doubt, Natesa Mudaliar performed the marriage of the plaintiff, but it is out of charity and not on account of any relationship. Natesa had executed a registered will on 22nd July, 1964(Ex. B1) in a sound and disposing state of mind. He had bequeathed his properties to the extent of 37 paise in a rupee to the first defendant with a gift over of the same in favour of her brother Subramanian, another 37 paise in a rupee to the second defendant and the remaining 26 paise in a rupee to the fourth defendant Subadra Ammal. He has also made a provision for the expense of marriage of the plaintiff to the extent of Rs. 10,000. It is a true and valid document attested by witnesses and deposited by Natesa himself with the District Registrar. The terms of disposition are clearly in accord with the natural wishes and intentions and bears the stamp of truth and it was executed voluntarily. The amount due under the insurance policies must be available only to this defendant and not to the plaintiff. The suit is bad and unsustainable, because of non-joinder of necessary parties, including the partners of the two businesses mentioned as items 1 and 2 of the plaint schedule, the Life Insurance Corporation of India, which is interested in items 7 and 8 and Subadra Ammal and Subramaniam, the other legatees under the will of the deceased Natesa Mudaliar.

3. The second defendant in her written statement denied the adoption of the plaintiff. Natesa Mudaliar performed the marriage of the plaintiff in which she was also present but she or the first defendant did not participate in the actual marriage ceremonies and in fact the first defendant never even attended the marriage. The plaintiff was not living with Natesa. She used to visit him occasionally and was not living continuously with Natesa. It is incorrect to suggest that Natesa was a drunkard and was not always in his senses. He had only a permit for liquor and that was purely on medical grounds. He was not addicted to drink and hence, the will executed by Natesa and the deposit by him before the District Registrar of North Arcot was a free and voluntary act of Natesa.

4. It is totally incorrect to state that this defendant is only a kept mistress of Natesa. On the contrary, she is one of the two wives of Natesa. It is false to suggest that the defendants are merely nominees in respect of the

Insurance Policies. So, she is also a Class-I heir under Act 30 of Hindu

Succession Act. She is also entitled to claim a share and work out her rights in accordance with the terms and provisions of the aforesaid

enactment with regard to the estate of Natesa, if the will is not accepted as genuine. One of the policies has been assigned to the Syndicate Bank

by Natesa for raising drafts and loans for his business. She is entitled to a share in the other Policy, since it was taken and held in trust for her and

the first defendant by their deceased husband, Natesa Mudaliar, She is not in possession of the moveables, as alleged. Should for any reason this

Court hold that the plaintiff is entitled to share in the assets of Natesa, she must be equally made liable for the debts and liabilities of Natesa before

she could claim any share in the properties.

5. Having regard to the limited scope of the claim, we do not think it is necessary for us to traverse the written statement filed by defendants 3, 4

and 7. We may state at this juncture that defendants 5 and 6 did not file any written statement.

6. A reply statement was filed by the plaintiff, reiterating the stand taken by her in the plaint.

7. After filing the written statement, the second defendant, Kannammal died. Thereafter the plaint was amended as per the order in I.A. No. 661

of 1974 dated 12th July, 1974 wherein it was stated as follows:-

8(a) The second defendant died leaving behind a will, while in a own disposing state of mind in which she has bequeathed her interest in the suit

property in favour of the plaintiff and the sixth defendant herein and hence the sixth defendant is added in the suit. In any event, the plaintiff is

entitled to claim a share as per the said registered will.

8. On these pleadings, the following issues were framed for trial:-

1. Whether the plaintiff is the adopted daughter of Natesa Mudaliar ?
2. Whether the will dated 22nd July, 1964 set up by the defendant is true and valid ?
3. Whether the suit properties are available for partition as claimed by the plaintiff ?
4. Whether the second defendant is the kept mistress of Natesa Mudaliar ?
5. Whether the second defendant is a legally wedded wife of Natesa mudaliar

entitled to a share in the suit properties ?

6. Whether the suit is bad for the non-joinder of the parties mentioned in paragraph 21 of the written statement of the first defendant ?

7. Whether the suit has not been properly valued for the purposes of Court-fees ?

8. Whether the plaintiff is entitled to the relief of accounting and mesne profits?

9. To what relief, if any the plaintiff is entitled ?

Additional Issues framed on 13th October, 1972:-

1. Is the debt by Natesa Mudaliar pleaded by the third defendant true and liable to be provided for ?

2. Is the assignment of the policy No. 11254521 pleaded by the third defendant true and valid ?

Additional Issue framed on 6th August, 1973:-

1. Has the fourth defendant any right to the suit properties as claimed by her ?

Additional Issues framed on 18th July, 1975:-

1. Whether the settlement of accounts pleaded by the seventh defendant true, valid and binding on the plaintiff ?

2. Is the seventh defendant entitled to settle the accounts of item Nos. 1 and 2 of the plaint schedule with defendants 1, 2 and 4 ?

3. To what relief, is the plaintiff entitled against the seventh defendant ?

9. On issue No. 1 in relation to the adoption of the plaintiff, the learned Subordinate Judge, on a consideration of the evidence before him, came to

the conclusion that the plaintiff was not the adopted daughter of the deceased Natesa Mudaliar. On issues 4 and 5, viz, as regards the status of the

second defendant, he was of the view that the second defendant was not a kept mistress but she was the legally wedded wife of the deceased

Natesa Mudaliar and, therefore, she was entitled to a share in the suit properties. On issue No. 2, viz., whether Ex. B1 was true or not, he came to

the conclusion that the will dated 22nd July, 1964 (Ex. B1) was true and valid. On issue No. 6, as to the non-joinder of parties, he held that the

Life Insurance Corporation of India, Arumugha, one of the surviving partners, Subadra, Subramanian and Nala the other legatees have been

impleaded as parties to the suit and, therefore, the suit is no longer bad for non-joinder of necessary parties. On issue No. 7 it was held that proper

court-fee had been paid. On issue No 3 as to whether the suit properties were

available for partition, he concluded that item 6, which was not the subject-matter of the will of Natesa, viz., Ex. B1 dated 22nd July, 1964, was available for partition. On issue No. 8 relating to accounting, he held that the plaintiff was not a sharer and, therefore, she is not entitled to the accounting, as she admits that she is living in item 6 property. On additional issues framed on 13th October, 1972 and 6th August, 1973 it is held that the fourth defendant under Ex. B1 is entitled to 26 paise share out of the assets of the deceased Natesa in the Prabath Press and Ambiga Pictures but the fourth defendant has not paid the court-fee therefor, that she may implead herself if she is so advised in the suit filed by the first defendant against the seventh defendant for rendition of accounts with regard to the assets of the deceased Natesa in the Ambiga Pictures and the Prabath Printing Press. On the additional issue framed on 18th July, 1975, he held that she may also implead herself as a party in the suit between the first defendant and the seventh defendant to ask for her share as heir to the deceased Natesa Mudaliar. On issue No. 9, he held that in view of his earlier findings, the plaintiff was found entitled only to a decree for partition of item 6 house property into two shares and for allotment of one such divided share to her therein and that the division claimed by her in respect of other items of properties was disallowed. In the result, a preliminary decree with regard to item No. 6 alone was passed. Thus, the appeal by defendants 1 and 3.

10. Mr. T. R. Ramachandran, learned counsel for the appellants raises the following points :- In a suit for partition filed as against the assets of Natesa, on the specific finding that she was the adopted daughter, the plaintiff having failed, cannot seek a decree as against the assets of Natesa, which was the subject matter of will under Ex. B8. The causes of action for the two suits are different because, in the earlier suit it was found that the plaintiff was the adopted daughter of Natesa; now she claimed as a legatee under Ex. B8. Where, therefore, there are two different causes, the mere amendment will not enable her to get a decree. This is not a subsequent event in the ordinary sense of the terms. Secondly, he has argued that in so far as Ex. B8 Will was not the point in issue, the question whether Kannammal, the second defendant was a concubine or not would not even be germane. Even otherwise, as regards her status, normally one would expect

her in her written statement to state that a second marriage took place. Nothing of that story has been stated. No doubt, in Ex. B1, Natesa had described her as his second wife. That may be a relevant piece of evidence. But that is not conclusive. There are other evidence from which no inference can be drawn at all. As a matter of fact, the plaintiff herself in more than one place states that she is not the second wife of Natesa. On the contrary she is only a kept mistress. Then again, the evidence let in this regard is prevaricated. Some witnesses say that she is the first wife, which is not the same. The other witnesses say that she is the second wife. Therefore, the legal presumption that if there has been cohabitation between a man and a woman for a length of time presumed to be man and wife cannot be invoked in this case. Lastly, it is argued that in so far as the necessary legatees had not been impleaded and, there being the vested remainder given under Ex. B8, the decree passed with regard to item 6, when the prayer has not been amended, is bad.

11. As against this, Mr. B. Rajagopalan, learned counsel for the respondents would submit that at the time when the suit was filed, Kannammal was alive. Where, therefore, she died, so alternative prayer was made that even if the Court finds that she was not the adopted daughter of Natesa, the plaintiff could well succeed as a legatee under Ex. B8. Such a subsequent event should be taken note of for the purpose of rendering justice in order to shorten the litigation. This is the purport of the ruling reported in Shikharchad Jain v. Digamber Jain Prasand Karini Sbha and others 1974-3-S.C.R. 101 at page 107. Equally, the same ratio as found are stated in Naghubai Ammal and others v. B. Shama Rao and others 1956-S.C.R.451 and M. Palaniswamy Gounder Vs. Nachimuthu Gounder and Others, wherein the Supreme Court ruling has been relied on. The first defendant in her written statement does not deny the status of the second defendant. The fifth defendant curiously did not even file any written statement. However, he was examined as P.W.1. He admits in his testimony that Natesa and Kannammal were living as husband and wife right from 1945. D.W. 5, the Manager of Prabath Press states that he knows that they are living as a man and wife. Therefore, this is a clear case wherein a presumption as to the marriage must be drawn as laid down in Rajagopal Pillai and others v. Pakkiam Ammal and another 81 L.W. 200

at 203 and *Badri Prasad v. Dy. Director of Consolidation and others* 91 L.W. 168 S.C. (S.N.). If these facts are available before the Court,

certainly the necessary inference must be drawn. In what cases inference could be drawn from the fact is stated in *Thirumalai Iyengar v. Subba*

Raja 1962 1 M.L.J. 193 at 196. Therefore, if on the evidence of P.W. 3, D.W.1. and D.W.5 coupled with the statement in Exs. B1 and B8, a

presumption could be drawn as to the marriage, it does not matter whether the marriage, in that Natesa and Kannammal were living together right

from 1945 was continuing. On the question whether the presumption with regard to the second marriage of the husband of the first defendant, the

Court below has commented upon the absence of any denial in the written statement of the first defendant as to the status of the second defendant.

12. Mr. T.R. Ramachandran, learned counsel for the appellants in reply states that what is the evidentiary value of a deceased person making a

document can be gathered by a ruling in *Smt. Vidya Devi and Others Vs. Nand Kumar*, . That is only a relevant fact and it cannot be held to be

conclusive. These are the only arguments addressed before us.

13. In view of the limited arguments, the following questions arise for our consideration:-

1. Whether the preliminary decree passed with reference to item No. 6 can be sustained? and

2. Whether the second defendant is the wife of Natesa or a kept mistress of Natesa ?

14. As regards the first point, we have already noted that it is only after the death of Kannamma pending suit, who died after the filing of the written

statement, the amendment was necessitated. That was ordered in I.A. No. 661 of 1974 dated 12th July, 1974. By reason of that, it is stated that

the second defendant died leaving behind a will while in a disposing state of mind in which she has bequeathed her interest in the suit property in

favour of the plaintiff and the sixth defendant herein and hence the sixth defendant is added in the suit and that in any event, the plaintiff is entitled to

claim a share as per the said registered will. This registered will is Ex. B8. Though it is true that the plaintiff came forward with a suit originally on

the footing that she was the adopted daughter of Natesa, the finding under issue No. 1 is against the plaintiff wherein the learned Subordinate Judge

held that she was not the adopted daughter. That finding has become final and it is no longer open for attack. However, in so far as Ex. B1 Will

executed by Natesa does not cover item 6, the share of Kannammal can be validly bequeathed which is claimed in the alternative prayer. It may

appear that causes of action may be different. But having regard to the nature of the averments, certainly this is only a subsequent development or a

subsequent event. As to when the subsequent event could be taken note of for the purpose of giving redressal to the party has been categorically

laid down in Shikharchand Jain Vs. Digamber Jain Praband Karini Sabha and Others, . Their Lordships of the Supreme Court stated as follows:-

Ordinarily, a suit is tried in all its stages on the cause of action as it existed on the date of its institution. But it is open to a Court (including a court

of appeal) to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances

where it is shown that the relief claimed originally has (1) by reason of subsequent change of circumstances became inappropriate, or (2.) where it

is necessary to take notice of the changed circumstances in order to shorten the litigation, or (3) to do complete justice between the parties (See

Rat Charan Mandal and another v. Biswanath Mandal and others AIR 1915 Cal. 103.

This ruling was followed by the learned single Judge of this Court in M. Palaniswamy Gounder Vs. Nachimuthu Gounder and Others, . In

paragraph 14, the learned Judge observed as follows:-

There is a well-settled principle that a Court can take notice of events which have happened after the institution of the suit and afford relief to the

parties in the changed circumstances so as not to drive them to a fresh litigation and so as to do complete justice between the parties. This principle

has been laid down by the Supreme Court in Shikharchand Jain Vs. Digamber Jain Praband Karini Sabha and Others, . In that case it was

pointed out as follows :-

Ordinarily, a suit is tried in all its stages on the cause of action as it existed on the date of its institution. But it is open to a Court (including a Court

of appeal) to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances

where it is shown that the relief claimed originally has (1) by reason of

subsequent change of circumstances become inappropriate; or (2) where it is necessary to take notice of the changed of circumstances in order to shorten the litigation; or (3) to do complete justice between the parties.

This inherent power of the Court to give adequate relief to suitors in suitable cases in view of the changed circumstances after the filing of the suit

so as to shorten the litigation has also been earlier brought out in Pangoti Mangarao Vs. Chinnadi Kishan Rao, . If the appellant's plea were to be

accepted in the present case then it would only be necessary for the plaintiffs to file a suit on the same ground, viz., that the conveyance in favour of

the first defendant was a nominal or a fraudulent transaction and, therefore, invalid. There is no good served by merely allowing the parties to go to

a fresh suit. Complete justice could be rendered in the present suit itself by granting the decree in the manner done by the lower appellate Court.

15. Therefore, it is clear that in order to shorten the litigation or to do complete justice between the parties, the Court can take notice of the

subsequent event. This is not a case where two causes of action being different. The relief being one for partition, the question is on what basis. No

doubt, earlier the claim to the assets of Natesa was on the footing of adopted daughter. But that does not mean that the claim to Natesa's assets

forming the bequest under Ex. B6, cannot be claimed. In this case, all the necessary parties have been impleaded. That has been so found under

issue No. 6. Therefore, on that score, it cannot be said that the suit is bad for non-joinder of necessary parties. Therefore, we are of the view that

the decree with regard to item No. 6 can easily be sustained.

16. As regards the status of the second defendant, as rightly contended by the learned counsel for the respondents, Mr. Rajagopalan, the first

defendant does not deny the status of the second defendant in her written statement. The fifth defendant did not file a written statement at all.

Therefore, neither of the appellants has any right to question the status. However, for the sake of completion, we will examine the evidence as well

P.W.1 admits that both Natesa and Kannammal were living as husband and wife right from 1943. Then again, D.W.5 also admits that Natesa has

married the second defendant as his first wife. He claims to know the parties for more than 15 years Even P.W.3 states that in all the documents

Natesa had described Kannammal as his wife. He has also been told by Natesa

that she was his wife. Then again, there are recitals in Ex. B1 wherein Natesa in unequivocal terms said that Kannammal is his second wife. In Ex. B3 Kannammal herself described as the wife of Natesa. If, therefore, in view of the overwhelming evidence, which is established that Natesa and Kannammal were living as man and wife right from 1945, it is not only proper, but also just to draw the inference or presume that there was a marriage. As to when such presumption can be drawn has been laid down by a Division Bench of this Court reported in Rajagopal Pillai and others v. Pakkiam Ammal and another 81 L.W. 200 at 203 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 the 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 had actually taken place, far better and more acceptable evidence would be available. We are not inclined to accept these submissions, as 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 provided, 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 is in 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 cohabited 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".

17. In *Badri Prasad v. Dy. Director of Consolidation and others*, 91 L.W. 168 S.C. (S.N.) it was observed thus Krishna Iyer, J., Speaking for the

Court held as follows: -

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

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

favour of wed-lock 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 Shri 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 were validly married, few will succeed. The contention deserved to be

negatived 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. As a matter

of fact, the decision in Smt. Vidya Devi and Others Vs. Nand

Kumar, which is relied on by Mr. T. R. Ramachandran relates to a statement with regard to the authority to adopt mentioned in a document. That

was also held to be a relevant piece of evidence.

18. We cannot see how the presumption of character will not arise. If it were to be implied as a second marriage, we consider the situation prior to

the Hindu Bigamy Prevention Act, 1949, in this State, viz, the situation as obtainable in 1945. Under these circumstances, the status of the second

defendant has been rightly held to be that of the legally wedded wife. Accordingly we answer this point. In the result, we Dismiss the appeal.

However, there will be no order as to costs.