

(1992) 04 MAD CK 0032
In the Madras High Court
Case No : C.S. No. 178 of 1981

Kumari Baghyavathi

APPELLANT

Vs

Smt. Llakshmikanthammal (deceased) and others

RESPONDENT

Date of Decision : 23-04-1992

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 2, 4

Evidence Act, 1872 — Section 114, 45, 47, 73

Hindu Marriage Act, 1955 — Section 16(1)

Tamil Nadu Hindu (Bigamy Prevention and Divorce) Act, 1949 — Section 1

Citation : AIR 1993 Mad 346

Hon'ble Judges : Thangamani, J

Bench : Single Bench

Advocate : M/s. Aiyar and Dolia, for the Appellant;

Judgement

1. Suit for partition and separate possession.

2. The plaint averments are as follows :--

The 1st defendant Smt. Lakshmikan-thammal and 2nd defendant Smt. Rajalakshmi Ammal are senior and junior widows of one late Srinivasalu

Naidu who died intestate on 4-5-1980. The 3rd defendant Smt. Sarojini is the daughter of the 1st defendant Smt. Lakshmikanthammal, while 4th

defendant Gajalakshmi is the eldest daughter of 2nd defendant Smt. Rajalakshmi Ammal. plaintiff Baghyavathi is her youngest daughter.

Srinivasalu Naidu married the second defendant Smt. Rajalakshmi Ammal as his second wife in the year 1948. While items 1 to 3 in the plaint

schedule are the self acquired properties of Srinivasalu Naidu, the shipping and clearing agent business carried, on by him as sole proprietor is

described as Item 4 in the plaint schedule. The parties herein alone are legal heirs of deceased Srinivasalu Naidu. The plaintiff is entitled to 1/4th

share in the said properties. Hence the suit for partition and separate possession of her one fourth share in the said properties. Hence the suit for

partition and separate possession of her one fourth share in the plaint properties and for directing the defendants to pay her marriage expenses and

for directing the defendants 1 and 2 to render a true and proper account of the mesne profits and pay her due share therein.

3. The 2nd defendant has paid court fees and demanded for partition and separate possession of her share in the properties. She pleads that her

marriage with late Srinivasalu Naidu was solemnised at Sri Parthasarathy-swamy temple, Triplicane, Madras according to Hindu rites and customs

in the year 1948. Thereafter both of them were living together as husband and wife at Old No. 21, Vinayaga Maistry Street. G.T. Madras. The

plaintiff was born to her on 10-5-1951 at the Rainey Hospital, Tondiarpet, Madras during their lawful wedlock. She and late Srinivasalu Naidu

lived together at No. 12 Sambier street. George Town from 1949 to 1958. Thereafter they shifted their residence to No. 1/55, Mullah Sahib

Street, George Town. They were living at No. 318 Mint street, Madras from the year 1960 to 1976. Her husband Srinivasalu Naidu was very

much attached to her and her daughter the plaintiff herein.

4. The 4th defendant practically admits the allegations in the plaint and sails with the plaintiff. She claims that she is the eldest daughter of late

Srinivasulu Naidu through his second wife Smt. Rajalakshmi Ammal. And she is entitled to an one fourth share in the suit properties after the death

of her father.

5. The 3rd defendant who is the contesting defendant denies in her written statement and additional written statement that either the plaintiff and the

4th defendant are the daughters nor the 2nd defendant is the wife of M. Srinivasalu Naidu. She and her mother the 1st defendant are the only heirs

to the estate of M. Srinivasulu Naidu. The plaintiff and the defendants 2 and 4 belong to Devadasy community who have peculiar customs of their

own. M. Srinivasalu Naidu had nothing to do with these three people throughout their life and he lived only with the 1st defendant in the latter's

house and died there. M. Srinivasulu Naidu had not married any one else in his lifetime except the first defendant. In any event, Item No. 1 of the

suit property absolutely belongs to the 1st defendant. Srinivasulu Naidu owned

Item No. 2 alone. The business of shipping agency described as

Item No. 3 does not belong to M. Srinivasulu Naidu exclusively. The said business was carried on by him in partnership with this defendant. The

partnership was automatically dissolved on the demise of Srinivasulu Naidu on 4-5-1980. At the time of his death Srinivasulu Naidu owed Rs.

89,000/- to the partnership.

6. The 1st defendant by a memo has adopted the written statement of the 3rd defendant. After the death of 1st defendant the 3rd defendant has

been recorded as her legal representative.

7. On these pleadings the following issues arise for consideration :--

1. Whether the 2nd defendant Rajalakshmi Ammal is the legally wedded 2nd wife of Srinivasalu Naidu?

2. Whether the plaintiff is the daughter of Srinivasalu Naidu through the 2nd defendant?

3. Whether the plaintiff or the 2nd defendant has any right in the properties left by Srinivasalu Naidu?

4. Whether the 2nd defendant has to be allotted any share in the suit items?

5. Whether the 4th defendant is the daughter of Srinivasalu Naidu through the 2nd defendant?

6. Whether Item I of the plaint schedule property belongs to the 1st defendant?

7. Whether Item 3 of the plaint "B" schedule partnership business did not belong to Srinivasalu Naidu exclusively? and whether Srinivasalu Naidu was only debtor of that Firm?

8. Whether the Motor car described in Item 4 of the plaint "D" schedule did not belong to Srinivasalu Naidu?

9. To what relief?

8. Issues Nos. 1, 2 and 5 :-- There is no dispute that the 1st defendant Smt. Lakshmi-kanthammal and the 3rd defendant Smt. Sarojini are the

widow and daughter respectively of late Srinivasalu Naidu who died on 4-5-1980. While they contend that the 1st defendant is the only wife and

the 3rd defendant is the only daughter of M. Srinivasalu Naidu, controversy herein relates to the marital status of the second defendant and the

paternity of plaintiff and fourth defendant. Though defendants 1 and 3 chose to allege in their pleadings and Ex.P3 Reply Notice issued by them on

21-7-1980 for Ex.P1 Notice dated 1-7-1980 of the plaintiff and second defendant that plaintiff and defendants 2 and 4 are total strangers to them

and they have nothing to do with Srinivasulu Naidu during trial there was a shift in their stand. When P.W. 1 Bagbya-vathi was in the witness-box,

the third defendant has suggested to her in cross-examination that perhaps Srinivasulu Naidu had some affairs or some connection with third

defendant Rajalakshmi Ammal, but he was not the lawfully wedded husband of the third defendant. While D.W. 1 Rajalakshmi was cross-

examined by third defendant it was also suggested to her that Srinivasulu Naidu had some illegitimate affairs with her and taking advantage of that

she has tried to build up a false case. Besides we find from Ex.P4 Birth Register Extract that a female child was born to Rajalakshmi on 20-6-

1951 in Rainy Hospital. In this Extract the father's name of the child is shown as M. Sreenivasulu Naidu and his permanent address as 12,

Sambier Street. In this connection it is the evidence of P.W. 1 Bhakyavathi that this certificate relates to her birth and M. Srinivasulu Naidu is

shown as her father. She was born in Rainy Hospital, Royapuram, Madras. Ex.P11 is her S.S.L.C. Book wherein also her father's name is given

as M. Srinivasulu Naidu. Ex. PI I (a) is the signature of her father. Till 1955 they were residing at 12, Sambu Iyer Street, D.W. 3 Rajalakshmi

speaks about the birth of P. W. 1 Bhakyavathi at Rainy Hospital, Tondiarpet, Madras in 1951 and the registration of the birth in the hospital itself.

Ex.D3 is the S.S.L.C. Book of the fourth defendant Gajalakshmi. In this her date of birth is shown as 10-6-1948 and M. Srinivasan is described

as her father. The fourth defendant as D.W. 2 states that her father came to the school and signed on 28-6-1965 in Ex.D3 S.S.L.C. book before

the Headmistress. She also says that P.W 1 Bhakyavathi is her younger sister. The second defendant Rajalakshmi Ammal is her mother. She is

now working in the Tamil Nadu Housing Board, Nandanam and Ex.D4 is the xerox copy from her Service Book wherein her father is described

as M. Srinivasulu Naidu residing at 318, Mint Street, Madras-1, D.W. 1 Rajalakshmi states in her evidence that the fourth defendant Gajalakshmi

is her first daughter born to Srinivasulu Naidu in 1948.

9. No doubt P.W. 1 Bagyavathi stated in her evidence that her date of birth is 20-5-1951. While Ex.P4 Birth Register Extract reads that she was

born on 20-6-1951, her S.S.L.C. Book Ex.P11 mentions the date as 10-5-1951. The learned counsel for the third defendant argues on the basis

of this discrepancy that no reliance could be placed on the entire in these documents. It is true that there is no satisfactory explanation for the

discrepancy of the date of birth found in Ex.P4 Birth Extract and Ex.P11 S.S.L.C. Book. However Ex.P9 is an affidavit dated 31-3-1975 filed by

Srinivasalu Naidu before the Assistant Chief Accounts Officer, Customs House, Madras-1 declaring that he has not inherited any ancestral

property and he has no brother. It is significant to note that the signature of Srinivasalu Naidu found in Ex.P9 is similar to that occurring in Ex.P11

S.S.L.C. Book. And above all the husband of the third defendant Sarojini who has been examined as D.W. 3 admits in cross-examination that he

is acquainted with the signature of Srinivasalu Naidu. Ex.P11(a) is the signature of Srinivasulu Naidu in Ex.P11. So the discrepancy in date of birth

found in Ex.P4 and Ex.P11 does not affect the fact that Srinivasulu Naidu has recognised the plaintiff as his daughter.

10. While in Ex.P4 and Ex.P11 the father of the plaintiff is described as M. Srinivasulu Naidu in Ex.D3 the S.S.L.C. book of the 4th defendant

Gajalakshmi the father's name is mentioned as M. Srinivasan. The learned counsel for the 3rd defendant argues that in view of the discrepancy in

the father's name found in Ex. D3, the father of the plaintiff and the father of the 4th defendant cannot be one and the same person. However we

find in the same page of the S.S.L.C. Book that the father of the pupil has signed as M. Sri-nivasulu Naidu and this has been marked as Ex.D3(a).

A comparison of the signatures found in Ex.D3, Ex.P4, Ex.P11 and Ex.P9 would convince anyone that they are of the same individual. Besides

D.W. 3 Gopala-krishnan who is the husband of the 3rd defendant candidly admits that he is very much acquainted with the signature of Sri-

nivasulu Naidu and Ex.D3(a) is that of the said Srinivasulu Naidu. Be it noted that the Evidence Act contemplates three modes of proving the

signature of a person. u/s 45 of the Evidence Act the opinion of experts on the question whether two handwritings were written by one and the

same person or by different persons is relevant. u/s 47 of the Evidence Act when the Court has to form an opinion as the person by whom any

document was written or signed the opinion of any person acquainted with the hand writing of the person by whom it is purported to have been

written or signed is a relevant fact. u/s 73 of the Evidence Act in order to ascertain whether the signature or writing is that of the person by whom it

is purported to have been written any signature or writing admitted or proved to the satisfaction of the Court to have been written by that person

may be compared with the one which is to be proved. And in this case the admission of D.W. 3 Gopalaksrishan as well as comparison of the

disputed with the admitted signatures establish beyond the possibility of any doubt that the signature in Ex. D3(a) is that of M. Srinivasulu Naidu

who has also signed Ex.P11 S.S.L.C. Book of the plaintiff. Thus we find that long prior to the dispute between the parties M.Srinivasulu Naidu

himself has owned that the plaintiff and 4th defendant are his daughters.

11. It is the evidence of D.W. 1 Rajalakshmi that after her marriage she was living with Srinivasulu Naidu in Vinayaga Maistry Street, Sowcarpet,

Madras for about 21/2 years. Thereafter they lived in Sambier Street, Madras. Four years later they shifted their residence to Mulla Sahib Street

Madras. From there they came to reside for about 16 years at No. 318, Mint Street, Madras. This version finds support from Ex.P4 Birth Extract,

Ex.D4 Service Register Extract, Ex.P5 Radio Licence, Ex.P8 T.V. Licence and Ex.P6 Rent receipts. It is significant to note that in Ex.P4 the

permanent address of M. Srinivasulu Naidu and Rajalakshmi the parents of the plaintiff is given as No. 12, Sambier street in the year 1951. Ex In

P8 T.V. Licence for the period 1979-1985 M. Srinivasulu Naidu is stated to be residing at No. 92, Thaiyappa Mudali Street. Ex.P6 is the Rent

Receipts standing in the name of Srinivasulu Naidu for Door No. 318, Mint Street, Madras from 1962-1975. Ex.P5 is the Radio Licence of

Srinivasulu Naidu for the period from 1981-1985 wherein also the address is given as No. 318, Mint Street, Madras. In Ex.D4 the 4th defendant

Gajalakshmi has given the residence of her father in the year 1971 as 318, Mint Street, Madras. Had Srinivasulu Naidu been a stranger to 2nd

defendant Rajalakshmi, plaintiff Baghyavathi and 4th defendant Gajalakshmi Exs.P5 Radio Licence and P8 T. V. Licence Rent Receipts issued to

M. Srinivasulu Naidu would not have found their way into the hands of these three persons. Besides the addresses given in these documents go in

support of the evidence of D. W. 1 Rajalakshmi regarding her residence as mentioned above.

12. Ex.P10 is the wedding invitation of the 4th defendant Gajalakshmi. This invitation has been issued in the name of Mrs. and Mr. M. Srinivasulu

Naidu for the marriage of Gajalakshmi to be held on 1-3-1973 in a Kalyanamandapam at Mint Street, Madras. D.W. 1 Rajalakshmi deposes in

her evidence that in 1973 her husband Srinivasulu Naidu performed the marriage of her daughter 4th defendant Gajalakshmi. Ex.P10 is the

marriage invitation printed for that purpose.

13. In the plaint as originally filed the 4th defendant was not a party. The plaint as well as Ex.P1 notice are conspicuously silent about the existence

of 4th defendant. They do not contain any reference to her. The original of Ex.P1 notice dated 1-7-1980 has been issued only by plaintiff and 2nd

defendant. The Written statement filed by the 2nd defendant merely mentions that she gave birth to a daughter the plaintiff herein on 10-5-1951 at

Rainey Hospital, Tendiarpet, Madras. It does not say that the 4th defendant is also her daughter. The 4th defendant was impleaded only after the

3rd defendant brought to the notice of the Court about this. When D.W. 1 Rajalakshmi was asked during her cross-examination by the counsel for

the 3rd defendant as to why she has failed to refer in her written statement that she had two daughters, she would only say that there was

misunderstanding between Srinivasulu Naidu and the parents-in-law of 4th defendant. The parents-in-law of Gajalakshmi did not permit her to join

in the suit. We cannot say that this is a satisfactory explanation for the nonjoinder of the 4th defendant initially in this action. Even if the 4th

defendant was not impleaded as a party to the action, nothing prevented the plaintiff and 2nd defendant to refer to the existence of Gajalakshmi in

their pleadings. The learned Counsel for the 3rd defendant argued on the basis of this non-inclusion that the 4th defendant was not born to

Srinivasulu Naidu. When D.W. 1 Rajalakshmi was in the witness box it was suggested to her by the counsel for the 3rd defendant that

Gajalakshmi was born to her through one Narayanan alias Varathan. This suggestion was promptly denied by D.W. 1 Rajalakshmi. However

excepting this suggestion there is nothing in evidence to indicate that Gajalakshmi was not born to Srinivasulu Naidu. And D.W. 3 the only witness

examined on the side of the contesting 3rd defendant admits in cross-examination that she does not know anybody by name Varathan alias

Narayanan. In any event merely because there is no satisfactory explanation from plaintiff and second defendant for the non-mention of the fourth

defendant in their notice and pleadings we cannot conclude that the fourth defendant is not the daughter of Srinivasulu Naidu and Rajalakshmi. The

description of Srinivasulu Naidu as father in Ex.D3 S.S.L.C. Book of Gajalakshmi and Ex.D4 Service Book is only in consonance with the theory

that D.W.2 Gajalakshmi is the daughter of D.W. 1 Rajalakshmi through Srinivasulu Naidu.

14. Both D.W. 1 Rajalakshmi and P.W. 1 Baghyavathi state in their evidence that some six years after the of the house in Thaiyappa Mudali street

under the original of Ex.D1 by the former, housewarming ceremony was performed. Exs. P14 and P15 are photographs taken on that occasion.

According to D.W. 1 she and Srinivasulu Naidu are found in these photographs. The learned counsel for the 3rd defendant assailed these

photographs on the ground that in the absence of their negatives no importance could be attached to them. In these days of advanced photographic

purchase technology there is every possibility of producing trick photos (sic). But it may be borne in mind that no objection was taken by the 3rd

defendant when these photographs were admitted in evidence during the chief examination of D.W. 1 Rajalakshmi. While so the admissibility of

these photographs cannot be questioned (sic) merely on the suggestion put to D.W. 1 Rajalakshmi (sic) that these photographs have been get up

for the occasion. And Ex.14 and Ex.P15 photographs coupled with the evidence of P.W. 1 and D.W. 1 also probalilise in view that D.W. 1

Rajalakshmi and Srinivasulu Naidu had a separate residence of their own.

15. D.W. 1 further says that when Srinivasulu Naidu was alive her relationship with the 1st defendant Lakshmikanthammal was cordial. She used

to attend the functions in the house of the 1st defendant. She attended the puberty ceremony of Sarojini Ammal's daughter with plaintiff and the 4th

defendant. Ex.P16 is the photograph taken on that occasion wherein her two daughters and Sarojini Ammal's daughter are found. The learned

counsel for the 3rd defendant argued that in the absence of the negative this photographs also cannot be looked into in evidence. But when this

photographs Ex.P16 was marked during the chief examination of D.W. 1 Rajalakshmi no objection was raised hy the contesting 3rd defendant. In

any event. D.W. 3 Gopalakrishnan who is the son-in-law of the 3rd defendant has candidly admitted in his cross-examination that the girl standing

in the middle in Ex.P-16 photograph is his daughter. The other two persons are plaintiff and the 4th defendant. The occasion for the photo was the

puberty ceremony of his daughter. This conduct suggests that the relationship between the two women was only cordial and third defendant and

her mother well received second defendant's daughters in family functions.

16. From the discussion above these facts emerge :

(1) Defendants 1 and 3 are the wife and daughter of late M. Srinivasulu Naidu.

(2) Srinivasulu Naidu was also living with 2nd defendant

Rajalakshmi Ammal at Vinayaka Maistry Street, Sowcarpet, No. 12, Sambier Street, No. 92, Thaiyappa Mudali Street and No. 318 Mint Street

during 1951-1985. (3) plaintiff Baghyavathi and 4th defendant Gajalakshmi are daughters born to 2nd defendant Rajalakshmi Ammal. (4)

Srinivasulu Naidu has recognised plaintiff and the 4th defendant as his daughters and acknowledged the paternity in their school records. (5)

Srinivasulu Naidu has celebrated the marriage of 4th defendant Gajalakshmi and at that time the wedding invitation was issued in the names of Mrs.

and Mr. M. Srinivasulu Naidu. (6) During the lifetime of Srinivasulu Naidu the relationship between 1st defendant Lakshmikanthammal and 3rd

defendant Sarojini on the one hand and the 2nd defendant and her two daughters on the other was nothing but cordial. (7) The 2nd defendant

Rajalakshmi Ammal along with her two daughters attended the puberty ceremony of the daughter of the 3rd defendant Sarojini and they were well

received by the family.

17. Regarding the factum of marriage between 2nd defendant Rajalakshmi Ammal and M. Srinivasulu Naidu there is no direct evidence except that

of D.W. 1 Rajalakshmi in the witness box that the said marriage was solemnised in 1947 as per Hindu customs at Parthasarathy Temple,

Triplicane, Madras, and subsequent to the marriage they were living in various places including Sambier Street and No. 318 Mint Street, Madras.

She admits in cross-examination that there is no receipt issued by the temple for the payment of marriage fees. She further says that she saw

Srinivasulu Naidu for the first time when he came to her house and negotiated with her mother for the marriage. According to her he came alone

and that was his first visit to her house. No marriage invitation was printed. Her sister's husband Parthasarathy Naidu and her sister and some

other friends attended the marriage. On the whole about 65 guests came to the marriage. But, none of them has been examined to support her

version. D.W. 1 Rajalakshmi also says in the course of cross-examination that the 1st defendant Lakshmikanthammal did not attend their marriage.

This witness is the only daughter of her mother. She has no brother. Her mother presented her with 15 sovereigns of jewels at the time of marriage.

On the day of wedding Srinivasulu Naidu was 38 years old while she was aged about 15 or 17 years. She and her mother were aware of the fact

that Srinivasulu Naidu was already married and that the marriage took place without the knowledge and consent of 1st defendant

Lakshmikanthammal. She does not know whether the relatives of 1st defendant attended the marriage. It is the argument of the learned counsel for

the 3rd defendant that there is no reason for giving D.W. 1 Rajalakshmi in marriage to M. Srinivasulu Naidu as his second wife while the first wife

was alive especially when the bride was about 20 years younger than the bridegroom. However, it is in the evidence of D.W. 1 Rajalakshmi that

Srinivasulu Naidu had no male issue and so he wanted to marry her as his second wife. Besides, there is no dispute that Srinivasulu Naidu was

possessed of several Immovable properties and he was a shipping and clearing agent and he was also owning a car. So there is nothing unnatural in

those days people belonging to well-to-do families going in for second marriage in their anxiety to have a male child.

18. In the plaint it is stated that Srinivasulu Naidu married the second defendant as his second wife in the year 1948 whereas P.W. 1 Bagyawathi

states in her evidence that the marriage was performed in the year 1947. D.W. 1 Rajalakshmi also deposes in the witness box that the marriage

took place in 1947. In Ex.D-3 the S.S.L.C. Certificate of the 4th defendant, her date of birth is given as 10-6-1948. The learned counsel for the

3rd defendant argued that in order to fit in with the date of birth mentioned in Ex.D-3 S.S.L.C. Certificate the plaintiff and D.W. I have changed

their version regarding the date of marriage. And in view of the inconsistency regarding the year of marriage the evidence of these two witnesses

could not be relied upon. However, I do not think that this discrepancy in the year of marriage is such a serious one that it goes into the root of the

claim. Be it noted that plaintiff being the daughter of Srinivasulu Naidu, she could not have had any personal knowledge about the year of marriage.

Considering the fact that the alleged marriage took place some three decades ago, when this plaint came to be prepared, this difference in date

cannot affect the veracity of the evidence.

19. Under the original of Ex.D-1 the registration copy of the sale deed dated 14-9-1970 second defendant Rajalakshmi Ammal has purchased

Door No. 31, Thaiyappa Mudali Street. In this sale deed she is described as the wife of M. Srinivasulu Naidu. Significantly enough as per the Sub-

Registrar's endorsement found in the document M. Srinivasulu Naidu was present in the Sub-Registrar's Office at the time of registration and had

paid the purchase price on behalf of the vendee to the vendor. This fact taken in conjunction with the other circumstances in the case like

Srinivasulu celebrating the marriage of the 4th defendant Gajalakshmi by printing the Invitation Card in the name of himself and his wife and the 2nd

defendant's active participation along with her two daughters in the puberty ceremony of third defendant's daughter as members of the family goes

a long way to probabalise the view that M. Srinivasulu Naidu married the second defendant Rajalakshmi as his second wife. Had she been only a

concubine of Srinivasulu Naidu certainly she would not have been well received by the family in the function and her daughters allowed to have

Ex.P-16 photograph with the third defendant's daughter.

20. The next argument of the learned counsel for the plaintiff is that apart from the evidence referred to above, the court can also presume that the

second defendant Rajalakshmi is the legally wedded second wife of Srinivasulu Naidu in the background of the case. It is true that the burden is

entirely on the plaintiff to prove the marriage between her mother and M. Srinivasulu Naidu. But the presumption of marriage u/s 114 of the

Evidence Act arises from the fact either that the persons have lived together for length of time or that they have been recognised as husband and

wife by a certain number of persons. The presumption of marriage arising out of long cohabitation and repute is much stronger than the

presumption in regard to other facts. 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. Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary. The presumption of law is the strongest of legal presumptions and not lightly to be repelled by a mere balance of probabilities and that 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 distant, the date of the marriage, the more readily is the presumption drawn, based upon cohabitation and repute. The presumption is not only with regard to the factum of the marriage, but also with regard to the performance of the requisite ceremonies to constitute a valid marriage. The question of validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for there is a strong presumption in favour of marriage, particularly after the lapse of a great length of time. The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question. Once a presumption is raised from long cohabitation and reputation there is a very heavy burden to rebut the presumption on persons who allege to the contrary. Needless to add that the circumstances of the case as discussed above strongly warrant such a presumption.

21. On the other hand, the learned counsel for the 3rd defendant vehemently argues that the second defendant Rajalakshmi Ammal hails from Devadossy Community and there could not have been a valid marriage between her and Srinivasulu Naidu. On this aspect the evidence of P.W. 1 Baghyavathi. D.W. 1 Rajalakshmi D.W. 2 Gajalakshmi is to the effect that they belong to Balija Naidu Community. During the cross-examination it was suggested to them by the 3rd defendant that they are from Devadossy Community. The only witness D. W. 3 Gopalakrishnan examined on the side of the contesting 3rd defendant does not speak anything on this aspect in his chief examination. Curiously enough, only in the cross-

examination by the plaintiff he says that he enquired and came to know that they were from Devadosy Class. So the version of the abovesaid

three witnesses that they are of Balija Naidu Community remains unre-butted.

22. The learned counsel for the third defendant went on to argue that the institution of the marriage is unknown in Devadosy Community. The 2nd

defendant having been bom in that community cannot contract a valid marriage. So there could be no presumption in favour of any such marriage

even though the circumstances may warrant such a presumption in other cases. Even if the evidence of D.W. 2 Rajalakshmi that Sri-rivasulu Naidu

married her as his second wife in 1947 in Parthasarathy Temple is true, it cannot be a valid marriage by reason of her caste. However, the learned

counsel for the respondents could not cite any authority or Text of Hindu Law to support his proposition of law.

23. Whereas it is stated at page 214 of Mulla's Principles of Hindu Law (1982 Edition) that where a woman of the ""dancing girl"" caste does not

follow her traditional calling but marries and lands the life of an ordinary married woman and reverts to her original calling after widowhood, it has

been held that her position is not different from that of an unchaste married woman and her property devolves on her heirs according to ordinary

Hindu law. The same Text Book at page 558 reads that ""It has been held by the Madras High Court that a Nattukottai Chettiar who is a Shudra

can legally marry a dancing girl who has not been dedicated to a temple. Whether he could marry a girl who was actually dedicated was not

decided in the case.

But this last question cannot now arise after the advent of Madras Devadasis (Prevention of Dedication) Act XXXI of 1947 on 17-1-1948. In

Subbaratna Mudali and Others Vs. Balakrishnaswami Naidu, an interesting question as to the succession to the property of a woman of the

dancing girl caste arose. The following observations made by the Division Bench during the course of their judgment is relevant for our present

purpose : ""That members of this caste are Hindus is certain, though the ancient writers and their modern exponents find some difficulty in fixing

them in one of the four castes: but whether they belong to the Sudra or fourth caste or to a separate fifth caste is immaterial. That male members of

this caste are usually governed by the Hindu Law arid usage does not seem to

have been questioned, so also when female members marry and have children, as they sometimes do, their family, relation is governed by the Hindu Law and presumably the ordinary Hindu Law of Inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become professional dasis without any degradation or stigma attaching to them so long as they observe the caste customs. It is well known that at least in the Southern Districts they are supposed to be married to the idol of some temple and it is a question not beyond dispute whether after such a marriage, signified by the tying of a bottu and thali by the archaka or priest, they can contract a real marriage with a member of their caste. They are not virgins, are not married women and never become widows. We are led to make these observations for showing that there is no such thing as a dissolution of the natural tie of relationship between the members of the caste who remain unmarried and follow their trade and their married relations who lead a respectable life." In *Viswanatha Mudali and Another Vs. Doraiswami Mudali and Another*, also the law of succession which was applicable to the descendants of the sons of a dancing woman assuming that the parentage of the sons is unknown and that they are not the sons of one individual came to be considered. While following the decision in *Subbaratna Mudali and Others Vs. Balakrishnaswami Naidu*, the Division Bench in this case has traced the history of the law on this aspect as extracted below :--

The plaintiffs and the defendants in this case are Hindus, Hindus by religion, as well as by their customs and manners. If the Hindu Law is not applicable to them, what other law is applicable? Though the *Srutis* and *Smritis* are applicable only to the Aryans, yet the text-writers have extended the law to all the residents of India, and the Courts have applied the Hindu Law to all the races inhabiting this vast country in the absence of proof of any special or local custom. The Dravidians of Southern India who are of Turanian origin had settled in India long before the Aryans entered it. They had their own laws and customs which are prevalent even today. The Aryans when they settled in this part of India attempted to introduce their customs and laws but they were never completely successful. The laws relating to family relations and succession and inheritance laid down by Manu and the commentators like Yajnavalkya and Vignaneswara

were never accepted as binding by all the people. It was the East

India Company's Courts that held for the first time that the laws contained in the ancient Srutis and Smritis were applicable to all Hindus in

Southern India in the absence of any custom or customary law governing any class of people. Manu in order to extend the influence of the Aryans

compendiously uses the term "Sudras" to the people of this country who are not Aryans in the same way as the Europeans use the word "native

to all those who are not of European descent, and postulates that they are all Sudras who have fallen a way from the high place once occupied by

them in the Aryan polity as the following verses show :

Chapter X, Verse 43 : "the following races of Kshatriyas by their omission of holy rites and by seeing no Brahmins have gradually sunk among men

to the lowest of the four classes." Verse 44 : "Paundrakas, Oodras, Dravidas, Kambojas, Yavanas and Sakas; Paradas, Pahlavas, Chinas, Kiratas.

Deradas and Chasas." Verse 45 : "All those tribes of men who sprang from the mouth, the arm, the thigh and the loins of Brahma but who became

out castes by having neglected their duties are called Dasyus or plunderers, whether they speak the language of the Mlechhas or that of Aryans.

This attempt on the part of the law-giver Manu to extend the influence of the Aryans among the races who inhabited this land was always pushed in

the direction of influencing their religion and the rules of succession. When the East Indian Company's Courts were established, the Judges took

the law from the Pandits who naturally relied upon the texts of the ancient law-givers and commentators as authority for their opinion. In course of

time the Courts have come to regard Manu and the commentators as authoritative exponents of the law applicable to all the inhabitants of this

country who don't profess any distinctive faith like Muhammadanism or Christianity. The customary law and considered as an exception to that

contained in the Srutis and Smritis. Under the loose term "Hindu" all classes of people are brought within the pale of "Hindu Law" as expounded in

the texts of the various Srutis and Smritis and their commentators. It therefore follows that people who have been born in India and who are of the

Hindu faith and whose customs and manners are those of Hindus are governed by the Hindu Law. In the case of a dancing woman or Hindu

prostitute, her religion is Hindu and her customs, manners and observances are

Hindu, and her sons are Hindus and the Hindu Law therefore is applicable to them.

From the passages extracted above it would be evident that women belonging to Devadasi Community are also governed by the Hindu Law and there is no prohibition in their contracting a valid marriage.

24. The next argument of the learned counsel for the third defendant is that where concubinage is permitted or recognised or where even if it is not

expressly permitted it is winked at or condoned by the Society to which the parties belong, the presumption in favour of marriage becomes weak.

However, the evidence on the conduct of the parties concerned herein as well as their repute justifies the drawing of the presumption of a valid

marriage. It is true if the association of two persons living together as husband and wife could not result in a legal marriage between them, it may be

that the presumption of marriage could not be raised in such a case. But where they could have married each other and law permits such marriage

there is nothing to prevent the presumption coming into play. Since the Madras Hindu (Bigamy Prevention and Divorce) Act 6 of 1949 came into

force on 29-3-1949 there could not have been any impediment to the parties contracting a valid marriage.

25. Yet another argument of the learned counsel for the third defendant was that no presumption of a second marriage could arise by reason of

long cohabitation. A single Judge of the Andhra Pradesh High Court has held so in Dalavayi Nagarajamma Vs. State Bank of India and Others, .

However, Mr. C. Raghunatha Reddy the learned counsel for the third defendant has fairly placed before the Court the decision of the Division

Bench of this Court in Raghuvir Kumar and Another Vs. Shanmughavadivu and Others, wherein it chose to differ from the view expressed by the

single Judge of the Andhra Pradesh High Court. The Division Bench went on to say that in a society where second marriage is not prohibited

under the statute or under the customary law, it is always open for any person to marry a second wife if he so desires and if he goes through a form

of marriage and lives with the other party as husband and wife, we find no obstacle to the presumption being raised from the fact of long

cohabitation and repute. While so the inference is irresistible in the background of the case that third defendant Rajalakshmi is legally wedded

second wife of late M. Srinivasulu Naidu and plaintiff and fourth defendant are their children born out of lawful wedlock. These issues are

answered in favour of plaintiff and defendants 2 and 4.

26. Issue Nos. 6 to 8 :-- Item 1 of the suit property is the house bearing Door No. 11, Damodara Mudaliar Street, Kilpauk, Madras. Ex. D8 is

the sale deed dated 28-4-1972 in favour of first defendant Lakshmi-kanthammal in respect of this property. Item No. 3 is Door No. 33, First

Cross Street, Trustpuram, Kodambakkam. Ex. D-7 is the sale deed dated 7-7-1969 in the name of first defendant Lakshmikanthammal in respect

of this house. Evidently plaintiff cannot lay any claim to these two items on the ground that they stand in the name of the first defendant benami for

M. Srinivasulu Naidu. u/s 4 of the Benami Transactions (Prohibition) Act (45 of 1988) no suit to enforce any right in respect of any property held

benami against the person in whose name the property is held shall lie by or on behalf of a person claiming to be the real owner of such property.

In Mithilesh Kumar and Another Vs. Prem Behari Khare, the Supreme Court has laid down that the Benami Transaction (Prohibition) Act is a

piece of prohibitory legislation and it prohibits benami transactions subject to stated exceptions and makes such transactions punishable and also

prohibits the right to defence against recovery of benami transactions as defined in Section 2(a) of the Act. The Parliament has jurisdiction to pass

a declaratory legislation. "" As a result of the provisions of the Act all properties held benami at the moment of the Act coming into force may be

affected irrespective of their beginning, duration and origin. This will be so even if the legislation is not retrospective but only retroactive. The Act

contains no specific provision making its operation retrospective.

27. The business carried by Srinivasulu Naidu is described as item 1 of "B" Schedule in the plaint. In this connection third defendant pleads in the

written statement that M. Srinivasulu Naidu and Co., the business of shipping agency referred to in the plaint "B" Schedule did not solely belong to

M. Srinivasulu Naidu. Ever since the year 1960 the said business was carried on by him in partnership with the third defendant and the partnership

stood automatically dissolved at his demise on 4-5-1980 and his individual account with the firm showed a debit balance of about Rs. 89,000/-.

The present M. Srinivasulu Naidu and Co. is a new firm, constituted after the

demise of M. Srinivasalu Naidu of which the partners are the third defendant, her son and daughter. Ex. D-9 the certified copy of Register of Firms indicates that both M. Srinivasalu Naidu and third defendant were partners of the Firm M. Srinivasalu Naidu and Co. Shipping and Clearing Agents. plaintiff as P.W. 1 has marked Ex.P-17 purports to be the Income and Expenditure Account of the Firm for the year ended 31-3-1982 and this discloses a surplus of Rs. 76,966.70 for the year 1981-82.

The third defendant Sarojini has not gone into the witness box. Her husband who is D.W. 3 states on the basis of Ex.D-9 that Srinivasalu Naidu was not the sole proprietor of M. Srinivasalu Naidu and Co. There is no evidence on the part of the third defendant to contravert the statement of account in Ex.P-17. So it is evident that the third defendant has to render accounts in respect of the half share of deceased Srinivasalu Naidu in the partnership firm till it got delivered on 9-5-80.

28. An Ambassador Car bearing Registration No. TMC 1458 is described as item 2 of plaintiff "B" Schedule. The plaintiff simply reads that

Srinivasalu Naidu was owning the said Ambassador car. There is no evidence on this aspect of the case. In the absence of any material regarding the availability of the car no relief could be granted in respect of the same. So plaintiff can claim relief only in respect of Ambattur house and the

half share of Srinivasalu Naidu in the business of M. Srinivasalu Naidu and Co. described as item 2 of plaintiff "A" Schedule and item 1 of plaintiff "B"

Schedule respectively. These issues are answered accordingly.

29. Issue Nos. 3 and 4 :-- The second defendant has paid Court fees and demanded partition and separate possession of her share in the

properties. We have already seen that the second defendant is the second wife and plaintiff is the daughter of Srinivasalu Naidu and item 2 of

plaintiff "A" Schedule and item 1 of plaintiff "B" Schedule are the properties left by Srinivasalu Naidu. While each daughter is entitled to 1/4 share in

these items, the two widows are jointly entitled to the remaining 1/4 share. So the second defendant has to be allotted half of one-fourth share in

the above said two items. Besides, in view of the amendment to Section 16(1) of the Hindu Marriage Act, 1955, by Act LXVIII of 1976, right has

been given even to illegitimate children even though the marriage might have been void or voidable. What is more, they will share equally with the

legitimate children and there is no ambiguity about that at all. Section 16 of the Amended Act clearly treats the illegitimate children also if they

would have been legitimate if the marriage had been valid. So the right of the plaintiff to claim her share in the properties left by Srinivasalu along

with defendants 1 and 3 cannot be refused at any cost. These issues are answered accordingly.

30. Issue No. 9 :-- In the result preliminary decree for partition and separate possession in respect of 1 / 4 share in item 2 of plaint "A" Schedule

Ambattur house and 1/8 share in respect of item 1 of plaint "B" Schedule partnership business in favour of the plaintiff and in respect of (sic) 1/8

share in item 2 of plaint "A" Schedule and 1/16 share in item 1 of plaint "B" Schedule in favour of the second defendant is passed. In other

respects the suit is dismissed. In the circumstances, parties are to bear their own costs.

31. Order accordingly.