
(2010) 08 MAD CK 0016
In the Madras High Court
Case No : Appeal Suit No. 753 of 2008

Nilopher and Others

APPELLANT

Vs

Seyeedha and Others

RESPONDENT

Date of Decision : 06-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Evidence Act, 1872 — Section 114, 47, 50
Penal Code, 1860 (IPC) — Section 494, 497, 498

Citation : (2010) 4 LW 344

Hon'ble Judges : R. Banumathi, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : G. Suryanarayanan, for the Appellant; T. Mathi, for R1 and R2 and R. Meena, for R11, for the Respondent

Final Decision : Allowed

Judgement

R. Banumathi, J.—This Appeal arises out of the judgment in O.S. No. 5 of 2006 dismissing the Appellants/Plaintiffs suit for partition

claiming 91/112 share in the suit properties. Unsuccessful Plaintiffs are the Appellants.

2. Brief facts are that the suit properties belonged to one Khader Ghouse Sahib. One Akther was his first wife. After the death of Akther, the said

Khader Ghouse Sahib married the 1st Plaintiff on 09.12.1971 in accordance with Muslim law and custom at Mumbai, Bendi Bazaar. Out of the

lawful wedlock, Plaintiffs 2 to 5 were born to them. Khader Ghouse Sahib, native of Vridhachalam was working at Kuwait and his mother was

residing at Vridhachalam. Khader Ghouse Sahib used to come and live with the Plaintiffs at Bombay during his visit to India on leave and when he

was visiting his mother at Vridhachalam. The mother of Akther and the mother of

1st Defendant are sisters. According to Plaintiffs, during his visit to India, Khader Ghouse Sahib married 1st Defendant-Seyeedha and 2nd Defendant-Asha was born to Khader Ghouse Sahib and the 1st Defendant. Further case of Plaintiffs is that Khader Ghouse Sahib used to live with 1st Plaintiff as well as 1st Defendant during his visit to India.

Defendants 1 and 2 are living at Vridhachalam. Khader Ghouse Sahib died on 18.4.2001 at Kuwait. Prior to his death, his mother also expired.

As such, Plaintiffs as well as Defendants 1 and 2 are the legal heirs of Khader Ghouse Sahib. In the capacity of wife, 1st Plaintiff and 1st Defendant are entitled to 1/8th share each. Plaintiffs 4 and 5 are entitled to 14/56 share each and in the capacity of daughters of Khader Ghouse Sahib, each Plaintiffs 2 and 3 and 2nd Defendant are entitled to 7/56 share. Claiming 91/112 share, Plaintiffs issued Ex. A.7 notice (23.10.2003) and the same was returned as ""insufficient address"". Defendants 6 to 9 are tenants who are paying the rent to Defendants 1 and 2. During the pendency of the suit, a portion of 5th item of "A" schedule property was purchased by the 10th Defendant-Sulaiman and the possession of the said property has to be recovered from him. The 1st Defendant was working as a teacher in the school of 11th Defendant-Ye-sudhas Raja and to defeat the lawful share of the Plaintiffs, 1st Defendant has executed a sham and nominal document in favour of 11th Defendant with respect to item No. 4. For proper and complete adjudication, Plaintiffs impleading all the tenants and also the 11th Defendant and filed the suit claiming partition of 91/112 share in the suit properties.

3. Denying the marriage of 1st Plaintiff with the Khader Ghouse Sahib, Defendants 1 and 2 have filed written statement contending that 1st Defendant alone is the legally wedded wife of Khader Ghouse Sahib and 2nd Defendant is their legitimate daughter. The 1st Defendant and deceased Khader Ghouse Sahib lived as wife and husband for nearly 20 years and after return from Kuwait, the 1st Defendant was living at Vridhachalam and she is living in suit item 1 and 2 and enjoying items 3 and 5. According to 1st Defendant, out of her separate funds she is constructing a kalyana mandapam with two shops in suit item No. 5. According to the Defendants 1 and 2, the marriage certificate of 1st Plaintiff is a concocted, fabricated and a forged one and Plaintiffs 2 to 4 are not the legal

heirs of Khader Ghouse Sahib. According to Defendants, the deceased Khader Ghouse Sahib had a friend at Bombay and 1st Plaintiff is his kept mistress and the Plaintiffs want to grab the properties of Khader Ghouse Sahib. An agent in Vridhachalam is acting on behalf of the Plaintiffs and the Plaintiffs are not the sharers and they are not entitled to any share in the suit properties.

4. Defendants 1 and 2 have also filed additional written statement contending that suit item No. 4 was sold to 11th Defendant and that the suit item

No. 4 is in possession and enjoyment of the 11th Defendant.

5. Resisting the suit, 9th Defendant who is the tenant has filed written statement contending that he got item No. 5 in "A" schedule property on

lease from Khader Ghouse Sahib. Case of 9th Defendant is that he is paying the rent to the Defendants 1 and 2 regularly till 15.12.2005.

According to 9th Defendant, since Defendants 1 and 2 are about to vacate the 9th Defendant by adopting illegal means, he has filed O.S. No.

7/2006 before Principal District Munsif, Vridhachalam and depositing the rent as per the orders of the Court. Further case of 9th Defendant is that

at the request of 1st Defendant, he has constructed the compound wall by spending huge amount to protect the property and prayed for dismissal

of the suit against him.

6. Similarly, 10th Defendant also filed written statement contending that he has taken a portion of 5th item in "A" schedule on monthly rent for his

business and he was regularly paying rent to the 1st Defendant till the filing of the suit. Since, 1st Defendant tried to vacate the 10th Defendant, he

has filed O.S. No. 70/2006 on the file of Principal District Munsif Court, Vridhachalam and depositing the rent.

7. The 11th Defendant filed written statement contending that he is a bonafide purchaser of suit item No. 4 and that the item No. 4 was purchased

for valuable consideration even prior to the filing of suit.

8. Other Defendants 3, 4 and 6 - Bank Managers of various Banks have also filed separate written statements contending that Defendants 3, 4

and 6 have unnecessarily impleaded in the suit. According to Defendants 3,4 and 6, there is no locker facility available to them in the name of

Khader Ghouse Sahib.

9. On the above pleadings, ten issues and three additional issues were framed. 1st Plaintiff-Nilopher examined herself as P.W. 1. One Kathoon

Beebi, Beebi John, Sheik Hussain, Rokiah Bee and her husband Khan were examined as P. Ws. 2 to 6 respectively. One Ko-lanji, who was then

working as clerk in Fatima Matriculation Higher Secondary School, Vridhachalam was examined as P.W. 7. One Kaji Farid Kaberkhan, Chief

Kazi was examined as P.W. 8. Exs. A1 to A12 were marked on the side of Plaintiffs. 1st Defendant-Seyeetha Begum examined herself as D.W. 1.

One Ramakrishnan, who is the neighbour of 1st Defendant was examined as D.W. 2. Sister of 1st Defendant viz., Shamla was examined as D.W.

3. One Jeyakumar, who is then working as Officer in Karur Vysia Bank, Vridhachalam was examined as D.W. 4. 11th Defendant-Yesudhas Raja

was examined as D.W. 5. Exs. B1 to B51 were marked. Photograph of the 1st Plaintiff with the deceased Khader Ghouse Sahib was marked as

Ex. X1. School Admission Register of Plaintiffs 2 and 3 were marked as Exs. X2.

10. Upon consideration of oral and documentary evidence, trial Court held that Ex. A.5-marriage certificate cannot be accepted as a valid

document and the marriage between 1st Plaintiff and Khader Ghouse Sahib has not been proved either by direct evidence or by long cohabitation.

Holding that the marriage between the 1st Plaintiff and Khader Ghouse Sahib is not proved and that the 1st Plaintiff is not the legally wedded wife

of Khader Ghouse Sahib, trial Court answered Issue No. 1 against the Plaintiffs. Trial Court took the view that Plaintiffs 2 and 3 could have been

admitted in Fatima Matriculation Higher Secondary School, Vridhachalam is possible only if the 1st Appellant/Plaintiff and deceased Khader

Ghouse Sahib lived there and the same was not pleaded in the plaint. Pointing out certain discrepancies in Ex. X2, Ex. X2 was rejected by the trial

Court. Evidence of P.Ws. 2 to 6 were also rejected by the trial Court on the same ground that cohabitation at Vridhachalam was not pleaded in

the plaint. Holding that Plaintiffs 1 to 5 are not the legal heirs of deceased Khader Ghouse Sahib, the trial Court dismissed Plaintiffs suit for

partition.

11. Challenging the findings of the trial Court Mr. G. Suryanarayanan, learned Counsel for Appellants submitted that evidence of P.W. 8 Chief

Kazi [Kaji Farid Kaberkhan] coupled with Ex. A9-Nikkah Namah is a strong piece

of evidence to prove the marriage and while so, trial Court erred in brushing aside the evidence of P.W. 8-Chief Kazi and Ex. A9-Nikkah Namah [Ex. A 10-English translation of Ex. A9]. Learned Counsel for Appellants would further contend that evidence of family members [P.Ws. 2 to 6] is very much relevant and while so, trial Court erred in brushing aside the evidence of P. Ws. 2 to 6 on an unsustainable ground that cohabitation in Vridhachalam was not pleaded. It was further contended that evidence of P. Ws. 2 to 6 as to the marriage, birth of children out of lawful wedlock would bring home the valid marriage as held in *Tulsa and Others Vs. Durghatiya and Others*, and while so, the trial Court erred in finding that Plaintiffs are not the legal heirs of Khader Ghouse Sahib and judgment of the trial Court is not sustainable.

12. Reiterating the findings of the trial Court Mr. T. Mathi, learned Counsel for Respondents 1 and 2/Defendants 1 and 2 contended that absolutely no documentary evidence was produced by the Plaintiffs to show that 1st Plaintiff-Nilopher was the legally wedded wife of deceased Khader Ghouse Sahib. Learned Counsel for Respondents would further contend that P.W. 8-Chief Kazi who appeared in the Court without being summoned and P.W. 8 is not a competent person to speak about the marriage and to depose about the contents of Exs. A9 to A12 and his evidence was rightly rejected by the trial Court. Drawing our attention to the pleadings, learned Counsel for Respondents would further contend that long cohabitation in Vridhachalam was not pleaded in the plaint and therefore, evidence of P.Ws. 2 to 6 and purported admission of Plaintiffs 2 and 3 in Fatima Matriculation Higher Secondary School, Vridhachalam was rightly rejected by the trial Court. Taking us through the number of exhibits filed by the Defendants, learned Counsel would submit that upon consideration of evidence, trial Court rightly dismissed Plaintiffs' suit for partition and the findings of the trial Court warrants no interference.

13. Upon consideration of oral and documentary evidence and judgment of the trial Court and also materials on record, the following points arise for consideration in this Appeal:

(1) Whether 1st Plaintiff-Nilopher is proved to be the legally wedded wife of Khader Ghouse Sahib and whether the findings of the trial Court on the first issue is sustainable?

(2) Whether the trial Court was right in rejecting Exs.A9 to A12 [Nikkah Namah and Nikkah Register] and Ex. A5 Marriage Certificate and the evidence of P.W. 8 Chief Kazi?

(3) Whether the trial Court was right in rejecting the evidence of P.Ws. 2 to 6 on the ground that cohabitation was not pleaded in the plaint?

(4) Whether the trial Court was right in entertaining doubts about Ex. X2 and the discrepancy in Ex. X2 on the ground that cohabitation in

Vridhachalam and admission of Plaintiffs 2 and 3 in Fatima Matriculation Higher Secondary School, Vridhachalam was not pleaded?

(5) Whether the Plaintiffs are entitled to partition? If so to what share?

14. Point Nos. 1 to 5: Case of 1st Plaintiff is that she is the legally wedded wife of Khader Ghouse Sahib and that the marriage was solemnized in

a Hotel at Bendi Bazaar, Mumbai on 09.12.1971. Marriage certificate has been marked as Ex. A5 and Nikkah Namah in Urdu and English

translation and the extract of Nikkah Namah from the original have been marked as Exs. A9 to A12 respectively. To prove the marriage and birth

of other Plaintiffs through the lawful wedlock, 1st Plaintiff has examined P.W. 8 Chief Kazi and her relatives P.Ws. 2 to 6 School Admission

Register pertaining to Plaintiffs 2 and 3 was marked through P.W. 7 KoIjanji as Ex. X2.

15. Defendants 1 and 2 deny that 1st Plaintiff was the legally wedded wife of Khader Ghouse Sahib and that the marriage certificate [Ex. A5] is

fabricated and forged one. According to Defendants, deceased Khader Ghouse Sahib had a friend at Mumbai and 1st Plaintiff was the kept

mistress of the said friend of Khader Ghouse Sahib. Further case of defence is that deceased Khader Ghouse Sahib was earning good income in

foreign country and was affluent and 1st Plaintiff and her paramour have secretly planned to grab his wealth and properties by illegal means.

16. Before proceeding to analyse the evidence, reference may be made to Section 114 of Indian Evidence Act which refers common course of

natural events and the judicial pronouncements on these aspects of the matter. In determining the question of valid marriage, conduct of the

deceased Khader Ghouse Sahib and the relatives would be very much relevant.

17. It is well settled that in determining the question of valid marriage evidence like (i) marriage certificate; (ii) opinion of the family members and

the society; (iii) children born out of lawful wedlock are relevant. In the instant case to prove the marriage, Plaintiffs have adduced various limbs of

evidence viz., (i) evidence of P.W. 1 herself; (ii) marriage certificate [Ex. A5]; Nikkah Namah [Ex. A9]; English translation of Ex. A9 [Ex. A10],

extract of Nikkah Register [Ex. A11] and English translation of Ex. A11 [Ex. A12] and also coupled with the evidence of P.W. 8 Chief Kazi; (iii)

factum of marriage and cohabitation as spoken by P.Ws. 2 to 6; (iv) admission of Plaintiffs 2 and 3 in Fatima Matriculation Higher Secondary

School, Vridhachalam.

18. First Plaintiff who examined as P.W. 1 has clearly and cogently stated in her evidence that she married the deceased Khader Ghouse Sahib on

09.12.1971 in Bendi Bazaar, Mumbai in hotel Cap Amin and Rs. 725/- was fixed as Maher. The relevant portion of evidence of P.W. 1 reads

that

In her evidence, P.W. 1 also deposed that after the marriage, herself and Khader Ghouse Sahib lived in Mumbai for two years. Thereafter Khader

Ghouse Sahib went to Kuwait and P.W. 1 also went along with him where three children born. In her evidence, P.W. 1 further deposed that she

frequently visited India and Kuwait. The relevant portion of evidence of P.W. 1 reads as under:

Evidence of P.W. 1 is strengthened by Ex. A5 marriage certificate evidencing the marriage solemnized between the 1st Plaintiff and deceased

Khader Ghouse Sahib at Bendi Bazaar, Mumbai on 09.12.1971. In Ex. A5 marriage certificate, the Maher amount is stated as Rs. 725/-.

19. Evidence of P.W. 1 is strengthened by Ex. A9 Nikkah Namah [English translation Ex. A10]. We may usefi vant entries in Exs.A9 as follows:-

Table Hotel: Camforam 9.12.1971 Sion Road. Mumbai-22.

Ex. A11 is the Xerox copy of Nikkah Register extract in Urdu [English translation Ex. A12] produced by P.W. 8 Chief Kazi of Mumbai. Hotel:

Camforam 9.12.1971 Sion Road. Mumbai

Hotel :

Camforam

9.12.1971

Sion Road.

Mumbai-

22.

Maher Rs. Witness Witness Vakil Arif Bride Bridegroom

725/- No. 2 A.K.No. 1 Husain S/o.Nilofar @ Kadar

Abubakar, Anwar Ali, Akbar Ali Ta hira D/o.Ghouse

S/o. S/o. Asgar Akbar Ali S/o. Shaik

Abubakar Ali Bapu

Mohammed

20. In his evidence P.W. 8-Chief Kazi [Kaji Farid kaberkhan] has stated that he has been the Chief Kazi from 1975 and previously his father

Abdul Mohammed Jafer Khan was the Chief Kazi. In his evidence P.W. 8 has stated that the marriage of Khader Ghouse Sahib and the 1st

Plaintiff-Nilopher was solemnized on 09.12.1971 and the relevant entries have been made in Ex. A11 Nikkah Register. P.W. 8 had spoken about

the entries in the Nikkah Namah [Ex. A9] stating that 1st Plaintiffs father Akbar Ali and Khader Ghouse Sahib and father of Khader Ghouse Sahib

viz., Shaikh Bapu Mohammed and one Arif Hussain Akbar Ali have signed as witnesses. P.W. 8 has further stated that Nikkah of 1st Plaintiff with

Khader Ghouse Sahib was solemnized by Shakir Hussain and he passed away in 1977. The relevant portion of evidence of P.W. 8 reads as

under:

21. P.W. 8 being the Chief Kazi, the Nikkah Register [Ex. A11] has been produced from proper custody and by proper authority. Trial Court

rejected the evidence of P.W. 8 on the ground that entries in Nikkah Namah [Ex. A9] and Nikkah Register [Ex. A11] were not written by P.W. 8

and that those entries were written by the Assistant Kazi [Mohammed Shakir Hussain]. Trial Court took the view that P.W. 8 was not present at

the time of marriage and that the documents were written by another person and not by P.W. 8 and therefore, P.W. 8 Chief Kazi is not a

competent person to depose and prove the contents of the documents. Trial Court brushed aside the evidence of P.W. 8 on the ground that there

is no evidence to the effect that P.W. 8 is acquainted with the hand writings of Assistant Kazi-Mohammed Shakir Hussain and summon was taken

to one ""Jaffar Khan"" and not on P.W. 8 Chief Kazi and therefore, P.W. 8 is not a

competent person to speak about the marriage.

22. Learned Counsel for Respondents-Defendants 1 and 2 assailed the evidence of P.W. 8 contending that no summon was issued to P.W. 8.

Whereas summon was sent to one ""Jaffar Khan"" and P.W. 8 brought the Register only at the request of the Plaintiffs and therefore, P.W. 8 cannot

be said to be an independent witness. It was further submitted that P.W. 8 was not present at the time of marriage nor he acquainted with the

signatures of Assistant Kazi-Mohammed Shakir Hussain and P.W. 8 Chief Kazi has appeared in the Court only to help the Plaintiffs and therefore,

trial Court has rightly rejected the evidence of P.W. 8 on the ground that he is not the competent person to speak about solemnization of marriage

and the entries in the Nikkah Register [Ex. A11],

23. P.W. 8 being the Chief Kazi is the custodian of Nikkah Register [Ex. A11]. In his evidence P.W. 8 has stated that he has issued Ex. A5

marriage certificate. Ex. A11 Nikkah Register [Ex. A12] was produced from proper custody and by proper authority. The primary evidence is

Nikkah Register [Ex. A11]. Assistant Kazi who solemnized the marriage and made entries in the Nikkah Register passed away in 1977. P.W. 8

being the Chief Kazi from 1975 has clearly stated that he is acquainted with the hand writings of Assistant Kazi [Mohammed Shakir Hussain].

When the document was produced from proper custody and by a proper authority, trial Court was not right in rejecting the evidence of P.W. 8 on

the ground that he has not made the entries in the Nikkah Register.

24. Section 47 of Indian Evidence Act deals with the question of identification of hand writing. Hand writing may be proved by the opinion of any

person who is acquainted with the hand writing of the man alleged to have written the document. A person may be acquainted with the hand

writing of another person in three ways, viz., (i) when he has seen that person write; (ii) when he has received communication purporting to be

written by that person in answer to documents purporting to be written by himself, although neither of them saw each other write; (iii) when in the

ordinary course of business documents purporting to be written by that person have been habitually submitted to him. This kind of nonexpert

evidence is in most cases better than expert evidence, if the good knowledge of the character of one's hand writing or signature. But the strength of

such evidence varies with the degree of a person's knowledge of the hand writing of another, i.e., the opportunities he had of seeing him write or

the number of times he has received and read correspondence written by him, or the length of time which has passed after he saw the last writing.

In his evidence, P.W. 8 has clearly stated that he is acquainted with the hand writing/signature of Assistant Kazi Mohammed Shakir Hussain.

Evidence of P.W. 8 who is acquainted with the hand writing/signature of Assistant Kazi Mohanimed Shakir Hussain is a strong piece of evidence

strengthening the evidence of Plaintiffs.

25. Trial Court rejected the evidence of P.W. 8 on the ground that summon was sent only to Jaffar khan and not to P.W. 8 and P.W. 8 having not

made the entries in the Nikkah Register [Ex. A11] is not a competent witness to speak about the entries in the Nikkah Register. If a person who is

not summoned has been examined, his evidence cannot be rejected on the ground that he is not the summoned witness, more so, when the

summon is only for production of records. Even if the witness is not summoned witness, witness like P.W. 8 Chief Kazi can be treated as

independent witness. As rightly pointed out by the learned Counsel for Appellants, Nikkah Namah and Nikkah Register is of the year 1971 and

the documents being thirty years old are deemed to be genuine. The burden is on the Defendants to disprove the same. It is pertinent to note that

P.W. 8 has not been suggested that the signature found in the Nikkah Register is not that of Khader Ghouse Sahib. No contrary evidence

produced as against the Nikkah Namah and Nikkah Register [Exs. A9 to A12].

26. In Acharu Vs. Rappai and Others, , the Kerala High Court has held that when the marriage register which is thirty; years old is produced, it

would substantiate the marriage. Trial Court erred in disbelieving the evidence of P.W. 8 Chief Kazi. That apart being the Chief Kazi why should

P.W. 8 take pains in attending the Courts in Tamil Nadu and depose falsehood. In our considered view, evidence of P.W. 8 is amply strengthened

by Exs. A9 to A12 documents. Trial Court went wrong in disbelieving the evidence of P.W. 8 and the approach of the trial Court being perverse

cannot be countenanced.

27. To prove the existence or non-existence of relationship, u/s 50 of Indian Evidence Act, evidence of members of family and how members of

family treated them are relevant. To prove the factum of marriage and cohabitation and relationship, P.Ws. 2 to 6 were examined. P.Ws. 2 to 6

are related to Khader Ghouse Sahib as under:

28. Khader Ghouse Sahib is the brother in law of P.W. 2 Kathoon Beevi. In her evidence, P.W. 2 has stated that marriage of Khader Ghouse

Sahib and 1st Plaintiff-Nilopher was solemnized in the hotel at Mumbai at 2.00 P.M. on 09.12.1971 and that she has attended the marriage. P.W.

2 also stated that Maher was fixed at Rs. 725/-. P.W. 2 also stated that Khader Ghouse Sahib and 1st Plaintiff lived together in Mumbai, Kuwait

and also in Vridhachalam. P.W. 2 has further stated that five children were born and one child died and two children of 1st Plaintiff studied in

Vridhachalam.

29. Evidence of P.W. 2 is assailed contending that P.W. 2 is deliberately deposing falsehood as she has denied the marriage of Khader Ghouse

Sahib with 1st Defendant-Seyeedha and that Seyeedha was only a kept mistress of Khader Ghouse Sahib and P.W. 2 has stated that 1st Plaintiffs

father owns house at Mumbai in which 1st Plaintiff-Nilopher has been living ever since her marriage. It was further submitted that P.W. 2

contradicted her own evidence saying that Khader Ghouse Sahib and 1st Plaintiff lived together in Vridhachalam for three years. At the time of

deposing in Court, P.W. 2 was aged 65 years and nearly 30 years after the marriage of Khader Ghouse Sahib and 1st Plaintiff, she has deposed

and therefore, she cannot be expected to remember all the minute details. The points of attack of P.W. 2's evidence does not undermine the

evidence of P.W. 2.

30. P.W. 3-Beebi John is the step sister of Khader Ghouse Sahib [daughter through first wife of Shaikh Bapu]. P.W. 3 has stated that marriage of

1st Plaintiff and Khader Ghouse Sahib was solemnized in Mumbai and that she attended the marriage. P.W. 3 has stated that the marriage was

solemnized only after the consent of both bride and bridegroom. P.W. 3 also stated that five children were born out of the lawful wedlock and one

child died. P.W. 3 also stated that two daughters were admitted in Fatima Matriculation Higher Secondary School, Vridhachalam and they studied

there. Evidence of P.W. 3 is sought to be attacked on the ground that she has approbated and reprobated with regard to 1st Plaintiffs marriage.

Learned Counsel for 1st Defendant contended that P.W. 3 has stated that she has not attended the marriage and subsequently changed her version

that she attended the 1st Plaintiff -Nilopher's marriage. When being questioned, P.W. 3 has stated that she did not remember the month and year

of Nilopher's marriage, but she has stated that marriage invitation was printed. For many questions put to her during her cross-examination, she

answered that "she does not remember" or that "she does not know". At the time of examination in Court, P.W. 3 was aged 70 years. After

several years, she might not have been in a position to recollect the incidents. Evidence of P.W. 3 is not in anyway undermined on the ground that

she was not able to answer the questions put to her during her cross-examination.

31. P.W. 4 Sheik Hussain is the son of Shiek Batchi who is the step brother of Kadher Ghouse Sahib i.e. son of Sheik Bapu through first wife

Hayat Beevi. Like other witnesses, P.W. 4 has clearly stated that marriage of Khader Ghouse Sahib and Nilopher was solemnized in 1971 in a

hotel at Mumbai and that consent of Bride and Bridegroom was taken and Maher was fixed at Rs. 725/-. Evidence of P.W. 4 is to the effect that

Nilopher was treated as wife of Khader Ghouse Sahib. P.W. 4 was attending to the travels in Mumbai run by Khader Ghouse Sahib. Evidence of

P.W. 4 is sought to be attacked contending that he was aged only 13 years at the time of marriage and therefore, he is not a competent person to

speak about the marriage. Being closely related and associated with Khader Ghouse Sahib, evidence of P.W. 4 as to solemnization of marriage

and that family members treated the 1st Plaintiff as wife of Khader Ghouse Sahib stands on higher footing.

32. P.W. 5 Rokiah Bee [wife of P.W. 6] is the own sister of Khader Ghouse Sahib. P.W. 6-Khan is the husband of P.W. 5. Both P. Ws. 5 and 6

have clearly stated that Khader Ghouse Sahib married the 1st Plaintiff-Nilopher in Mumbai and that five children were born to them. At the time of

marriage of Khader Ghouse Sahib and 1st Plaintiff-Nilopher, since P.W. 5 was in the family way, both P. Ws. 5 and 6 did not attend the marriage

in Mumbai. However, they have Spoken in one voice and that 1st Plaintiff was living with him. From the evidence of P.W. 6, it is seen that mother

of Rokkiah viz., Jahara Beevi [2nd wife] was running a Mess in Mumbai and at that time, P.W. 6 was working in Mumbai and that he had known

Khader Ghouse Sahib from his childhood. P.W. 6 married P.W. 5 in 1957 and thereafter, he had gone to Kuwait. After he settled in Kuwait,

Khader Ghouse Sahib and his mother Jahara Beevi also went to Kuwait and when Khader Ghouse Sahib went to Kuwait he was aged about 12

years. P.W. 6 educated Khader Ghouse Sahib and in his evidence P.W. 6 has stated that Khader Ghouse Sahib opened Travels office in

Mumbai. P.W. 6 also stated that he has arranged for the marriage of Khader Ghouse Sahib and 1st Plaintiff and since P.W. 5 was pregnant they

could not attend the marriage. In our considered view, P.W. 6 who has known Khader Ghouse Sahib from his childhood and also taken care of

him is an important witness. His evidence as to the marriage and cohabitation of Khader Ghouse Sahib with 1st Plaintiff both in Mumbai, Kuwait

and in Vriddhachalam stands on higher footing. Evidence of P.W. 6 cannot be assailed on trivial contradictions. Being closely related and having

known Khader Ghouse Sahib from his childhood, evidence of P.W. 6 is unassailable.

33. Evidence of P.Ws. 2 to 6 being members of the family is very much relevant to prove (i) marriage solemnized in Mumbai in a hotel in 1971; (ii)

Maher was fixed at Rs. 725/-; (iii) cohabitation of Khader Ghouse Sahib and 1st Plaintiff-Nilopher in Mumbai, Kuwait and Vriddhachalam; (iv)

family members treated Khader Ghouse Sahib and 1st Plaintiff as husband and wife; (v) birth of children.

34. Being family members, u/s 50 of Indian Evidence Act, evidence of P.Ws. 2 to 6 is very much relevant and stands on higher footing. Section 50

of Indian Evidence Act reads as under:

Section 50. Opinion on relationship, when relevant. - When the Court has to form an opinion as to the relationship of one person to another, the

opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special

means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings [under the Indian Divorce Act, or in prosecutions under

Sections 494, 497, or 498 of the Indian Penal Code].

Illustration (a) - The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband

and wife, is relevant.

Existence of relationship as spoken by P.Ws. 2 to 6 strengthens the Plaintiffs case. That Khader Ghouse Sahib and 1st Plaintiff were received and

treated by the relatives as husband and wife is proved by the consistent evidence of family members and close relatives.

35. Evidence of P.Ws. 2 to 6 were rejected by the trial Court on a puerile ground that there are certain minor contradictions/variations in their

evidence as to (i) whether the marriage invitation printed or not; (ii) long cohabitation was not pleaded in the pleadings. The finding of the trial

Court in Paragraph (22) is to the effect that""... P.W. 2 to P.W. 5 are also deposed to that effect. Living together for two years will amount as long

cohabitation. As, long cohabitation is also a proof of wife and husband, this aspect ought to have been pleaded in the plaint. But this aspect was

not at all pleaded in the plaint. Evidence adduced without pleading, cannot be admitted

36. Trial Court rejected the evidence of P.Ws. 2 to 6 saying that they are planted witnesses at the instance of tenants. Trial Court erred in saying

that P.W. 2 [Kathoon Beebi]; P.W. 3 [Beebi John]; and P.W. 4 [Sheik Husin] never attended the marriage and erred in rejecting the evidence.

Appellate Court will not normally interfere with the opinion of the trial Court as to the credibility of witnesses. It should not forget that trial Court

had an advantage and opportunity of seeing the demeanour of witnesses and therefore, trial Court's conclusion should not normally be disturbed,

unless the approach of the trial Court in appraisal of evidence is erroneous, contrary to the well established principles of law or unreasonable. In

the instant case, trial Court ignored the consistent evidence of P.Ws. 2 to 6 which is strengthened by unimpeachable evidence of Ex. A9 to A12

documents. In our considered view, trial Court misread and misconstrued the consistent evidence of P.Ws. 2 to 6 and therefore, the findings of the

trial Court rejecting the evidence of P.Ws. 2 to 6 cannot be sustained.

37. At this juncture reference may be made to Section 114 of Indian Evidence Act. As pointed out earlier, since the provision refers to common

course of natural events, human conduct and private business. The Court may presume the existence of any fact which it thinks likely to have

occurred. Reading the provisions of Sections 50 and 114 of the Evidence Act

together, it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the facts of a particular case.

38. There is no denying that P.Ws. 2 to 6 are related to Khader Ghouse Sahib as stated in Paragraph (27). Witnesses P.Ws. 2 to 6 have

consistently spoken about solemnization of marriage of Khader Ghouse Sahib and 1st Plaintiff-Nilopher in 1971 in Mumbai and their living

together in Mumbai, Kuwait and Vridhachalam. The evidence on record clearly shows that marriage of 1st Plaintiff and Khader Ghouse Sahib and

their living together in Mumbai, Kuwait and Vridhachalam. As per the well settled principles the trial Court ought to have accepted the evidence of

P.Ws. 2 to 6 and ought to have held that the 1st Plaintiff is the wife of Khader Ghouse Sahib and Plaintiffs 2 to 5 are the children born out of lawful

wedlock.

39. In her evidence, P.W. 1 has deposed that she was living in Vridhachalam for two years and at that time, Plaintiffs 2 and 3 were admitted in

Fatima Matriculation Higher Secondary School, Vridhachalam. On summon, P.W. 7 Kolanji, a clerk from the said school produced the Admission

Register maintained by the School for the year from 1969 to 1979 [Ex. X2]. In the said admission register at Page 66, entries 341 and 342 relates

to Plaintiffs 2 and 3 which read as under:

S. No.	Ad. Name	House Name	of Residence	Occupation	Date of	Date of	Whether
							Religion
							Caste Class
							on

No. of	The Name	the Parent	of Parent	Admission	Birth	protected	Admission
--------	----------	------------	-----------	-----------	-------	-----------	-----------

Pupil	or	or guardian	from
-------	----	-------------	------

Gauardian	small	pox
-----------	-------	-----

or No

341	865	Sha Vridhna	Quader Vridhna	Business	7.9.77	29.7.72	Yes	Muslim-	UKG
-----	-----	-------------	----------------	----------	--------	---------	-----	---------	-----

Runnisa	Chalam	Ghause	Chalam
---------	--------	--------	--------

Shaikh

Bapu

352	866	Fauziya	Quader	Business	26.6.73	26.6.73	Yes	Muslim-	LKG
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Ghause

P.W. 7 has spoken about the abovesaid entries in Ex. X2 Admission Register. Ex. X2 Admission Register being maintained in the regular official course, the entries thereon is a strong piece of evidence.

40. Evidentiary value of Ex. X2 was assailed contending that there are no entries as to who brought the children and who admitted them in the school. Drawing our attention to the entries in Ex. X2, learned Counsel for Defendants 1 and 2 contended that father's name and other details were newly written and the ink is different from the other entries in the said Register which would show that entries in Ex. X2 are manipulations. As against Serial No. 341 [Sha Runnisa] a letter "U" appearing to be in the beginning of "Sha Runnisa" appear to have been scratched. During cross examination, P.W. 7 has also confronted and P.W. 7 has admitted the scratching and slightly brightness of the ink. His answer to that effect reads

... 34

41. Referring to the above answers of P.W. 7, trial Court rejected the entries in Ex. X2 on the ground that first letter in Serial No. 341 appears to have been erased and that the two entries are prominent when compared with the other entries. Trial Court further observed that for admitting the Plaintiffs 2 and 3 in the school at Vridhachalam is possible only if Khader Ghouse Sahib and 1st Plaintiff lived in Vridhachalam and that the same was not pleaded in the plaint. Trial Court also observed that none of the Plaintiffs' name is ""Sha Runnisa"" and on those grounds disbelieved the entries in Ex. X2.

42. We have carefully gone through Ex. X2 original Register. In Page 66 of Ex. X2 in Serial No. 341 as against the name of "Sha Runnisa" first letter appears to have been slightly erased. Even though, name of "Sha Runnisa" is different from the name of 2nd Plaintiff [Hanna], it is quite improbable for the 1st Plaintiff would have had an access to the Admission Register and make corrections. In fact, only the 1st Defendant was working in the said Fatima Matriculation Higher Secondary School, Vridhachalam for some time as is seen from her evidence. The relevant portion of evidence of 1st Defendant [D.W. 1] reads that "".... During the cross-examination, P.W. 7 clerk of the said school appears to have given answers against the Plaintiffs perhaps to support the 1st Defendant who worked in their school for some time. In our considered view the

difference in the name of 2nd Plaintiff in Ex. X2 does not dilute the evidentiary value of the entries in Serial No. 341 and 342 for whom the father's

name has been mentioned as Khader Ghouse Sahib. Ex. X2 Admission Register being maintained in the official course of business, much value has

to be attached to the entries thereon where two girl students [Plaintiffs 2 and 3] were admitted in the school as the daughters of Khader Ghouse

Sahib.

43. Trial Court rejected the entries in Ex. X2 on the ground that cohabitation of 1st Plaintiff and Khader Ghouse Sahib in Vridhachalam was not

pleaded in the plaint. In her evidence, P.W. 1 has stated that she has been living in Vridhachalam and at that time, she has admitted Plaintiffs 2 and

3 in Fatima Matriculation Higher Secondary School, Vridhachalam. Of-course, 1st Plaintiff living in Vridhachalam has not been pleaded in the

plaint. Mere omission to plead the same in the plaint cannot be the reason for disbelieving the evidence of P.W. 1. In drafting the plaint especially

from the Mofussil areas, parties giving instructions to the Counsel as to how pleadings should be drafted. When the facts are stated, counsel

prepares the pleadings and files in Court. Merely because the averment in pleading is lacking, it cannot be the ground for disbelieving the version of

a witness. It is no doubt true that if the pleadings are clearly set out, it would be easy for the Court to decide the matters, but pleadings are not to

be construed strictly. Court must look into the essential justice of the case. Where the parties are related to each other and when they know

everything and there will be no element of surprise to the opposite party, deficiency in pleading would not affect the case of the Plaintiff.

44. Trial Court proceeded to discard the evidence of P.W. 1 observing that no amount of evidence can be looked into when no pleading was put

forward. Ordinary rule is that evidence has to be given only on a plea properly raised and not in contradiction of the plea. When the parties went to

trial knowing fully well what they were required to prove and they have adduced evidence of their choice in support of the respective claims and

that evidence was considered by the competent Court below, they cannot turn round and say that there was no proper pleading on that aspect.

45. On behalf of Defendants 1 and 2 much arguments was advanced contending that Plaintiffs have not produced (i) children school certificate; (ii)

children birth certificate; (iii) passport of 1st Plaintiff and the children; (iv) family card and other relevant documents issued by the competent

authorities. Learned Counsel for Defendants 1 and 2 mainly contended that 1st Plaintiff has not produced the best attainable evidence like birth

certificate, passport of Plaintiffs and family card etc. In Paragraph 23 of its judgment, trial Court faulted the Plaintiffs for not producing the birth

certificate of Plaintiffs 2 and 3 from the hospital in Kuwait and also non production of passport of 1st Plaintiff. Trial Court drew adverse inference

against the Plaintiffs for not producing those documents. Of course, it would have been better if the 1st Plaintiff has produced the birth certificate of

children and passport. It is pertinent to note that Plaintiffs 2 to 5 are living in Mumbai whereas 1st Plaintiff is stated to be living in Vridhachalam.

Perhaps for want of proper assistance or due to non-availability, the 1st Plaintiff was not in a position to produce those documents. Non

production of birth certificate of children and passport does not in any way weaken Exs. A9 to A12 and the consistent evidence of P.Ws. 2 to 6.

46. Defendants have produced number of documents like passport of deceased Khader Ghouse Sahib [Exs. B3 to B5], passport of Defendants 1

and 2 [Exs. B6 and B7] and original sale deeds pertaining to the suit properties [Exs. B41 to B48 and Ex. B49 Will executed by Johira Beebi

infavour of Khader Ghouse Sahib and trial Court elaborated upon Issue No. 9 that Defendants 1 and 2 are the legal heirs of the deceased Khader

Ghouse Sahib. Trial Court swayed by number of documents filed by the Defendants. The fact that 1st Defendant is the wife of Khader Ghouse

Sahib and the 2nd Defendant being the daughter of 1st Defendant and Khader Ghouse Sahib is not at all in Issue. Trial Court ignored the evidence

adduced on the side of Plaintiffs and trial Court was not right in rejecting the unimpeachable evidence of Exs. A9 to A12 and the evidence of P.W.

8 Chief Kazi. Evidence of family members [P.Ws. 2 to 6] is also substantiated the Plaintiffs' case. The approach of the trial Court is erroneous and

the conclusion of the trial Court is not sustainable and the judgment and Decree of the trial Court is liable to be set aside. In their capacity as wife,

1st Plaintiff-Nilopher and 1st Defendant-Seyeedha are jointly entitled to 1/8th share each. In the remaining, in the capacity as sons of deceased

Khader Ghouse Sahib, Plaintiffs 4 and 5 [Bassam and Imran] are entitled to 14/56 share each and in their capacity as daughters of deceased

Khader Ghouse Sahib, Plaintiffs 2 and 3 [Hanna and Pousiah] and 2nd Defendant [Asha] are entitled to 7/56 share each i.e. Plaintiffs 1 to 5 are

entitled to 91/112 share in the suit properties.

47. Coming to the items available for partition - item Nos. 1 and 2 of "A" schedule and item No. 3 of "B" schedule [Locker available in State

Bank of India, Kariveppilankurchi and jewels and cash thereon] are said to be available for partition. Item No. 4 of "A" schedule property was

sold to 11th Defendant-Yesudhas Raja under Ex. B51 sale deed dated 14.10.2003. The suit was filed on 29.04.2004.

48. Ms. Meenal, learned Counsel for 11th Defendant submitted that even during the life time of Khader Ghouse Sahib, he negotiated for selling

item No. 4 of "A" schedule property to 11th Defendant and therefore item No. 4 of "A" schedule is to be held as ""not available"" for partition. As

pointed out earlier, just six months prior to the filing of the suit, 1st Defendant had sold item No. 4 of "A" schedule to 11th Defendant and just 10

days prior to Ex. A7 notice. Since, item No. 4 in "A" schedule belong to Khader Ghouse Sahib, the alienation is subject to the share of the

Plaintiffs and the Plaintiffs are entitled to 91/112 share in item No. 4 of "A" schedule property also.

49. In so far as item No. 3 of "A" schedule properties in Vridhachalam, during the pendency of Appeal the said item is said to have been sold to

one Dr. Anbuchezhian on 28.08.2008. During the pendency of the Appeal, item No. 5 of "A" schedule was said to have been sold to one P.K.

Rias Ahamed on 11.12.2009. Appeal is only continuation of the suit and therefore, sale of item Nos. 3 and 5 of "A" schedule are subject to the

result of the Appeal. Notwithstanding the sale of item Nos. 3 and 5 of "A" schedule, Plaintiffs are entitled to 91/112 share in item Nos. 3 and 5 of

"A" schedule also. Defendants 6 to 10 being the tenants of item No. 1 of "A" schedule properly are to be directed to pay proportionate rent or

91/112 share to the Plaintiffs 1 to 5 till the final decree is passed.

50. In the result, Judgment and Decree of the trial Court in O.S. No. 5/2006 dated 27.06.2008 on the file of Additional District Judge, Fast Track

Court No. III, Vridhachalam is set aside and the Appeal is allowed. Plaintiffs are entitled to 91/112 share in item Nos. 1 to 5 of "A" schedule

properties and in item No. 3 of "B" schedule property. In so far as properties

alienated to the 11th Defendant equity could be worked out at the time of passing final decree. In so far as past mesne profits and future mesne profits, Plaintiffs are relegated to take recourse under Order 20, Rule 12 Code of Civil Procedure. Defendants 6 to 10 shall pay rent in respect of Plaintiffs share directly to the 1st Plaintiff commencing from the month of August 2010 till the final decree is passed. Those of the tenants who have hitherto depositing the rent in the Court shall also pay proportionate share of rent to the Plaintiffs 1 to 5 hereinafter. In so far as, rent already deposited in the Court i.e. subject to the result of the final decree to be passed. Both parties are directed to bear their respective costs.