

(2002) 04 MAD CK 0161

In the Madras High Court

Case No : A.S. No. 729 of 1986 and C.M.P. No. 739 of 2002

Parvathi Ammal, Mallika, S. Rajendran, S. Dhanapalan and S. Neelamegam APPELLANT

Vs

S. Madathi Ammal, S. Devi, S. Jagadeesan, S. Sudha, Govindammal, K. Karuppana Thevar, K. Vazhivittan, K. Murugan and K. Karunamuthu RESPONDENT

Date of Decision : 04-04-2002

Acts Referred:

Hindu Marriage (Amendment) Act, 1956 — Section 16

Citation : AIR 2002 Mad 462 : (2002) 2 MLJ 175

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : S. Subbiah, for the Appellant; R. Thamodaran, for the Respondent

Judgement

Prabha Sridevan, J.—Defendants 2 to 6 are the appellants herein aggrieved by the judgment and decree in O.S. No. 347/82 filed by respondents 1 to 4. The fifth respondent was the first defendant in the suit.

2. According to the averments in the plaint, the suit schedule properties were the self-acquired properties of one Samivel, who was the husband of the first appellant and respondent and father of appellants 2 to 5 and respondents 2 to 5. Samivel had a wife called Perumal Ammal, who is now deceased is the mother of the fifth respondent herein. The first appellant married Samivel after the death of Perumal Ammal and appellants 2 to 5 were born to them. The first respondent was married to Samivel on 9.6.1969, respondents 2 to 4 were born to them. The first appellant and the first respondent are sisters. Samivel was working in Madura Coats and the first respondent was working as a Government School teacher. Samivel died intestate. The appellants are residing in item No.1 of the suit property. 4 tenants are residing in item No.2, 2 tenants in item No.3 and one tenant in item No.4. The parties are in joint possession of item No.5. After the death of Samivel, since enmity had arisen between the parties, the respondents

1 to 4 demanded partition on 11.2.82 but the appellants were not agreeable. Item No.3 of the suit property was sold pending suit. Two fixed deposits were created by Samivel, one in the name of first appellant and the other in the name of the second respondent. These are included as item Nos. 6 and 7 of the suit property. Preliminary decree of 7/18th share in the suit property was prayed for.

3. The first appellant as the second defendant filed her written statement denying the averments contained in the plaint. A written statement was filed by the first defendant, who is the fifth respondent. An additional written statement was filed by the same party praying for her share. One more written statement was filed on account of the averments made in the written statement filed by the appellants herein claiming that suit item Nos.1 and 5 were purchased from the 'Stridhan' of the first appellant herein.

4. In the written statement filed by the appellants, it was stated that Samivel married only twice, once to the mother of the fifth respondent herein and after her death, to the first respondent herein. The paternity of respondents 2 to 4 was denied. It was stated that the first appellant was not leading a straight life and therefore, she was sent to work as a maid in Samivel's house. She developed a relationship with one Kalimuthu, who was in the army. Since the first appellant questioned the first respondent for not taking care of the children, the deceased Samivel sent the first respondent to work for one Dr.Venkatasamy to take care of his mother. After Dr.Venkatasamy's mother became better, the first respondent was sent to her own village. Then she took teacher's training with the help of the deceased Samivel, who acted as a local guardian. Two years later, she returned to Madurai. At that time, one Senduran developed an association with the first respondent. The first respondent never married Samivel. The children are not his children. She lived independently. The only connection Samivel had with her was in the capacity of a guardian. The first appellant came to India from Srilanka and she brought jewels and money. She got married to Samivel. The property in item No.1 was purchased with her 'Sthridhan' and thereafter, in 1960, the super structure was put up. Item No.5 of the suit property was also purchased from jewels of the first appellant. The first respondent, taking advantage of the illiteracy of Samivel and the first appellant, alleging to be related to them, has filed the suit to grant the property belonging to the appellants and therefore, the suit should be dismissed.

5. The Trial Court dismissed the suit insofar as the first respondent is concerned and passed a preliminary decree declaring the 3/9th share of respondents 2 to 4 in the suit property and 1/9th share of the fifth respondent in item Nos.1, 2, 4, 5 and 7 of the suit properties. Since item No.3 of the suit property has been sold to defendants 7 and 10 and since the first appellant had withdrawn the fixed deposits, item No.6, it was directed that in equity, these should be allotted to the shares of the appellants at the time of passing of final decree.

6. An additional written statement was filed when the Appeal Suit was pending along with C.M.P. No. 739 of 2002. This deals only with item No.2 of the suit

property. According to this, item No.2 was only the superstructure put up in the site belonging to a temple with the amount obtained from the sale of item No.3 and item No.2 was purchased in the name of deceased Samivel. The temple initiated action under Land Encroachment Act. The appellants filed a Writ Petition. It was dismissed as also the writ appeal. The temple has taken possession of item No.2 and therefore, it is not available for partition.

7. Mr.S. Subbiah, learned counsel for the appellants would submit that the Trial Court came to the conclusion that the first appellant and the first respondent were sisters without any basis. The evidence would clearly show that this was a false statement. It was further submitted that there was no evidence to show either that Samivel was married to the first respondent or that respondents 2 to 4 were born to Samivel. The date of birth of the second respondent has not been proved and there is nothing to show that the fourth respondent was born to Samivel and the first respondent. He submitted that if at all, only the birth certificate of the third respondent bears Samivel's name no importance can be given to this, since the identity of the informant is not known. He would submit that the Court below had erred in giving weight to Ex-A17 dated 8.9.83, which is subsequent to the suit. In this, the first respondent is addressed as 'Chithi' and the respondents 2 to 4 as younger brothers and sisters. This cannot be accepted as evidence of the paternity especially when a suggestion has been put to the fifth respondent/ D.W.1 that she had written this letter because she was angry with the appellants for not giving her a share when item No.3 of the suit property was sold. He also submitted that three letters have been filed before the Court below, Exs-B5,B6 and B8 allegedly written by one Saraswathi and the tenor of the letters show clearly that they are not what they seem to be and they are actually written by a male. He also pointed out the evidence of D.W.1 as well as D.W.3 wherein it was stated that the Samivel was so weak before his death that he could not have fathered the fourth respondent who was born just few months prior to the death of Samivel. The various exhibits were referred to, to show that the first respondent has scant respect for truth.

7. The learned counsel also relied on B. Mahadeva Rao Vs. Yesoda Bai, in which it was held that no presumption of paternity could arise when the information for record in birth register is supplied by mother, unless it is established beyond doubt.

8. The Director, Department of Animal Husbandry and etc. Vs. A. Kaliyamurthy, T.N.(2001 III L.W. 842) was also relied on by the learned counsel for the appellant wherein it was held that a horoscope has a very little evidentiary value to decide the paternity.

9. The learned counsel for the respondent on the other hand urged confirmation of the decree. The appellants have gone to the extent of denying that the first respondent who is the first appellant's sister only to deprive the legal heirs of Samivel of getting any right in the property. According to the learned counsel the marriage had been proved and the very fact that item No.7 fixed deposit had

been created in the name of the first respondent would itself show that not only did Samivel treat her as his wife but also the children as his own children. He would also submit that P.W.1, the daughter to Samivel through the first wife would actually benefit if she did not acknowledge the paternity of the respondents and the very fact under Ex-A17 she has done so, would show the relationship. He would reject the allegations on behalf of the appellants in respect of Ex-B5,B6 and B8 casting a suspicion that the first respondent had illicit relationship with others. It is also submitted that Ex-B2 which is the certificate given by the Karnam in favour of the first respondent for enrolling in the Teachers' Training School would show that Samivel has given security and if Samivel did not treat her as his wife he had no reason to give security. The horoscope of R3 would show that Samivel was his father. The birth certificates prove that Samivel was the father of the respondents 2 to 4. The evidence of P.Ws.1 & 2 clinchingly prove the marriage of Samivel and the first respondent. So the pleading and evidence only support the case of the respondent.

10. As regards item No.1, this has been purchased on 02-04-1957 by Samivel from one V.G. Perumal. In 1985, a legal opinion had been obtained under Ex-B12 in which the Government Pleader opined that the first appellant should also join as the co-executant in the mortgage deed since she is not only a member of the Co-operative Society but also an earning member. The case of the first respondent is that she got married to Samivel only in 1969, and it is also her evidence that she knew Samivel only in 1969. Therefore, she has no knowledge of the source of funds of purchase of item No.1. It is the case of D.W.3, the first appellant that two years after her marriage, the first item property was purchased and that it was purchased with the sum of Rs.500/- given by her father as "Sthridan". Ex-B49, the original document is marked through her two years later. According to her she commenced building the superstructure. Ex-B14 is the mortgage deed wherein this property was mortgaged, funds were raised for putting up a superstructure. Ex-B13, is the legal opinion. Her evidence is that she discharged the loan. Her evidence also is that the patta transfer for item No.1 and 5 was only at the instance of her husband. In cross examination by the respondent/plaintiff, the witness categorically stated that at her wedding it was only her father who gave a sum of Rs.500/-. There is virtually no cross-examination regarding the source for item No.1. Ex-B53 and B54 have been produced to show that the first appellant has repaid the loan from the Co-operative Society for item No.1. The accounts book were rejected by the Trial Court. It must be remembered that these are the notings of a person untrained in keeping account and the standards expected of a bank clerk or accountant cannot be applied. The account books also do not appear concocted. The Trial Court has disbelieved the case of the first appellant on the ground that D.W.3 has not proved that she paid a sum of Rs.500/- for purchase of item No.1 property. The Trial Court has accepted the contention of the respondents.

This is a pure surmise and unwarranted. The evidence of D.W.3 stands un rebutted and no explanation has been given as to why the legal opinion

insisted that she should be joined as a mortgagor. Therefore, this also lends credence to the case of the appellants that A1's property was purchased with the funds given by the appellants and the loan was also discharged by the first appellant. It is the evidence of D.W.3(the 1st appellant) that when the property was purchased she said that it should be in Samivel's name. D.W.2 her son also supports the fact that the property was purchased in his father's name because he was more worldly-wise. Though it was only his mother who had provided the funds, his evidence that his mother gave a sum of Rs.500/- which was obtained by her as Stridhan for purchasing item No.1 also remains unchallenged. The legal opinion also supports the case of the appellants because if D.W.3 had not contributed to the purchase of item No.1, there was no reason for Samivel to agree to her being the co-executant in the mortgage deed. The reason why the first appellant was shown as co-mortgagor has not been properly explained. The Government Pleader's opinion shows that the first appellant has her own funds. She has discharged the mortgage. In these circumstances, it is held that item No.1 belongs to first appellant and is not available for partition.

11. Marriage:

There is no documentary evidence regarding the marriage of Samivel with first respondent. It is the case of the respondents that the marriage was on 09-06-1969 in Madurai town. The first respondent as P.W.1 speaks of this marriage and so does P.W.2. The evidence of P.W.2 is to the effect that he and his father attended the wedding. No invitation was printed, but he was invited in person. The evidence of P.W.1 is that her brother was present at that time. There is no reference in her evidence to P.W.2 attending the marriage. The witnesses on the side of the defendants have all denied that there was a marriage and they do not admit that they attended such a marriage. Since the first respondent claims to be the sister of the first appellant a question has been put to the first appellant whether her father married a second wife and whether out of the second marriage four children viz., Madan, Madati, Ponnammal and Raju were born. There is no reference to any of them being present in the Wedding.

(a) P.W.2 also admits that apart from attending the wedding of Samivel and the first respondent, until the death of Samivel, he has not attended any of his family functions. He did not attend the marriage of the fifth respondent, who is Samivel's daughter through the first wife nor has he attended the marriage of the third appellant, Samivel's son. According to him, he was only a school going student at the time when Samivel married the first respondent. P.W.2's evidence is not enough to show that there was a marriage on 09-06-1969.

(b) Ex-A7, the letter written by the fifth respondent was relied on by the respondents to prove marriage. But it is alleged that the fifth respondent was disappointed that the appellants did not give her share in the sale of certain items of the suit property and therefore, pending the suit she was persuaded to write this letter to support the case of the respondents. (c) The plaint does not give any details regarding the period during which Samivel and the first

respondent lived together or cohabited. The plaint averments are to the effect that they got married on 09-06-1969, that the first respondent was a Government School Teacher since 1960 and Samivel died in Madurai on 28-06-1980 and defendants 2 to 6 are now residing in item No.1 and that, even after the death of Samivel the appellants and the respondents lived together in item No.1 of the suit property and thereafter, they were asked to seek separate residence. The first defendant, who is the fifth respondent herein has denied this in her written statement stating that at no time respondents were ever living in the suit items, and that the first respondent came to Madurai and was in their house as a servant to take care of the children and thereafter, since she could not be retained in the house, she was sent to work for Dr. Venkatasamy's mother. Then the first respondent completed her Teacher's Training Course and returned to her home-town in Chatramkondan.

(d) Two years later, the first respondent worked in Sahayamatha Elementary School in Subramaniapuram and Samivel was her local guardian. She lived independently. The fourth defendant, who is the fourth appellant has also filed his written statement stating that the appellants and the respondents never lived together in item No.1 of the suit property. The oral evidence of P.W.1 with regard to residence is to the effect that till February, 1982 all of them lived together in item No.1 of the suit property and then, they were chased out.

(e) P.W.1 asserts that the second defendant is her sister. But, she does not know the date of her sister's marriage with Samivel and she also says that she knew Samivel only from 1969. If Samivel had been her sister's husband then she would have known her since their marriage. This statement that she knew of Samivel only from 1969 is falsified by Ex-B2 which shows that on 14-06-1967, Samivel had given his immovable property as security for P.W.1 to take teacher's training. It is the evidence of D.W.2, the second defendant that her husband helped P.W.1 to be trained as a teacher though originally she came only as their servant. She also has stated that,

The evidence of the first appellant is that though she would come and work in their house as a servant, she was not residing there.

(f) The first respondent totally denies that she ever worked as a servant maid for Samivel's family. But in Ex-B7, dated 09-04-1966 shows clearly that she had been working there as a servant. This is admittedly a letter written by the first respondent to Samivel. So she had been a maid in Samivel's house.

(g) D.W.1, the daughter of Samivel through the first wife would however, say that the first plaintiff came to work as a servant maid in or about 1968, and that he helped her to get Teacher's Training and got her a job as a teacher in 1970.

(h) P.W.1's evidence is that she came to Madurai only in 1969. It must be remembered that she got married only in 1969, and that in 1968 and 69, she studied in the Teacher's Training Institute as a resident student. The words used are:

The school records are not produced and her own letter Ex-B7 shows that she was a house-helper in Samivel's house. While the first respondent was getting training, she was residing in the institute itself. Therefore, in 1968 and 69, she was not living with Samivel and his family. And Ex-B7, shows that after working as a maid she was sent away in 1968. Ex-B3 is the receipt given by LIC dated 27-03-1974. Here, as first respondent's address, neither item No.1 of the suit property nor item No.4 is shown, but the school address.

(i) The electoral rolls filed as Ex-A18 and A19 also do not help the case of the respondent, as regards the year from which she resided with Samivel. Ex-A18 relates to the electoral roll of the year 1978, it shows the place of residence as item No.1. Samivel's age is shown as 51. Parvathi, the 1st appellant's age is shown as 38 and Malathi's, presumably the first respondent's age is shown as 28. The particulars cannot be correct since Samivel retired at the age of 58 in 1977. Ex-A19 is the electoral roll of the year 1980 and is also with reference to item No.1 and it gives Samivel's age as 56, Parvathi's age as 36 which is less than 2 years her age in 1978 and Malathi's age as 31. Ex-A9 dated 08-04-1983 is a certified copy of the electoral roll and it is certified as the electoral roll for the period corrected upto 01-01-1980 and it shows Samivel's age as 43, Parvathi's age as 30 and Malathi's age as 27.

(j) Even assuming that the electoral rolls are admissible in evidence and are proof of the contents therein notwithstanding the discrepancies which are apparent, all that these exhibits may show is that the first respondent was residing with Samivel and Parvathi from 1978. Notwithstanding her denial that she does not describe herself as Malathi(which is the name found in Exs-A18 and A19) this Court is willing to accept that Malathi is an alias for Madathi, but these entries which are per se erroneous cannot be accepted as proof of the date of marriage or the period of cohabitation.

(k) Similarly, Ex-A17 the letter contains glaring errors with regard to the names of respondents 2 to 4 and cannot be evidence of date of marriage, period of cohabitation or even paternity. Though in her evidence, the first respondent denies that she had ever worked for Dr. Venkatasamy's mother, Ex-B7 dated 09-04-1966 when pointed out to her, it was admitted by her in which she had stated as follows:

This is written from Kottakal in 1966 and she also says that Amma is getting better. So her evidence that she did not go to help Dr. Venkatasamy's mother in Kerala has been proved false.

(l) But apart from her own statement that she got married in 1969 to Samivel and the not so reliable evidence of P.W.2, there is nothing to show that she either married Samivel or even that she lived with Samivel. P.W.2 is a neighbour. He claims to have been born in 1951. But in his cross-examination he says, "vd; taJ 26 vd;why; 35 MfpwJ/" According to him, he was studying in 8th class when he attended the wedding of Samivel and P.W.1 and everybody was commenting

about the fact that Samivel was marrying for the third time. It is also his evidence that Samivel was about 45 years old then. Factually, he was 50 years in 1969, since he retired in 1977 at the age of 58. It is also his admission that he has not attended the wedding of any other members of Samivel's family. He claims to have helped the plaintiff to get admission in school for his children, Suseela Devi and Jagadeesan @ Sukumaran.

(m) Ex-A13 is a letter written by Madurai Coats Limited to P.W.1's counsel in response to her enquiry regarding the details of the Fixed Deposits created by Samivel and while referring to Parvathi, the second defendant the Industrial Relations Manager of Madurai Coats Limited describes as his first wife. The letter merely says while referring to the other Fixed Deposit, which is item No.7, as "the nominee for which is your client Smt. Madathi", and not as Samuel's wife. If she had been described in Ex-A13 as Samuel's wife it may be proof, that there was a marriage(though void) between Samivel and the first respondent. A xerox copy of the challan for Fixed Deposit, item No.7 is produced, there is a squiggle near the name of the first respondent which may be the word "wife". But since the document is a xerox copy, which is not certified by the authorities who had issued it, it is not possible to rely on the same.

(n) The denial of D.W.2 of any marriage between her husband and the first plaintiff is quite natural, because if the relationship between Samivel and the first respondent is true she must have been aggrieved by her husband's conduct. But the plaintiff who comes to Court stating that she was married must have some proof of the same. She admits in her evidence that she knew that the marriage was contrary to law because Samivel was married already and the spouse was living. Her case is that Samivel married her because he wanted to keep all the income that she earned for himself. Even this is not believable because she got a job only in 1970 and that too by Samivel's efforts. Her evidence is that initially her salary was only Rs.300/-. Therefore, if her case is that he married her to keep her earnings, then the marriage must be in 1970 or after and not in 1969. So there is no acceptable evidence either regarding marriage or cohabitation.

12. Paternity:

Now, let us look at the evidence regarding paternity.

(a) The plaint shows the name of the second plaintiff allegedly the daughter of Samivel as S. Devi. P.W.2 refers to Suseela Devi. Ex-A7, the letter written by D.W.1., the first daughter of Samivel also refers to Suseela Devi, (P.W.2 refers to the first respondent's daughter as Suseela Devi) whereas Ex-A20 the unattested xerox copy alleged to be the record sheet of the second plaintiff gives the name as S. Devi, father's name Samivel and there is no address. This is the only document filed to prove the paternity of second respondent.

(b) As regards the third respondent the position is even worse. A horoscope unsigned, which refers to @_ khd; rhkpntY mth;fspd; g[z; zpa Fkhud; \$fjPrd; mth;fspd; g[dpj\$hjfk;/@ is marked as evidence. It is not possible to conclude the

paternity merely on the basis of this horoscope.

(c) Next, Ex-A21 is produced as the birth certificate for the fourth respondent. The date of birth is 26-12-1977, which correlates with Ex-A14. The place of birth is shown as one Rajabhai Maternity House. The name of the father and mother is shown as Samivel and Madathi Ammal. The permanent address of father/mother column is blank. There is nothing to show who was the informant. From this alone it is not possible to come to the conclusion that the third plaintiff was born to the first respondent through Samivel.

(d) In *Sarangapani and others Vs. Varadhan and others*, , it was held that while dealing with legitimacy of a child, presumption about marriage unless rebutted would lean in favour of the existence of marriage. In that case, there were documentary evidence like birth certificates and marriage invitation in which one Mr. X was described as plaintiff's father. The invitation for funeral ceremony of plaintiff's mother was in the name of Mr.X, the tax receipts also in the name of Mr.X and therefore, this was held to be sufficient to draw the presumption of marriage between the plaintiff's mother and Mr.X. The non-examination of any independent witness, in view of the documentary evidence, was held to be not fatal to the presumption to marriage. There the father Venugopal Pillai had himself issued invitations describing the children as his children and also has issued invitation for the funeral ceremony of the plaintiff's mother describing her as his wife. These declarations were held to be sufficient to arrive at the conclusion of the manner in which he had considered them.

(e) In *Rajagopal Pillai Vs. Pakkiam Ammal* 1968 II MLJ 411, the Division Bench of this Court held,

"The marriage state being the chief foundation on which the superstructure of society rests, presumption of the marriage arising from cohabitation of spouses is a very strong presumption. Where a man and a woman had lived together as man and wife, the law will presume, until the contrary is proved, that they were living together by virtue of a legal marriage and not in concubinage. The presumption of law is the strongest of legal presumption and is not lightly to be repelled by a 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 defacto and the more distant, the date of the marriage, the more readily is the presumption drawn, based up cohabitation and repute. The presumption still exists, even when there is no positive evidence of any marriage having taken place. "

(f) *Mohan Vs. Santha Bai Ammal* 1989 II LW 197 deals with an almost identical case. There one D and her children claimed a share in the estate of one S. The defendants were the wife of S and her children. In this case there was atleast a letter addressed by the person claiming to be the wife referring to herself as "mgpkhd kidtp" and to the children. There was atleast a marriage receipt issued by the Temple which said "fy;ahz tut[" , and inspite of that the Division Bench

held that the documents are of no use to the plaintiff to prove the factum of marriage. As regards the birth register, even the birth register extracts were not held to be sufficient.

(g) In this case, there is reference to the first respondent's brother attending the marriage. But he is not examined as a witness. There is very little evidence to either hold that there was a valid marriage or that there was long cohabitation or even to hold that Samivel was indeed the father of the plaintiffs 2 to 4. This judgment applies on all fours to this case. So there is no satisfactory evidence of paternity.

13. Cases, where a second marriage is alleged and the children born out of this union claim shares are numerous. One is conscious that law leans towards validity of a marriage, and in favour of legitimacy of children, when there is some evidence. It is not possible to presume marriage or even cohabitation without any evidence. While on the one hand there is the poignant possibility of children born out of a union not recognised by law, being denied a status and property rights, the legal wife and children cannot be made to suffer by "pretenders" to the estate. The rival rights have to be balanced. It cannot be denied that notwithstanding laws regarding monogamy, parties do enter into subsequent relationships. Some of these relationships are called "marriages", some are not. In some cases, legally acceptable evidence may be available but in many cases there may not be any evidence. While Section 16 of the Hindu Marriage Act grants certain rights to children born of a void marriage the wife of a "void marriage" does not get anything. Is not the "cohabitee" entitled to anything ?

14. In 2000 (2) L.W. 782 it was observed:

"After the advent of Tamil Nadu Hindu (Bigamy Prevention and Divorce) Act, 1949 and Hindu Marriage Act, 1956, the second marriage during the subsistence of the first marriage is totally void, illegal and opposed to public policy. No amount of pleading or proof of custom or consent by wife can validate such a marriage. Therefore, the alleged marriage with seventh defendant could never acquire legal status. To hold otherwise, would be putting premium on persons who violate the law to the detriment of the legally wedded life and the legitimate children. Every individual, in an orderly society, has to go by the basic rules and there could be no question of any sympathy towards a person who willingly hurts others knowing fully well that the marriage during the subsistence of another marriage, would be illegal. The position of the children born out of such relationship is no doubt tragic and to be sympathised with, and the law has taken care of them by enacting Section 16 of the Hindu Marriage Act, 1955, which, not only removes the stigma of illegitimacy, but also entitles them to equal share in the individual and self-acquired property of their father. "

There is no gainsaying this fact. But no deprivation is suffered by the man who is equally instrumental in flouting the law. It appears that he gets the benefit on all scores. It must be a rare case where a "second husband" makes a claim to the

Hindu female's estate. But one has to apply the provisions of law as they stand since the questions are subject to the rule of law.

15. Registration of marriages and scrupulous recording of entries in birth register including the name of the informant may be a solution. But it is not a panacea for all the evils that arise in cases like this.

16. In *M.(D.) v. M.(S.) AND G.(M. (D.A.) intervening*) 1969 II All E R 243 where allegation of adultery was made in the paternity of the child was in issue Lord Denning, M.R. held that Courts should help in the ascertainment of truth by ordering a blood test, if it is of any possible benefit to the infant and further held as follows:

"The only known man is the husband. There is a 70 per cent chance that it may show that the husband was not the father. But, if that is shown, what good is it to the boy? It would only show that he is illegitimate and that the wife was telling lies when she said that the husband was the father. That does the boy no good."

17. In *Re O* 2002 All E R 29, which dealt with the jurisdiction of Court to compel mother's to consent to blood test of the minors, it was held that the Court had no jurisdiction to do so and when cases, where blood tests were ordered in order to give medical treatment, were relied on, it was held that while blood test may be taken for the purpose of treatment it will not include steps taken to avoid the potential psychological damage of children growing up without certain knowledge of their paternity. Therefore, it is clear that Courts have protected even the psychological interests of a child to that extent.

18. In this case the Court below has concluded that the respondents 2 to 4 are the children of Samivel and the first respondent. The appellant has attacked those documentary evidence as insufficient. When the objections raised by the appellant are bound to be accepted, this Court is acutely conscious of what the consequences will be. Therefore, though there are certain parameters in the Code to call for a finding from the Lower Court by recording new evidence, in this case the interests of children are paramount and must be protected and the power of this Court or rather duty of the Court as the instrument of rendering justice especially in the case of such children far outweighs any procedural limitation.

19. In the evidence of P.W.1 she has stated that she has some school documents to show that Samivel was the father of the three children. It is already found that item No.1 is not available for partition since it belongs to the first appellant. The possession of item No.2 has been resumed by the temple and therefore, that is also not available for partition. Item No.3 has been sold and the sale consideration has been received by the appellants. According to the appellants item No.4 is in the possession of the third party which is denied by the respondents. Item No.5 is available for partition.

20. As regards item Nos.6 and 7, it is clear that Samivel had deposited his

terminal benefits and created two fixed deposits, one in the name of the first appellant in which reference is made to her as Samivel's wife. But with regard to the fixed deposit which is suit item No.7, where the nominee is the first respondent the original certificate has not been produced. Perhaps if it is produced it may show whether Samivel had treated the first respondent as his wife.

21. It has been repeatedly held by Courts dealt with questions of validity of marriage and paternity of children that law leans in favour of validity of marriages and in favour of legitimacy and not bastardy.

22. In these circumstances, the judgment of the Court below is set aside. Item No.1 is held to be the property of the first appellant.

The Lower Court is directed to give a finding on the following questions:

(1)Whether there was a marriage on 06-09-1969?

(2)Whether there is evidence regarding cohabitation between Samivel and the first respondent ? and

(3)Whether the respondents 2 to 4 were born to Samivel and the first respondent?

The Lower Court is directed to give its finding on these three issues after giving an opportunity to the parties to adduce oral and documentary evidence and return the evidence together with its findings to this Court on or before July 2, 2002.

On receipt of the findings this Court will decide the entitlement of the respondents to a share in the other properties.