

**(1969) 11 MAD CK 0045**  
**In the Madras High Court**

Raghuvir Kumar by next friend and mother Smt. D.P. Kamala  
Kumari and Another

APPELLANT

Vs

Smt. Shanmughavadivu and Others

RESPONDENT

---

**Date of Decision :** 14-11-1969

**Acts Referred:**

Evidence Act, 1872 — Section 21  
Insurance Act, 1938 — Section 39

**Citation :** (1970) 2 MLJ 193

**Hon'ble Judges :** G. Ramanujan, J;G. Ramanujam, J

**Bench :** Division Bench

---

**Judgement**

G. Ramanujan, J.—The plaintiffs in O.S. No. 69 of 1960 on the file of the Sub-Court, Coimbatore, are the appellants in this appeal. They filed the suit for partition and separate possession of their alleged 3|10th share of A and B schedule items and for past mesne profits at the rate of Rs. 500 and future mesne profits at the rate of Rs. 2,400 per annum from the date of suit till delivery of possession, or in the alternative, for possession of the properties equal in extent and value to that of the properties set out in the will dated 2nd May, 1949 executed by one Palaniswamy Nadar in favour of the first plaintiff. The first and second plaintiffs claimed respectively to be the son and fourth wife of the said Palaniswamy Nadar who died on 5th January, 1960 and the suit came to be filed on that basis. The first defendant is the third wife of Palaniswamy Nadar and defendants 2, 3 and 4 are his sons through the first defendant. The fifth defendant is the father of the first defendant and sister's husband of Palaniswamy Nadar. Defendants 6 and 7 are the grandsons of Valliammal, Pahniswamy's maternal aunt and also the sons of his brother, Mounaguruswami. The 8th defendant was impleaded as he was claiming certain rights as usufructuary mortgagee from Palaniswamy Nadar over one item. Palaniswamy got divided from his brothers and sisters by partition deeds dated 3rd August, 1955 and 6th March, 1959 and he died possessed of the properties set out in Schedules A and B to the plaint. Parts I and II of Schedule A to the plaint are the

lands and houses respectively left by the deceased Palaniswamy. Part I and Part II of Schedule B are outstandings and movables respectively left by him.

2. The plaintiffs claim for a share was denied by the contesting defendants 1 to 4 and they contended that the second plaintiff has not been married to the said Palaniswamy and that she was only his concubine. They also alleged that so far as the particular part of the country where they reside is concerned in the Nadar community to which they belong, there was an immemorial custom prohibiting a second marriage while the first subsisted, that therefore the alleged second marriage of Palaniswamy with the second plaintiff would be quite improbable and that in any event it would be invalid in view of the said custom even if the marriage had in fact taken place. They also denied the validity of the will said to have been executed by Palaniswamy in favour of the first plaintiff on 2nd May, 1949.

3. The fifth defendant practically adopted the defence set out by defendants 11 to 4. Defendants 6 and 7 did not contest the suit but remained *ex pane*.

4. The 8th defendant claimed a usufructuary right over item E of A schedule. He contended that Palaniswamy received an advance of Rs. 2,000 from him and agreed on 10th October, 1959, to execute a usufructuary mortgage of the said item for Rs. 5,000 after receiving the balance, that he died without executing the mortgage and that he was constrained to file a suit O.S. No. 72 of 1960 on the file of the District Munsif of Dharmapuram for specific performance. He also stated that he was not a necessary party to the present suit.

5. The trial Court took up for consideration *inter alia* the following substantial issues:

(1) Whether the second plaintiff is the legally wedded wife of late Palaniswamy Nadar and whether the first plaintiff is the legitimate son of Palaniswamy Nadar ?

(2) Whether the special custom preventing a valid second marriage pleaded by the defendants 1 to 4 is true and valid ?

(3) Whether the will dated 2nd May, 1949, said to have been executed by Palaniswamy Nadar was true and valid and if so, whether the first plaintiff is entitled to substituted properties in lieu of the properties covered by the will as claimed by the plaintiffs, and

(4) What are the properties available for partition in the event of the plaintiffs' claim being upheld ?

6. The trial Court considered the main issue as to the alleged marriage of the second plaintiff with Palaniswamy and held that the second plaintiff has not established that she is the legally wedded wife of Palaniswamy and that the first plaintiff is his legitimate son. In view of this finding on the main issue the trial Court held that the plaintiffs are not entitled to any share in the suit properties but that the first plaintiff is only entitled to maintenance under the Hindu)

Succession Act of 1956 for which he must take appropriate separate proceedings.

7. As regards the special custom prevalent in a particular locality pleaded by the defendants 1 to 4 that in the community of Nadars, namely that one cannot marry a second wife during the life-time of the first wife, the trial Court held that defendants 1 to 4 have not established the alleged custom.

8. As regards the validity of the will dated 2nd May, 1949, put forward by the plaintiffs, the trial Court took the view that the said will is true and valid, that the same is not vitiated by undue influence by the second plaintiff, but that the will has become inoperative and unenforceable for the reason that the properties covered thereby had been allotted to other members of the family at the time of the partition which took place even during the life-time of Palaniswamy. Therefore the first plaintiff was held not entitled to substituted properties as claimed by him.

9. As regards the properties which will be available for division if the plaintiffs were to succeed in establishing their right to a share in the suit properties, the trial Court found that items 1 to 5 of part 2 of B schedule were not available for partition as their existence and their loss have not been proved by the plaintiffs. As regards other items of part 2 of B schedule, the evidence tendered by the plaintiffs was found to be quite meagre and insufficient to support their case. The trial Court also rejected the claim of defendants 1 to 4 for inclusion in Schedule A of a house at Coimbatore purchased under Exhibit A-30 in favour of the second plaintiff's mother and later on settled by her in favour of the first plaintiff under Exhibit A-31, for purposes of division. The lower Court also negatived the claim of defendants 1 to 4 for a share in an insurance policy bearing No. 70406 for Rs. 10,000 in Prithvi Insurance Company in the name of Palaniswamy showing the second plaintiff as his nominee and in certain jewels given to her by Palaniswamy.

10. So far as the 8th defendant was concerned, the trial Court held that he was a necessary party to the suit as he claimed certain rights in respect of Item E of B Schedule.

11. The plaintiffs have come forward with this appeal questioning the correctness of the decision rendered by the trial Court.

12. For a proper appreciation of the rival contentions of the parties, it is necessary to set out certain facts which are not in controversy. Deceased Palaniswamy Nadar was the grandson of one Shanmugavelu Nadar through his daughter, Thathammal alias Nagarathnammal, belonging to one of the rich families in Udumalpet taluk. Shanmugavelu Nadar had two daughters Thathammal and Valliammal. He bequeathed some of his properties under a will dated 15th April, 1922, in favour of his daughter, Thathammal. Most of the properties owned by Palaniswamy Nadar were got by him through his mother, Thathammal under the original of two deeds of partition Exhibit A-28 dated 3rd August, 1955 and Exhibit A-29 dated 6th March, 1959, Palaniswamy married a first wife in or about 1939, but she died within six months of the marriage.

Subsequently he married a second wife who also died issueless shortly after the marriage. Then he married the first defendant, his sister's daughter in 1942 as his third wife. Defendants 2 to 4 are the children of Palaniswamy and the first defendant. Palaniswamy's family originally resided at Udumalpet and in or about 1947 his mother Thathammal purchased a house known as "Pasumadam" at Palani and the family shifted to Palani which became the permanent residence of Palaniswamy from the year 1947 onwards. Palaniswamy got divided from his brothers and sisters in 1955. He was suffering from jaundice for about 6 months prior to his death and he underwent treatment in the Bharathi Nursing Home and Erskine Hospital, Madurai, and as his condition was hopeless, he was taken to Palani on 5th January, 1960, where he expired on the same day. The second plaintiff is the daughter of one Damodara Iyengar through his wife Karunaiammal belonging to Chetty community. She was living with her father Damodara Iyengar at Udumalpet and Palaniswamy used to visit their house and during such visits Palaniswamy and second plaintiff, fell in love with each other. Palaniswamy purchased a house at Coimbatore in the name of the second plaintiff's mother and the second plaintiff has been living in that house. She was being educated for some time by Palaniswamy and the first plaintiff was born to Palaniswamy and the second plaintiff. Palaniswamy also maintained the plaintiffs at Coimbatore and met all their expenses. Palaniswamy also executed a will dated 2nd May, 1949, bequeathing a few items of his property in favour of the first plaintiff.

13. According to the plaintiffs, there was a marriage between the second plaintiff and Palaniswamy in 1943 and they lived as husband and wife thereafter till Palaniswamy's death in 1960, at Coimbatore. They claim that Palaniswamy married the second plaintiff in Avani 1943 as has fourth wife, that the first plaintiff is a legitimate son born of that lawful wedlock and that the first plaintiff as one of the legitimate sons of Palaniswamy and the second plaintiff as one of his widows are respectively entitled to 2/10th share and 1/10th share under the provisions of the Hindu Succession Act. The defendants, on the other hand would say that the relationship between Palaniswamy and the second plaintiff was not one of husband and wife but was one of paramour and concubine. Therefore the contest between the parties mainly centres round the nature of the relationship between the second plaintiff and Palaniswamy and as such the main question that arises for consideration is whether the plaintiffs had established their case of a valid marriage between the second plaintiff and the deceased Palaniswamy.

14. Before dealing with the evidence relating to the factum of marriage pleaded by the plaintiffs, we would like to consider the plea put forward by the defendants based on a special custom among the Nadars in Udumalpet taluk. They allege that in the Nadar community in this locality, there is an immemorial custom that one does not marry a second wife during the life-time of his first wife, that Palaniswamy's family is also bound by that custom and that this improbabilises the marriage between the second plaintiff and Palaniswamy. The trial Court dealt with this plea of the defendants in paragraph 32 of its judgment

under issue 3. It considered the evidence of D.Ws. 2 to 5 who gave three or four instances where persons who had no child through the first wife did not marry a second time during the life time of the first wife because of this special custom now admitted that this custom is only in three villages, namely, Dharapuram, Sedapalayam and Udumalpet, that within the last 20 or 30 years Nadars in the above villages have marriage connections with other parts of South India, namely, Sivakasi, Madurai and other places, and that they are not aware that the custom spoken to by them is observed in those places also. The Court below also considered the evidence adduced on the plaintiff's side which was to the effect that there were other instances of persons belonging to the same community in the villages aforesaid having taken a second wife even during the life time of the first wife. The trial Court found that there is nothing on record to establish; the custom, that the evidence of D.Ws. 2 to 5 is quite interested, that in any event the evidence adduced by the defence is not sufficient to establish the custom pleaded by the defendants and that such a custom, even if established cannot have the force of law. This finding of the trial Court that there is no custom among the Nadars in Udumalpet taluk preventing a second marriage while the first marriage subsisted has not been seriously challenged before us by the respondents in this appeal. Having regard to the said finding which we accept as correct in the light of the evidence discussed above, we have to hold that there was no bar for the deceased Palaniswamy to take a second wife in the year 1943 when the marriage between Palaniswamy and the second plaintiff is said to have taken place.

15. As regards the factum of marriage, we have to consider the evidence of P.W. 1, P.W. 2 and P.W. 5. P.W. 1 is a retired head weaving maistry, Central Jail, Coimbatore and he is the father of P.W. 6. P.W. 2 is the second plaintiff herself and P.W. 5 is a cousin of Palaniswamy. It is the evidence of P.W. 2 that while she was aged 14, herself and Palaniswamy mutually fell in love with each other and Palaniswamy got the consent of her father for the marriage, and that the marriage was celebrated at Patteeswararswami temple, Perur on the first Friday of Avani 1943 in the presence of her father, Damodara Iyengar, P.W. 1 and P.W. 5. She speaks to the fact that after pooja the mangaliyam was tied round her neck by Palaniswamy and that they also exchanged rings and garlands. It is also her evidence that after the wedding they went back to Coimbatore for dropping P.W. 1 in his house on their way to Udumalpet. It is the evidence of P.W. 2 that since Palaniswamy had the first defendant as third wife and a daughter through her, he wanted to avoid publicity and to marry her in private and that is why no printed invitations were sent for the marriage. P. WS. 1 and 5 corroborate P.W. 2 in relation to the performance of marriage at Perur temple. P.W. 1 would state that he was invited to attend the marriage by Damodara Iyengar who was known to him for some time. P.W. 5 would state that his mother and Palaniswamy's mother are cousins, that he was living with Palaniswamy's family from 1940, that Palaniswamy was taking him wherever he went and that he attended the marriage between Palaniswamy and P.W. 2 at Perur as spoken to by P.W. 2.

16. Besides the oral evidence of P.Ws. 1, 2 and 5, the learned Counsel for the appellants (Plaintiffs) also relies upon a number of documents to establish the factum of marriage between Palaniswamy and P.W. 2. Exhibit A-1 is an agreement dated 19th August, 1946 between Palaniswamy and the second plaintiff which recited:

Whereas we have been living together in close intimacy as husband and wife for the past about three years, and whereas we desire to continue in the same relationship as husband and wife and to record the same in writing now, therefore, this agreement witnesseth that we hereby agree to live always as husband and wife, faithful, true and loving each other, that we shall not give each other up and that children born to us, shall be our legitimate children entitled to succeed to our estate as per laws of the land.

It is the evidence of P.W. 2 that she and Palaniswamy went to Madras in August, 1946, when the first plaintiff was conceived, that she asked Palaniswamy to execute a document recognising the marriage privately and secretly conducted earlier and the document Exhibit A-1 came into existence. Exhibit A-2 is an extract from the birth register and that shows that a child was born to Palaniswamy and the second plaintiff on 19th March, 1947 in door No. 82, Angalamman Koil Street, Coimbatore, and that the person who gave the report is Palaniswamy himself. This also shows that P.W. 6 Dr. Sengaliappan attended the delivery. Exhibit A-4, dated 2nd May, 1949, a will said to have been executed by Palaniswamy in favour of the first plaintiff was also relied on for purpose of proof of marriage. In the said will, the second plaintiff is referred to as the junior wife of Palaniswamy and the first plaintiff as his son. The second plaintiff has been appointed as guardian of the minor son, the first plaintiff. Under this will Palaniswamy purports to bequeath 6 acres and 64 cents of nanja land, bearing Survey No. 209 in Kannadiputhur Village, Udumalpet taluk to the first plaintiff and P.W. 1 is one of the attestors to this document. P.W. 1 and Damodara Iyengar are shown as identifying witnesses before the Sub-Registrar. Exhibit A-6 and A-7 are extracts from the school registers wherein Palaniswamy has signed as parent of the first plaintiff. Exhibits A-9 and A-10 are voters' list for Ward 29 of Coimbatore Town for the years 1955 and 1959 respectively wherein Palaniswamy is shown as the husband of the second plaintiff. Exhibits A-57, A-58 and A-59 are the proposal, personal statement and policy in respect of life insurance policy No. 70406 for Rs. 10,000 taken by Palaniswamy wherein the second plaintiff is shown as the fourth wife of Palaniswamy while nominating her u/s 39 of the Insurance Act. In his personal statement, Exhibit A-58 he has declared that he had two wives living and their ages are shown as 30 and 25. According to the plaintiffs in these documents Palaniswamy has admitted and acknowledged the second plaintiff as his wife and the first plaintiff as his son, and that this constitutes a conclusive piece of evidence to prove that there was a valid marriage between Palaniswamy and the second plaintiff.

17. The learned Counsel for the appellants (plaintiffs) referred to Section 21 of

the Evidence Act and urged that the admissions made by Palaniswamy that the second plaintiff was his wife and the first plaintiff was his son are relevant and may be used against Palaniswamy or his representatives in interest. He also relied on a decision of a Division Bench of this Court in Depuru Veeraraghava Reddi Vs. Depuru Kamalamma and Another, for the proposition that what a party himself admits to be true may reasonably be presumed to be so and that until that presumption is rebutted", the fact admitted must be taken to be true. That was a case where the plaintiff claimed to be the adopted son of one Rami Reddi and the Court held that though normally the burden of proving his adoption would be on the plaintiff, the admissions of the widow of Rami Reddi that she had adopted him shifted the onus on her on the principle of *Slatterle v. Pooley* 151 E.R. 579 "that what a party himself admits to be true may reasonably be presumed to be so". But on the facts of that case the Court took the view that the widow had satisfactorily explained the admissions and rebutted the presumption arising from the statements contained in documents to which the plaintiff was not a party. According to the learned Judges the admission made in documents to which the plaintiff was not a party can be explained by the party making the admission as having arisen out of a mistake, etc The learned Counsel for the appellants (plaintiffs) also relied on the recent decision of the Division Bench of this; Court in *Rajagopal Pillai and Others Vs. Pakkiam Ammal and Another*, for showing that on similar facts this Court upheld the marriage put forward by the plaintiffs therein. It was pointed out that in *Subarna Bissoiani Vs. Arjuno Bissoi*, a statement by a deceased executant that the defendant was his legally wedded wife was held admissible to prove the marriage., The following observations of Sir James Mansfield in the *Berkeley Peerage* case (1811) 4 Camp. 410 : 171 E.R. 128 was cited as being pertinent in this connection.

If the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.

18. Then reliance was placed on a series of letters, Exhibits) A-12 to A-21, A-37 and A-38 written by the deceased Palaniswamy to the second plaintiff as showing that their relationship was one of husband and wife and that they were treated! and recognised as such by the members of the family. From these letters it is seen that the second plaintiff had been invited and taken to the family house at the time of all the religious festivals such as guntpooja etc., along with her child the first plaintiff. The photos Exhibits A-44 to A-49, A-53 and A-55 show that the second plaintiff and the first plaintiff have been taking part in almost all the important functions in the family such as marriage, gurupooja etc., and that they have been mixing with the other members of the family without any distinction. In some of the photos the second plaintiff is seen along with the other ladies in the family including Palaniswamy's mother and the first defendant, which may not be the case if the second plaintiff was a concubine.

19. There are a further series of letters written by the relations of Palaniswamy to the second plaintiff, which are relied on to show that the second plaintiff has

been treated by the relations of Palaniswamy with esteem and respect which will not be the case if she was only a concubine of Palaniswamy. Exhibit A-41, dated 6th October, 1955 written by Rajalakshmi, daughter of Palaniswamy's brother, Mounaguruswami and sister of defendants 6 and 7 to the second plaintiff refers to her son as the grandson of the second plaintiff and the first plaintiff and her; brother. This letter reflects a close association, affinity and intimacy between her and the second plaintiff. Exhibit A-42, dated 19th November, 1955 is a letter written from Blackburn (U.K.) by N. Padmanabhan, the 7th defendant, son of Mounaguruswami and brother of Rajalakshmi addressed to both the first and second plaintiffs and also Palaniswamy. In that letter Padmanabhan writes about his welfare and acknowledges the receipt of a group photograph from them and offers to send his photograph. He states therein that whenever he feels homesick, he looks at the group photo and gets consolation. Exhibit A-43 is another letter written by Padmanabhan when he was at Udumalpet and when he was studying at Alagappa Chlettiar College, Karaikudi to the first plaintiff as his loving brother. Exhibits A-39, dated 23rd December, 1947 and A-40, dated 3rd October, 1955 are letters written by Soundararajan, brother of Palaniswamy to the second plaintiff addressing her as meaning brother's wife. In these letters Soundararajan informs the second plaintiff about the birth of children and about the condition of his wife.

20. The first defendant had also written letters to the second plaintiff's address and they are Exhibits A-23, dated 5th April, 1948, A-24 dated 4th August, 1948 A-25 dated 27th July, 1953 and A-26 dated 24th September, 1966. In Exhibit A-23, the first defendant complains to the second plaintiff that Palaniswamy is in bad company and states that for the welfare of everybody she desires to come and live in Coimbatore, very near the second plaintiff and asks the 2nd plaintiff to find out a house for her residence as early as possible. In this letter she refers to Palaniswamy as "our" Ihusband and states that he is staying with her for 10 days at Udumalpet and then leaves for Coimbatore on the 10th day of to live with the second plaintiff for the next 10 days, that both of them are finding it difficult and that if they reside in the same place, it will be better for both of them. She therefore offers to come to Coimbatore and take up residence there or in the alternative invites the second plaintiff to come and reside at Udumalpet. In Exhibit A-24, the first defendant writes to Palaniswamy during his stay with the second plaintiff at Coimbatore explaining to him as to why she disposed of the stock of paddy left in the house for discharge of certain pressing debts. She also refers therein to the fact that Palaniswamy is having two wives and many concubines. It is clear that the two wives referred to therein were the first defendant and the second plaintiff. The first defendant seems to think that Palaniswamy is angry with her and because of that he is continuously residing with the second plaintiff at Coimbatore and she requests her husband to forgive her. In Exhibit A-25 the first defendant enquires the second plaintiff about her son's health after a small cut he received recently and shows her anxiety to come and see the first plaintiff in person. In Exhibit A-26 the first defendant acknowledges

the receipt of sarees sent by the second plaintiff from Coimbatore and asks her to purchase and send some Mysore Silk sarees and some clothing for her son, the third defendant. From all these letters it is clear that the relationship between the first defendant and the second plaintiff was quite cordial, and that the first defendant treated the second plaintiff as her co-wife and sought her help to put things in order in the family of their husband. Exhibit A-18 is a letter written by Palaniswami to the second plaintiff and there is a reference to the visit of the first defendant to the second plaintiff. From the correspondence set out above it transpires that the first defendant was on visiting terms with the second plaintiff. In some of the letters written by Palaniswamy to the second plaintiff, there is reference to the visit of Palaniswamy's mother Thathammal also to the second plaintiff's residence at Coimbatore. All these letters show as to how the family members of Palaniswamy including his mother, Thathammal and the first defendant treated the second plaintiff. They had treated her as the second wife of Palaniswamy and the first plaintiff as the son of Palaniswamy. The letters are spread over from 1948 upto 1958 practically till the death of Palaniswamy in 1960. Relying on these letters and the evidence of P.Ws. 3, 4 and 6, the learned Counsel for the appellants (Plaintiffs) urges before us that the evidence adduced in this case on the side of the plaintiffs is quite sufficient to warrant a finding that there has been a tacit recognition of the married status of the second plaintiff with Palaniswamy not only by the family members but also by friends and neighbours.

21. Even the trial Court, after considering the evidence in this regard has expressed:

There can be no doubt that there is ample evidence to show that after the date of Exhibit A-1, the second plaintiff was recognised as the wife of Palaniswamy and the first plaintiff as his son....

It is in evidence that plaintiffs 1 and 2 were attending all the functions in the house of Palaniswamy and his relations. However it has taken the view that "the expression by conduct as the existence of relationship of husband and wife and father and son, and the acknowledgment or recognition of the same by Palaniswamy", would not prove the marriage. The Court below however, did not advert to the legal consequences flowing from such repute, treatment and recognition by the members of the family of Palaniswamy and his relations.

22. The learned Counsel for the appellants then relies on the following authorities for the proposition that normally a presumption has to be drawn in favour of the marriage from long cohabitation and repute and such a presumption will have to be rebutted by cogent and strong evidence to the contrary. In *George v. Thyer* L.R. (1904) 1 Ch. 456 an Englishman and woman travelled to France with the intention of getting married and there purported to go through a form of marriage. On return they lived together in England as man and wife for thirty years and had" several children. There was also evidence of recognition of the children by the family. On these facts the Court held that, though the alleged

marriage was impossible according to French Law where the marriage is said to have taken place, the fact of long cohabitation was found sufficient to raise the presumption in favour of marriage, and that the invalidity of the marriage according to French Law will not be sufficient to rebut that presumption.

23. In *De Thoron v The Attorney-General* (1876) 1 H.L. 686, it was laid down that the presumption of marriage arising out of long cohabitation and repute is much stronger than the presumption in regard to other facts. There also a ceremony of marriage was gone through in Scotland and the parties lived together continuously for years as husband and wife believing themselves to be validly married and were regarded as such by all who knew them. Though the ceremony said to have taken place was invalid, the marriage was held to have been established by the force of habit and repute and the onus of rebutting such a marriage by habit and repute was held to be on the persons who deny the marriage.

24. In *Piers v. Piers* II H.L.C. 331, it was ruled by the House of Lords that 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, and that such a presumption must be rebutted by strong, distinct and satisfactory disproof. At page 362 of the reports the following observations of Lord Lyndhurst in the case of *Maoris v. Davies* 5 Clark and Fin. 163, are extracted:

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 evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.... 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.

25. In *re, Taylor (deceased) Taylor v. Taylor* (1961) 1 All E.R. 55, Lord Evershed, M.R., cited with approval the said observations of Lord Lyndhurst in *Morris v. Beves* 5 Clark&Fin. 163 and said that once a presumption is raised from long cohabitation and reputation there is a very heavy burden to rebut that presumption on persons who allege to the contrary. In this decision reference was also made to *Re: Taplin Watson v. Tate* (1937) 3 All E.R. 105, where Simonds, J., dealing with the question of repute, had expressed as follows:

They were there received into society, which was not a society of loose and uncertain morals, but with proper views as to marital relations, and were at all times regarded as man and wife. This presumption is not to be disturbed except by evidence of the most cogent kind.

In this case it is clear from the evidence that the second plaintiff was received in the family of Palaniswami practically as one of its members and his mother Thathammal and his wife, the first defendant, and other relations were treating the second plaintiff as another wife of Palaniswami in all these years upto to

death of Palaniswamy. It is significant to note that there is no piece of evidence that the second plaintiff was ever referred to by any one as a concubine of Palaniswamy until his death in 1960 but, on the other hand, there is considerable evidence, both oral and documentary, showing that she was treated and recognised as a member of the family and that Palaniswamy himself had acknowledged the second plaintiff as his wife.

26. In *re, Thompson Langham v. Thompson* 91 LTR 680, where from 1856 to 1866 a man and woman lived together as man and wife and had five children and where there was evidence that they had been treated as man and wife by friends and neighbours and their children had been recognised by the head of the father's family, the Court, in dealing with the question of legitimacy of the children born held that that the presumption in favour of a marriage having taken place had been established from the mere fact of cohabitation. The Court applied the principle laid down in *Lyle v. Ellood* 19 Eq. Cas. 98, which held that "where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a prima facie presumption that they really are, and have been, what they profess to be."

27. In 19 Halsbury's Laws of England, third Edition page 812, paragraph 1323 dealing with the presumption from cohabitation it is said:

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.

28. In paragraph 1324 it has been stated that 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. Reference is made in support of the principle aforesaid from the decision in *Re: Haynes, Eaynes v. Carter* (1906) 94 L.T. 431. The facts of that case were as follows:

There was cohabitation between the parties as man and woman with two children from 1878 to 1893. There was general reputation as husband and wife, but there was some evidence doubting the repute and no evidence of any marriage having been solemnised. The elder child was born in 1873 in maternal grandmother's house and registered by the mother in her maiden name. Younger child was born in 1879 and registered in father's name. On these facts it was held that a marriage must be presumed, but that only the younger child was legitimate.

29. In *Nizampatnam Nagachari Vs. Kondiparti Butchayya (died) and Another*, , Chandrasekhsira Ayyar, J., expressed:

The presumption to be drawn in favour of marriage from cohabitation will have to

vary from country to country or society to society. 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. But where it is established by evidence that a man and woman were not merely living together but professed themselves to be husband and wife and were treated as such by the society in which they moved and this conduct and recognition extended over sufficiently long period of time, a presumption can well be drawn in favour of marriage.

30. Then reference has to be made to a recent judgment of a Division Bench of this Court in *Rajagopal Pillai and Others Vs. Pakkiam Ammal and Another*, , which held that 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. After referring to the various decisions on the point, both English and Indian, dealing with the presumption of marriage, the learned Judges Ramamurti and Alagiriswamy, JJ., expressed:

The presumption of law is the strongest of legal presumptions 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 *de facto* and the more distant, the date of the marriage, the more readily is the presumption drawn, based upon cohabitation and repute. The weight of the presumption gets strengthened when it is proved that the party whose marriage is in question distinctly intended to marry and went through a form of marriage with that intention and also subsequently lived together as man and wife and were esteemed and reputed as such by those who knew them. The presumption still exists, even when there is no positive evidence of any marriage having taken place. 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.

31. As against these decisions which lend considerable support to the appellants' contention that there is a strong presumption in favour of the marriage and that the evidence adduced on the side of the defendants are quite insufficient to rebut the legal presumption arising from the established facts in this case, the learned: Counsel for the respondents referred to the following authorities in support of his contention that such a presumption cannot arise in the case of a second marriage.

32. In *Dalavayi Nagarajamma Vs. State Bank of India and Others*, , a view has been taken that where a person is already married, no presumption of second marriage arises by reason of long cohabitation though such presumption may be raised in the case of first marriage. Reliance was also placed on the unreported decision in S.A. No. 592 of 1921, where this Court had expressed a similar view. The learned Judge of the Andhra Pradesh High Court in the above decision held that there is no evidence as to the *factum* of marriage and the mere fact that the

alleged wife was described as a wife in some of the documents ranging from 1953 did not establish that she is the lawfully wedded wife of one Ramaswamy and refused to invoke the presumption of marriage on the facts of that case. In passing they said that the presumption cannot be invoked in case of second marriage. We are not in a position to express our agreement with the view expressed in the above decision that the presumption of marriage cannot be raised in case where the first marriage is subsisting. 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. Of course, if there is a statute such as the Madras Bigamy Prevention Act, 1949 or the Hindu Marriages Act, 1955, a second marriage cannot be presumed from long cohabitation and repute, as such a marriage cannot be recognised in law. In our opinion the mere fact that there was an earlier marriage subsisting in this case, it cannot be considered sufficient to rebut the presumption of a marriage arising out of long cohabitation and repute.

33. The learned Counsel for the respondents then submitted, basing himself on the decision of the Supreme Court in *Thakur Gokalchand Vs. Parvin Kumari*, , that in any event the presumption of marriage in this case is a rebuttable one and that there are enough circumstances which completely destroy the presumption. It was laid down in *Thakur Gokalchand Vs. Parvin Kumari*, , that:

It is well-settled that continuous cohabitation for a number of years may raise the presumption of marriage. In the present case, it seems clear that the plaintiff and Ram Piari lived and were treated as husband and wife for a number of years, and, in the absence of any material pointing to the contrary conclusion, a presumption might have been drawn that they were lawfully married. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the Court cannot ignore them.

Reliance was also placed on the decision in *Bachubhai alias Kiritkumar Gopaldas Vs. Bai Dhanlaxmi and Another*, . There the parties had lived and cohabited together for long period, and were recognised by relations and friends as husband and wife. It was held on the facts that though a presumption of marriage can be raised, such presumption was always rebuttable. In the case before them the learned Judges found that the cohabitation lasted for less than 2 years that the man was potter and the girl came from brahmin family, and that there was no evidence of repute or recognition as husband and wife. In these circumstances the learned Judge held that the presumption of marriage has been rebutted and that the probability was that the man lived with the woman as his mistress. Relying on this decision, the learned Counsel for the respondent submits that the facts in this case are similar to the facts in *Bachubhai alias*

Kiritkumar Gopaldas Vs. Bai Dhanlaxmi and Another, , and that the facts established here are sufficient to rebut the presumption of marriage arising out of cohabitation, and repute. We are not prepared to agree that the facts of the present case are similar to those in the Gujarat case. There the period of cohabitation was less than 2 years. In the case before us the period of cohabitation was for more than 15 years and there is the admission and acknowledgment by Palaniswamy in various documents that the second plaintiff was his wife and the first plain tiff was his son. The second plaintiff has also been recognised and admitted as such by the members of the family during the entire period. In the Gujarat case there was no evidence of repute at all and there was no question of acknowledgment or admission on the part of the man who had cohabited with the woman. The learned Counsel for the respondent urged before us that the facts in this case indicate that the relationship between Palahiswamy and the second plaintiff should be that of paramour and concubine and not husband and wife. He referred to the immemorial custom of prohibition of second marriage prevailing in Nadar Community and submitted that as such the second marriage was not probable. But the custom set up having been found against by us earlier it cannot be considered as a pointer against the truth of the marriage. The learned Counsel then relied on the fact that there has been a marriage of Palani-swami with the first defendant in 1942 and there was no necessity, reason or justification for Palaniswamy to marry a second wife. Here again we are not in a position to see any point in the submission made. It is not for us to speculate as to whether Palaniswamy has any reason to marry a second wife. It all depends upon the personal likes and dislikes and it is not improbable that he would have thought of the second marriage in 1943 when he had married that first defendant an year earlier. It was also urged that if really Palaniswamy wanted to marry a second wife, he being a rich man, would have informed his relations and conducted the marriage with pomp as he celebrated his marriage with the first defendant, and that there is no reason why he should keep the marriage with the second plaintiff as a secret one. In our view this circumstance also will not militate against the truth of the marriage if it is otherwise proved. It may be that Palaniswamy wanted to marry the second plaintiff without the knowledge or consent of his mother and the first wife for the fear that they may be against it. It is not for us to find out the motive why Palaniswamy wanted to keep the marriage with the second plaintiff a secret one, and we consider it is not improbable that when he cultivated intimacy with the second plaintiff he might have married her out of love and wanted to keep it as a secret one till some time, especially when he is marrying a girl outside his community and when the earlier marriage is subsisting. We find from the circumstances of this case that Palaniswamy had every reason to keep the marriage as a secret one.

34. The learned Counsel for the respondent referred to the following circumstances as throwing considerable doubt as to the truth of the marriage. He referred to the fact that there is no reference to the marriage said to have taken place in the temple at Perur in any of the letters that passed between

Palaniswamy and the second plaintiff. According to him there is no reason as to why no reference to the factum of marriage was made in these private and secret letters., Even if the marriage took place secretly it will normally find a place in these letters between Palaniswamy and the second plaintiff which are not expected to be read by others. The learned Counsel emphasised the fact that the second plaintiff who has been writing letters to Palaniswamy showing some anxiety about their relationship would normally mention the ceremony of marriage said to have taken place at Perur temple. He also urged that the evidence adduced in the case is not sufficient to prove the ceremony of marriage, that the evidence consists of the pooja and tying of mangalyam and exchange of rings and garlands at the temple. No one among the members of the family has spoken to about the second plaintiffs wearing a thali all these years ever since 1943. Even the mother of the second plaintiff has not been examined to prove that the second plaintiff was wearing thali. It was also urged that the absence of the mother of the second plaintiff at the time of the alleged marriage at Perur temple is tell-tale, and that the reason given by the second plaintiff for the absence of the mother at the time of the marriage was not convincing. The learned Counsel for the respondent referred to the letters Exhibits B-31 and B-33 to show how the second plaintiff was treated by the mother of Palaniswamy and other members of the family when she visited the family house at Palani and Udumalpet between the years 1955 and 1957, that these letters show that the second plaintiff's relationship with the members of the family was not such as to amount to recognition of the second plaintiff as the wife of Palaniswamy. The second plaintiff herself was sore with reference to her visits to the family house and her relationship with the other members of the family was not quite cordial. But we consider that this will not lead to the conclusion that the second plaintiff was only a concubine of Palaniswamy and that is why the members of the family did not treat her well. It is not improbable that even if the marriage had taken place between Palaniswamy and the second plaintiff still there might be some disagreement or estrangement making her visit to the family house unpleasant. On the contrary there is evidence in the case that the mother of Palaniswamy and the first defendant visited the second plaintiff in her residence at Coimbatore and the first defendant stayed in the second plaintiff's house in Coimbatore on more than one occasion.

35. The respondents' learned Counsel then submitted that the form of address contained in Exhibits B-22, B-26 and B-19 written by the second plaintiff to Palaniswamy as is quite unusual and inconsistent with the factum of marriage. He also referred to Exhibits B-11 and B-23 wherein the second plaintiff has addressed Palaniswamy as "Dear Swami" and in Exhibit B-8 as "Dear P. S.". It was also pointed out that till 1946 the second plaintiff was signing the letters as D. K. Kumari, D representing the name of her father Damodara Iyengar and after 1946 only she signs as D. P. K. Kumari, P representing Palaniswamy., From this it is argued that till 1946, the second plaintiff did not consider herself as the wife of Palaniswamy but only later on, after execution of Exhibit A-1 in 1946 she styled

herself as D. P. K. Kumari and this completely belies their case of marriage in 1943. Giving our due consideration to the above letters and the submissions based thereon made by the respondents' Counsel, we feel it is not safe to treat them as conclusive for finding out whether there was in fact a marriage between the second plaintiff and Palaniswamy. After all the second plaintiff was a student practically till 1946 and it may be that she did not want to show herself as a married girl especially When the alleged marriage was performed in a secret way, the intention of the parties being to keep the marriage as secret. After 1946 Exhibit A-1 came to be executed and registered by Palaniswamy publicly recognising the earlier alleged marriage and there was the birth of the first plaintiff in 1946 there made it unnecessary for the marriage to be kept as a secret one. The fact that in some of the letters the second plaintiff addressed Palaniswamy: as may not be taken note of seriously as she was only a girl of 14 at the time of writing these letters and was studying in the school. Since the marriage was performed secretly it may be that she thought it safe to address the husband in that manner so that others who may come across these letters may not have any suspicion about the marriage and their relationship as husband and! wife. For the reasons aforesaid we are not giving much importance as has been given by the trial Court, to the second plaintiff's form of addressing Palaniswamy in the above letters.

36. The respondents learned Counsel further submitted that when the marriage is said to have been conducted in secret, there is no question of any repute as the parties cannot be said to be living as husband and wife to the knowledge of others. He relied on the case in *Ma Wun Di v. Ma Kin* (1907) L.R. 351. A. 41 : 18 M.L.J. 3, in support of his submission that no repute can arise in the circumstances of this case where the parties wanted to keep the factum of marriage secret. It was observed by the Judicial Committee in that case that before applying the general presumption of marriage arising from cohabitation with habit and repute, there must be some body of neighbours before repute can arise, that the habit and repute must be of that particular status which in the country in question is lawful marriage and that the presumption cannot arise where there is no tangible evidence of recognition of a woman in her quality of wife by people external to the house in which: she lives. This case was also relied on by the learned Counsel for the respondent in support of his stand that mere acknowledgment of admission on the part of Palaniswamy that the second plaintiff was his wife was not sufficient to raise the presumption of lawful marriage. In that case there was a dispute between the widow and two persons who claimed to be the widow and son of one Moung: Gale as to succession, and the plaintiffs alleged a lawful marriage in 1887 between Mau Wun Di (the first plaintiff) and Maung Gale which was followed by cohabitation. The widow denied the alleged marriage and stated that Mau Wun Di was only one of the numerous concubines taken by Maung Gale during his stay in Siamese territory according to the practice of Maulmein foresters when visiting and residing in Siamese territory and that she was merely a "monkey wife" or temporary mistress of

Maung Gale and not his legal wife. The Judicial Committee, after referring to the circumstances under which Maung Gale came into contact with Mau Wun Di in the company of other woman and the difficulty in that part of the world where there were not many people at all to act the part of neighbours or public, held that there is no tangible evidence of recognition of the woman, in. her quality of wife, by people external to the house and independent of it. The Judicial Committee cited with approval the following passage from the judgment of the Chief Justice of the Chief Court of Lower Burma.

It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectable. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and I would add that the presumption is strengthened if, and as in the present case, the cohabitation is behind the back and without the knowledge of the first wife.

The decision in that case is mainly rested on the fact that the cohabitation between the parties was behind the back of the first wife and there was no evidence of repute having regard to the special facts of the case. This decision will not apply to the facts of the present case where the mother of Palaniswamy, the first defendant and other close relations were aware of the long cohabitation between the second plaintiff and Palaniswamy and almost all the members of the family were treating them as husband and wife. There was no distinction shown between the first plaintiff and the other children of the family, during festive occasions and the second plaintiff and her son were invited for almost all festivals and functions in the family. The explanation attempted by the first defendant that the second plaintiff was treated as a member of the family with a view to satisfy Palaniswamy cannot be accepted. The first defendant herself has sought solace from the second plaintiff at the time when her husband Palaniswamy neglected her and she has treated the second plaintiff as a co-wife as evident from some of her letters addressed to the second plaintiff. Further immediately after the death of Palaniswamy there was an inventory taken of moveables and cash found in the family house by the relations such as 6th defendant and others and the first defendant as well as the second plaintiff were each given a list of inventoried articles and cash of Rs. 1,000. All these go to show the treatment meted out to the 2nd plaintiff and her son, the first plaintiff was one consistent with their being the members of the family. We cannot agree with the learned Counsel for the respondent that the evidence adduced in this case by the plaintiff is not sufficient to establish habit and repute.

37. The learned Counsel for the respondent pressed for our acceptance the views expressed by the trial Court under issue 1 in paragraph 29 of its judgment, that if at all the second plaintiff may be stated to have been given the status of a secondary wife or "Avaruddha Stree" based on the decision in *Siva Kumari v.*

Udey Pratap Singh AIR 1947 All. 314, which sets out the characteristics of "Avaruddha Stree" as follows:

An "Avaruddha Stree" has not the same status as that of a wife, but that status is very akin to it. The law recognises a clear and well defined line between a harlot and an "Avaruddha stree". She may be a concubine but she may, by her fidelity to her paramour, win a position of dignity and respect in his family. Fidelity to him or to his memory is an essential "condition. She is a wife though not in the orthodox sense. As a wife she has a distinctive position, she is admitted in the bosom of the family, though she may not be living in the house occupied by the family. She may not be the mistress of the house and yet she commands the affection of her paramour and the respect due and ordinarily shown to a wife.

We are not in a position to accept the said view of the trial Court. The trial Court relies on the form of address by the second plaintiff in some of her letters to Palaniswamy as It also refers to the recitals in some of her, letters where she has expressed concern over their relationship and desires Palaniswami to do something to end her anxiety. The trial Court thinks that such recitals in the letters Exhibits B-26, B-11, B-13, B-23, B-25, B-17 and B-8 showing the anxiety of the second plaintiff, make it clear that the marriage pleaded between the second plaintiff and Palaniswamy cannot be true and that the recitals therein are inconsistent with the married status set up by the second plaintiff., It is said that if the marriage had really taken place and if they had been living as husband and wife, there is no necessity or reason for the concern expressed by the second plaintiff at her relationship with Palaniswamy. It was also said that if the marriage had really taken place, there was no necessity to bring about the document, Exhibit A-1 in 1946., As already expressed by us the marriage having taken place in private, it is possible that the second plaintiff; was anxious to make it public and to get a recognition as wife of Palaniswamy in the letters addressed to him., In some of the letters written prior to the date of A-1, disappointed at the silence of Palaniswamy with! reference to her request, she has written in an angry mood questioning his sincerity and consistency. We do not agree with the view of the trial Court that the terror of these letters are by themselves sufficient to indicate that they were not living as husband and wife.

38. In this case there are various clinching circumstances to justify a conclusion that the marriage said to have been performed at the Perur temple and the subsequent conduct of the parties living as husband and wife has been established. P.W. 1 a respectable person belonging to another community has deposed that he attended the marriage at Perur temple and that after the marriage the second plaintiff and Palaniswamy were living as husband and wife to his knowledge. P.W. 1's son, Dr. Songaliappan (P.W. 6) has also deposed to the fact that Palaniswamy and second plaintiff had been living as husband and wife from 1943 onwards and he was their doctor from 1945., P.W. 5, who is the cousin of Palaniswamy, has deposed that he accompanied the parties and

attended the marriage at Perur temple. We do not find any justifiable reason as to why we should not accept their evidence as correct. No acceptable motive has been suggested to discredit their evidence and probability also seems to be in favour of the parties going through a form Of marriage in 1943.: It is in evidence that the second plaintiff was a girl of 14 in 1943 and the relationship between Palaniswamy and. her became quite intimate. Having seen the trend of the letters written by the second plaintiff showing considerable anxiety and demanding a marriage status, it is probable that she insisted on some ceremony of marriage before she allowed Palaniswamy to have any cohabitation with her. From the mere fact that there is no reference to the ceremony of marriage in any of the letters, or the agreement Exhibit A-1 it cannot be said that they are conclusive against the factum of marriage. It may be that the second plaintiff was not satisfied with the ceremony of marriage secretly conducted in a temple and thought that may not give her sufficient status as wife of Palaniswamy as among the members of his family unless there is a regular marriage in the presence of the family members or a document evidencing the marriage is executed., The marriage agreement, Exhibit A-1 might have been executed by Palaniswamy at the instance of the 2nd plaintiff by way of caution.

39. The learned Counsel for the respondent further submitted that the evidence on record shows that the relationship between Palaniswamy and the second plaintiff started with illicit intimacy in such a case, no presumption can arise of a lawful marriage merely because of the long cohabitation"., We are of the view that the evidence adduced in the case by the defendants is not sufficient to establish the fact that the relationship started with illicit intimacy. It is found that the second plaintiff attained puberty in 1942 and when Palaniswamy and the second plaintiff became friendly shortly thereafter they went through a form of marriage in the temple at Perur and they thereafter began to live as husband and wife. There is no evidence on record that even before the alleged marriage at Perur temple there was any illicit intimacy between the second plaintiff and Palaniswamy. We are inclined to accept the evidence of the second plaintiff as P.W. 2 and the evidence of the other witnesses who speak to the marriage having taken place at Perur temple and hold that it is that marriage ceremony which has inaugurated the connection between the second plaintiff and Palaniswamy.

40. The learned Counsel for the respondents submitted that even the marriage ceremony spoken to by the said witnesses does not satisfy the requirements of a valid marriage as laid down in *Detvanai Achi v. Chidambaram Chettiar* (1955) 1 M.L.J. 120. In that case *Satyanarayana Rao and Rajagopalan, JJ.*, after referring to various texts of Hindu Law, expressed that if the parties are governed by the Hindu Law. as the parties in this case are, in order to bring about a valid marriage they must either observe the formalities and ceremonies requisite for a valid marriage under Hindu Law or, at any rate, such form and such ceremonies which according to the usage of the community, caste, sub-caste or family govern that marriages.; If they do not choose however to conform to any of the forms recognised on permitted by Hindu Law, it is open to; them to have

recourse to the statute, for. example Act III of 1872 and get the marriage registered According to the learned Judges the Hindu conception of a marriage is "Samskara", a purificatory ceremony prescribed by religion and a marriage in Hindu Law is not a mere contract and that it is the rite of marriage which creates the indissoluble religious tie between husband and wife. It was urged that the essentials of a marriage such as Homam and Sapthapathi have not proved to have been performed in this case.

41. In this case there is the evidence of D.W. 3 and D.W. 4 to the effect that tying of thali alone is an important ceremony in a marriage among the Nadars all other ceremonies are not so important., Then there is evidence of P.W. 1, P.W. 2 and P.W. 5 which is categoric about the tying of the thali in the temple and exchange of rings and garlands in the presence of the persona gathered there Even the trial Court expresses the view that in case it is found that the marriage between the second plaintiff and Palaniswamy at Perur, temple is true, the validity of the marriage cannot be questioned.

42. The learned Judges in *Deivanai Achi v. Chidambaram Chettiar* (1955) 1 M.L.J. 120 have, after referring to the decision in *Bai Diwali v. Moti Karson* I.L.R.(1898) Bom. 509 expressed the view that if certain ceremonies are performed and it is not known after a long lapse of time as to what exactly was the nature of the ceremonies, there may be room for presuming the validity of a marriage from the fact of continued cohabitation for a long time as husband and wife.

43. *Rajamannar, J., (as he then was) in R. Thirumalai Naicker by his duly constituted agent V.S. Govindaraja Naicker Vs. Ethirajammah and Others*, held that, where the ceremony of marriage "consisted in the case of a widow of tying what is called naduveettu thali which was found to be the; custom among the Naickers, the evidence adduced in the case was insufficient to establish the custom to constitute a valid form of marriage.; At the same time the learned! Judge was however inclined to hold that when the factum of celebration of some form of marriage is established, a valid -marriage may be presumed in view of long cohabitation. The observations of the learned Judge are as follows:

In this state of evidence I am forced to rest my conclusion not on a definite finding that it has been established before me that this form of marriage is valid, but rather on the general presumption which ought to be drawn in favour of a valid marriage when the fact of the celebration of some form of marriage is established and it has not been established before me by evidence on behalf of the Plaintiff that that form is invalid.

In this connection we may refer to the decision in *Collins v. Bishop* (1878) 48 L.J. Ch. D. 31 in which the marriage was held established by mere repute on the basis of legal presumption even though the positive evidence in support of the marriage was not satisfactory.

44. After going through the authorities cited at the Bar, we are inclined, on the facts of this case where the factum of the celebration of some form of marriage

is established, to raise the legal presumption of lawful marriage arising out of the long cohabitation and repute.,

45. The learned Counsel for the appellants urged an alternative contention, that even if the alleged marriage performed at Perur temple is not accepted as true or valid, the provisions of Madras Act (XXI of 1967) enacted for the purpose of validating marriages popularly known as "Suyamanyathai or Saenhiruththa" marriages. The learned Counsel invoked the provisions of Section 2 of that Act which inserted Section 7-A in the Central Act (XXVI of 1955).; Section 7-A (1) reads as follows;

Special provision regarding suyamanyathai and seerthiruththa marriages:

(1) This section shall apply to any marriages between any two Hindus, whether, called suyamanyathai marriage or seenhiruththa marriage or, by any other name, solemnized in the presence of relatives, friends or other persons:

(a) by each party to the marriage declaring in any language understood by the parties that each takes the other to be his wife or, as the case may be, her husband; or (b) by each party to the marriage garlanding the other or, putting a ring upon any finger of the other; or (c) by the tying of the thali.

The learned Counsel relies on this provision for two purposes namely, (1) to validate the marriage said to have been performed at Perur temple in the event of the Court holding that the ceremonies said to have been; performed are insufficient to constitute a valid marriage under the Hindu Law and (2) to construe the document Exhibit A-1 as constituting a valid marriage agreement in case it is held that no marriage was in fact performed at Perur temple. It was submitted that Section 7-A (1) enables the parties to solemnize a marriage by mere declaration that each takes the other to be his wife or, as the case may be, her husband or by each party to the marriage garlanding the other, or exchanging] rings or by tying a thali Section 7-A (2) (b) validates all marriages: to which Section 7-A (1) applied and solemnized at any time before the commencement of the Act shall be deemed to have been with effect from the date of such solemnization be good and valid in law. On a due consideration of the scope, and object of the above provisions, we are of the view that Sub-sections (b) and (c) of Section 7-A (1) can be applied to the facts of this case and the marriage said to have been performed at Perur, temple will be good and valid in law in view of the retrospective nature of the provisions, We are however not inclined to accept the submission made by the appellants' Counsel that Exhibit A-1 by itself will be sufficient to constitute a marriage as a declaration contemplated under, Sub-section (a) of (section 7-A (1) of the Act. It is doubtful whether the mere execution of the document Exhibit A-1 by the spouses will amount to a declaration in the presence of friends, relatives and other persons contemplated in the section., Further Exhibit A-1 does not purport to inaugurate the relationship between the spouses on that day but it recognises the existing relationship between them and we are not sure that Section 7-A (1) (a) can be

applied to such cases as amounting to a solemnization of marriage by declaration. Sub-section (a) of Section 7-A (1) seems to contemplate a solemnization of a marriage by declaration which inaugurates the connection between the spouses and not a validation of an existing relationship. However, we are not expressing any final opinion as to the scope of Section 7-A (1) (a) as we are resting our decision on the form and ceremony of marriage conducted at Perur temple and the validating provision contained in Section 7-A (1) (b) and (c) read with Section 7-A (2) b) of the Act, for holding that a marriage has in fact taken place as contemplated by law and the decision in *Deivanai Achi v. Chidmbaram Chettiar* (1955) 1 M.L.J. 120 will not stand in the way of the second plaintiff establishing her marriage with Palaniswamy on the material on record.,

46. In the view we have taken, we have to disagree with the decision of the trial Court on the main issue relating to the validity of the marriage between Palaniswamy and the second plaintiff and hold that a lawful marriage between them] has been established in this case, that the first plaintiff is the legitimate, son of Palaniswamy and that as such they are entitled to the shares claimed by them in the suit.

47. We are, however, accepting as correct the decision of the trial Court on other issues referred to earlier in this judgment. As a matter of fact the appellants did not challenge the correctness of the findings of the trial Court on other issues at the time of the hearing of this appeal.: They confined their attack only on the main issue as to the validity of the. marriage.,

48. In the result, the decree and judgment ;of the trial Court is partly set aside and there will be a preliminary decree for partition of the plaintiffs' 3|10th share in the estate left by Palaniswamy., On the question of mesne profits, past and future, we direct the same shall be ascertained by the trial Court after enquiry under Order 20, Rule 12 of the Civil Procedure Code.; The plaintiffs shall be entitled to their costs in this appeal.

49. C.M.P. No. 13239/69 Ordered.