
(1956) 09 KL CK 0012
In the High Court Of Kerala
Case No : A.S. No. 558 of 1952

V. Mmu Namboodiri and Others

APPELLANT

Vs

Kutti-parit Amma and Others

RESPONDENT

Date of Decision : 14-09-1956

Acts Referred:

Cochin Nair Act, 1113 — Section 3

Citation : (1956) 09 KL CK 0012

Hon'ble Judges : Koshi, C.J;M.S. Menon, J;Kumara Pillai, J

Bench : Full Bench

Advocate : T.S. Venkiteswara Iyer, K.M. Krishna Iyer and C.S. Ananthakrishna Iyer, for the Appellant; V. Sankara Menon and K. Madhavan Nair, for the Respondent

Judgement

Kumara Pillai, J.—This appeal arises out of a suit for partition of the assets of a Nair female who died without leaving any issue. Plaintiff who is a Namboothiri Brahmin, claimed that he was her lawful husband and was entitled u/s 19 of the Cochin Nair Act, XIII of 1095, to one half of her separate assets. Defendants 1 to 33 are the Maru-makkathayee heirs of the deceased woman, being her mother and other members of the mother's thavazhi, who would be entitled to the other half of her assets if the Plaintiff was her husband and who would be entitled to all her assets if the Plaintiff was not her husband.

On behalf of them it was contended in the lower Court that the Plaintiff had not legally married the deceased and that she was only living in concubine with him. This contention was accepted by the lower Court, and the suit dismissed. The Plaintiff therefore filed the present appeal. After filing the appeal he died, and it .

2. Section 3 of the Cochin Nair Act, which into force on 23rd Edavom 1095 M.E., convincing to 5th June 1920 A. D., provides: Subject to the restrictions of consanguinity and affinity recognised by the community, the conjugal union of a Nair female with (a) a Nair male or (b) any male, other than a Nair, with whom conjugal union is permitted according to social" customs and usage, openly

solemnised toy the presentation of cloth, to the female by the male, or in any other customary form before the date on which this Act comes into force and subsisting on such date, or so solemnised by the presentation of cloth after this Act comes into force, shall be deemed; to be a legal marriage....

The Plaintiff's case is that he lawfully married the deceased Ammukutty alias Parukuttyi Amma on 23rd Dhanu 1103, according to the social usage, solemnised by presentation of cloth to her, and that while his marriage with her, was subsisting she died on 15-1-1121 leaving no, issue and he is therefore entitled u/s 19 of the Cochin Nair Act to one-half of the assets left by her. Defendant 1 is Parukutty Amma's mother, Defendants 2 and 3 her brothers, and Defendants 4 to 7 he sisters:

Besides Defendants 4 to 7 Parukutty Amma had another sister named Kunchi Amma who predeceased her, and Defendant 8 is the daughter of that sister.

Defendants 9 to 33 are the other members of Defendant's thavazhi, being the issue of Defendants 4 to 8". The suit was contested on behalf of Defendants 1 "to 33 by Defendants, 1 to 7, Defendants 1 & 3 to 7 filing a joint written statement and Defendant 2 a separate written statement. They contended that the Plaintiff was not Parukuttyi Amma's legal husband, that Parukutty Amma was originally married by one Gopalan Nair who wasl the brother of P. W. 5, that after his death the Plaintiff contracted an intimacy with her which subsequently developed into a concubine, that he had never legally married her and there was no marriage on 23-5-1103 as alleged in the plaint, that one Ammukutty Warasyar was the Plaintiff's wife and he had five children by her, and that as Parukutty Amma was never legally married to the Plaintiff he had no right at all to the assets left by her.

In his evidence as P. W." 1 the Plaintiff admitted that Ammukutty Warasyar was his wife before his marriage with Parukutti Amma, and that at the time of his marriage with Parukutti Amma he had four children by her. But he also said that in 1101 before his marriage with Parukutty Amma, he had terminated his relationship with Ammukutty Warasyar and that it was after so terminating it that he married Parukutty.. Amma. He admitted further that even after his marriage with Parukutty Amma he had been consorting occasionally with Ammukutty Warasyar and had another child by her.

His explanation for this was that, as his marriage with Parukutty Amma proved to be barren he consulted an astrologer who told him that was because of Ammukutty Warasyar's grief on account of his separation from her that children) were not being born to Parukutty Amma and that he resumed his relationship with Ammukutty Warasyar in order to appease her and enable children to be born to Parukutty Amma. At the time of hearing in the lower Court it was contended on behalf of the Defendants that since the Plaintiff had married Ammukutty Warasyari before his marriage with Parukutty Amma and the, evidence relating to his divorce of her was unreliable in the light of his admission

and the evidence of the other witnesses In the case relating to his relationship with her even after his marriage with Parukutty Amma, the marriage with Parukutty Amma, even if true was illegal and void u/s 4 of the Nair Act since it Was a marriage during the continuance of a, prior marriage.

In reply, to this contention it was argued on behalf of the Plaintiff that Ammukutty Warasyar being a female not governed by the Nair Act,; the Plaintiff's marriage with her, which wag in the sambhandhom form, i. e., by presentation Of cloth, was no legal marriage at all and that, therefore his marriage with her, even if it was subsisting on the date of his marriage with Parukutty Amma, was no legal impediment to his marriage with the latter.

The lower Court dismissed the suit, deciding all questions including the above contention, against the Plaintiff, and holding that he had not legally married Parukutty Amma by openly solemnising the marriage by the presentation of cloth as required by Section 3 of the Nair Act and she was only his concubine and not legal wife, that he was not therefore entitled to any share in" the assets left by her, that his marriage with Ammukutty Warasyar was a legal marriage and was not one which could be ignored as constituting no legal relationship of husband and wife, that he had not divorced her before 12th Dhanu 1403 and his marriage with her was therefore a bar, to a legal marriage with Parukutty Amma, and that even if he had married Parukutty Amma in the manner prescribed by Section 3 of the Nair 4ct that marriage would therefore be illegal and void.

3. The main question for decision in the case is whether the Plaintiff had legally married Parukutty Amma and whether she was his lawful wife at the time of her death. The evidence is clear; one may even say that it is practically admitted, that for a long time before Parukutty Amma's death there was open and continuous co-habitation between the Plaintiff and Parukutty Amma and that they were being looked lipori by others as husband and wife. The Defendant's contentions in the written statements were that this co-habitation was due to a concubinage and not to any legal marriage, that Parukutty Amma was never legally married by the Plaintiff in the manner prescribed by Section 3 of the Nair Act, and that, as she was not legally married by the Plaintiff, he was not entitled to, any share in the assets left by her even though they were living together on account of the concubinage.

The question therefore for decision is whether the Plaintiff had married Parukutty Ammai in the manner prescribed by Section 3 of the Nair Act. On this question, after hearing both sides, we are perfectly satisfied, for reasons which will be stated presently that the Plaintiff had never married Parukutty Amma in the manner prescribed by Section 3 of the Nair Act and that therefore his relationship with her cannot be held to be a legal marriage and was only a concubinage. In this view it is unnecessary to consider the question of the validity of the Plaintiff's marriage with Ammukutty Warasyar and whether on account of his marriage with her the alleged subsequent marriage with Parukutty 4 ima was illegal and void u/s 4 of the Act.

It may also be stated in this connection that there was no specific pleading in the lower Court about the validity of the Plaintiff's marriage with Ammukutty Warasyar and as to his marriage with Parukutty Amma being illegal and void on account of that earlier marriage and that the lower Court had not also set down any issue for trial in regard to the matter. There is also no specific evidence as to whether the Plaintiff had actually gone through any marriage ceremony with Ammukutty Warasyar and what was the form of his marriage with her. In the circumstances and in the view of the conclusion we have reached on the question whether the Plaintiff had married Parukutty Amma in the manner prescribed "by Section 3 of the Nair Act we do not express any opinion at all as to the validity of his marriage with Ammukutty Warasyar and" whether that marriage would affect the validity of his alleged marriage with Parukutty Amma.

4. His Lordship then briefly stated the oral evidence given on the side of the Plaintiff,, referred to the contents of certain letters- written by Defendant "7 and her husband and some of the other members of the tarwad and proceeded:) 7 The Defendants freely admit that the Plaintiff and Parukutty Amma were living together for- i a very long time as husband and wife. The fact of a long, continuous and open co-habitation is; " also clear beyond dispute from the letters referred to above, the genuineness of all of which is j admitted.

The Defendant's case is that the Plaintiff had never married Parukutty Amma and that their co-habitation was only because of a concubinage v. and not because of any legal marriage. It is f contended on their behalf that not only the evidence furnished by the Defendants" witnesses but also circumstances appearing even from the evidence of the Plaintiff's witnesses would conclusively disprove the Plaintiff's case of a legal marriage and show that Parukutty Amma was only his concubine and not lawful wife.

5. Numerous authorities were cited before us in support of the proposition that law presumes in favour of marriage and against concubine and that from continuous co-habitation for a number of years lawful marriage may be presumed. As we do not doubt the correctness of f this proposition, and its correctness was also not, disputed by the Respondent's counsel, it is unnecessary to refer to all, of them here. The law was laid down by the Privy Council in Mohapbat", All v. Md. Ibrahim Khan AIR 1929 PC 135 (A) is that there is a presumption in favour of marriage and against concubinage when a man an4." woman have co-habited continuously for a number of years.

After the marriage laws of Nairs have been defined and settled by the enactment of the Nair ", Act of 1095, when a man and woman governed -t by that Act are found to have been continuously co-habiting for a long number of years as husband and wife, this well-recognised presumption will arise in their case also and can be applied to them. But this is only a presumption upon a matter of fact, and is, therefore rebuttable. Where an explanation is offered for the facts giving rise to the presumption, the Court cannot ignore the explanation and act on the presumption alone.

In *Gokal Chand v. Parvin Kumari* AIR 1952 SC 231 (B), the Supreme Court has said that it is well settled that continuous co-habitation for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttable and:, that if there are circumstances which Weaken or destroy that presumption the Court cannot ignore them. What circumstances or evidence would weaken or destroy the presumption must "necessarily depend upon the facts of each case and no hard and fast rule can be laid down in regard to that matter. This principle has been recognised by the Privy Council in *Sastry Velaider v. Sembucutty*, 1881 6 ACC 364 (C), in which case their Lordships quoted with approval the following passage from *Piers v. Piers*, (1849) 2 HLC 331 (D).

The evidence for the purpose of repelling it presumption) must be strong distinct, satisfactory, and conclusive. No doubt every case must vary as to how far the evidence may be considered as satisfactory and conclusive; but he lays down this rule, that 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.

In *Ramlakhan Singh Vs. Gog Singh*, , it has been pointed out that although a certain presumption may arise in favour of the Plaintiff yet it may be rebutted at the same time by circumstances brought to light in the Plaintiffs' own evidence by means of cross-examination or otherwise independently of the evidence adduced by the Defendant. To prove the circumstances repelling the presumption the party seeking to rebut it is not necessarily confined to the evidence adduced by him alone and has the right, as in all matters pertaining to evidence to rely upon circumstances brought to\ light In the evidence of the opposite party.

Such circumstances should be strong and conclusive and must be established satisfactorily, but in considering, whether they have been established satisfactorily the Court is entitled to look into all the evidence in the case, including the evidence adduced by the party relying upon the presumption, and not merely the evidence of the party seeking to rebut it.

6. In this case the Defendants have not only given direct evidence disproving the marriage, that is to say, they have not only examined persons without whose knowledge a legal marriage, in the circumstances mentioned in the Plaintiff's evidence, could not have taken place, but also rely upon numerous circumstances which conclusively show that the Plaintiff had not legally married Parukutty Amma. D. W. 7 is Defendant 2 who is the karnavan of Parukutty Amma's tarwad, and D. W. 8 is Defendant 3, the next senior male member of the tarwad. A legal marriage of one of the female members of the tarwad with the usual feasting could not have taken place in the tarwad house without the knowledge of either of these persons.

Both of them say that Parukutty Amma was never legally married by the Plaintiff and, that, while she was living in the tarwad house after her first husband died,

the connection between her and the plaintiff began at first as a clandestine intimacy and was subsequently continued as a concubinage. According to them the karnavan had serious objections to this intimacy when he first came to know of it, but he had subsequently acquiesced in it because Defendant 1, his mother, was on the side of Parukutty Amma and the Plaintiff. D. W. 1 is a person who is entitled to certain customary rights in connection with all Nair marriages taking place in the village in which Parukutty Amma was residing, and D.W. 2 is a close neighbour.

Both of them swear that no marriage took place in. Parukutty Amma's house in Dhanu 1103, and D. W. 1 says that Parukutty Amma's connection with the Plaintiff first began as a clandestine intimacy and was subsequently acquiesced in by the other members of the tarwad and they were therefore living, together as man and woman. According to D. w. 1 he is entitled to customary rights in connection with marriages) and if a marriage had taken place he was one of the persons who would have been sure to be present. D. W. 2 says that being a close neighbor he too was certain to be invited if "there had been a marriage, and as a matter of fact no marriage took place in Parukutty Amma's house in Dhanu 1103 and he was also not invited for any such marriage. , Some of the other defence": witnesses also say that Plaintiff and Parukutty Amma were not legally married and were only living together as husband and wife. But it does not appear from their evidence that they were sure to know about the marriage if it had taken place, and so the Defendants do not rely upon their evidence. Thus, on the question whether there was a legal marriage or not we have on the one side the Positive evidence of P. Ws. 1 and 3 and on the other the negative evidence of D. Ws. 1, 2, 7 and 8. On behalf of the Plaintiff it is urged that in view of the presumption of law in favour of marriage and against concubinage the positive evidence of P. Ws. 1 and 3 must be preferred to the evidence of D. Ws. 1, 2, 7 and 8; and on behalf of the Defendants it is contended that the evidence of D. Ws. 1, 2, 7 and 8 as well as the numerous other circumstances appearing on the evidence in general strongly negative the presumption and that the evidence of D. Ws. 1, 2, 7 and 8 should therefore be accepted.

7. After the enactment of the Nair Act of 1095 marriages of Nair females by Nair males or by males of other communities with whom conjugal union was permitted by social usage were governed by Sections 3 to 6 until the enactment of the Nair Act, XXIX of 1113. Section 4 of the Act of 1095 prohibited the marriage of a male during the continuance of a prior marriage and also provided that no one having a personal law of his own" allowing polygamy could marry a Nair female while already married to a caste wife or marry a caste wife while having a Nair wife already.

Section 5 related to dissolution of marriage and provided that a marriage would be dissolved by dealing of either party or by the either party renouncing Hinduism, or becoming an outcaste, and that in all other cases it would be dissolved only by mutual consent evidenced by registered documents or by a

formal order of dissolution by a Court of law. Section 6 enjoined that when the husband sought to obtain an order of dissolution from the Court he should pay reasonable compensation to the wife. The last clause of S. 6 provided:

Notice of the marriage shall be given by such person and to such authority and in such form and within such time as the Government may prescribe. Failure to give the prescribed notice shall be punishable with fine which may extend to two hundred rupees.

There was practically no difference between the Acts of 1095 and 1113, in regard to these matters. Rules regarding the authority and form referred to in the last clause of Section 3 of the Act of 1095 were made by the Government on the 23rd Edavom 1095 and duly published in the Cochin Government Gazette. Under those rules the parties to the marriage, if they were majors, had to give notice of the marriage to the Parvathya-karan of the village in which the marriage was solemnised and the Parvathyakaran had to enter the particulars contained in the notice in a register kept for the purpose and submit the notice with a report to the Tahsildar of the taluk and the Tahsildar had to enter the particulars in a similar register kept by him and also publish a copy of the notices in the Government Gazette.

Parukutty Amma was twenty-one years old and the Plaintiff about thirty-four or thirty-five years¹ old at the time of their alleged marriage in 1103. It is admitted by the Plaintiff that neither he nor Parukutty Amma has given any notice of their marriage as required by Section 3 of the Act of 1095 and the rules mentioned above. If the Plaintiff had legally married Parukutty Amma neither he nor Parukutty Amma would have omitted to give that notice, especially in view of the penalty to which they rendered themselves liable by the omission to give the notice. The Plaintiff's explanation for this omission is that he was not aware of the duty cast by Section 3 to give notice of the marriage.

But it has to be remembered that the marriage itself is said to have taken place eight years after the enactment of the Nair Act, and the publication of the rules. The Nair community, being one of the major communities in the Oochin State, thousands of marriages must have been performed after the enactment of the Act and before the date of the Plaintiff's alleged marriage with Parukutty Amma. It is therefore impossible to believe the Plaintiff's explanation that he was not aware of the duty cast on him by Section 3 of the Act to give notice of the marriage. From the documents produced in the case the Plaintiff is seen to have been a member of a jenmi family and a man of means. P. W. 3, who is said to have been one of the guests invited by him for the marriage was himself a Parvathya-karan of another village who must have registered numerous marriages under this provision of law.

Besides these circumstances which tend to belie the Plaintiff's explanation, the Defendants have produced copies of the notice given u/s 3 in respect of the marriage of other female members of Parukutty Amma's tarwad after the

enactment of the Nair Act. One of these marriages, namely, that of Defendant 7, is said to have been brought about by the Plaintiff himself, and/ Ext. X is the copy of the notice given in respect of that marriage. It is significant that In the case of the alleged marriage of Parukutty Amma alone no notice has been given u/s 3 of the Act. Even if the Plaintiff was not aware of the provision to give notice of the marriage it is certain that the: members of Parukutty Amma's tarwad would have caused him or Parukutty Amma to give the notice required by Section 3 If Parukutty Amma was legally married by the Plaintiff as is now alleged by him. The karna-van, D. W. 7, was a clerk in the District Magistrate's Court.

In 1103, when the marriage is said to have taken place he could not have anticipated that Parukutty Amma would predecease the Plaintiff, and the chances then were that she who was only twenty-one years of age would survive the Plaintiff who was at that time thirty-four or thirty-five years old. As under the Act of 1095 the widow was one of the heirs of the deceased husband, if the Plaintiff had legally married Parukutty Amma In 1103 it is absolutely certain that D. W. 7 and other members of the tarwad would have taken oared to see that notice of the marriage was given immediately in order to ensure subsequent proof of that marriage.

No doubt the notice by itself is not conclusive proof of a legal marriage, but it is strong, though not conclusive, evidence of the marriage, especially as the form prescribed requires the signatures of both spouses. In view of the penalty attached to the omission to give the notice it is also highly improbable that any person, who was not a minor, would fail to give notice of his or her marriage. Before the enactment of the Act of 1095 a Namboo-thiri male was free to have at the same time a caste wife, a Nair wife and a wife belonging to any other Marumakkathayam community. He was free not only to have, wives in all these three categories but also to have as many wives as he liked in each category.

A change was brought about in this matter by Section 4 of the Act of 1095, and after the enactment of that Act he could not marry a caste wife or a wife belonging to any other Marumakkathayam community if he had a Nair wife already. It is admitted that the Plaintiff had no caste wife at the time of his alleged marriage with Parukutty " Amma. As he was only thirty four or thirty five year a old it is not improbable that he would have liked, at that time to keep unfettered his liberty to have a caste wife. That liberty would have been lost if he: had legally married Parukkutty Amma and it could be kept intact only by taking Parukutty Amma as a concubine and not as a legal wife.

In this connection it is significant that the Plaintiff is not a person who was averse to having a concubine or who would have preferred only wife and not a concubine. Even before: his marriage with Parukutty Amma he had another union with Ann mukutty Warasyar, which, according to him was not a legal marriage and had also four children by Ammukutty Warasyar. After he is said to have-married Parukutty Amma he resumed his connection with Ammukutty

Warasyar and got still another child by her. In the light of these facts the omission to give the notice u/s 3 appears to be a strong circumstance militating against the Plaintiff's case of a legal marriage.

8-9. In his cross-examination the Plaintiff admitted that there is no record containing any admission from him that Parukutty Amma was his ,"] wife. This is not a case in which there was no If likelihood of executing any document containing such an admission or no significance can be attached to the absence of such documents. If Parkutty Amma was the Plaintiff's lawful wife there were Plenty of occasions for stating that fact let registered documents. As has been stated already the Plaintiff belonged to a jenmi family and was if person of considerable means. His case is that the acquisitions in Parukutty Amma's name were n with funds given by him.

Ext. R is a sale-deed executed in Parukutt, Amma's favour by the Plaintiff's older brother and other persons on 12-10-1114. The second executanjtf in Ex. R was the wife of the Plaintiff's elder brother and was described in the document as such. If the Plaintiff's case is true that document was executed" by executants 1 and 2 in favour of the lawful wife of the first executant's younger brother. Yet Paruu, kutty Amma was described in Ext. R not as the wife of the first executant's younger brother but simply as a member of Chempakasseryputhaa Veedu and as the daughter of Defendant 1. The difference between the description of the second executant and the description of Parukutty Amma in Ext. R is very significant.

(His Lordship then referred to certain other similar documents and observed" that the omission? to describe himself in those documents as kutty Amma's husband stand on the same footing as the omission to give the notice u/s 3 referred to in paragraph 7 above and can be attributed only to the fact that there was no legal marriage. His Lordship further referred to the contents of the letter written to the Plaintiff and concluded:) Thefce letters by themselves do not prove any-thing more than that Parukutty Amma's tarwad had acquiesced in and accepted the relationship between the Plaintiff and Parukutty Amma and do not amount to proof of a legal marriage. During her lifetime when an acknowledgment of a lawful marriage between her and the Plaintiff would have been an impediment in the way of the Plaintiff taking another lawful wife and when there would have been a chance of Parukutty Amma inheriting to the Plaintiff in the event of his predeceasing her, the Plaintiff was careful not to make any admission in documents that she was his lawful wife although there were plenty of occasions on which it would have been natural for him to make such an admission. It is noteworthy that even PanhsuVty Amma had not made any statement during her life-time that she was the Plaintiff's lawful wife although such a statement would have been very beneficial for the interest and there were occasions on which it would have been natural for her to make such a statement. Both of them had not also given notice of their marriage to the authorities as required by Section 3. These are circumstances which cannot be ignored at all.

They and other circumstances referred to in Paragraphs 6, 7 and 8 above lead to one conclusion namely that there could not have been any legal marriage between the Plaintiff and Parukutty Amma and that they were living together only on account of a concubinage which was acquiesced in by the other members of the tarwad. The lower court was therefore right in disbelieving the evidence of P.Ws 1 and 3 and holding that the Plaintiff had not legally married Parukutty Amma and she was not his lawful wife at the time of her death.

10. It follows that the Plaintiff was not entitled to any share in the assets left by Parukutty Amma and that the suit was rightly dismissed. The decree of the lower Court is accordingly confirmed and this appeal dismissed with costs.