APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Stone.

1931, April 2.

MAYANDI ASARI AND TEN OTHERS (DEFENDANTS 1 TO 10 AND LEGAL REPRESENTATIVE OF FIRST DEFENDANT), APPELLANTS,

v.

SAMI ASARI AND ANOTHER (PLAINTIFF AND ELEVENTH DEFENDANT), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 112—Non-access—Burden of proof of—Indian law—Competency of wife to give evidence to prove access or non-access.

Section 112 of the Indian Evidence Act (I of 1872) lays a heavy burden on a person who questions the legitimacy of another on the ground of non-access of proving or showing such non-access. But the proof in such a case is not different from any other species of proof under the Evidence Act, viz. " when after considering the matters before it the Court either believes " that there was non-access, " or considers its existence so probable that a prudent man ought in the circumstances of the particular case to act upon the supposition that it exists." The section does not require a negative to be proved by positive evidence.

In Indian law a wife is a competent witness to prove access or non-access by her husband.

John Howe v. *Charlotte Howe,* (1913) 25 M.L.J. 594 (F.B.), and *Rozario* v. *Ingles,* (1893) I.L.R. 18 Bom. 468, followed.

APPEAL against the decree of the Court of the First Additional Subordinate Judge of Madura in Civil Suit No. 20 of 1923.

K. V. Krishnaswami Ayyar for appellants.

K. Rajah Ayyar for first respondent.

Second respondent was unrepresented.

Cur. adv. vult.

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* Appeal No. 342 of 1925.

The JUDGMENT of the Court was delivered by WALLACE J.—This appeal is against the decision of the First Additional Subordinate Judge of Madura in a suit for declaration of title and recovery of possession of property. The plaintiff sued for the property of one Karuppannan Asari, deceased, whose son he claimed to be. The contesting defendants denied his paternity, and the main issue in the case was that question. The lower Court held that the plaintiff's mother, eleventh defendant, had been living apart from Karuppannan, her husband, for some years before his death and for some years before the plaintiff's birth, that she was unfaithful to her husband, but that, as the plaintiff was born during the period of continuance of the valid marriage between his mother and Karuppannan Asari, and as the defendants had not succeeded in proving non-access at or about the time when the plaintiff might have been conceived, the plaintiff was entitled under section 112 of the Evidence Act to be declared the son of Karuppannan. It therefore gave him a decree. First to tenth defendants appeal.

In appeal it is contended that the lower Court has so interpreted section 112 as to place an unfair burden on the appellants which it is practically impossible for them to discharge. The lower Court found that the eleventh defendant had been long living apart from her husband, that in fact she was living with some paramour at Melur, but held that, as Melur is only nine miles from Karuppannan's village, Poruspatti, and as Karuppannan used occasionally to go to Melur to buy cattle in the market, it cannot be said that he had no opportunity of access to her at the time of the plaintiff's conception. It is plain that section 112 lays a heavy burden on the contesting defendants, the burden of proving or "showing" non-access, but such proof is not different from any other species of proof under the Evidence

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Act, namely, "when after considering the matters before it the Court either believes" that there was non-access, "or considers its existence so probable that a prudent man ought in the circumstances of the particular case to act upon the supposition that it exists;" (section 3 of the Evidence Act). It is not necessary, in fact it is not possible in most cases, for a party to prove a negative by positive evidence, and the test laid down by the lower Court comes very nearly to insisting on positive proof of a negative. Putting the most reasonable interpretation on the lower Court's proposition, it amounts to this; that non-access cannot be proved so long as the parties are within reasonable distance of each other, unless there is the evidence of a witness available who can account for every minute of the parties' time, which is of course practically impossible. It is the more necessary not to interpret section 112 in such an unreasonable fashion in this country, because here among the majority of Hindus a valid marriage once contracted cannot be dissolved and therefore "continues" until the death of one party to it. In the circumstances of this case we have no hesitation in holding that the lower Court's view that the legal burden on the appellants has not been discharged is wrong.

The suggestion that Karuppannan and the eleventh defendant might have met at Melur is no part of the plaintiff's case. His case is that eleventh defendant never left her husband's house. Karuppannan's habit of visiting Melur cattle market was put forward so casually in the cross-examination of one or two witnesses for the contesting defendants that no suggestion was even put to any of them that Karuppannan ever was in the village at the same time as the eleventh defendant or ever met her there. The eleventh defendant herself of course never suggested that, since it is

not her case. The possibility of access in Melur, accepted by the lower Court as a fact, therefore, was one not put forward by either side. The appellants had succeeded in proving that the eleventh defendant had been driven out of her husband's house and had been living apart from him for years, that he had married again, that his visits to Melur were for the purpose of buying cattle, and the plaintiff had not suggested that he ever met the eleventh defendant at Melur. In these circumstances we think that the appellants had discharged the onus of proving non-access sufficient to throw on the plaintiff the onus of proving access. It is claimed for the plaintiff here, as part of his answer to the appellants' claim, that the evidence adduced is enough to prove access; but there are many points which go to establish rather the truth of the appellants' contention. The strongest point to our mind is the admission of the eleventh defendant herself on two occasions that the father of the plaintiff was not Karuppannan but one Muttuswami Asari of Melur. In a guardianship proceeding, after Karuppannan's death, by one Ganapathi Asari, the husband of Karuppannan's sister, asking that he be appointed guardian of the minor plaintiff, the eleventh defendant filed a written statement, Exhibit IV, dated 31st July 1922, stating in categorical terms, what is the present case of the appellants; that she had left Karuppannan eight years before, had lived in concubinage first with one Sivan Asari of Madura and then with Muttuswami Asari of Melur, and that the plaintiff was the son of the latter. She repeated this statement in an affidavit, Exhibit VII-*a*, dated 22nd August 1922. Later on in those proceedings she attempted to withdraw Exhibit IV (see Exhibit VIII), but the District Judge would not allow her (see Exhibit IX). Her present explanation of these statements is that she was induced by her brothers to sign blank papers and that she does not

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know what they put on them. Such an explanation cannot be accepted. Exhibit IV is countersigned by her vakil in the guardianship proceedings, and it is ridiculous to suggest that it was not read over to her or that she did not know the contents. No sort of reasonable explanation is now advanced why she should falsely swear away her own chastity, and we cannot believe that she would have made such statements unless they were true or unless some severe physical coercion were used to her, which is not pleaded. It is urged, and is no doubt the case, that prior to the guardianship proceedings she had applied for a transfer of Karuppannan's patta in the name of the plaintiff. In the end that was refused. It is pointed out that in the patta transfer proceedings two village officers supported her claim (see Exhibit C). That may have been so then, but the plaintiff has not chosen to examine these village officers in this case. If they really knew the facts to be as he says, they would be excellent witnesses.

Other facts point the same way. For example, that, as his mother admits, the plaintiff was born neither in the family house nor in her parents' house, that she must have been pregnant with the plaintiff at the very time when Karuppannan was marrying a third wife, that Karuppannan himself in a deed of settlement, Exhibit D, dated 11th March 1920, on his third wife ignores the eleventh defendant and mentions only a senior wife who had died, that neither eleventh defendant nor plaintiff was present as a member of the family in a family photograph, for which omission illness and absence from the family house are her only excuse, and finally her omission to send any reply to an accusation of ex-communication and evil living, to very much the same effect as her own previous statements, contained in a reply notice of the appellants, Exhibit XIII, dated

25th February 1922. It is a circumstance worth comment that when the plaintiff put his mother into the witness-box he did not elicit from her any answer as to who was his father. The only document relied on by the plaintiff is the birth register, Exhibit E, which only proves that some informant then gave the name of Karuppannan Asari as the father of the boy registered there. Such evidence is of little value towards proving who was the father, since the plaintiff did not examine the informant in the lower Court.

With all these undeniable facts in support of the appellants' case that Karuppannan Asari was not the father of the plaintiff, the oral evidence adduced by the plaintiff to prove that his mother never left the family protection cannot be accepted, and we endorse the lower Court's rejection of that. Incidentally we may point out that there is nothing contrary to law, in the mother herself giving evidence on a point of this kind, since it is not the law in this country that a wife is not a competent witness as to access or non-access by her husband; see *John Howe* v. *Charlotte Howe*(1) and *Rozario* v. *Ingles*(2). There was therefore no legal objection to the admissibility of her evidence or of her previous statement.

The weight of evidence is decidedly in favour of the view that the defendants have proved, so far as they reasonably can, non-access; and the lower Court's application of section 112 is in our view not reasonable. We hold that the plaintiff is not the son of Karuppannan Asari. We reverse the decree of the lower Court and dismiss the plaintiff's suit with costs in both Courts. Plaintiff will pay the court-fee due to Government.

G.R.

(1) (1913) 25 M.L.J. 594 (F.B.). (2) (1893) I.L.R. 18 Bom. 468.