Legitimacy of Children Born of Void and Voidable Marriages

*K. N. Poddar**

LEGITIMACY OF a child is determined, in almost all systems of law, by reference to his paternity. A child is legitimate if his paternity is known and legal. Paternity is established by (*i*) presumption, or in cases where the presumption fails, (*ii*) by cogent evidence. *Pater est quem nuptiae demonstrant i.e.* "he is the father whom the marriage (itself) indicates". A child born to a wife even a day after the marriage took place is the lawful child of the husband and this presumption of paternity continues under section 112 of the Indian Evidence Act, for 280 days after the marriage is dissolved by death or divorce provided that the mother did not re-marry during that period. If she re-married the child would, since he was born during another marriage, be presumed to be the legitimate child of that marriage under the same section. The only method of rebutting the statutory presumption, which the section provides, is the proof that the parties had no access to each other at any time when the child could have begotten. A person of illegitimate birth or descent is, therefore, a person who is born out of lawful wedlock, that is, where no marriage had taken place or no valid marriage could take place between the parents.

In this paper it is proposed to examine, (*i*) the position of the children born of such unions, under the old Hindu law; and (*ii*) how far their conditions have been ameliorated by section 16 of the Hindu Marriage Act, 1955. An illegitimate child has not only suffered a social stigma in every legal order but has been subjected to an unfortunate position as regards his rights of inheritance and maintenance. An illegitimate child under the common law of England was completely devoid of any right as against the father and mother. The law recognized no legal relationship between the mother and the child, far less between the father and the child. A slight improvement in their pitiable condition was effected by the Poor Law Act of 1576 which imposed duty of maintenance of illegitimate children on their parents.

---

* M.A , M.L , Lecturer, Faculty of Law, Patna University.

1. VIII *Encyclopaedia of Social Sciences* 583.

II

An illegitimate child was not in a better position in Roman law. No relationship between him and his father or mother was recognized. But later on he was endowed with the right of support and succession with regard to his mother. This was further restricted to only those cases of illegitimate children who were born in concubinage. Under Muslim law also an illegitimate child and its father are not related in law, nor competent to inherit from each other,[2] but under Hanafi law the mother and her illegitimate offspring are competent to do so.[3]

Under Hindu law in force before 1956 an illegitimate son had in certain circumstances rights of partition in the property of his putative father. An illegitimate son may be a son by a concubine who is a *dasi* (*i.e.*, who is in exclusive and continuous keeping) or he may be the son of a woman who is not a *dasi*. The first is called *dasiputra* and the second is hardly ever dealt with in *dharmashastra*. From ancient times it had been settled that the *dasiputra* of a person belonging to the twice born classes is not entitled to a share on partition or to inherit, but is entitled to maintenance only. Gautama[4] provides that even the son of a Brahmana who is issue-less from a *shudra* woman (a concubine) should receive the means of maintenance provided he is obedient in the manner of a pupil. Brihaspati[5] contains a similar rule for the maintenance of an illegitimate son born of a *shudra* woman after the father's death. But as regards the son of a *shudra* from *dasi* Manu provides that such an illegitimate son may take a share in the father's property if the father allows him to do so The classical passage on the rights of the illegitimate son of a *shudra* from a *dasi* is of Yajnavalkya[7], these verses are introduced by Mayukha,[8] with the words "Yaj, declares a special rule as regards one begotten by a *shudra* on a woman (of the same caste) not married to him" and which may be rendered thus "even a son begotten by a *shudra* on a *dasi* may partake of a share at the choice (of his father). But, when the father is dead, the brothers should make him the recipient" of a half share. There are decisions by the Privy Council and courts in India on the interpretation of the above text relating to the right of an illegitimate child of a *shudra* from his female slave (*dasi*). It would be worthwhile here to refer to some of these authorities.

---

2. *Boodhun* v. *Jan Khan*, (1870) 13 W.R. 265.
3. Bail. I. 693 (703).
4. *Gautam* 28. 37, *Brihaspati* quoted by *Dayabhaga* IX. 28 at 141.
5. 33 S.B.E. at 374, verse 31.
6. IX *Manu* 179.
7. 11 *Yajanvalkya* 133-34.
8. V *Mayukha* at 103-104.

The first case in order of date is a Full Bench decision of this court in *Sadhu* v. *Baiza*.[9] In this case the legal status of an illegitimate son of a *shudra* as a son was recognised and it was held that after the death of his father such a son alongwith a legitimate son succeeded as coparcener with right of survivorship to the property in his father's hand, he, however, taking only half a share. As regard the question, whether, such an illegitimate son can succeed to ancestral property in his father's hand, the Privy Council supported the contention affirmatively in *Raja Jogendra Bhapati* v. *Nityanand Man Singh*.[10] In this case the raja who had succeeded to an impartible raj as the only legitimate son of the last holder died without leaving any male issue, and the plaintiff who was an illegitimate son of the same father filed the suit to establish his title to the raj. The Privy Council approved Sadhu's case and held that the plaintiff was entitled by right of survivorship to succeed to the impartible raj. It is apparent from the facts of the case that the property in the hands of the deceased raja was ancestral property.

The next important case is the Privy Council case of *Vellaiyappa Chetty* v. *Natarajan*.[11] The main question that arose for determination in that case was whether the plaintiffs who were illegitimate sons of a *shudra* by his concubine were entitled after their putative father's death to maintenance out of the family property possessed by their father's uncles and uncles' sons as his surviving coparceners. The father who held the estate jointly with his collaterals, left considerable joint family property, but no separate property of his own. The learned single judge of the Madras High Court decreed plantiffs' claim for maintenance for life and on appeal the Division Bench of the High Court confirmed the decree. From that decree the defendant collaterals of plaintiffs' father, filed an appeal to the Privy Council. Dinshah Mulla who delivered the judgment of the Board, pointed out that there was no text of *smriti* or *Mitakshara* which covered the point in question but relying on the principle of Hindu law that where a person is excluded from inheritance to property or from a share on partition of joint family property, he is entitled to maintenance out of that property and in certain Indian cases on the subject it is held that an illegitimate son of a *shudra* by a continuous concubine has the status of a son and is a member of the family, that the share of inheritance given to him is not in lieu of maintenence but in recognition of his status as a son, therefore, the plaintiffs were entitled to maintenance out of the joint family property.

The rule or law based upon the decision of Privy Council in *Vellaiyappa Chetty* is stated in Mulla's Hindu Law[12] as follows :

---

9. (1880) I L.R. 4 Bom. 37 (FB).
10. (1890) 17 Ind. App. 128 (P.C.).
11. A.I.R. 1931 P.C. 294.
12. Reprint (1970, 13th ed.) at 365, para 362.

If the father was joint at his death with his collaterals e.g., his brothers or their sons, or his uncles or his sons, the illegitimate son is not entitled to demand a partition of joint family property, but he is entitled as a member of the family to maintenance out of such property, provided his father left no separate estate.

There are also two Supreme Court cases *viz.*, *Gur Naraian Das* v. *Gur Tahal Das*[13] and *Singhai Ajit Kumar* v. *Ujayar Singh*[14] on this point. These decisions too have followed the rule laid down in *Vellaiyappa Chetty's* case.

The following propositions as deduced from the texts and the case law, referred to above, may be set out here : (*i*) the illegitimate son of a *shudra* even under the *Mitakshara* does not acquire by birth any interest in the estate held by the father and so cannot enforce a partition in his father's life time, but the father may give him a share in his life time, which may even be equal to that of a legitimate son; (*ii*) on the father's death an illegitimate son of a deceased *shudra* becomes a coparcener along with the legitimate sons and the former is entitled to seek partition; (*iii*) on a partition the illegitimate son takes only one half of what he would have taken if he were a legitimate son; (*iv*) if no partition takes place and the legitimate son or sons all die without partition, the illegitimate son would take the whole as the last survivor of the coparcenary; (*v*) if there be no legitimate sons, grand sons, or great grandsons of the *shudra* father, the illegitimate son takes the whole estate; (*vi*) as the text of *Yajnavalkya* refers only to a son, an illegitimate daughter is not entitled to any inheritance or even maintenance; (*vii*) if the *shudra* father be joint with collaterals such as brothers, uncles or nephews, the illegitimate son cannot demand a partition of the joint family property though he is entitled to maintenance as a member of the family provided the father left no separate estate.

III

It has always been felt that the position of illegitimate children was unfortunate and deserved sympathetic consideration and change. Exclusion from inheritance of the illegitimate children who are not responsible for the manner in which they are brought into existence, will not prevent the evil, nor will it patch up the sentiment which has already been violated by allowing the parties to lead such an immoral life. Hence, throughout the history we find that efforts have been made to improve the position of children born out of wedlock.

---

13. A.I.R. 1952 S.C. 225.
14. A.I.R. 1961 S.C. 1334.

In England, the Matrimonial Causes Act, 1937 embodied a provision which is now contained in section 11 of the Matrimonial Causes Act, 1965[15] wherein childeren born of voidable marriage have been declared to be legitimate children, provided a decree of nullity is passed annulling the voidable marriage. It grants relief to those children of voidable marriages who would have been legitimate had marriage been dissolved instead of being annulled. But even the Matrimonial Causes Act, 1937 as amended by the Matrimonial Causes Act, 1950 could not remove the bar against the children born of a void marriage. But section 2 of the Legitimacy Act of 1959 provides that the child of a void marriage, whether born before or after the commencement of the Act, shall be treated as the legitimate child of his parents if at the time of the act of intercourse, resulting in the birth, both or either of the parties reasonably believed that the marriage was valid.

The position of an illegitimate child under Muslim law continues to be as before. No legislative steps have so far been taken for improving their status and rights.

Under Hindu law certain legislative steps have been taken for ameliorating the lots of illegitimate children born of only void and voidable marriages. Other classes of illegitimate children, such as, children born of adulterous intercourse or concubines have been left to suffer from the social stigma of illegitimacy and its consequences. Even in case of children born of void marriages, these legislative actions have created confusion and anomalies far more than the improvements in their conditions. After the commencement of the Hindu Succession Act, 1956 it can be said that the position of an illegitimate child even of a *shudra* has worsened because nowhere the Act has provided different rules of inheritance for *shudras* and no where it has been said that a son or daughter includes illegitimate son or daughter. Of course, illegitimate minor sons and unmarried daughters have been allowed the rights of maintenance under the Hindu Adoption and Maintenance Act, 1956.[16]

So far the position of an illegitimate child including the child born of a void marriage under Hindu law as regards the rights of inheritance is concerned

---

15. S. 11 of the Matrimonial Causes Act, 1965 reads :
Where a decree of nullity is granted in respect of voidable marriage, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled shall be deemed to be their legitimate child.

16. See s. 21 (viii) and (iv) of the Act.

continues to be unhappy even after the new enactments. Section 16[17] of the Hindu Marriage Act, however, makes an attempt to alleviate the rigour of law to which children born of void marriages were subjected under the prior law. This section deals with the legitimacy of children of void and voidable marriages so declared by a decree of nullity under sections 11 and 12 of the Act. Thus, the section leads to the effect that unless a decree of nullity is granted in respect of the marriage under section 11 or section 12 of the Act, any child conceived or begotten cannot be deemed to be the legitimate child of the parties to the marriage.

This was precisely the conclusion of the Madras High Court in *Gowri Ammal* v. *Thulasi Ammal.*[18] The facts of this case are that one Periaswami who died in 1956 possessed some properties. He had a wife, Gowri Ammal, the first defendant and Anandam, a minor son aged 5 years by the first defendant, who was the second defendant. It was alleged that Periaswami married a second wife, Kannu Ammal, the first plantiff who had a daughter from Periaswami. The daughter was the second plaintiff and was aged 4 months at the time when the suit was filed. This marriage took place after the Hindu Marriage Act, 1955. The first and second plaintiffs claimed in the suit, partition and separate possession of one half share in the properties of the deceased Periaswami. The defendents denied the *factum* of the marriage of the first plaintiff, and asserted that, in any event if the process of a marriage ceremony had taken place, it would be void under the provisions of section 5 of the Hindu Marriage Act.

Both the trial court as well as the lower appellate court found that the first plaintiff was married to Periaswami in accordance with the rights prescribed under Hindu law but the marriage was void under section 5 (*i*) of the Hindu Marriage Act. However, the trial court was of the opinion that even though the marriage of the first plaintiff might be null and void, the issue of that marriage, the second plaintiff. would be legitimate under

17. S. 16 of The Hindu Marriage Act provides :

Legitimacy of children of void and voidable marriages :

Where a decree of nullity is granted in respect of any marriage under section 11 or section 12 any child beggotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity :

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

18. A.I.R. 1962 Mad. 510.

section 16 of the Act and, therefore, the second plaintiff, would be entitled to 1/6th share in the property of Periaswami. The learned subordinate judge to whom the first and the second defendants appealed, confirmed the findings of the trial court and its construction of section 16 of the Act. A second appeal was, therefore, filed by first and second defendents before the High Court of Madras. An extract from the judgement of Rama Krishanan, J., reads :

> The marriage of the first plaintiff, in this case when another wife was alive came within the mischief of section 5, clause (*i*) of the Act, and it is therefore a marriage void *ipso jure*, and not a voidable marriage. Section 16 of the Act provides that where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made.. shall be deemed to be their legitimate child notwithstanding the decree of nullity. The question now for consideration is whether if one of the spouses is dead without a decree of nullity of marriage being obtained, and when in a subsequent dispute about succession to property, the marriage is found to be void under section 11, principle of legitimacy of the children laid down in section 16 of the Act can be applied.[19]

Section 16 of the Hindu Marriage Act is an adaptation but with a variation of section 9 of the English Matrimonial Causes Act, 1950 which is in the following form :

> Where a decree of nullity is granted in respect of a voidable marriage, any child of the parties to the marriage at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.

Section 9 of the English Act confines the relief of legitimacy to childern born of voidable marriages, and it made a further requisite that a decree of nullity should be granted in regard to such a voidable marriage before legitimacy can be statutorily conferred on the children.

The Indian legislature, however, seems to have decided to extend the benefit of statutory legitimacy, to children born also of void marriages, but retained the prerequisite recognized in section 9 of the English Act, *viz.* the passing of decree of nullity, before this statutory benefit can be conferred on the children. No doubt, this leads to a certain anomaly. It is well known that a decree for nullity of marriage is a special provision found in the

19. *Id.* at 511-512.

legislation relating to matrimonial causes. The Hindu Marriage Act, provides for such a decree being obtained by a proceeding under the Act. Thus, for a decree of nullity under section 11, a petition has to be presented by either party to the marriage before the court having jurisdiction under the Act. For obtaining a decree of nullity under section 12 of the Act, similarly a petition has to be presented by one of the spouses.

The court, therefore, in *Gowri Ammal* v. *Thulasi Ammal*[19a] concluded that after the death of one of the spouses a decree of nullity cannot be obtained and where no decree of nullity is passed in respect of a void or voidable marriage children born of any such marriage would not be entitled to the benefits of section 16.

It is abundantly clear that this section provides only a partial protection to illegitimate children, first, because it is applicable to only children born of void and voidable marriages, secondly, because it is applicable only to those children born of void or voidable marriages in respect of which a decree of nullity is passed by a competent court, and thirdly, because it entitles even children (benefited by the section) to take a share in the properties of parents only.

A contrary construction of this section has been made by the High Court of Patna in *Banshidhar Jha* v. *Chhabi Chatterjee*.[20] A Division Bench of the court has held that children born of void and voidable marriages shall be deemed to be the legitimate children of their parents until a decree of nullity or a decree of annulment, as the case may be, is passed by a court. The observation made by the court is worth noting:[21]

> The effect of a decree of nullity in case of a void marriage or annulment of a voidable marriage, is to render the marriage null and void from its inception for all intents and purposes. Hence, it is provided in section 16 of this Act that in no case should children of parents whose marriage is solemnised but is void or voidable under section 11 or 12 be regarded as illegitimate. Such children, according to section 16, shall be deemed to be the legitimate children of their parents, until a decree of nullity or a decree of annulment as the case may be, is passed by a Court.

The confusion and anomalies created by these conflicting decisions have been because of the bad and unimaginative and defective drafting of section 16. The legislature would have rendered a more valuable service to the

19a. *Ibid.*
20. A.I.R. 1967 Pat. 277.
21. *Id.* at 279.

unfortunate illegitimate children had they simply adopted the rule on this point applicable, under the old Hindu law, to the *shudras* and had made it applicable to all. But that had not been the view expressed by the Patna High Court as far as it relates to children of void marriages, is not correct and as far as it relates to children of voidable marriages, this will be the position even if there was no section 16 in Hindu Marriage Act, 1955.

Section 16 is further defective as far as it does not apply to a marriage declared void on the ground that it contravenes the conditions specified in clauses (*iii*) and (*vi*) of section 5 for such marriages have not been declared void under section 11 or voidable under section 12 of the Hindu Marriage Act. In a recent judgement delivered in *Panchireddi Appala Suramma*, v. *Godela Ganapatlu*[22] the Division Bench of the Andhra Pradesh High Court dissenting from a Single Bench decision of the High Court of Himachal Pradesh in *Smt. Naumi* v *Narotam*,[23] has expressed the view that where the age of any of the parties to a marriage does not satisfy the requirement of clause (*iii*) of section 5, the marriage cannot be solemnized and if performed, it is void *ab initio* and it is not necessary for any party thereto to get it declared null and void under the provisions of either section 11 or section 12 which does apply to such case. Similarly section 16 of the Hindu Marriage Act will also not apply to void marriages solemnised prior to the Act, as section 11 applies only to post Act void marriages. Section 16 will also not apply to a marriage which is void on the ground that proper ceremonies of marriage under section 7 of the Act were not performed or to a marriage which is void because it was performed in contravention of section 15 of the Act.

It was, therefore, natural that when the questian about revising the Hindu Marriage Act was taken up by the Ministry of Law, section 16 of the Act also attracted its attention. Amongst the various amendments included in the draft Bill sent by the Ministry of Law to the Law Commission, for consideration and in its recommendations, there were two amendments proposed to be made in section 16. The first proposal was that the condition that a decree of nullity must have been granted in order that the section may apply should be removed.[24] The second, and the more controversial proposal was that this section should apply if, at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage, where the marriage follows the act) both or either of the parties reasonably believed that the marriage was valid.[25]

---

22. A.I.R. 1975 A. P. 193.
23. A.I.R. 1963 H.P. 15.
24. The Law Commission *Fifty-ninth Report* 30 (1974).
25. *Ibid.*

As regard the first proposal there cannot be any difference of opinion and the Law Commission has rightly expressed its view that it should not be a condition precedent to the applicability of the beneficial provision in section 16 of the Act, that there must have been actual legal proceedings resulting in a decree of nullity.[26]

The second proposal is based on section 2 of the Legitimacy Act, 1959 of England. Its insertion in section 16 will rather create more difficulties. The Law Commission has, therefore, disagreed to this.

After examining the two proposals extensively the Law Commission has recommended that section 16 (1) should be revised as follows :

(1) Notwithstanding that a marriage is null and void on any ground specified in section 11, any child is born before or after the commencement of the Hindu Marriage Act had been valid, shall be legitimate, whether such child is born before or after the commencement of the Hindu Marriage (Amendment) Act, 1974. and whether or not a decree of nullity is granted in respect of that marriage, under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

And the rest of the section should be recast as follows :

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made would have been the legitimate child of the parties to the marriage if at the date of the decree it has been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in this section shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

---

26. *Id.* at 31.
27. *Id.* at 35-37.

IV

There can be no two opinions that if section 16 of the Act is redrafted in accordance with the recommendations of the Law Commission, it will remove the defects in its present form to a great extent. This will confer the status of legitimacy, of course, for the limited purpose under sub-section (3) of section 16, on every child born of void marriages under section 11 of the Act, whether a decree of nullity is granted or not in respect of such marriages. This might have been the intention of Parliament in enacting section 16 but it could not be realised due to its bad drafting. The recommendations of the Law Commission, however, leave the fate of the children, born of marriages that may be declared null and void because of their being violative of the conditions specified in clauses (*iii*) and (*vi*) of section 5 of the Hindu Marriage Act, hanging in uncertainty. It is, therefore, submitted that either these marriages should be declared void under section 11 of the Act by making suitable amendments therein, *i.e.*, section 11 should be made exhaustive as regard void marriages under the Act or by inserting saving clauses in section 5 or 7 so that the aforesaid marriages should be saved from being declared void by the courts.