

RIGHTS OF LEGITIMATIZED CHILDREN UNDER HINDU LAW

I Introduction

SECTION 16 of the Hindu Marriage Act, (HMA) 1955 confers the status of legitimacy on the children of void and annulled voidable marriages. Before the 1976 amendment, children of void marriage were legitimate only if a decree of nullity was granted in respect of such marriage under section 11 of the Act. If no decree was obtained the children could not be legitimized. Further, in a collateral dispute relating to succession to the property an ordinary civil court, other than the matrimonial court, could give a decision that the marriage was a void one but without passing a decree of nullity. In such cases also the children could not become legitimate.¹ After the amendment, under sub-section (1) of section 16 the children of void marriage are legitimate whether a decree of nullity is passed or not. They are legitimate even when the marriage between the parties is held to be void otherwise than on a petition under the Act. In respect of the children of voidable marriages sub-section (2) states that they are legitimate even on the passing of a decree of nullity as though the marriage was dissolved by a decree of divorce instead of being annulled. Thus section 16 confers the status of legitimacy on the children of void and annulled voidable marriages. It removes the long-standing social stigma suffered by the illegitimate children. However all illegitimate children are not made legitimate.² The marriage must be null and void under section 11 or must be one that has been annulled by a decree of nullity under section 12, before section 16 can apply.

II Restricted property rights

Though the status of legitimacy has been conferred on the children of void and voidable marriages their rights in respect of property are restricted. Sub-section (3) of section 16 states that the children who are made legitimate under sub-sections (1) and (2) get or acquire rights in or to the property of their parents only.³ Under the Hindu Succession Act 1956 (HSA) legitimate children can succeed to the property of their father and mother. But illegitimate children can succeed to their mother only. This is because

1. These defects were pointed out by the Madras High Court in *Tulasi Ammal v. Gouri Ammal*, A.I.R., 1962 Mad. 510 and *Tulasi Ammal v. Gouri Ammal*, A.I.R., 1964 Mad. 118

2. For example a case of no marriage or a marriage without essential ceremonies is not covered by section 16 and the children in such situations are illegitimate.

3. However if a child of void or voidable marriage is capable of possessing or acquiring any rights in the property of any person other than his parents in some other capacity or status he may get that property. See sub-section (3) of section 16.

of the definition of the expression 'related' under section 3(i)(j). The expression 'related' means related by legitimate kinship. But the proviso to section 3(1)(j) lays down that illegitimate children shall be deemed to be related to their mother and to one another. Thus under the HSA illegitimate relationship with the father is not recognised but it is recognised with the mother.

The question for consideration is whether a child of void marriage or annulled voidable marriage is entitled to succeed to his father under the provisions of the HSA. In *Dadoo Atmaram v. Raghunath*⁴ a single judge of the Bombay High Court, dealing with the rights of inheritance of a child of void marriage, held that since a child of void marriage is illegitimate he is not entitled to succeed to the estate of his father under the Act. In this case section 16 of the HMA was not brought to the attention of the learned judge and therefore its effect on the rights of the child of void marriage was not considered. In *Laxmibai v. Limbabai*⁵ another single judge considered the provisions of section 16, HMA and section 8, HSA. Dealing with section 16 of the HMA the learned judge pointed out that the effect of legitimacy is to confer rights in or to the property of parents. Then dealing with the provisions of the HSA, he observed that 'son' and 'daughter' are of class I heirs. The term 'heir' means any person who is entitled to succeed to the property of an intestate. 'Son' and 'daughter' are the descriptive natural terms indicating off-springs having only sex differential, 'son' indicating male off-spring and 'daughter' indicating the female off-spring. To be the son or daughter, it has to be shown that the person was born to a Hindu who has died intestate. If the description is answered then the person will be entitled to inherit the property of the father. The ultimate conclusion of the court that the child of void marriage is entitled to succeed to the property of the father is correct. But the learned judge has not considered the matter in the light of the definition of the expression 'related' under section 3(1)(j) of the HSA. The question whether section 16 of the HMA controls section 3(1)(j) of the HSA was not considered.

As *Dadoo Atmaram* has not considered section 16, HMA and *Laxmibai* has not referred to section 3(1)(j), HSA, they have been subjected to criticism in *Shantaram v. Dagubai*⁶ by the Division Bench. After examining the provisions of both the Acts the Division Bench came to the conclusion that legitimacy created by section 16 must be read into as part of the definition in section 3(1)(j). If so construed the child of void marriage is related to his father within the meaning of section 3(1)(j) and hence succeeds to his estate. Thus the children of void and annulled voidable marriages are entitled to succeed to the property of their father as legitimate children.

4. A.I.R. 1979 Bom. 176.

5. A.I.R. 1983 Bom. 222.

6. A.I.R. 1987 Bom. 182.

III Legitimized son's rights

Another question for consideration is whether a son born under void marriage is entitled to share in the joint family property under Mitakshara law. In other words whether the legitimized son acquires an interest by birth in the joint family property under Mitakshara law. This matter has been considered by courts in some cases. In one set of cases⁷ it was held that though the children of void marriages are made legitimate sub-section (3) of section 16 forbids the conferment of any right on them in the property of another person, other than the parents. Therefore the legitimized son cannot get a share in the property which belongs to coparcenary of which his father is a member. The legitimized son is concerned with the property left by his parents, i.e., he succeeds to the property on the death of his parents.

In another set of cases⁸ it was observed that since the son of void marriage is made legitimate, he is entitled to share in the coparcenary property. But in these cases the effect of sub-section (3) on the rights of legitimized children was not considered. The question as to whether the legitimized son is entitled to share in the joint family property inspite of the restriction under sub-section (3) was not considered and therefore not answered.

Recently the Division Bench of the A.P. High Court in *Rasala Prakasa Rao v. Rasala Venkateswara Rao*⁹ has considered in detail the rights of illegitimate sons under the Hindu Law and the effect of section 16 on the rights of such a child. Reviewing the Hindu Law texts and the case law¹⁰ on the point the court observed that illegitimate sons of the Dwijas are entitled to maintenance only. The illegitimate son of a Sudra by a permanently kept concubine has the status of a son and is a member of the family. But his rights are limited compared to those of a son born in wedlock. He has no right by birth and therefore he cannot demand partition during his father's lifetime. If a partition is made during the father's lifetime, he will be allotted a share by father's choice. But if a partition is made after the father's death, the brother should make him a partaker of the moiety

7. *Hanmanta v. Dondavvabai*, A.I.R. 1977 Bom. 191; *Shantaram v. Dhagubai*, A.I.R. 1987 Bom. 182; *Sivagnana Vadivu Nachiar v. Krishna Kanta*, (1976) 89 Mad. L.W. 706; *Perumal Gounder v. Pachayappan*, A.I.R. 1990 Mad. 110; and *Jagarlamudi Sujata v. Jagarlamudi Krishna Prasad*, A.I.R. 1992 A.P. 291.

8. *Raghunath v. Nana*, (1985) 87 Bom. L.R. 448; *Margabandhu v. Kothandarama Mandhiri*, (1983) 96 Mad. L.W. 448 and *Goverdhan Fingh v. Hiranman Singh*, 1980 (2) APLJ 172. It is to be noted that *Raghunath* was overruled in *Shantaram supra*, note 7 and *Margabandhu* was reviewed in *Margabandhu v. Kothandarama Mandhiri*, (1987) 2 Mad. L.J. 267 and a different conclusion was arrived at.

9. A.I.R. 1992 A.P. 234.

10. *Valliyappa Chetty v. Natarajan*, A.I.R. 1931 P.C. 294; *Raju V. Arunagiri v. A.I.R.* Mad. 397; *Guru Narain v. Guru Tahal Das*, A.I.R. 1952 S.C. 225; *Ajit Kumar v. Ujagar Singh*. A.I.R. 1961 S.C. 1334; *Dorai Babu v. Gopala Krishna*, A.I.R. 1960 Mad. 501; *Raghavendra Rao v. Rajeswara Rao*, (1974) II An. W.R. 245.

of a share. On a partition the illegitimate son takes only half of what he would have taken if he were a legitimate son. Thus he succeeds, under Mitakshara law, to the father's estate as a coparcener with the legitimate son with the result that on the death of the latter before partition he becomes entitled to the whole estate by survivorship. Even if there is no legitimate son, the illegitimate son would be entitled to moiety of his father's estate where there is a widow, daughter or daughter's son of the last male holder. In the absence of any one of the three heirs, he succeeds to the entire estate of his father.¹¹

Then considering the effect of section 16 on the rights of illegitimate son the court observed that it (section 16) has conferred on him the status of legitimate son and his other pre-existing rights are in no way curtailed. After 1976 amendment the benefits of section 16 are enlarged. By virtue of section 16 he can be equated with the natural son and treated as coparcener for the properties held by the father whether the property be originally joint family property or not. He can share equally along with other sons. The only limitation is that during the lifetime of the father he is not entitled to seek partition. He can seek partition after the death of the father.¹²

The net result of the decision is that the legitimized son does not acquire any right by birth in the joint family property even by virtue of the provisions of section 16. He becomes coparcener with the other legitimate sons after father's death. On partition he shares equally along with other coparceners in view of the provisions of section 16.¹³

There seems to be some contradiction in the judgment. According to the court the share of the legitimized son becomes enlarged under section 16 but he does not acquire any right by birth in the joint family property. It is submitted that if it is possible under section 16 to enlarge the share of the legitimized son it should also be possible to confer on him a right by birth in the joint properties. The court should have taken a pragmatic view and arrived at a right conclusion. It just missed an opportunity to correct the things.

The following are the consequence of the decision. Firstly, the legitimized son does not become a coparcener with his father and therefore he is not entitled to claim a share during the life time of the father. Secondly,

11. *Id.* at 237 and 238.

12. *Id.* at 246.

13. It seems that the court wrongly applied the provisions of section 16 to the facts of the present case. Legitimacy is conferred by sub-section (1) of section 16 on the children of a marriage which is null and void under section 11. Section 11 applied only to marriages solemnized after the commencement of the Hindu Marriage Act and does not relate to marriages solemnized prior to the said Act. Section 16 does not confer legitimacy on the child born of a marriage invalid under the law in force prior to the commencement of the Act. In the instant case the second marriage (void marriage) took place before the commencement of the Act and hence the provisions of section 15 are not applicable accordingly. See *P.E. K. Kalliani v. K. Devi*, A.I.R. 1989 Ker. 279.

a partition is made between the father and legitimate sons but no share is allotted to the legitimized son. Later he will not be entitled to share.¹⁴ Thirdly, the father dies undivided in terms of the proviso to section 6, HSA. In such a situation whether share is to be allotted or not to the legitimized son under notional partition. Under notional partition shares are allotted to the coparceners as if partition has taken place before the death of the father. If that is the case share may not be allotted to him. Lastly, the legitimized son in respect of twice born castes is not entitled to share in the joint family property in any case. The exclusion of him from the enjoyment of property on the basis of caste is unreasonable.¹⁵

It is submitted that the legitimized son becomes coparcener with his father and he is entitled to claim a share even during the lifetime of his father. Under section 16 he is legitimate and the legitimacy relates back to the date of his birth. Therefore, he acquires an interest by birth in the ancestral property of his father and becomes coparcener with him. This can be explained with the following simple illustration. A, a Hindu male, who is a sole surviving coparcener or separated coparcener married B, a Hindu female according to Hindu customary rites and ceremonies. However A's marriage with B is void for the reason that they are within the *sapinda* relationship. X, a son is born under the marriage. Section 16 confers the status of legitimacy on X and it also confers on him a right in or to the property of his father. As X is legitimate he acquires an interest by birth in the ancestral property held by the father. It is submitted that same is the case even if there is another coparcener with the father. The acquisition of an interest in the coparcenary property may have the effect of decreasing the shares of other legitimate sons (if any) but it does not amount to divestment of property vested in them.¹⁶ The share of a coparcener in Mitakshara coparcenary becomes specified only on partition. Before partition it is a fluctuating interest. Therefore acquisition of an interest by the legitimized

14. The legitimized son can only succeed to the father's share as a class I heir under the Hindu Succession Act.

15. In *In re Amina*, A.I.R. 1992 Bom. 214, D.R. Dhanuka, J. expressed the view that personal laws are 'law' and "laws" in force" under Article 13 of the Constitution and they must conform to the fundamental rights. According to the learned judge some of the provisions of personal laws like a Muslim man's right to take more than one wife, uniletaral divorce, gross inequality in matter or inheritance are unjust and unconstitutional. If the views of the learned judge are correct, then the exclusion of children from the enjoyment of property on the basis of caste is also unconstitutional.

16. The Supreme Court in *Vasant v. Dattu*, A.I.R. 1987 S.C. 398, has held that the son adopted by the widow of a deceased coparcener becomes a coparcener with others in Mitakshara coparcenary. The acquisition of an interest in the joint family property by the adopted son may have the effect of decreasing the shares of other coparceners but it does not amount to divestment of property within the meaning of the proviso (c) to section 12, Hindu Adoptions and Maintenance Act, 1956. See also *Agalawe v. Agalawe*, A.I.R. 1988 S.C. 845.

son in the ancestral property does not amount to acquisition of right in the property of other coparceners. The restriction under sub-section (3) of section 16 with regard to the acquisition of right in the property of others, other than the father, is applicable to the case of an undivided interest of a coparcener dying in terms of section 6 of the HSA. Thus if a coparcener, other than father, dies leaving his undivided share then the legitimized son cannot claim it either by succession or survivorship. Sub-section (3) in no way prohibits the acquisition of an interest by birth in the ancestral property of the father by the legitimized son.

The provisions of section 16 are beneficial in nature and hence they must be liberally interpreted. Even if two interpretations are possible we must prefer that interpretation which will remedy the injustice.¹⁷ The benefits that are conferred by section 16 are not confined to matters of intestate succession alone but may extend to others also. Sub-section (3) of section 16 enables the legitimized son to acquire an interest in the property of his father. Such a right cannot be denied to him merely because of the presence of another coparcener. The intention of the legislature is clear. It is to confer on the legitimized child a right in or to the property of the father. If the father is in possession of ancestral property the legitimized son acquires an interest in it by birth. If the father is in possession of separate property he succeeds as a class I heir after the death of the father.

Thus the forgoing discussion makes it clear that the legitimized son becomes a coparcener with his father and he is entitled to share in the joint family property during the lifetime of the father and even in the presence of other coparceners.

Apart from this, it may be mentioned here that under the old Hindu Law the illegitimate son of a Sudra from a permanent concubine was related to his putative father and succeeded to the estate of the father along with legitimate sons, though not equally. Now under the Hindu Succession Act the illegitimate son of a Sudra too is not entitled to succeed to his putative father. In some countries like New Zealand, Russia and in parts of Australia and Canada the distinction between legitimate and illegitimate child has been done away with. All children, whether born to married parents or unmarried parents, possess the same rights. In England after the passing of the Family Law Reform Act 1987 illegitimate children enjoy full rights of succession. It is unfortunate that the HSA, instead of protecting the rights of illegitimate children has taken away their rights once enjoyed by them. There is an urgent need for an amendment of the law so as to confer more rights on illegitimate children.

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17. *Gurupad v. Hirabai*, A.I.R. 1978 S.C. 1239.

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