

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.08.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

A.S.No.158 of 2013
and
M.P.Nos.1 & 2 of 2013
and
Cross Objection No.70 of 2013

Date of Reserving the Judgment 29.07.2015	Date of Pronouncing the Judgment 05.08.2015
--	---

1.BABY @ ROHINI (DECEASED)
2.S.K.RAVIKUMAR
3.S.K.SHOBANA
4.S.K.SENTHILKUMAR
5.R.RAJU
6.LAVANYA
7.REVATHI

...Appellants in Appeal 158/13
and respondents 1 to 4 and 90,
91 & 92 in Cross Objection
(Plaintiffs)

(Appellants 5 to 7 in appeal brought on record as LRs of the deceased 1st appellant vide order of the Court dated 29.01.2015 made in M.P.No.3 of 2015) and R90 to 92 in Cross Objection brought on record as LRs of the deceased 1st respondents in cross objection vide order of this court dated 18.6.2015 made in MP.3/15 in Cross Objection 70/13)

-Vs-

1.KAMALAM KUMERASAN
2.S.K.JEYARAJ
3.CHITRA AJIT KUMAR
4.AKALYA SRIKANDAMOORTHY
5.JAYANTHI SRINIVASAN
6.SANTHI VASUDEVAN
7.KALPANA VIJAYASARATHI
8.CHANDRASEKARAN
9.BABY
10.BHUVANESWARI

11 SHANTHI
12 AKALYA
13 AVINASHIPPAN
14 KRISHNASAMY EDUCATION TRUST
15 KRISHNASAMY
16 VENKATACHALAM
17 CHINNU
18 DR.P.VENKATACHALAM
19 A.ABDUL HAKKIM
20 RAMALINGAM
21 RIYASUDEEN
22 K.A.SEKAR
23 M.M.ABDUL KADHAR
24 MANAGER, LORD KRISHNA BANK
25 M/S MURUGESN ENTERPRISES
26 R.MUTHUSAMY
27 P.A.AYEESHA
28 P.K.KADHEEJA
29 A.MOHAMED
30 P.K.BHOTHUTTI
31 A.SALINA
32 D.K.ABUBAKKAR HAJEE S/o/ABDULLA HAJEE
33 P.K.ABUBAKKAR HAJEE, S/O/ KUNNI MOHAMMED
34 V.K.HASAN
35 C.K.MOIDHU
36 K.IBRAHIM
37 A.SHANNI D SILVA
38 A.JOE D.SILVA
39 M/S NEW KOUSHIKA SWEETS BY PARTNER RAMACHANDRAN
40 M/S SRIVATSA TRADING CORPN & IYYENGAR BAKERY BY PARTNER
C.S. RAMASAMY
41 L.M.ANNAMALAI, MUTHURAMALINGAM & CO
42 L.m.ANNAMALAI
43 KALAIMAGAL PRINTING INDUSTRIES (P) LTD.,
44 PONNUSAMY
45 NANDHAKUMAR
46 S.PERIYASAMY
47 CHINNAMALAI
48 ANARIN
49 S.RAMASAMY
50 SELVARAJ
51 R.GOPAL
52 K.CHINNA GOUNDER
53 NATCHIMUTHU GOUNDER
54 P.RAMANI
55 S.MARIAPPAN
56 BAKINATHAN
57 RAMA MOORTHY
58 AMARJOTHI @ JOTHI
59 DR.M.RAMAINGAM
60 M. SORNAMBAL

WEB COPY

61 MRS SUSMA
62 NATCHIMUTHU
63 MANOHARAN
64 VENKITACHALAM
65 DHATCHINA MOORTHY
66 RAFSON ENTERPRISES
67 DR.R.JAGAN
68 R.THAMARA SELVAM
69 SELV JAGAN DIED
70 DR.REVATHI SELVAM
71 C.K.ANEEZ
72 ANNACHA PALLAY MOIDEEN KUTTY HAJI
73 MOHAMMED MUNAS
74 MOHAMMED MUSTAQ
75 NASEEMTH
76 P.ARUMUGHAM
77 S.SARAVANAN
78 V.VELUSAMY
79 P.SOUNDARARAJAN
80 A.THIRUNAVUKKARASU
81 KAMALA
82 PARARPARAMBIL VELLANGOF BEERON KUTTY HAJI
83 K.P.RAGHURAMAN
84 R.PROBHURAM
85 B.RAVICHANDRAN
86 N.SIVASHANMUGHAM
87 ANANTHA SRINIVASAN
88 K.S.KANDASAMY
89 K.ANANDAKUMAR
90 R.SATHYANARAYANA SETTY ..respondents in appeal and
respondents 5 to 69 cross
objectors and respondents in
70 to 92 in cross objection.
(9 to 25, 27 to 65,71,73 to 81, 83
to 89 remained exparte in the
trial court, notice dispensed
with)

Prayer:

First Appeal filed under Section 96 of the C.P.C., against the judgment and decree dated 22.02.2013 made in O.S.No.269 of 2004 on the file of the Vth Additional District and Sessions Court, Coimbatore.

For Appellants

In A.S.No.158/2013 : Mr.T.S.R.Venkatramana
for Mr.V.Srikanth and for
Respondents 1 to 4, 90,91 &92
in Cross objection

For Respondents

In A.S.No.158/2013 : Mr.S.Parthasarathy, Senior Counsel
for Mr.Anandhagomathy, for R.72
in appeal & R71 in Cross Objection

Mr.S.Kumaradevan, for R1 in appeal
R5 in Cross objection

Mr.R.Bharath Kumar, for R2 in appeal &
R6 in cross objection

Mr.S.Venkatesh, for R6 & R8 in appeal
and R10 &12 in cross objection

Mr.C.R.Prasannan, for R66 to R68, R70
in appeal and cross-objectors in cross
cross objection

Mr.R.Subramanian, for R82 in appeal &
R81 in Cross Objection

Mr.Rajamanickam, for R90 in appeal &
R89 in cross Objection

R9 to R25, R27 to R65, R71,
R73 to R81 R83 to R89 in appeal
and R13 to 29, 31 to 69, 70, 72 to 80,
82 to 88 in cross objection-
Exparte (vide EB)

R3, R4, R5, R7, R26 -in appeal and
R7, R8, R9, R11 & R30 in Cross
Objection-No appearance

J U D G M E N T

The first appeal arises out of the judgment and decree dated 22.02.2013 made in O.S.No.269 of 2004 on the file of the Vth Additional District and Sessions Court, Coimbatore.

2.The averments made in the plaint are as follows:

(a) Originally the suit properties are the self-acquired properties of late Veeraboyan who had two wives Nagammal and Nanjammal. Veeraboyan had only one daughter named Valliammal through his first wife and three sons viz., S.V.Subramaniam, S.V.Kumaresan and S.V.Viswananthan through his second wife. The plaintiffs are the children of the deceased S.V.Kumaresan through his second wife Chandra. The first defendant is the first wife and the defendants 2 to 5 are her children through the deceased S.V.Kumaresan. Veeraboyan executed a settlement deed dated 23.01.1950 and Will dated 06.04.1950 in respect of the suit properties and other properties. As per the settlement deed, 'A' schedule properties were given to S.V.Subramaniam, 'B' schedule properties were given to S.V.Kumaresan, 'C' schedule properties were given to S.V.Viswananthan and 'D' schedule properties were jointly given to both his wives and his daughter born through his first wife.

(b) All the settlees were given only a right to enjoy their respective properties during their life time without the power of alienation. As regards the 'D' schedule properties, it was stated that in case of death of the first wife, 1/3rd of the 'D' schedule properties should go to the first son and in case of death of the second wife, 1/3rd of the 'D' schedule properties should go to the second son and in case of death of his daughter, 1/3rd of the 'D' schedule properties should go to the third son.

(c) As per the recitals in the settlement deed, dated 23.01.1950 in case any of his sons did not have any issue, his share after his lifetime and the lifetime of his wife should got to the other brothers or their heirs. The first son S.V.Subramaniam died without any issues on 18.01.1993 and his widow also dies on 07.06.1993. The third son S.V.Viswanathan pre-deceased the first son and died on 30.08.1990. Therefore, the entire 'A' schedule properties and the 1/3rd share in the 'D' schedule properties left by the first son S.V.Subramaniam was inherited by the second son S.V.Kumaresan who was alone alive on the date of the death of S.V.Subramaniam.

(d) S.V.Kumaresan was in possession and enjoyment of the properties allotted to him in the settlement deed dated 23.01.1950 and also the properties allotted to S.V.Subramaniam in the said settlement deed. Therefore, the plaintiffs 2 and 4 and the 2nd defendant as male heirs are entitled to inherit the properties included in the 'B' schedule and also the 1/3rd share in the 'D' schedule as per the Will dated 23.01.1950. That apart, the plaintiffs 1 to 4 and the defendants 1 to 8 are equally entitled to the properties described in 'A' schedule and

1/3rd share in 'D' schedule as per the settlement deed, dated 23.01.1950. Even though the plaintiffs are the children of a bigamous marriage, under Section 16 of the Hindu Marriage Act, they are entitled to inherit their father's property along with the defendants 1 to 5. Further, the plaintiffs are deemed to be in joint possession of the suit properties.

(e) After the death of S.V.Kumaresan, the plaintiffs issued a notice dated 27.12.1997 to all the tenants to pay their share of the rent. However, none of the tenants paid any rent to the plaintiff. While so, the second defendant S.K.Jeyaraj, s/o.S.V.Kumaresan filed a suit in O.S.No.1420 of 1991 against S.V.Subramaniam, S.V.Kumaresan and others for declaration that the suit properties absolutely belonged to him. However, pending suit S.V.Kumaresan, S.V.Subramaniam, his wife Lakshmi Subramaniam and Rani Viswananthan died. The plaintiffs are not aware of the said suit till they received a reply notice dated 18.01.2002 wherein it was stated that the second defendant alone is the owner of the entire properties left by S.V.Subramaniam as per the compromise decree in O.S.No.1420 of 1991 dated 20.02.2001. The said compromise decree was a collusive one obtained behind the back of the plaintiffs. So, the said decree is void and not binding on the plaintiffs who were not parties to the said suit and prayed for decree.

3.The gist and essence of the written statement filed by the 2nd defendant are as follows:

The averment that the plaintiffs are the children of the deceased Kumerasan through his second wife is not true. Chandra was not married to Kumaresan and she was only a concubine of Kumerasan. The first defendant is the only wife of Kumaresan and the second defendant is their only son. Further, the deceased Kumaresan did not inherit the 'A' schedule properties and the 1/3rd share in the 'D' scheduled properties allotted to the deceased S.V.Subramaniam. The mother of the plaintiffs viz., Chandra was a Christian. She was married to one R.S.Pillai on 02.09.1954 under the Special Marriage Act. However, the said marriage was dissolved by a decree of a competent court. The first plaintiff was born in about four months after the said decree. However, there was no marriage between Chandra and Kumaresan. Any marriage between them whether legally valid or not in view of its bigamous nature could only be a registered marriage under the Special Marriage Act. Hence, the Children of Chandra who are the plaintiffs herein cannot claim even as the illegitimate child born of a void marriage. As such, the plaintiffs are not the heirs of Kumaresan even if the later was the putative father. There is no chance of invoking Section 16 of the Hindu Marriage Act. Even otherwise Section 16(3) is also a bar to any such claim. Further, as per the settlement deed, dated 23.01.1950 Kumaresan did not succeed to A scheduled property as absolute owner. He got only a life estate in both A

and D scheduled properties, apart from those in Schedule B. The remainder vested with the 2nd defendant in the branch of Kumaresan and the 8th defendant in the branch of Viswanathan. As far as the properties in Schedule A and D are concerned, Kumaresan had no heritable estate and no body can claim any property as heir to Kumaresan. The claim of the second defendant in respect of the property in Schedule A and D, is not as heir to Kumaresan but by virtue of the grant by the settlement deed. Hence, the 2nd defendant prays for dismissal of the suit.

4. The written statement filed by the 4th defendant and adopted by the defendants 1 and 3 also puts forth the very same contention raised by the 2nd defendant and prays for the dismissal of the suit.

5. The gist and essence of the written statement filed by the 6th defendant and adopted by the 8th defendant is as follows:

The defendants 6 and 8 are the children of S.V.Viswanathan who is no more. The wife of S.V.Viswanathan is also no more. The defendants 6 and 8 are concerned only with the A and D schedule properties which devolved upon S.V.Viswanathan and S.V.Kumaresan for life, after the death of S.V.Subramaniam and Mrs.Lakshmi Subramaniam, who died issueless. As such the A and D schedule properties belonged to V.Chandrasekaran and S.K.Jayaraj equally. S.K.Jayaraj who is the son of S.V.Kumaresan filed a suit in O.S.No.1420 of 1991 against S.V.Subramaniam and others. In the said suit, a compromise decree was entered into and as per the said decree, 50% of the A schedule property was allotted to the 8th defendant viz., V.Chandrasekaran and the remaining 50% was allotted to S.K.Jayaraj, the 2nd defendant in the said suit. Further, the plaintiffs are the not the children of the deceased Kumaresan through his second wife Chandra. The said Chandra was not married to Kumaresan and she was only a concubine of the deceased Kumaresan. The 1st defendant is the only wife of Kumaresan and the 2nd defendant is their son. The suit properties are the ancestral properties and as such the plaintiffs who are only illegitimate children of the concubine of S.V.Kumaresan cannot claim any right in the suit properties, as the suit properties are not the self acquired properties of Kumaresan. The alienation made by the plaintiffs' father S.V.Kumaresan, his only son S.K.Jayaraj are valid and binding on the plaintiffs and the plaintiffs cannot question the alienations made by S.V.Kumaresan, S.V.Viswanathan or S.V.Subramaniam. Furthermore, the suit is bad for non-joinder of necessary parties.

6. The gist and essence of the written statement filed by the 26th defendant is as follows:

It is true that the plaintiffs are the children of the deceased Kumaresan through his second wife Chandra. The first defendant is the first wife of the deceased Kumaresan and the

defendants 2 to 5 are their children. This defendant had purchased a part of the suit scheduled property from its absolute owner and he is a bonafide purchaser for value. Only in order to disturb the peaceful possession of the people who had purchased the property for value like this defendant, the present suit has been filed. Hence, he prayed for dismissal of the suit.

7. The gist and essence of the written statement filed by the 68th defendant is as follows:

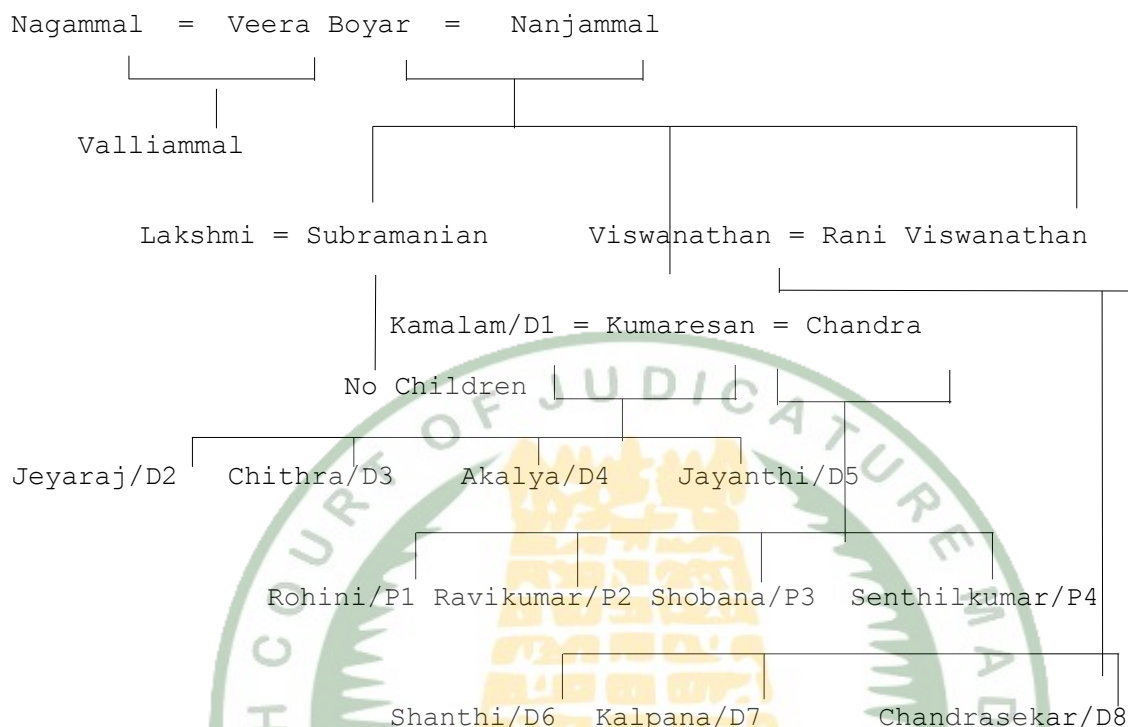
The 66th defendant is a partnership firm and the defendants 67 to 70 are the partners of the firm. The suit properties formed a part of the larger part of the absolute property of the firm and the larger part belonged to one Veera Boyar. The said Veera Boyar executed a Will bequeathing the suit property to his son S.V.Subramaniam and after his death, his wife Lakshmi Ammal succeeded the vested remainder. Thereafter, the said Lakshmi Ammal executed a Will bequeathing the suit property to her brother Dakshinamoorthy and after the death of Lakshmi Ammal, Dakshinamoorthy became the absolute legatee and owner. When Dakshinamoorthy constituted a partnership firm, the suit property was declared as the Firm's property. Thus, the firm became the absolute owner of the property covered by the Will of Veera Boyar and Lakshmi Ammal. Thus, the defendant prayed for dismissal of the suit.

8. The gist and essence of the written statement filed by the 90th defendant is as follows

This defendants purchased item no.4 in B schedule through sale deed dated 04.07.2008 and 04.08.2008. The said property devolved upon Kumaresan and the heirs of S.V.Viswanathan on the death of Subramaniam and they sold away the property to the vendors of this defendant during their life time. So the property purchased by this defendant was not owned by Kumaresan at the time of his death. Further, the suit is barred by limitation. The sale was effected in the year 1996 and the suit was filed in the year 2002. So, without seeking the relief to set aside the sale, the suit is not maintainable. Thus, the defendant prayed for dismissal of the suit.

9. The trial Court, after considering the averments both in the plaint and the written statements and arguments of both the counsel, framed eight issues and considering the oral evidence of P.W.1, P.W.2, D.W.1 to D.W.5 and the documentary evidences viz., Exs.A.1 to A.66 and Exs.B.1 to B.43, dismissed the suit, against which the present first appeal has been preferred by the appellants/plaintiffs.

10. For the sake of convenience, the genealogy of Veeraboyar family is set out hereunder:



11. The learned counsel appearing for the appellants would submit that the suit properties originally belong to late Veeraboyan who had two wives Nagammal and Nanjammal. Veeraboyan had only one daughter named Valliammal through his first wife Nagammal and three sons viz., S.V.Subramaniam, S.V.Kumaresan and S.V.Viswanathan through his second wife Nanjammal. The first son S.V.Subramaniam and his wife Lakshmi Ammal had no issues. The second son S.V.Kumaresan and his wife Kamalam (D1) had a son Jeyaraj (D2) and three daughters viz., Chitra (D3), Akalya (D4) and Jayanthi (D5). The third son S.V.Viswanathan had two daughters viz., Santhi (D6) and Kalpana (D7) and one son V.Chandrasekaran (D8). The appellants 1 to 4/plaintiffs 1 to 4 are the children of the deceased S.V.Kumaresan through his second wife Chandra.

12. The learned counsel would further submit that as per Ex.A.37/Settlement Deed, dated 23.01.1950 'A' schedule properties were settled to S.V.Subramaniam, 'B' schedule properties were settled to S.V.Kumaresan, 'C' schedule properties were settled to S.V.Viswanathan and 'D' schedule properties were jointly settled to both his wives and the daughter born through his first wife and after their lifetime, the 'D' scheduled properties had to be divided between his three sons. In the said settlement deed, his sons were given only the right to enjoy their respective properties during their life

time without the power of alienation and the vested remainder was given to the Aan Santhathis. In the absence of Aan Santhathis, the properties may devolve upon the Pen Santhathis and in case any of his sons did not have any issue, his share after his lifetime and the lifetime of his wife should go to the other brothers or their heirs.

13. The learned counsel also vehemently contended that though the respondent herein has raised the plea that the mother of the appellant Chandra is a Christian and after she begot a child, she had divorced her husband R.S.Pillai, the marriage was not performed under the Special Marriage Act. However, the Trial Court has disbelieved the contention of the respondent and drawn adverse inference because of the non-examination of the first defendant, who is the competent person to speak about the marriage between the deceased Kumaresan and Chandra. However, no appeal has been preferred against the said finding. In such circumstances, the learned counsel for the appellants would submit that Chandra is the second wife of Kumaresan and the appellants 2 and 4 born to Kumaresan and Chandra will come under the category of Aan Santhathis as mentioned in Ex.A.37/Settlement Deed and so they are entitled to share in the properties. Since some of the properties were sold during the life time of S.V.Kumaresan, the tenants and the subsequent purchasers were impleaded as parties. To substantiate his contention, the learned counsel for the appellants relied upon the following decisions:

1. AIR 1926 Privy Council 73, (Bai) Nagubai Manglorkar v. Bai Monghibai (since deceived) and others
2. AIR 1931 PRIVY COUNCIL 294, P.M.A.M.Vellaiyappa Chetty and others v. Natarajan and another
3. AIR 1933 Madras 659, Subramania Chetti v. Mahalakshmi Ammla and others
4. AIR 1939 Madras 614, Maharajah Sahib of Venkatagiri and another v. Raja Rajeswara Rao and another
5. AIR 1952 Supreme Court 225, Gur Narain Das and another v. Gur Tahal Das and others
6. AIR 1961 Supreme Court 1334, Singhai Ajit Kumar and another v. Ujayar Singh and others
7. 2011 (1) CTC 92, S.K.Jeyarhaaj v. Baby @ Rohini
8. AIR 1975 MADRAS 275, Narayani Ammal and another v. Govindaswami Naidu
9. (2011) 5 MLJ 86, Dhanalakshmi v. S.Prabhavathy and Others
10. AIR 1987 BOMBAY 182, Shantaram Tukaram Patil and another v. Smt.Dagubai Tukaram Patil and others
11. AIR 1999 MADRAS 143, A.Parasurama Reddiar v. Arunachala Reddiar and others
12. (2011) 11 Supreme Court Cases 1, Revanasiddappa and another v. Mallikarjun and others
13. AIR 1978 Supreme Court 1051, G.Appaswami Chettiar and another v. R.Sarangapani Chettiar and others

- 14.67 L.W. 1205, Kotta Pullaiah v. Gandhi Veeraraghavamma and another
- 15.2010 (2) CTC 622, Kuppan v. Muniammal and another
- 16.(2000) 2 Supreme Court Cases 431, Rameshwari Devi v. State of Bihar and Others
- 17.(1996) 2 Supreme Court Cases 567, Gurnam Kaur and another v. Puran Singh and others
- 18.AIR 1992 Supreme Court 756, S.P.S.Balasubramanyam v. Suruttayan alias Andali Padayachi and others
- 19.88 L.W. 706, Sivagnanavadivu Nachiar and others v. Krishnakanthan and others
- 20.AIR 1992 ANDHRA PRADESH 234, Rasala Surya Prakasarao and others v. Rasala Venkateswararao and others
- 21.AIR 1983 BOMBAY 222, Laxmibai Nagappa Matiwadar and others v. Limbabai Nagappa Matiwadar
- 22.2015 (1) CTC 114, Karedla Parthasaradhi v. Gangula Ramanamma (D) through L.Rs & others
- 23.SLP (Crl.) No.3390 of 2014, Uday Gupta v. Aysha and another
- 24.1997-1-L.W.738, Sivaprakasam Pillai v. Sadasivam and 7 others

14. Resisting the same, the learned Senior counsel appearing for the 72nd respondent would submit that the deceased Kumaresan had not married Chandra and that she was only a concubine. In the plaint, the appellants/plaintiffs claim for share as per Section 16(3) of the Hindu Marriage Act. So, it is the duty of the appellants/plaintiffs to prove the factum of marriage. Section 16(3) of the Act can be invoked only if the marriage is void or voidable. However, since the factum of marriage itself was not proved, the mother of the plaintiffs has only the status of a concubine. So, the plaintiffs 2 and 4 who are born to the deceased Kumaresan and Chandra cannot be considered as the 'Aan Santhathis' as mentioned in Ex.A.37/Settlement Deed, executed by Veeraboyan.

15. The learned counsels would further submit that the appellants/plaintiffs are also estopped from questioning the same because their father Kumaresan along with the second defendant had executed Ex.A.24/Settlement deed, dated 07.12.1975 in respect of 1 item of the property. Even though the said property is one of the items mentioned in the schedule under Ex.A.37/Settlement Deed, it is not the subject matter of the suit. During the execution of the Ex.A.24/Settlement Deed, the deceased Kumaresan had mentioned his son Jeyaraj, the 2nd defendant/2nd respondent as 'Aega Puthalvan', which means 'Sole Son' and the said deed had been acted upon by them under Ex.B.3/Plaint in O.S.No.109/1984. In such circumstances, the plaintiffs 2 and 4 are estopped from claiming that they are the Aan Santhathis of S.V.Kumaresan and they are entitled to share in the properties mentioned in Ex.A.37/Settlement Deed. The learned counsels would further submit that the term Male Varisu

would only denote the legitimate children and not the illegitimate children. To substantiate their contentions, the learned counsels relied upon the for the 72nd respondent relied on the following decisions:

1. 1939 (1) MLJ 831, Maharajah Sahib of Venkatagiri and another v. Raja Rajeswara Rao and another
 2. AIR (37) 1950 MADRAS 480, The Commissioner of Income Tax, Madras v. Sri.C.S.Rajasundaram Chetty
 3. 1998-3-L.W.753, A.Parasurama Reddiar v. Arunachala Reddiar and others
 4. AIR 2010 BOMBAY 24, Shahaji Kisan Asme and others v. Sitaram Kondi Asme and others,
- and prayed for dismissal of the appeal.

16. The learned counsel for the second respondent would submit that he is adopting the argument put forth by Mr.S.Parthasarathy, learned Senior Counsel appearing for the 72nd respondent. He would further submit that the appellants are not the legitimate children and the presumption of the legitimate marriage cannot be drawn merely on the ground of prolonged cohabitation of the couple. Furthermore, the presumption under Section 112 of the Indian Evidence Act cannot be invoked unless there is a strong evidence of legitimate marriage between the mother of the person claiming legitimacy and his father. For the said reason, the learned counsel relied upon the decision reported in (2011) 5 MLJ 86, Dhanalakshmi v. S.Prabhavathy and Others and prayed for the dismissal of the appeal.

17. On the other hand, the learned counsel for the cross-objectors 1 to 4 who are the respondents 66 to 70 would submit that the 65th respondent got the property from his sister Lakshmi Ammal. However, since the attesor of the Ex.A.27/Will executed by Lakshmi Ammal was not examined, the Trial Court has held that the Will has not been proved. It is a well settled principle that when the execution of a Will was not disputed, there is no necessity for examining the attesor. So, the learned counsel prayed for setting aside the said finding of the Trial Court. To substantiate his contention, the learned counsel for the cross-objector relied upon the following decisions:

1. AIR 1990 KERALA 226, Thayyullathil Kunhikannan and others v. Thayyullathil Kalliani and others
2. 2008 (1) CTC 130, R.Vellingiri and another v. R.Kannaian and others
3. 2010-3-L.W.282, Karpagam and another v. E.Purushothaman and others

18. Considered the submissions made by the learned counsel for the appellants as well as the learned counsels for the respondents, learned counsel for the cross-objectors and perused the materials available on record.

19. After hearing the arguments advanced by the learned counsels appearing on either sides, the following points for determination are framed:

1. Whether the appellants/plaintiffs are entitled to the relief of preliminary decree of partition in respect of the suit properties ?

2. Whether the appellants/plaintiffs are entitled to share in the properties as AAN SANTHATHI mentioned in Ex.A.37/Settlement Deed?

3. Whether the Cross Objectors are entitled to any relief?

4. Whether the decree and judgment passed by the Trial Court is sustainable?

5. And for what reliefs the appellants/plaintiffs are entitled to?

Point Nos.1 and 2

20. Now the point to be decided is whether the 2nd and 4th appellant/plaintiff are the Aan (Male) Santhathi as mentioned in Ex.A.37/Settlement Deed?

It is an admitted fact that the suit scheduled properties are the self acquired properties of late Veeraboyan who had two wives Nagammal and Nanjammal. Through his first wife Nagammal, Veeraboyan had only one daughter named Valliammal and through his second wife Nanjammal, he had three sons viz., S.V.Subramaniam, S.V.Kumaresan and S.V.Viswanathan. Veeraboyan executed Ex.A.37/Settlement deed dated 23.01.1950 and as per the same, 'A' schedule properties were settled to S.V.Subramaniam, 'B' schedule properties to S.V.Kumaresan, 'C' schedule properties to S.V.Viswanathan and 'D' schedule properties were jointly settled to both his wives and his daughter born through his first wife. As per the Settlement Deed, all the settlees were given only life estate without the power of alienation. After their life time, their Aan (Male) Santhathi shall enjoy the properties absolutely. If any son was not having male Santhathis, then the female Santhathis will inherit the property and if there are no male and female Santhathis, then after the life time of his son and daughter-in-law who had no issues, the properties will go to his other sons or their heirs. As far as the 'D' scheduled property is concerned, it has been stated that after the death of his wives and his daughter, his sons will get 1/3rd share in the 'D' scheduled properties.

21. As far as the 'C' scheduled properties in Ex.A.37/Settlement Deed are concerned, S.V.Viswanathan is having a son V.Chandrasekaran, who is the 8th defendant/8th respondent. As far as the 'B' scheduled properties are concerned, the appellants A2 and A4 are claiming share in the properties as Aan (Male) Santhathi as mentioned in Ex.A.37/Settlement Deed. As far as 'A' scheduled properties are concerned, S.V.Subramaniam and his Lakshmi Ammal died without any issues. As per the Settlement Deed, after their life time the properties devolve upon the

other sons of Veeraboyan or their heirs. So, it is appropriate to consider the decision relied on by the learned counsel for the appellant whether A2 and A4 are the Aan (Male) Santhathis and whether they are entitled to share in the properties?

22. Admittedly, after the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Act VI of 1949) came into existence on 23.03.1949, only the first marriage is valid. It is pertinent to note that the marriage between the first defendant and the deceased Kumaresan is not disputed. The 2nd defendant is the son and the defendants' 3 to 5 are the daughters. Even though the respondent/appellant herein has stated that he is the father, to prove the paternity of the child EX.A.1 and A.2/ SSLC certificate were marked wherein Kumaresan has signed. It is also admitted that the respondent herein has not disputed the Paternity of the plaintiffs but the only point is that they are the illegitimate children and they are not entitled to any share in the property because it is not the self earned properties of their father but it is the properties of their grandfather and he has settled only the life estate to his sons and the vested remainder is given to the second defendant/second respondent.

23. It is a well settled principle of law that the plaintiff's must prove their case. The plaintiffs have stated that their mother Chandra was married to one Kumerasan. However, the factum of marriage has not been proved by the appellant herein. The Trial Court has held that the first respondent/Kamalam was the competent person to speak about the marriage, however she was not examined, so by invoking section 114(g) of the evidence Act, adverse inference was drawn. But the Trial court has committed an error in this aspect. It is a well settled dictum of the Hon'ble Apex Court that the plaintiff has to prove his case and he cannot take advantage of the loop holes and defects in the defendant's case and sought for relief. So, it is the duty of the appellants/plaintiffs to prove the marriage between Chandra and the deceased Kumaresan.

24. At this juncture, the learned counsel for the appellant would submit that they have not preferred any appeal against the finding and so they are not entitled to canvass about the marriage between Chandra and the deceased Kumaresan. So, it is appropriate to consider the issues framed by the Trial Court.

1. Whether the suit is bad for non joinder of necessary parties?
2. Whether the court fee paid is correct?
3. Whether the suit as framed is maintainable?
4. Whether the plaintiffs are entitled to partition over the suit properties as prayed for?
5. Whether the plaintiffs are entitled to income from the defendants 1 to 8 as prayed for?

6. Whether the plaintiffs are entitled to mesne profits from the defendants 27 to 38, 46 to 82 as prayed for?
7. Whether the 64th defendant is entitled to the relief of permanent injunction as prayed for in the counter claim against the plaintiffs?
8. To what relief?

25. A bare perusal of the issues would reveal that the issues has not been properly framed. Further, the factum of marriage between Chandra and the deceased Kumaresan is neither pleaded in the plaint not in the Proof affidavit. It is true that if a man and woman was cohabiting for a number of years, the presumption that they lived as husband and wife arises. It is pertinent to note that the divorce application has been filed by Chandra and divorce has been granted as per Ex.B.6 on 15.11.1960 in O.P.No.89/1960 and the marriage between Chandra and one R.S.Pillai was dissolved. It is also an admitted case that before Kumaresan and Chandra lived together, the first plaintiff was born 4 months after the date of dissolution of marriage of Chandra with R.S.Pillai. So, this Court has to consider whether a legitimate marriage can be presumed merely on prolonged cohabitation of the deceased Kumaresan and Chandra. At this juncture, it is appropriate to incorporate the decisions relied on by the learned counsel in this aspect.

26.1. In the decision reported in (2011) 5 MLJ 86, Dhanalakshmi v. S.Prabhavathy and Others, it was held that the presumption of a legitimate marriage cannot be drawn merely on ground of prolonged co-habitation of a couple. It is appropriate to incorporate paragraph 18 of the said decision:

"18. No doubt, there are certain documents which would also exemplify and demonstrate that Varadarajulu during his lifetime described Ranganayaki as his wife, but both the Courts below negatived the contention of Ranganayaki and her children and held that they are not the legitimate heirs of deceased Varadarajulu as against which they have not chosen to prefer any objection or appeal and as such this Court need not ponder over those documents. There is no iota or shred, shard or miniscule, pint of jot of evidence available on the side of D11 to demonstrate that Krishnabai was ever referred to by Varadarajulu as his wife even though Krishnabai claims to have lived with him for four decades or so. The reliance placed on the Birth Certificates undoubtedly refer to the parents of those children as Krishnabai and Varadarajulu. Simply because the children were born to them, it cannot be presumed that there was legitimate relationship between the two and that that too in the wake of specific allegation by the plaintiff, D1 and D2 that Krishnabai was already married to Andi Munusamy and one of the children was born to Krishnabai through Andi Munusamy and the remaining children were born of Varadarajulu. Any children born out of

adulterous relationship cannot be treated as the ones eligible to invoke Section 16 of the Hindu Marriage Act. Over and above that, I would like to refer moment I even thought of referring to the old Hindu Law which would contemplate that even an illegitimate child born out of a kept mistress or concubine could also be taken as one entitled to a small moiety along with the legitimate child. But in this case, Varadarajulu died only in the year 1983 long after the commencement of Hindu Marriage Act as well as Hindu Succession Act and once codified new law in the form of Section 16 of the Hindu Marriage Act started occupying the field, the question of invoking the contrary old Hindu Law does not arise. In such an event also I would like to point out that nowhere in the old Hindu law it is found envisaged that a child born out of adulterous connection would be entitled for a share in the self acquired property of its Hindu father. The first appellate Court in paragraph Nos. 23 and 24 of its judgment clearly dealt with those points, so to say *au fait* with the correct proposition of law the dispute was decided warranting no interference in the Second Appeal. With a fine-toothed comb, the matter does not warrant it to be combed as already such exercise was properly performed by the first appellate court."

26.2. In the decision reported in AIR 1992 Supreme Court 756, *S.P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi and others*, it was held that if a man and woman was living under the same roof and cohabiting for a number of years, the presumption that they lived as husband and wife arises and the children born to them are not illegitimate. It is appropriate to incorporate paragraph 3 of the said decision:

"3. The defendants resisted the suit out of which the present appeal arises, *inter alia*, contending that Ramaswamy was not the legitimate son of Chinnathambi and in any event Chinnathambi could not get absolute right in respect of his share of property given to him under Ex. B-32. The trial Court accepting the case of the defendants dismissed the suit. It was held that there was no evidence about the marriage of Chinnathambi with Pavayee No. 2. The appellate Court however, held to the contrary. It held that since Chinna thambi and Pavayee No. 2 continuously lived under the same roof and cohabited for a number of years the law would raise presumption that they lived as husband and wife. There was no other evidence to destroy that presumption. So stating the plaintiffs suit was decreed. In the second appeal the High Court took a different view. It was held that presumption available in favour of Pavayee No. 2 by her continuous living with Chinnathambi has been destroyed by other circumstances in the case. The High Court relied upon three circumstances to rebut the presumption (i) Non-mentioning the name of Pavayee No. 2 in the will Ex. B-1; (ii) Not referring the names of Pavayee No. 2 and her

children by Chinnathambi in the compromise Ex. B-32; and (iii) The evidence of P.W. 6 and D.W. 4. We do not think that the circumstances relied upon by the High Court are relevant to destroy the presumption which is otherwise available to recognise Pavayee No. 2 as the wife of Chinnathambi. The first two circumstances relied upon by the High Court are indeed neutral. The absence of any reference to Pavayee No. 2 in Ex. B-1 or in Ex. B-32 cannot be held against the legitimacy of the children of Pavayee No. 2 born to Chinnathambi. Equally, we do not find anything from the evidence of P.W. 6 or D.W. 4. Both these witnesses did not deny that Chinnathambi and Pavayee No. 2 were living together. It is not in dispute that children including Ramaswami were born to Chinnathambi. In our opinion, the circumstances and the evidence relied upon by the High Court are not relevant to destroy the presumption that Chinnathambi and Pavayee No. 2 lived together as husband and wife."

26.3. In the unreported judgment of the Hon'ble Apex Court made in SLP (Crl.) No.3390 of 2014, Uday Gupta v. Aysha and another, it was held that if a man and woman are living together for a long time as husband and wife, though never married, there would be a presumption of marriage and their children could not be called to be illegitimate.

26.4. In the decision reported in (2000) 2 Supreme Court Cases 431, Rameshwari Devi v. State of Bihar and Others, the order of the High Court holding that the minor children of second marriage were entitled to family pension but not the second widow was upheld. It was further held therein that the cohabitation for a long period gives rise to a strong presumption of wedlock and therefore, the second spouse need not prove her marriage in the court of law.

26.5. In the decision reported in 2010 (2) CTC 622, Kuppan v. Muniammal and another, it was held that unless a valid marriage is proved, Section 16 of the Hindu Marriage Act cannot be invoked. It was further held therein that where a man and women are proved to have lived together as man and wife, law will presume that they were living together in consequence of valid marriage. It is appropriate to incorporate paragraph 11 of the said decision:

"11. In determining question of valid marriage, conduct of deceased would be relevant. As pointed out earlier, deceased Sadasiva Gounder had married the 1st plaintiff. It is well settled that long cohabitation and how the society treated them would be relevant. Holding that presumption of valid marriage though is rebuttable, a heavy burden lies on the person who seeks to prove that no marriage has taken place in Challaamma v. Tilaga and others, 2009 (9) SCC 299, the Supreme Court held as under:

In *Tulsa v. Durghatiya* [(2008) 4 SCC 520], this court held:
"11. At this juncture reference may be made to Section 114 of the Evidence Act, 1872 (in short "the Evidence Act"). The provision refers to common course of natural events, human conduct and private business. The court may presume the existence of any fact which it thinks likely to have occurred. Reading the provisions of Sections 50 and 114 of the Evidence Act together, it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the facts of a particular case.

12. A number of judicial pronouncements have been made on this aspect of the matter. The Privy Council, on two occasions, considered the scope of the presumption that could be drawn as to the relationship of marriage between two persons living together. In first of them i.e. *Andrahenndige Dinohamy v. Wijetunge Liyanapatabendige Balahamy*. Their Lordships of the Privy Council laid down the general proposition that: (AIR p. 187) "... where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage."

13. In *Mohabbat Ali Khan v. Mohd. Ibrahim Khan* Their Lordships of the Privy Council once again laid down that: (AIR p. 138) "The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years."

14. It was held that such a presumption could be drawn under Section 114 of the Evidence Act."

12. It is also well settled that a presumption of a valid marriage although is a rebuttable one, it is for the other party to establish the same. {See *Ranganath Parmeshwar Panditrao Modi v. Eknath Gajanan Kulkarni* [(1996) 7 SCC 681], and *Sobha Hymavathi Devi v. Setti Gangadhara Swamy* [(2005) 2 SCC 244]}.

Such a presumption can be validly raised having regard to Section 50 of the Indian Evidence Act. [See *Tulsa (supra)*] A heavy burden, thus, lies on the person who seeks to prove that no marriage has taken place."

Considering the facts and circumstances of the case in the light of the above citations, there is no evidence to show that Kumaresan had married Chandra. Moreover, Kumaresan had a first wife, namely the first defendant and through her, the defendants 2 to 5 were the legitimate children. So, I am of the view that merely because of the prolonged cohabitation of Kumaresan and Chandra, they cannot be presumed as husband and wife.

27. Now this court has to decide whether the illegitimate children can claim share in the properties of the Grandfather as Aan (Male) Santhathi? Before going into the facts of the case, this court has to consider the decisions relied on by both the parties with regard to the term 'Santhathi'.

28. The learned counsel for the appellants relied upon the following decisions:

28.1. In the decision reported in AIR 1939 Madras 614, Maharajah Sahib of Venkatagiri and another v. Raja Rajeswara Rao and another, it was held that the words used to denote the male descendants of each member were "purusha santhathi" and having regard to surrounding circumstances and other provisions of the deed, the expression "purusha santhathi" referred only to the legitimate issue and did not include illegitimate issues of the members. It is appropriate to incorporate the relevant portion of the said decision:

"The rule that an illegitimate son of a Sudra is entitled to half of what a legitimate son is entitled to in his father's estate may be taken as a guide in fixing the amount of his allowance for maintenance and Rs.250 per mensem for each of the respondents is a reasonable allowance. The respondents are entitled to an allowance for maintenance from the date of their father's death. They are entitled to have the amounts payable to them charges on the estate."

28.2. In the decision reported in (2011) 11 Supreme Court Cases 1, Revanasiddappa and another v. Mallikarjun and others, it was held that the children of void or voidable marriages are entitled to only their parents' property, whether self-acquired or ancestral, falling to parents' share after partition. However, the matter was recommended to be referred to a larger bench. It is appropriate to incorporate paragraph 45 of the said decision:

"45. In the instant case, Section 16(3) as amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self-acquired or ancestral."

28.3. In the decision reported in AIR 1978 Supreme Court 1051, G.Appaswami Chettiar and another v. R.Sarangapani Chettiar and others, the term "Puthra Poutra Santhathies" were discussed in detail.

But the above citation is not applicable to the facts of the present case because in the instant case it has been specifically mentioned as "Aan Santhathi"

29. The learned counsel appearing for the 72nd respondent relied upon the following decisions:

29.1. The learned counsel relied upon the decision reported in 1939 (1) MLJ 831, Maharajah Sahib of Venkatagiri and another v. Raja Rajeswara Rao and another which was later followed by this Court in the decision reported in 1998-3-L.W.753, A.Parasurama Reddiar v. Arunachala Reddiar and others and held that the term 'Aan Varisu' denotes only the legitimate children and not the illegitimate children.

29.2. In the decision reported in AIR (37) 1950 MADRAS 480, The Commissioner of Income Tax, Madras v. Sri.C.S.Rajasundaram Chetty, it was held that the word 'child' prima facie means in law a legitimate child unless there is something in the subject or the context to indicate that the contrary is intended by the use of the word in the statute. It is appropriate to incorporate paragraphs 3, 5 and 6 of the said decision:

"3. The only question that arises for decision, therefore, is whether the illegitimate child Thyagarajan can properly be described as "child" within the meaning of Section 16 (3) (a) of the Act to uphold the inclusion of the sum of Rs. 7,236. The word "child" is not defined either in the Income-tax Act or the General Clauses Act. As pointed out by Denman C. J. in the case in the Queen v. Tottle, (1845) 7 Q. B. 596 at p. 600 : (115 E. R. 614),

"the law does not contemplate illegitimacy. The proper description of a legitimate child is "child." Prima facie, therefore, the word "child" must be interpreted to mean a legitimate child unless there is something in the subject or context to indicate that the contrary is intended by the use of the word in the statute. The same rule of construction has been applied also in the case of wills. It has been stated by Pollock C. B. in Diekinson v. The North Eastern Railway Co., (1863) 2 H. & C. 735 : (159 E. R. 304) that beyond all doubt in the construction of this Act of Parliament the word "child" means legitimate child only." He also adverts to the rule of construction applicable to wills as laid down by Hawkins which is:

"A gift to children means legitimate children only, unless it appears, from the context or from circumstances, that illegitimate children must have been intended."

These principles of interpretation have been lucidly summarised in Lord Hailham's Halsbury's Laws of England, Vol. 17, 2nd Edn., p. 688 in these terms :

"In the absence of a contrary intention either expressed or deducible by necessary inference, all provisions repeating 'children' contained in any laws or instruments having a legal operation, refer exclusively to legitimate children."

In support of this statement of the law, the learned author refers to the statement of Denman C. J. already quoted and the

observations of Pollock C. J. in Dickinson's case, (1863) 2 H. & C. 735: (159 E. R. 304). Applying these principles one is not able to find anything to indicate a contrary intention in the statute now under consideration; nor are there any circumstances which compel us to infer that the Legislature did not intend by the use of the word 'child' to convey its prima facie meaning, viz., legitimate child. On the other hand, the use of the word in juxtaposition with the words 'wife, occurring in the same sub-clause seems to indicate that it is only the legitimate relations that have been intended to be covered by the language of the section.

...

5. Under the Income-tax Act we do not see anything in the object to deviate from the accepted rule of construction of the word in the statute as summarised in Halsbury's Laws of England, Vol. 17, and we must, therefore hold that the word "child" is used in its natural sense of legitimate child and does not include an illegitimate child."

30. As per the decision of the Hon'ble Apex Court reported in (2000) 2 Supreme Court Cases 431, Rameshwari Devi v. State of Bihar and Others, the cohabitation for a long period gives rise to a strong presumption of wedlock and therefore, the second spouse need not prove her marriage in the court of law. But after the introduction of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, during the subsistence of the first marriage, even though there is a long cohabitation of a male and female, they cannot be presumed to be a Husband and Wife. However, the learned counsel for the appellants would submit that the children born to void and voidable marriage are legitimate and they are entitled to share in their parent's property, as per Section 16 of the Hindu Marriage Act, 1955. At this juncture, it would be appropriate to incorporate the said provision:

16. Legitimacy of children of void and voidable marriages.-

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been void, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, 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.

(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, 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 notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) 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.

31. Section 16 thus enacts a complete Code with regard to the off-springs of void or voidable marriages. Firstly, it declares the status of such a child being one as legitimate. Secondly, it recognises rights in the property of the parents. The provision itself thus is for the benefit of the children and will have to be applied in full so as to confer status with interest in property. So, this Court has to decide whether it is a voidable marriage? If the children are born out of voidable marriage, then they are legitimate children as per Section 16 of the Hindu Marriage Act.

32. In the instant case, it is the duty of the appellants/plaintiffs to prove the factum of marriage between the deceased Kumaresan and Chandra. Even on perusal of the evidence of P.W.1/Ravikumar, it is seen that he has not stated that the deceased Kumaresan and his mother Chandra were married. It is true that no child will witness the marriage of their parents. However, once they are claiming share in the properties, it is their duty to prove the factum of marriage by examining the witnesses namely, close relatives and family friends. As already stated, the appellants/plaintiffs had not pleaded the factum of marriage neither in their plaint nor in their proof affidavit. So, it has to be concluded that the factum of marriage between the deceased Kumaresan and Chandra has not been proved.

33. In such circumstances, I am of the view that the long cohabitation alone will not give the status of legitimacy to the children born to the deceased Kumaresan and Chandra, since the first marriage was in subsistence.

34. On considering the facts of the present case in the light of the above decisions, it is pertinent to note that the respondents had taken pain to file some documents to prove that the Chandra had a daughter through one R.S.Pillai and that the properties had been settled. However, it is not necessary to appreciate those documents because as already stated, the plaintiffs must succeed or lose his case only on the basis of his own pleadings and evidence. Just because the first defendant/Kamalam who is the elder member of the family was not examined, it will not take away the right of the respondents to take defence that the appellants/plaintiffs had not proved the

factum of marriage. As per the decision reported in (2011) 5 MLJ 86, Dhanalakshmi v. S.Prabhavathy and Others, the presumption of marriage cannot be drawn merely on the ground of prolonged cohabitation of a man and a woman.

35. Further, it is true that the intention of the parties must be taken into consideration while deciding the legitimacy. So, it has to be considered as to whether the deceased Kumaresan considered the appellants/plaintiffs as his legitimate children?

36. At this juncture, it is appropriate to consider the decisions relied on by both sides with regard to illegitimacy: The learned counsel for the appellant relied upon the following decisions:

36.1. In the decision reported in AIR 1926 Privy Council 73, (Bai) Nagubai Manglorkar v. Bai Monghibai (since deceased) and others, it was held that concubine is entitled to maintenance till her death.

But the above citation is not applicable to the facts of the present case because in the instant case, Chandra, who claims to be the second wife of the deceased Kumaresan had predeceased him.

36.2. In the decision reported in AIR 1931 PRIVY COUNCIL 294, P.M.A.M.Vellaiyappa Chetty and others v. Natarajan and another, it was held that the illegitimate son of a Sudra by a continuous concubine has the status of a son and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, his illegitimate son is not entitled to demand a partition of the joint family property in their hands, but is entitled as a member of the family to maintenance out of that property.

36.3. The above citation has been canvassed in the decision of this Court reported in AIR 1933 Madras 659, Subramania Chetti v. Mahalakshmi Ammla and others, wherein it was held it is an attractive line of investigation, if it should become necessary to decide it, whether, in view of the recent decisions of the Privy Council, notably Vellaiyappa Chetti v. Natarajan, when a Sudra Hindu executes a deed or a will using the word "Santhathi", he must be understood as including the illegitimate as well as the legitimate offspring or heirs. It is appropriate to incorporate the relevant portion of the said decision:

"As a mere question of construction, I should hesitate to say that a share of the inheritance being awarded to illegitimate children of Sudras in certain cases is necessarily conclusive of the meaning of a Sudra donor of property or testator as to what he means when he talks of his santhathi. As the matter is however of general importance, and as I am sitting alone, I am not inclined to express any deliberate opinion on the matter in this case."

In the said decision, it has been specifically stated that "such a question has not hitherto arisen." Hence, the above citation is not applicable to the facts of the present case.

36.4. In the decision reported in AIR 1952 Supreme Court 225, Gur Narain Das and another v. Gur Tahal Das and others, it was held that the illegitimate son of a Sudra by a continuous concubine has the status of a son and the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son. It is appropriate to incorporate paragraph 8 of the said decision:

"8. The third contention urged on behalf of the appellants relates to the question whether the plaintiff is entitled only to maintenance or to a share in the properties left by Nandkishore Das. The rights of an illegitimate son of a Sudra are considered in Mitaksbara Ch. 1, S. 12, which is headed "Rights of a son by a female slave, in the case of a Sudra's estate".

This text was fully considered by the Privy Council in Vellaiyappa v. Natarajan and the conclusions derived therefrom were summarized as follows :-

"Their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but is entitled as a member of the family to maintenance out of that property."

This statement of the law, with which we agree, may be supplemented by three other well-settled principles, these being firstly, that the illegitimate son does not acquire by birth any interest in his father's estate and he cannot therefore demand partition against his father during the latter's lifetime; secondly, that on his father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with a right of survivorship and is entitled to enforce partition against the legitimate son

(s); and thirdly, that on a partition between a legitimate and an illegitimate son, the illegitimate son takes only one-half of What he would have taken if he was a legitimate son."

36.5. In the decision reported in AIR 1961 Supreme Court 1334, Singhai Ajit Kumar and another v. Ujayar Singh and others, it was held that an illegitimate son of a Sudra has the status of a son under the Hindu Law, but his rights are limited compared to those of a son born in wedlock and that he cannot demand partition during his father's life time. It is appropriate to incorporate paragraph 7 of the said decision:

"7. The main contention that arises in this appeal is whether an illegitimate son of a Sudra vis-avis his self-acquired property, after having succeeded to a half share of his putative father's estate, will be entitled to succeed to the other half share got by the widow, after the succession opened out to his putative father on the death of the said widow. The answer to the question depends upon the content of the right of an illegitimate son to succeed to the self acquired property of his putative father. The source of his right is found in the relevant Hindu Law texts. Mitakshara in explanation of the texts of Manu and Yajnavalkya says in Chapter I, S.12, in the following three verses thus:

"1.The author next delivers a special rule concerning the partition of a Sudra's goods. 'Even a son begotten by a Sudra on a female slave may taken a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of share: and one, who has no brothers, may inherit the whole property, in default of daughter's son.'

2.The son, begotten by a Sudra on a female share, obtains a share by the father's choice, or at his pleasure. But, after the demise of the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half of share: that is, let them give him half as much as is the amount of one brother's allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only.

3.From the mention of a Sudra in this place it follows that the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance."

No mention of a widow is found in the above verses, but in Dattaka Chandrika, the author says in v.30, 31 thus:

"If any, even in the series of heirs down to the daughter's son, exist, the son by a female slave does not take the whole estate, but on the contrary shares equally with such heir."

The leading decision on the rights of an illegitimate son is that of the Judicial Committee in Raja Jogendra Bhupati v.

Nityanund Mansingh, 17 Ind App 128 (PC). There, one Raja died leaving behind him a legitimate son and an illegitimate son. On the death of the legitimate son, who had succeeded to the Raja, it was held that the illegitimate son succeeded to him by survivorship. Sir Richard Couch cited two verses from Mitakshara Chapter I, S.12. We have already extracted the said verses. Commenting upon these verse, the learned Judge observed at p.132 thus:

"Now it is observable that the first verse shows that during the lifetime of the father the law leaves the son to take a share by his father's choice and it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do. But the language there is very distinct, that if the father be dead the brethren should make him partaker of the moiety of a share. So, in the second verse the words are that the brothers are to allow him to participate for half a share and later on there is the same expression: The son of the female share participates for half a share only'."

On that interpretation, he accepted the view of the Bombay High Court and held that an illegitimate son and a legitimate son, being members of an undivided Hindu family governed by Mitakshara, the legitimate son becomes entitled to the whole of the immovable property of the family if the legitimate son dies without any male issue. The Judicial Committee again considered the rights of an illegitimate son in *Kamulammal v. Visvanathaswami Naicker*, 50 Ind App 32: (ARI 1923 PC 8). There it was held that in a competition between a widow and illegitimate son to the property of his putative father, the illegitimate son takes half of the property and the widow the other half. Sir Lawrence Jenkins observed at p.37 (of Ind App0: (at p.9 of AIR): thus:

"Here the contest is between the illegitimate son and the widow, and though the widow is not named in the text it is well settled that as a preferential heir to the daughter's son she is included among those who share with the illegitimate son and it would serve no useful purpose to speculate why she was not mentioned in the text."

@page-SC 1337

The status of the illegitimate son was subject of further scrutiny by the Privy Council in *Vellaiyappa Chetti. V.Natarajan*, ILR 55 Mad 1 : (AIR 1931 PC 294). There the question arose in the context of an illegitimate son's right to maintenance from a joint family property after the death of his father who left no separate property. The Judicial Committee held that he was entitled as a member of the family to maintenance out of the joint family property in the hands of of the collaterals with whom the father was joint. In dealing with the question of status of an illegitimate son, Sir Dinshah Mulla, speaking for the Court, after considering the relevant Hindu Law texts and decisions, arrived at the following

conclusion at p.15 (of ILR Mad) : (at p.298 of AIR):

"On a consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son;" It is not necessary to multiply decisions. The law pertaining to the right of inheritance of an illegitimate son to his putative father's self-acquired property may be stated thus: An illegitimate son has the status of a son under the Hindu Law and he 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. During the lifetime of his father, the law allows the illegitimate son to take only such share as his father may give him. But on his father's death, he takes his father's self acquired property along with the legitimate son and in case the legitimate son dies, he takes the entire property by survivorship. Even if there is no legitimate son, the illegitimate son would be entitled to a moiety only of his father's estate when 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. From the premises it follows that an illegitimate son, except to the extent circumscribed by the Hindu Law texts, has the status of a son and is heir to the self acquired property of his putative father. If that be his undoubted right under the Hindu Law. On what principle can he be deprived of his right of succession to the other moiety of his father's property after the death of the widow? Under the Hindu Law, the death of the widow opens inheritance to the reversioners and the nearest heir at the time to the last full owner becomes entitled to possession. When the succession opens, in a competition between an legitimate son and other reversioners, the illegitimate son is certainly a nearer heir to the last male holder than the other reversioners. If he was the nearest heir only yielding half a share to the widow at the time of the death of his putative father, how does he cease to be one by the intervention of the widow's estate? As on the death of the widow the estate reverts back to the last male holder, the succession shall be traced to him and if so traced the illegitimate son has a preferential claim over all other reversioners. In Mayne's Hindu Law, 11th edn., this position has been controverted in the following manner at p.637:

"The illegitimate son, though he inherits on the death of his putative father, along with or in default of male issue, widow or daughter, cannot come in as a reversionary heir on the death of the widow or daughter, as he is undoubtedly neither a sagotra nor a bhinnagotra sapinda of the last male holder within the text of Manu."

We regret our inability to accept this proposition, for, if accepted, we would be speaking in two voices. Once it is established that for the purpose of succession an illegitimate son of a Sudra has the status of a son and that he is entitled to succeed to his putative father's entire self-acquired property in the absence of a son, widow, daughter or daughter's son and to a share along with them, we cannot see any escape from the consequential and logical position that he shall be entitled to succeed to the other half share when succession opens after the widow's death. The intervention of the widow only postpones the opening of succession to the extent of half share but it cannot divert the succession through a different channel, for she cannot constitute herself a new stock of descent. The opinion expressed in Mayne's Hindu Law is sought to be supported by the author by reference to a decision of the Madras High Court in Karuppayee Ammal v. Ramaswami ILR 55 Mad 856 : (AIR 1932 Mad 440). But a reference to that judgment shows that no such proposition has been laid down therein. There the facts were that on the death of a Sudra, the last male owner of one state, his widow succeeded to a moiety thereof and his illegitimate son to the other moiety; the widow then died leaving behind her a son of the daughter of the last male owner and the illegitimate son above mentioned. The Madras High Court held that the daughter's

@ page-SC 1338

son was entitled to the moiety that had vested in the widow and the illegitimate son was not entitled to any portion thereof. The reason for that conclusion is found at p.868 (of ILR Mad) : (at p.444 of AIR) and it is:

The principle underlying the doctrine of reverter referred to is that the last male holder's estate is inherited by females who have no free right to alienation and who hold a peculiar kind of estate called "woman's estate and on whose death that then heir of the last male holder succeeds to the last maleholder's estate. From its very nature, the doctrine could not apply legitimately to a case where the last maleholder's estate vested on his death not in a female heir but in a male heir also. In such a case, the doctrine as such would not strictly apply, nor has it been, so far as we are aware, applied to such a case."

The reason of the decision is therefore clear and that is when a daughter's son succeeds to one state, there is no further scope for the application of the doctrine of reverter. The learned Judges expressly left open the present question when they said, "We are not now concerned with the question as to what would become of the property if the last of the daughters died without leaving a daughter's son, in such circumstances. "This decision cannot, therefore, be invoked in support of the contention that in a case where the doctrine of reverter applied the illegitimate son is excluded from succession. On the other hand, the Nagpur High Court in Bhagwantrao vs. Punjaram, ILR (1938) Nag 255 : (AIR 1938 Nag 1) rightly came to the conclusion

that where on a partition between a legitimate and an illegitimate son, the widow was allotted a share, on her death the illegitimate son was entitled to a share in the property. We, therefore, hold that on the death of the widow, the illegitimate son, the father of the first respondent herein succeeded to the other half share of the estate of his putative father Raja Ajit Singh."

36.6. In the decision reported in AIR 1975 MADRAS 275, Narayani Ammal and another v. Govindaswami Naidu, it was held that where there is no inhibition expressly or impliedly to be found in the original text, Courts cannot lose sight of the progressively changing views of social outlook and insist upon only applying the old notions. It is appropriate to incorporate paragraph 8 of the said decision:

"8. On the question which we are called upon to answer, where there is no inhibition expressly or impliedly to be found in the original text, Courts cannot lose sight of the progressively changing views of social outlook and insist upon only applying the old notions. We are with great respect, unable to concur with Seshagiri Aiyar, J., that an illegitimate daughter has no place at all under the Hindu Law except in limited cases which he pointed out. The change in the social outlook in respect of succession is reflected in the recent legislations, particularly the Hindu Succession Act, 1956, which has done away with the distinction between legitimacy and illegitimacy within certain limits in the matter of succession either to property of a male or a female, dying intestate. We also note that Section 3(j) which defines the word 'related' has a proviso according to which illegitimate children shall be deemed to be related to their mother and to one another. In fact it goes further and says that their legitimate descendants shall be deemed to be related to them and to one another and any word expressing relationship or denoting a relative shall be construed accordingly. It seems to us that having regard to this trend of legislation reflecting the changing social approach to succession, we will be justified in interpreting the word daughter in the original text as including - an illegitimate daughter as well. We are also of opinion that once an illegitimate daughter is an heir, as we hold she is, to succeed to her mother's stridhana property, so long as she is available, the son, who is not in the nearer line of stridhana heirs, cannot have preference and exclude an illegitimate daughter."

But the above citation is not applicable to the facts of the present case because it deals with the right of the illegitimate daughter towards the stridhana property of her mother.

36.7. In the decision reported in AIR 1987 BOMBAY 182, Shantaram Tukaram Patil and another v. Smt.Dagubai Tukaram Patil and others, it was held that a child born of marriage which is

void under Hindu Marriage Act can only succeed to the property of its parent in accordance with the provisions of S.8 and S.15 of the Hindu Succession Act. It is appropriate to incorporate paragraph 27 of the said decision:

"27. We now summarise the propositions of law emerging from the discussion made above:-

I. In regard to a child of a void marriage:

(1) a child of a marriage which is void under the provision of Hindu Marriage Act, whether a decree of nullity is passed or not, is a legitimate child (S. 16(1), Hindu Marriage Act);

(2) Such a child does not acquire right to property which a legitimate child would, but the legitimacy confers upon him right to property of his parents. (S. 16(3), Hindu Marriage Act);

(3) The property to which such a child can lay claim must be the separate property of the parents and not the coparcenary property in which the parent has a share. Contrary view in *Raghunath v. Nana* (1985) 87 Bom LR 488 is not the correct law;

(4) Since no child, whether legitimate or otherwise, acquires right by birth in the property of its parent, a child of a void marriage can only succeed to the property of its parent in accordance with the provisions of S. 8 or S. 15 Hindu Succession Act;

(5) A child of a void marriage is related to its parent within the meaning of S. 3(1)(j), Hindu Succession Act because of the provision of S. 16, Hindu Marriage Act; proviso to S. 3(1) must be confined to those children who are not clothed with legitimacy under S. 16, Hindu Marriage Act.

II. In regard to a woman whose marriage is void or declared void under the provisions of the Hindu Marriage Act:

(1) Section 25, Hindu Marriage Act, confers upon a woman, whose marriage is void or is declared to be void, a right of maintenance against her husband;

(2) This right of maintenance can be enforced by her not only in proceedings under s. 235, Hindu Marriage Act but, also in any other proceedings where the validity of her marriage is determined;

(3) This right can be enforced by her not only during the lifetime of her husband but also after his death against the property of her husband after his death;

(4) Of course, this right of maintenance is available only during her lifetime and ceases if she remarries."

36.8. For the very same proposition, the decision reported in AIR 1999 MADRAS 143, *A. Parasurama Reddiar v. Arunachala Reddiar* and others has been relied upon. It is appropriate to incorporate paragraph 14, 15 and 22 of the said decision:

"14. As far as the plaintiffs' claim over the first schedule property is concerned, the trial Court instead of considering the implications arising out of Section 16(3) of the Hindu Marriage Act, 1955, (hereinafter called "the Act") had chosen to

give reasons which are totally unwarranted. Strangely, the trial Court would say that the clause in the Will did not rule out an illegitimate male issue since the recital refers only to a male issue. The appellate Court though it had considered the effect of Section 16 of the Act, in my opinion, had committed an error in its interpretation of the said provision. It may be pointed out here that both the Courts have concurrently held that the first defendant had not established the termination of his first marriage with Valliammal and consequently Guruvammal was not a legally wedded wife of the first defendant and hence fifth defendant cannot be considered to be a legitimate child of the first defendant. In the said background Section 16 of the Act, extracted below, requires consideration.

"16. Legitimacy of children of void and voidable marriages- (1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act 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.

(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, 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 notwithstanding the decree of nullity.

(3) Nothing contained in Sub-section (1) or Sub-section (2) 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 possession or acquiring any such rights by reason of his not being the legitimate child of his parents."

Section 16(3) of the Act in particular falls for consideration in the present Second Appeal. According to learned counsel for the appellant, the expression "any rights in the property of any person other than parents" as occurring in Section 16(3) of the Act would only mean that the rights of an illegitimate child would be restricted only to the property belonging to the parents of the child alone and in respect of the property belonging to others over which the parents may have a claim by virtue of their coparcenary rights of inheritance cannot be inherited by the illegitimate child. As such, according to the learned counsel for the appellant, the property in question belong to the grand-father of the fifth defendant and therefore, the fifth defendant was not entitled to succeed to the same.

15. A Division Bench of this Court in a judgment reported in (1976) 89 Mad LW 706 (Sivagnanavadiyu Nachiar v. Krishnakanthan) while dealing with the proviso to Section 16 of the Act as it stood prior to the amendment (corresponding to Section 16(3) of the Act) held that the proviso forbids conferment of any right on the legitimized child in the property of any person other than that of the parents. As a result, it was held that such a child would be entitled only to the proportionate share of the father's share in the joint family property but cannot claim a share in the joint family property along with the legitimate sons. In 1989 (2) Mad LW 470 : AIR 1990 Madras 110 (Perumal Gounder v. Pachayappan) Ratnam, J. as he then was, while dealing with a suit for partition at the instance of illegitimate son, following the judgment of a Divisions Bench cited above, held that he was not entitled to ask for partition and that at best may be entitled to the rights in the properties of his father, after his death.

...
...

22. The Supreme Court went further to quote from the judgment of the Privy Council in Venkata Narasimha v. Parthasarathy, (1913) 41 Ind App 51, holding that the Court should put itself in the testator's armchair and it was the duty of the Court to carry out the intention as expressed and none other and that the Court will not be justified in adding to the testamentary dispositions. In the present case, both the Courts had ventured into an adventurous interpretation substituting testator's intention with their own understanding of the law of succession and inheritance holding that an illegitimate son was also entitled to succeed to the estate of the parent and that therefore, the fifth defendant would not be barred from inheriting the first schedule property. What they have ignored is that Hindu law of succession does not envisage a share in favour of illegitimate issue either under Section 8 or Section 15 of the Hindu Succession Act subject only to the definition of 'related' in Section 3(1)(j) of the Act. Section 16 of the Hindu Marriage Act is in the nature of an exception to the general law of succession. While Section 16(1) aims at removing the stigma on an illegitimate issue, Section 16(3) aims at binding only the personal property of the parent for his acts of indiscretion. The very underlying object of Section 16(3) of the Act to keep out the assets which did not belong to the parent as his own, had been lost sight by both the Courts."

36.9. In the decision reported in (1996) 2 Supreme Court Cases 567, Gurnam Kaur and another v. Puran Singh and others, it was held that though the marriage of child's mother with her previous husband was not legally dissolved, it will not render the child born to her second marriage as illegitimate and hence,

such child has a right to succeed to the property of his father. It is appropriate to incorporate paragraph 2 of the said decision:

"2. Preceding the amendment, declaration of nullity by a decree of a Court is a pre-condition. Amendment 68 of 1976 has done away with it and declared that notwithstanding the marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid shall be legitimate whether such child is born before or after the commencement of the Amendment 68 of 1976 and whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise then on a petition under the Act. Thus it would be clear that declaration of validity of a marriage on a petition of either party or, in other words, declaration of the marriage as nullity under a decree which were preconditions under Section 12 of the Act is done away with. Consequentially, as if the marriage had been valid, the child shall be legitimate whether such child was born before or after the commencement of Act 68 of 1976. By operation of Section 8 of the Hindu Succession Act 1956 read with Schedule I, appellant being the daughter of Ram Singh, is entitled to the property of her father. The decree is accordingly granted. Application for appointing a guardian of the minor is allowed."

36.10. In the decision reported in 88 L.W. 706, Sivagnanavadivu Nachiar and others v. Krishnakanthan and others, it was held that the rights of children born of void marriages is limited to the interests of their parents, as per Section 16 of the Hindu Marriage Act. It is appropriate to incorporate paragraph 3 of the said decision:

"3. We are unable to accept this construction because it is totally overlooked the effect of the proviso to S.16. But for the proviso, the view of the court below would be right. When the Section directs that on a decree of the nullity of the marriage, the children born of such marriage shall be deemed to be legitimate children notwithstanding the decree of nullity, we have to take it that legitimization will have effect from the birth of the children. Any other view will be odd for a child cannot be illegitimate for a period and legitimate for a subsequent period of his life. But having made it clear that the children born of such marriage would be regarded as legitimate children, notwithstanding the decree for nullity, which would otherwise have the effect, because of the relation back principle of enabling such children to line up along with the other legitimate children for purposes of succession, the right of such children to inherit should be limited and confined to the interests of their parents. The effect of the proviso is to so limit the logical result of legitimization with relation back

to the date of birth. The proviso forbids conferment of any right on the legitimized child in the property of any person other than the parents, where, but for the passing of the 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. In other words, if S.16 were not there, the result of declaring the marriage as nullity would be to regard the children born of such marriage as illegitimate in which case, they would not be entitled to any share at all in the property of the father, or to inherit any other property. But because of the legitimization, they should be regarded as legitimate sons born of the marriage declared void. But, in that case, the policy of S.16 taken along with proviso appears to be not to enable such child to have the full rights of legitimate sons. So, it follows in this case that since the father Sivanupandian died as early as 9th January, 1966, defendants 2 and 3, who were coparceners at the time, would have taken their share, each 1/3rd and the father's share on his death would be the remaining 1/3rd. The right to succeed under S.8 of the Succession Act of the legitimized sons is restricted to the interests of the father. The results in that each of the plaintiffs would be only entitled to a 1/6th share in the 1/3rd share of the father in the joint family properties. There will be a decree accordingly."

36.11. In the decision reported in AIR 1992 ANDHRA PRADESH 234, Rasala Surya Prakasarao and others v. Rasala Venkateswararao and others, it was held that the illegitimate sons are entitled to equal share with natural sons, however, they cannot claim partition during their father's lifetime. It is appropriate to incorporate paragraph 33 of the said decision:

"33. From the principles enunciated in the various decisions discussed above, it is quite clear that even prior to the advent of S. 16 of the Hindu Marriage Act, both as per the Shastric and textual law as well as the decisions of the highest courts, the illegitimate son of a Sudra is entitled to enforce a partition after the father's death. He is entitled to the rights of survivorship as he becomes a coparcener with the legitimate son. The decisions have held that he is a member of the family and that he has status as a son and by virtue of that he is entitled to the right of survivorship. Section 16 of the Hindu Marriage Act has conferred on him the status of a legitimate son and his other pre-existing rights are, in no way, curtailed. After the 1976 amendment of Section 16, the benefits of Section 16 are enlarged and such benefits are also conferred on a son of a marriage which is void under the provisions of the Hindu Marriage Act, whether a decree of nullity is passed or not, such a son becomes a legitimate son. Such a child is also entitled to rights of succession under the Hindu Succession Act. A child of void marriage is related to its parents within the meaning of S.

3(1)(j) of the Hindu Succession Act by virtue of S. 16 of the Hindu Marriage Act. Proviso to Section 3(1)(j) must be confined to those children who are not clothed with legitimacy under S. 16 of the Hindu Marriage Act. In conclusion, we hold that by virtue of S. 16(1) of the Hindu Marriage Act, as amended in 1976, the illegitimate son can be equated with his natural sons and treated as coparceners for the properties held by the father whether the property be originally joint family property or not. The only limitation is that during the lifetime of the father, the illegitimate son of a void marriage is not entitled to see a partition. He can seek a partition only after the death of the father."

36.12. In the decision reported in AIR 1983 BOMBAY 222, Laxmibai Nagappa Matiwadar and others v. Limbabai Nagappa Matiwadar, it was held that the children born of void marriage is entitled to right in the property of their parents, as per Section 16 of the Hindu Marriage Act. It is appropriate to incorporate paragraph 6 of the said decision:

"6. The present section which is in three parts, has been substituted for the original section 16 and sub-section (1), which opens with non obstante clause, declares, in no uncertain terms, that notwithstanding that such a marriage is null and void under section 11, the off-spring of such marriage shall be legitimate whether such child was born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise than on a petition under the Act. The 1976 amendment and the substitution of section 16(1) in this manner beyond doubt takes away and eclipses the general rule that the off-spring of a marriage, which is null and void ipso jure, is illegitimate. That was common law doctrine, inevitable resulting in the effect of bastardising children. The same has been superseded and the matter is governed by the express declaration available in section 16(1) of the Act to the effect that though because of the statute the marriage would be void, that would not lead to the inevitable result of bastardising the children who are born out of such a void wedlock. Sub-section (3) of section 16 is no doubt, restrictive in character. It is however in furtherance of the legislative declaration available in sub-section (1) of section 16 of the Act. Though couched in negative language, the provision itself is in two parts, one excluding the entitlement of such child of possessing or acquiring rights in or to the property of any person and recognising such rights in his favour with regard to the property of his parents. The effect of legitimacy recognised by section 16 thus is to confer the rights in or to the property of the parents, the disablement or incapacity being enacted only with regard to the property of any other person. As far as the property of other person is

concerned, sub-section (3) makes the position clear that the legitimacy conferred by sub-section (1) or (2) would not clothe such a child with the capacity of possessing or acquiring any right which it did not so possess by reason of its not being the legitimate child of its parents. Section 16 thus enacts a complete Code with regard to the off-springs of void or voidable marriages. Firstly, it declares the status of such a child being one as legitimate. Secondly, it recognises rights in the property of the parents. The provision itself thus is for the benefit of the children and will have to be applied in full so as to confer status with interest in property. This provision thus removes the disability of such children as far as the property of their parents is concerned. Reading together, it follows that Hiralal and Ambubai would be the legitimate children notwithstanding the fact that Laxmibai's marriage is void, and they would have rights in or to the property left by Nagappa or Laxmibai."

37. The learned counsel for the 72nd respondent relied upon the following decisions:

37.1. In the decision reported in AIR 2010 BOMBAY 24, Shahaji Kisan Asme and others v. Sitaram Kondi Asme and others, it was held that as per Section 16(3) of the Hindu Marriage Act, the illegitimate children would be entitled to inherit the property of their parents only and no other relations. It is appropriate to incorporate paragraph 18 of the said decision:

"18. 'Parent' does not mean grandparents. In view of this legal position, the plaintiff Nos. 1 to 3 and defendant No.3 being illegitimate children of deceased Kisan can inherit the property of their parents i.e. their father alone in the present circumstances and not the estate of the parents of Kisan. In view of the legal position, I find no fault in the allotment of shares by the Courts below in the suit property."

38. Now, It is appropriate to consider Ex.A.24/Settlement Deed, dated 07.12.1975, wherein it has been mentioned that the 2nd respondent/2nd defendant, S.K.Jeyaraj is the sole son of S.Kumaresan. The said Settlement Deed was executed by S.Kumaresan and S.K.Jeyaraj in favour Chandra. In that it has been specifically stated that Kumaresan was having life estate and the the second party was having the absolute estate. It is appropriate to incorporate the relevant portions of the said document:

1975ம் வருஷம் டிசம்பர் மாதம் 7ம் தேதி கோயமுத்துர் தாலுக்கா சிங்கநல்லூர் கல்பாவில் 3வது போயர் தெருவில் கதவ, எண் 1ல் வசித்து வரும் தேவராஜ் அவர்களின் குமாரத்தியம் S.V.கும்ரேசன் அவர்கள் அபிமான மனைவியுமான கமார் 39 வயதுள்ள சந்திரா K. அவர்களும் ஹைதாலுக்கா ஹைடவன் டாக்டர் தஞ்சப்பா ரோடு வீரபோயர் காலனியில் கதவ, எண் 11.248ல் வசித்துவரும் காலம்

சென்ற வீரபோயர் குமாரர் 46 வயதுள்ள விவசாய ஜீவனம் S.V.குமரேசன் 1டைடி 1லக்கமிட்டவரின் ஏகபத்திரன் 20 வயதுள்ள மாணவன் S.V.ஜெயராஜ் 2 ஆகிய நாங்கள் இருவரும் பத்திரம் என்னவென்றால்

உமக்கும் டைடி நான்கு குழந்தைகளுக்கும் 1லக்கமிட்டவர் செய்ய வேண்டிய கடமையை முன்னிட்டும் நம்மில் 1லக்கமிட்ட S.V.குமரேசன் அவர்களுக்கு இருதய சம்பந்தமான நோய் இருப்பதாலும் தான் இன்னும் அதிக நாட்கள் உயிரோடிருப்பார் என்ற நம்பிக்கை இல்லாததாலும் 1லக்கமிட்டவர்களாகிய நாங்கள் தங்கள் பேரிலும் குழந்தைகள் பேரிலும் உள்ள இயற்கை அன்பினாலும் பாசத்தினாலும் குழந்தைகள் சமீப உடிணை படிப்ப, கல்யாணம் இவைகளுக்காகவும் உங்களுக்கும் உங்கள் குழந்தைகளுக்கும் ஏதாவது ஒரு ஆதரவு, செய்து வைக்க வேண்டும் என்கிற எங்கள் மனப்பூர்வ இடைத்ததை முன்னிட்டும் கோயமுத்துர் R.O.வில் 319.1950 நெம்பராகப் பதிவாகியிருக்கும் 23.01.1950ம் தேதிய செட்டில்மெண்டுப் பத்திரப்படி எங்களில் 1லக்கமிட்டவருக்கு அனுபவ பத்திரப்பட்டுத் தற்சமயம் 1லக்கமிட்டவர் அனுபவகாலத்தினத்தில் இருந்து வருவதும் கலக்கமிட்டவருக்கு சர்வ சுதந்திர பத்திரப்பட்டுத் துமான இதனடியில் கண்ட ஸ்தாவா சொத்தை இந்த செட்டில்மெண்டுப் பத்திரமுலியமாய்..

39. Thus, it could be presumed that in the year 1975, the deceased Kumaresan had only considered the 2nd respondent/2nd defendant as his Aan (Male) Santhathi to inherit the properties, as was mentioned in Ex.A.37/Settlement Deed executed by Veeraboyan. Admittedly, at the time of execution of Ex.A.24/Settlement Deed, some of the plaintiffs are minors. However, it is pertinent to note that they had accepted the Ex.A.24/Settlement Deed and filed a suit in O.S.No.109 of 1984 as could be evidenced by Ex.B.3. The appellants 1 to 4 herein as plaintiffs 1 to 4 had filed the said suit against M/s.Hindustan Petroleum Corporation Limited , wherein at paragraph 5 of the plaint, it has been stated as follows:

"5. On 07-12-1975 Shri.S.V.Kumaresan and His Major Son Shri.S.K.Jayaraj executed a settlement deed in favour of Mrs.Chandra, the concubine of Shri.S.V.Kumaresan and the mother of S.K.Rohini, S.K.Ravikumar, S.K.Shobana and S.K.Senthilkumar (Plaintiffs 1 to 4). So, Mrs.Chandra became absolutely entitled to a half share in the above land. The rest of the half share belongs to Shri.S.V.Viswanathan, the 5th plaintiff. Mrs.Chandra died on 10-10-1976. Thereupon her rights in the property devolved on her four children, the plaintiffs 1 to 4."

The above extract would clearly reveal that the appellants/plaintiffs had accepted the Ex.A.24/Settlement Deed, dated 07.12.1975 and acted upon the same.

40. At this juncture, it would be appropriate to consider the meaning of concubine as was specified in the Law Lexicon. The word "concubine" is defined in the Universal Dictionary of the English language as a woman who goes with a man outside lawful wedlock. A single act of adultery committed by a wife would make her the concubine of another man and entitle her husband to obtain dissolution of his marriage under the Act.

Lord Darling made the following observation:

Almost a wife, according to ancient authorities, the distinction of the concubine from harlots was due to a modified chastity, in that she was affected to one man only although in an irregular union merely. Harlots solicited to immorality; concubines were reserved by one man.

41. Even though in Ex.A.24/Settlement Deed, Chandra has been mentioned as the "Abimana Manaivi" of the deceased Kumaresan, there is no iota of evidence to show that the deceased Kumaresan had considered his children as his legal heir. Further, as per the Ex.A.24/Settlement Deed, it is clear that Kumaresan wanted to settle some of the properties to the children born to him through Chandra and hence, he executed the said settlement along with the vested estate holder viz., S.K.Jeyaraj, the 2nd respondent herein. So, it clearly reveals the intention of Kumaresan that he had never considered his children born through Chandra as his legal heir and hence, the appellants 2 and 4 cannot be considered as Aan (Male) Santhathi as was mentioned in Ex.A.37/Settlement Deed, executed by Veeraboyan.

42. As per the decision reported in AIR 1999 MADRAS 143, A.Parasurama Reddiar v. Arunachala Reddiar and others, the Court should put itself in the testator's armchair and it was the duty of the Court to carry out the intention as expressed and none other and that the Court will not be justified in adding to the testamentary dispositions. In the instant case, it is clear that the intention of Kumaresan in executing the Ex.A.24/Settlement Deed is only to give some properties to the children born through Chandra for their livelihood and not recognizing them as legitimate children who are entitled to share in the properties mentioned in Ex.A.37/Settlement Deed and Ex.A.57/Will.

43. In such circumstances, I am of the view that the deceased Kumaresan has no intention to treat the appellants as legitimate children who are entitled to share in the properties mentioned under 1 Ex.A.37/Settlement Deed and Ex.A.57/Will. Further, on accepting the Ex.A.24/Settlement Deed, dated 07.12.1975, the appellants herein is estopped from claiming that the appellants 2 and 4 are the Aan (Male) Santhathis of the

deceased Kumaresan and they are entitled to his properties as Aan (Male) Santhathis as mentioned in Ex.A.37/Settlement Deed, executed by Veeraboyan and Ex.A.57/Will executed by Veeraboyan.

44. Further, on considering Ex.B.6/Decree in O.P.No.89/1960, it is seen that the marriage solemnised under the Special Marriage Act on 02.09.19954 between Chandra and R.S.Pillai was dissolved. So, considering all the above aspects, I am of the view that the children born to the deceased Kumaresan and Chandra are only illegitimate children and they are entitled to share only in their parents property and not in the property of their grandparents. So, the appellants 2 and 4 cannot be construed as Aan (Male) Santhathi of the deceased Kumaresan and they are not entitled to any share in the 'B' scheduled properties mentioned in Ex.A.37/Settlement Deed executed by Veeraboyan.

45. As stated already, since the marriage between the deceased Kumaresan and Chandra had not been proved, the appellants cannot be considered as legitimate children as per Section 16 of the Hindu Marriage Act. In paragraph 8 of the plaint, it has been categorically stated as follows:

"8. Eventhough the plaintiffs are the children of a bigamous marriage under section 16 of the Hindu Marriage Act, they are entitled to inherit their father's property along with the defendants 1 to 5. The plaintiffs are deemed to be in joint possession of the suit properties."

46. But admittedly the factum of marriage has not been proved. As per Ex.B.3/Plaint in O.S.No.109/1984, Chandra is only a concubine of the deceased Kumaresan and not his wife. So, consequently the children born to them cannot be considered as legitimate. Hence, the contention put forth by the learned counsel for the appellants that as per Section 16 of the Hindu Marriage Act, the children born to void and voidable marriages are legitimate cannot be accepted because in the instant case, the factum of marriage itself has not been proved. So, Section 16 of the Hindu Marriage Act, 1955 will not come to the rescue of the appellants/plaintiffs and the appellants are not entitled to any share under the pretext of Section 16 of the Act.

47. Now this Court has to decide whether the suit properties are the separate properties of Kumaresan or the properties of grandfather Veerboyan?

It is an admitted fact that the illegitimate children are entitled to share only in the properties of their father and not in the joint family properties. Admittedly, the properties mentioned in Ex.A.37/Settlement Deed belong to Veeraboyan and in the said deed, Veeraboyan had given life estate to his three sons and the vested reminder and absolute right to their Aan

(Male) Santhathis. In the absence of Aan (Male) Santhathis, the properties will devolve upon the Pen (Female) Santhathis and in the absence of Pen (Female) Santhathis, the properties will devolved upon his sons and their heirs. Admittedly, the 'B' scheduled properties in Ex.A.37/Settlement Deed has been mentioned as 'A' scheduled properties in the suit schedule. Since it was already decided, the appellants 2 and 4 are the illegitimate children, they are not entitled to any share in the 'A' scheduled properties, which is mentioned as 'B' scheduled properties in Ex.A.37/Settlement Deed.

48. As regards the 'C' schedule properties mentioned in Ex.A.37/Settlement Deed, it was allotted to S.V.Viswanathan who died leaving behind his wife and son, V.Chandrasekaran. Since there was a Aan (Male) Santhathi, to Viswanathan, there is no dispute with regard to the inheritance of the 'C' schedule properties.

49. As regards the 'A' schedule properties mentioned in Ex.A.37/Settlement Deed, it was allotted to S.V.Subramaniam, who died without any issues. It was clearly stated by Veeraboyan in Ex.A.37 that if any of his son was not having issues, both male and female, after the lifetime of his son and daughter-in-law, the properties will devolve upon his other sons. So, now this Court has to decide whether the appellants are entitled to share in the 'A' scheduled properties mentioned in Ex.A.37/Settlement Deed?

As already stated, the properties mentioned in Ex.A.37 are the self acquired properties of Veeraboyan. It is also pertinent to note that the 'B' scheduled properties mentioned in the suit schedule is the 'A' schedule properties mentioned in Ex.A.37. It is an admitted fact that on the date of death of Subramaniam, only Kumaresan alone was alive and Viswanathan had already passed away. There is a specific clause in EX.A.37 that all the settlees were given only a right to enjoy their respective properties during their life time without the power of alienation. Further, during their life time, S.V.Subramaniam and his wife Lakshmi Ammal had executed Ex.A.23/Release Deed in respect of the 'A' scheduled properties mentioned in Ex.A.37/Settlement Deed, in favour of Kumaresan and Viswanathan. Subsequent to that, they had made constructions in the said properties. During their life time, Kumaresan sold the properties under Exs.A.26 to A.29, A.35 and A.36 and Viswanathan and his heirs sold the properties under Exs.A.31 to A.34 and the other legal heirs of the deceased Veeraboyan executed Exs.A.38 to A.47/Sale Deeds, before the death of the sons of the deceased Veeraboyan. So, there is no evidence to show that the 'A' scheduled properties are available for partition. Furthermore, as per Ex.A.9, Kumaresan had executed a Will. In such circumstances, I am of the view that Kumaresan had not died

intestate. Even as per Ex.A.9/Will, Kumaresan had bequeathed 40% of the 'B' scheduled properties in favour of the plaintiffs. So, Kumaresan had not died intestate in respect of the 'A' scheduled properties mentioned in Ex.A.37.

50. It is also pertinent to note that during the lifetime of Subramaniam and Kumaresan, the following documents came into existence. Ex.A.11/Settlement Deed, dated 10.12.1980 and Ex.B.9/Partition Deed, dated 09.05.1962. As per the Ex.B.9/Partition Deed, Subramaniam and Kumaresan had partitioned the properties wherein it was specifically stated that 'A' scheduled properties were allotted to Subramaniam and 'B' scheduled properties were allotted to Kumaresan. It was further stated therein that Subramaniam purchased the properties in the year 1954 under Document No.681/1954 and also derived right to the properties under the release deed, dated 03.05.1958. Admittedly, during his life time, Subramaniam had settled some of the properties in favour of his brother-in-law Dakshinamoorthy under Ex.A.11/Settlement Deed, dated 10.12.1980. In the said settlement deed, Subramaniam had specifically stated that they are his self acquired properties.

51. As far as the issue in respect of the properties mentioned in the Will viz., Ex.A.57/Doc.38 of 1950 is concerned, the 'B' scheduled properties were given to both Viswanathan and Kumaresan jointly. Even in the said document, only limited estate was given. It is appropriate to incorporate the relevant portion in the said document.

"Ginning factory premises in Singanallur village described in Scheduled B below which is occupied by various tenants shall be taken in equal moieties by my 2nd son S.V.Kumaresan and my 3rd son S.V.Viswanathan for their respective lives and enjoyed by them by receiving rent or otherwise but without powers of alienation. They shall also not encumber the same in any manner during their lives. The shares of each of the aforesaid 2nd and 3rd sons shall after their respective deaths be taken absolutely by their heirs who ever they be with full powers of alienation."

52. So, as per Ex.B.57 also, the 'B' scheduled properties has to be taken only by the legal heirs of the deceased Kumaresan viz., the defendants 1 to 5 and not by the appellants/plaintiffs who are the illegitimate children. If the father inherits the properties by way of succession or he acquired the properties by self acquisition, only then the illegitimate children are entitled to share. But, in the instant case, as stated already the properties mentioned in Ex.A.37 and Ex.A.57 are the properties of the grandfather and he had given only the life estate to his sons and the vested remainder to the Aan (Male) Santhathis and their legal heirs respectively. Further, as per Ex.A.57, Veeraboyan had bequeathed the 'B' schedule properties

jointly in favour of his two sons Kumaresan and Viswanathan by giving life estate to them, without the power of alienation. As per the dictum of the Hon'ble Apex Court reported in AIR 1961 Supreme Court 1334, Singhai Ajit Kumar and another v. Ujayar Singh and others and (1996) 2 Supreme Court Cases 567, Gurnam Kaur and another v. Puran Singh and others, the illegitimate Children are not entitled to share in the grandfather's properties.

53. Admittedly, during the life time of Kumaresan, he himself had sold some of the properties. The second defendant/Jayaraj who is the competent persons to seek for setting aside the same had not filed any suit. Further, even though the suit has been filed by the children of Chandra begotten through Kumaresan against the children born to Kumaresan through his first wife, the main contesting defendants are the bonafide purchasers of properties and the 2nd defendant. In such circumstances, I am of the view that the appellants A2 and A4 are not entitled to any share in the 'B' scheduled properties in Ex.A.37/Settlement Deed = 'A' scheduled suit properties, since they are not the Aan (Male) Santhathis as mentioned in the Ex.A.37/Settlement Deed.

54. As far as the 'B' scheduled properties are concerned, there is no evidence to show that Kumaresan had succeeded the properties as class 2 heir, on the death of his brother Subramaniam and his wife Lakshmi Ammal. Further as per Ex.A.9/Will, he made testamentary disposition in the year 1995 and so there is no evidence to show that Kumaresan died intestate. So, the appellants are not entitled to any share in the 'B' scheduled properties.

55. As regards the 'C' scheduled properties are concerned, it is the properties mentioned in the Ex.A.57, wherein limited estate was given jointly to Kumaresan and Viswanathan and the vested remainder was given to their children. But as already discussed, the factum of marriage itself was not proved and so, the appellants/plaintiffs cannot take shelter under Section 16 of the Hindu Marriage Act, as the illegitimate children are not entitled to any share in the grandfather's properties. If the father inherits the properties or succeeds the properties from his ancestor, only then the illegitimate children can claim share in the properties along with the legitimate children in the father's property. In the instant case, as per Ex.B.57, father got the properties only as limited estate. In such circumstances, I am of the considered view that the appellants are not entitled to any share in the 'C' scheduled properties.

56. Furthermore, since A2 and A4 are not the legitimate children as per Section 16(3) of the Hindu Marriage Act, they are not entitled to any share in the properties.

Thus, the point Nos.1 and 2 are answered accordingly.

Point No.3

57. The learned Counsel for the Cross Objector would submit that the Trial Court without framing proper issues in respect of Ex.B.27/Will has given a finding that the Will has not been proved.

58. It is pertinent to note that Lakshmi, wife of S.V.Subramaniam had executed Ex.B.27/Will, dated 27.04.1993 in favour of her brother Dakshinamoorthy. However, the Trial Court had held that the Will had not been proved. But the cross-objection has been filed stating that the finding in that regard had to be set aside. Since the appellants herein had filed the suit for partition and separate possession, they have to prove that Kumaresan died intestate. But his legatee Dakshinamoorthy entered into a partnership firm as per Ex.B.28/Partnership deed and the property mentioned in Ex.B.27/Will was given as a partnership property. he retired from partnership firm, as per Ex.B.29 and Ex.B.30. Now they are claiming right over the properties under EX.A.27, wherein the father had given limited estate to his sons without the power of alienation and after the life time of his sons, their heirs are entitled to absolute right. In the instant case, S.V.Subramaniam died leaving behind his wife Lakshmi and she executed Ex.B.27/Will in favour of her brother Dakshinamoorthy. But the Will has been proved. It is true that the attestors are not examined before the trial Court. It is a well settled dictum that the judgment in respect of a Will is concerned, it is a judgment in rem. So, an opportunity must be given to the propounder to prove the Will. But, herein the appellants/plaintiffs had filed a suit claiming share in the property. But, Lakshmi being the wife of Subramaniam is entitled to absolute right over the property. If the Will is not proved then only the legal heirs are entitled to right in the properties. On the date of death of Lakshmi Subramaniam viz., 17.06.1993, all the other sons had died except Kumaresan, who died only on 07.12.1997.

59. It is pertinent to note that in the judgment passed by the Trial Court, in paragraph 119, it was specifically stated that the alleged will executed by the wife of Subramaniam has not been proved. It is also an admitted fact that the person who claims his right through the Will have to prove the attestation. However, the attestor was not examined before the Court. Further, on perusal of the issues framed by the Trial Court, it is seen that no issue has been framed in respect of Ex.B.27/Will. In the written statement filed by the 68th defendant, it has been specifically stated that the properties mentioned in the Will executed by Veeraboyan was enjoyed by S.V.Subramaniam till his life time as legatee and after his lifetime, his wife Lakshmi Ammal, as a sole legal heir had

succeeded the properties. Hence, she had an absolute right over the properties and she executed a Will bequeathing some properties in favour of her brother Dakshinamoorthy. Lakshmi Ammal died on 17.06.1993 and so, the Will came into effect on that date. But that factum was not disputed by the appellant by way of filing reply statement.

60. Thus, the learned counsel for the appellant would submit that when the execution of Will has not been specifically denied, examination of attesting witness to the Will does not arise.

61. At this juncture, it is appropriate to consider the decisions relied on by the learned counsel for the 66th respondent in this regard.

61.1. In the decision reported in AIR 1990 KERALA 226, Thayyullathil Kunhikannan and others v. Thayyullathil Kalliani and others, it was held that when the execution of the will or attestation thereof is not disputed, it is unnecessary to examine the attesting witness. It is appropriate to incorporate paragraph 34 of the said decision:

"34. Order 8 Rule 5 of the C.P.C. provides that unless there is a specific denial of any allegation of fact made in the plaint, it shall be taken to be admitted. Section 58 of the Evidence Act provides that no fact need be proved in any proceedings, which by any rule of pleadings in force at the time, the parties are deemed to have admitted by their pleadings. In this case, in the absence of any denial in the written statement, the genuineness and the validity of the will Ext. A1 must be deemed to have been admitted by the law of pleadings, namely Order 8 Rule 5, and therefore that fact was not required to be proved at the trial. Section 68 states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive. The proviso to the Section which was introduced by the amending Act 31 of 1926 makes an exception in the case of any document, not being a will, which has been registered, unless its execution by the persons by whom it purports to have been executed, is specifically denied. The fact that the proviso is not applicable to wills, and that it does not make an exception in the case of registered wills, does not lead to any inference that a will cannot be acted upon or used as evidence, unless it has been proved by examining an attesting witness. The only effect of the proviso is that registration of the will by itself does not obviate the necessity of calling an attesting witness to prove it, if it is otherwise required to be proved. The proviso does not speak of a case where a will is not in dispute. Section 68 relates to those documents which require

to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, Section 68 cannot operate to insist on formal proof by calling an attesting witness. Section 58 has to be read as overriding Section 68 and as obviating the necessity for calling an attesting witness, unless the execution of the will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a will could be used as evidence. Phipson on Evidence 12th Edition (1976) explains the rationale behind examining an attesting witness as that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, "an agreement which may be waived for the purposes of dispensing with proof at the trial", (paragraph 1751). In paragraph 1757, the learned author points out that proof of execution of documents required by law to be attested is dispensed with (although the attesting witness may be alive and in Court) "when the execution has been admitted for purposes of trial". Order 8 Rule 5, C.P.C. deems the execution of the will to be admitted in the absence of any denial thereof in the written statement. Examination of an attesting witness is therefore unnecessary when the parties have not joined issue on the validity or genuineness of the will."

61.2. For the very same preposition, the learned counsel relied upon the decision reported in 2008 (1) CTC 130, R.Vellingiri and another v. R.Kannaian and others, wherein the above decision has been followed. It is appropriate to incorporate paragraph 10 of the said decision:

"10. It is pertinent to point out that defendants 1 to 4 remained exparte and no written statement has been filed and therefore the genuineness and validity of Ex.A-2-Will was not at all in issue. The question to be decided is even when the validity of Ex.A-2-Will had not been questioned by the defendants, yet, whether it is necessary to prove Ex.A-2 as contemplated under Section 68 of the Indian Evidence Act. In this context it will be useful to refer to a Division Bench decision of the Kerala High Court in the case of Thayyullathil Kunhikannan Vs. Thayyullathil Kalliani reported in A.I.R.1990 Kerala 226 wherein in paragraph 34 of the said decision, it is laid down as follows:

"34. Order 8 Rule 5 of the C.P.C. provides that unless there is a specific denial of any allegation of fact made in the plaint, it shall be taken to be admitted. Section 58 of the Evidence Act provides that no fact need be proved in any proceedings, which by any rule of pleadings in force at the time, the parties are

deemed to have admitted by their pleadings. In this case, in the absence of any denial in the written statement, the genuineness and the validity of the will Ext.A1 must be deemed to have been admitted by the law of pleadings, namely Order 8 Rule 5, and therefore that fact was not required to be proved at the trial. Section 68 states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive. The proviso to the Section which was introduced by the amending Act 31 of 1926 makes an exception in the case of any document, not being a will, which has been registered, unless its execution by the persons by whom it purports to have been executed, is specifically denied. The fact that the proviso is not applicable to wills, and that it does not make an exception in the case of registered wills, does not lead to any inference that a will cannot be acted upon or used as evidence, unless it has been proved by examining an attesting witness. The only effect of the proviso is that registration of the will by itself does not obviate the necessity of calling an attesting witness to prove it, if it is otherwise required to be proved. The proviso does not speak of a case where a will is not in dispute. Section 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, S.68 cannot operate to insist on formal proof by calling an attesting witness. Section 58 has to be read as overriding S.68 and as obviating the necessity for calling an attesting witness, unless the execution of the will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a will could be used as evidence. Phipson on Evidence 12th Edition (1976) explains the rationale behind examining an attesting witness as that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, "an agreement which may be waived for the purposes of dispensing with proof at the trial". (paragraph 1751). In paragraph 1757, the learned author points out that proof of execution of documents required by law to be attested is dispensed with (although the attesting witness may be alive and in Court) "when the execution has been admitted for the purposes of trial". Order 8 Rule 5 C.P.C. deems the execution of the will to be admitted in the absence of any denial thereof in the written statement. Examination of an attesting witness is therefore unnecessary when the parties have not joined issue on the validity or genuineness of the will". A reading of the above said decision clearly shows that the examination of an attesting witness to a will is unnecessary when the parties have not joined issue on the validity or genuineness of the Will. As pointed out above, the validity and genuineness of Ex.A-2-Will was not at all in issue in the above

suit. Therefore, as laid down in the above said decision, the examination of one of the attesting witness to Ex.A-2-Will is not necessary."

61.3. In the decision reported in 2010-3-L.W.282, Karpagam and another v. E.Purushothaman and others, it was held that when the execution of Will has not been specifically denied, examination of attesting witness to the Will is unnecessary. It is appropriate to incorporate paragraphs 19 and 20 of the said decision.

"19. Signature of executant is thus proved by admission of 1st Defendant herself. Courts below concurrently found that Ex.A.1 Will was 'legally proved' as per Sec.69 of Indian Evidence Act, exercising jurisdiction under Sec.100 C.P.C., High Court will not interfere with such concurrent findings.

20. Denial of execution of Ex.A.1 Will in the written statement appears to be a casual denial. In (2008) 1 MLJ 1123 [R.Vellingiri and another v. R.Kannaian and others] it was held that examination of an attesting witness to a Will is unnecessary when the parties have not joined issue on the validity or genuineness of the Will."

62. Considering the facts of the present case in the light of the above decisions, admittedly, since the suit is in respect of number of items of properties and there are 90 respondents, I am of the view that the conduct of the Trial Court is erroneous in deciding that the Will executed by Lakshmi has not been proved, without even framing an issue in respect of the Will and not considering the facts that the appellants had not denied the execution of Ex.B.27/Will. So, the finding of the Trial Court in that regard has to be set aside. However, it is left open that the propounder of the Will has to prove the Will in accordance with law and the 66th respondent cannot take shelter under the citations because it was specifically stated that as per Sections 68 and 69 of the Indian Evidence Act and Section 63 of the Indian Succession Act, the Will ought to be proved and the attester has to be examined. In such circumstances, I am of the view that the finding in respect of Will has to be set aside and it is left open to the propounder of the Will to prove the Will in accordance with law.

63. Furthermore, in the Ex.B.27/Will it was specifically stated since she is the legal heir of the deceased Subramaniam, she has absolute right over the property and she can also dispossess the properties. As per Section 15 of the Hindu Succession Act, the property of a female Hindu dying intestate shall devolve firstly upon the sons and daughters, secondly upon the heirs of the husband, thirdly upon the mother and father, fourthly upon the heirs of the father and lastly, upon the heirs

of the mother. As per Section 8 of the Act, there is no first class heir to the deceased Subramaniam, but as per clause 2 of the II class heir mentioned in the schedule to Section 8 of the Hindu Succession Act, 1956, his brother Kumaresan is entitled to the properties. But as already stated, the Will has not been specifically denied. So, without framing any issue in respect of the Will, the Trial Court has committed an error by given the finding that the Will has not been proved. So, as already stated, it is left open to the 66th respondent to prove the Will in accordance with law.

Thus, the point No.3 is answered accordingly.

Point Nos.4 and 5

64. In view of the answer given to point nos.1 and 2 that the factum of marriage between the deceased Kumaresan and Chandra has not been proved and in view of the well settled dictum that long cohabitation and how the society treated them would be relevant and that the children born out of void and voidable marriage would be entitled to their father's property alone, the appellants are not entitled to any share in the separate property of Veeraboyan. So, the judgment and decree passed by the Trial Court does not warrant interference by this Court and the appellants are not entitled to any relief.

The point nos.4 and 5 are answered accordingly.

65. In view of the answer given to point nos.1 to 4, the appellants are not entitled to any relief in this appeal and consequently, the appeal is dismissed.

66. In fine,

1. The first appeal is dismissed. No costs.
2. The cross objection is allowed and the finding of the trial Court in respect of Ex.A.27/Will executed by Lakshmi Ammal, is hereby set aside and it is left open to the propounder of the Will to prove the same in accordance with law.
3. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

PGP

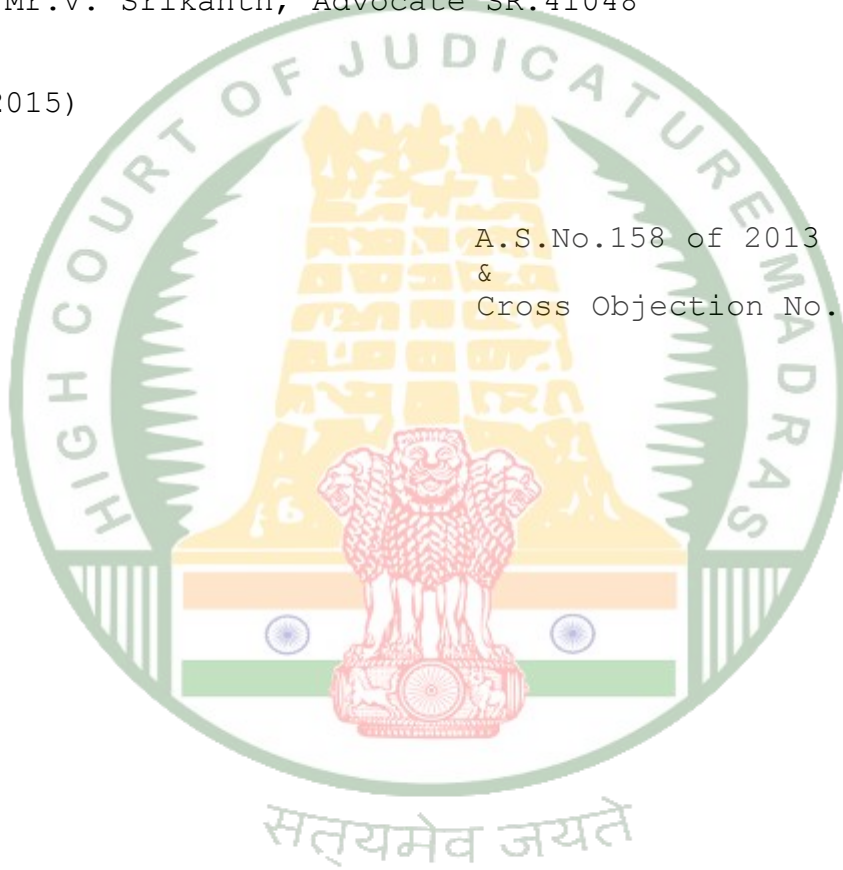
To

1.The Vth Additional District and Sessions Court, Coimbatore.

2.The Record Keeper, V.R.Section, High Court, Chennai.

+2ccs to Mr.C.R. Prasanan, Advocate, S.R.No.40284
+ 1cc to Mr.Ananda Gomathy, Advocate, S.R.No.40285
+ 1 cc to Mr.M. Rajamanickam, Advocate SR.40453
+ 1 cc to Mr.S. Venkatesh, Advocate Sr.40805
+ 1 cc to Mr.R. Bharathkumar, Advocate SR.40806
+ 1 cc to Mr.V. Srikanth, Advocate SR.41048

TEJ(CO)
EU(26/11/2015)



A.S.No.158 of 2013
&
Cross Objection No.70 of 2013

WEB COPY