

HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Appeal Suit No.411 of 1998

JUDGMENT:

This first appeal suit, under Section 96 of the Code of Civil Procedure, 1908, by the appellants-plaintiffs is directed against the decree and judgment, dated 03.08.1995, of the learned I Additional Senior Civil Judge, Visakhapatnam, passed in OS.No.353 of 1986.

2. I have heard the submissions of *Ms. Vanajakshi*, learned counsel representing Sri N. Ashwini Kumar, learned Counsel appearing for the appellants-plaintiffs, and of *Sri S.V.R. Subrahmanyam*, learned counsel appearing for the respondents1 & 2-defendants 1 & 2. I have perused the material record.

2.1 The parties in this appeal suit shall hereinafter be referred to as the plaintiffs and the defendants for convenience and clarity.

3. Since this is a first appeal suit and this Court is the last Court of fact, before proceeding further, it is necessary to refer to the cases of the parties.

3.1 The case of the plaintiff, in brief, is this: - 'The first plaintiff is the elder son of late Appanna. The second plaintiff is the legally wedded wife of the said Appanna. The said Appanna died on 08.12.1983. In or about 1950, the said Appanna brought the first defendant as his concubine. Originally, the first defendant was the legally wedded wife of one K. Venkata Swamy, who was alive by the time of Appanna bringing the first defendant. Subsequently, the said Appanna begot the second defendant through the first defendant, who is his kept mistress. The first

defendant has no right over the properties of Appanna. The first defendant also gave birth to a daughter through her said husband Venkata Swamy. The said daughter died unmarried. The marriage between the second plaintiff and Appanna was never dissolved. The second defendant is an illegitimate son of Appanna through the first defendant. The defendants have no right to any of the properties of late Appanna. Before the death of Appanna, the first plaintiff sought for partition of the properties since late Appanna is committing acts of waste. At the intervention of the elders, a partition was affected, on 24.04.1969. In the said partition, 'A' schedule property mentioned in the deed of partition fell to the share of Appanna and 'B' schedule property fell to the share of the plaintiffs. The said late Appanna acquired a centrally located site abutting the main road in Tagarapuvalasa and constructed shop rooms with the aid of the first plaintiff. After the death of late Appanna, the plaintiffs are entitled to the shop rooms. In fact, the same was confirmed by late Appanna before the elders by stating that the shop rooms along with the site will be the property of the plaintiffs and that after his demise, the plaintiffs can take possession and enjoy the same with absolute rights. Tattara Appalaswamy Patrudu and Chilla Baluvdu were also present at that time along with several other elders. But, after the death of Appanna, in the year 1983, the defendants 1 and 2 are forcibly collecting the rents from the tenants in the shop rooms, i.e., the defendants 3 and 4 and others. The defendants 1 and 2 are also trying to construct the first floor on the existing shop rooms, though the defendants 1 and 2 have no right whatsoever to do so. The plaintiffs got issued a lawyer's notice, dated 09.12.1985, calling upon the defendants 1 & 2 along with the tenants to handover the site

and shop rooms mentioned in the plaint schedule to them. The defendants 1 & 2 along with the tenants gave a reply, dated 18.12.1985, with false and untenable allegations. Hence, the suit is filed for declaration that the plaint schedule property belongs to the plaintiffs, delivery of vacant possession of the same, mesne profits and other reliefs.'

4. The second defendant filed a written statement contending as follows:

The allegations that the first defendant was brought by late Appanna in or about 1950 as his concubine; that she was married originally to one Venkata Swamy, who was alive by then; that she was the kept mistress and has no right over the properties of late Appanna; that she begot a daughter through the said Venkata Swamy; that the said daughter died unmarried; that the marriage between the second plaintiff and late Appanna was never dissolved; that the second defendant is an illegitimate son of late Appanna through the first defendant; that the defendants 1 and 2, after the death of Appanna, are forcibly collecting the rents from the tenants, viz., defendants 3, 4 and others; that the defendants are trying to construct the first floor over the existing shops; that the defendants 1 and 2 are not entitled to any properties of late Appanna; that the plaintiffs are entitled to the said shop rooms after the demise of late Appanna; and, that Appanna confirmed the same by giving a statement before several elders including the elders mentioned in the plaint are all false and are denied. The defendants 1 and 2 are legally entitled to right, title and interest over the plaint schedule property and so, the defendants 3 & 4 are paying the rents to them voluntarily. The

allegations that the defendants are forcibly collecting the rents and are trying to make constructions over the existing shop rooms in the plaint schedule property without any right to do so are false. The tenants are paying the rents to the defendants 1 and 2 even prior to the death of late Appanna. The said fact is known to the plaintiffs. During the life time of Appanna, there were disputes between him and the plaintiffs 1 & 2. At that time, the first defendant was unmarried and Appanna married her. There was a partition between late Appanna and the plaintiffs as mentioned in the plaint and that partition was reduced into writing. In the said partition deed, it is stated that one will not have any right, title and interest over the properties acquired by another subsequent to the said settlement. Accordingly, late Appanna acquired the plaint schedule property. Out of love and affection late Appanna gifted the same to the defendants 1 and 2 under a Gift Settlement Deed, dated 06.02.1971, as they are his wife and son. Since then, the defendants 1 and 2 are in peaceful possession and enjoyment of the said plaint schedule property and are collecting the rents from the tenants and are enjoying the same. The defendants 1 & 2 are improving the plaint schedule property. Hence, the plaintiffs developed eye sore against the defendants 1 & 2 and filed the suit to grab the plaint schedule property. The plaintiffs have no manner of right, title and interest over the plaint schedule property. The defendants 1 & 2 are the absolute owners of the same. After the gift settlement deed executed by late Appanna in favour of the defendants, they have developed the plaint schedule property by constructing shop rooms and leased out the same to tenants and are paying the municipal taxes regularly all these years. The alleged elders mentioned in the plaint are the henchmen of the plaintiffs. Exchange of notices as

mentioned in the plaint is true. The averments in the reply notice are correct. The plaintiffs have not issued any rejoinder notice to the reply notice. The suit is filed with false and untenable allegations by suppressing the truth and misrepresenting the facts. All the contrary allegations, which are not expressly denied in the written statement, shall not be deemed to have been admitted by the defendants. Hence, the suit may be dismissed.

4.1 The defendants 1, 3 and 4 filed a memo adopting the written statement filed by the second defendant.

5. On the basis of the above pleadings, the trial Court framed the following issues for trial:

1. Whether the plaintiffs are entitled for the declaration prayed for?
2. Whether the plaintiffs are entitled for possession of the plaint schedule property?
3. Whether the plaintiffs are entitled for mesne profits?
4. To what relief?

(Reproduced verbatim)

6. Be it noted that by orders, dated 22.03.1993, of the trial Court in I.A.No.853 of 1992, two more tenants were added as defendants 5 and 6 and they remained *ex parte*.

7. During the course of trial, PWs1 and 2 were examined and exhibits A1 to A6 were marked on the side of the plaintiffs. DWs1 to 3 were examined and exhibits B1 to B13 were marked on the side of the defendants.

8. On merits, the trial Court dismissed the suit of the plaintiffs. Hence, the plaintiffs brought this appeal suit.

9. Learned counsel for the plaintiffs contended as follows:

The relationship of the plaintiffs with late Appanna is not in dispute. The trial Court ought to have seen that the 1<sup>st</sup> defendant was brought by late Appanna as his concubine though she was originally married to one K.Venkata Swamy. The trial Court ought to have further seen that the 2<sup>nd</sup> defendant is not the legitimate Son of late Appanna through the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant is not the legally wedded wife of late Appanna and that she is only his kept mistress. The trial Court ought to have seen that since the 1<sup>st</sup> defendant is not the legally wedded wife and the 2<sup>nd</sup> defendant is the illegitimate son, they are not entitled to any property of late Appanna. The trial Court ought to have seen that the question of any divorce does not arise in this case as the dispute is with regard to the property and not the relationship. The trial Court ought to have seen that the defendants failed to place any evidence to show that the 1<sup>st</sup> defendant is the legally wedded wife of late Appanna and that the 2<sup>nd</sup> plaintiff is not the legally wedded wife of late Appanna or that late Appanna divorced the 2<sup>nd</sup> plaintiff before bringing the 1<sup>st</sup> defendant as his concubine. The trial Court ought to have seen that in the facts and circumstances of the case, the plaintiffs are entitled to the reliefs claimed in the suit. The trial Court ought to have decreed the suit as prayed for as the 2<sup>nd</sup> defendant is not the legitimate Son and as he is not entitled to any right, title and interest in the properties of late Appanna and his family. The trial Court failed to appreciate the facts & the evidence correctly & in proper perspective and arrived at incorrect conclusions. The said findings, which are

erroneous, are liable to be set aside. Hence, the appeal suit may be allowed and the suit may be decreed as prayed for.

10. On the other hand, learned counsel for the defendants 1 and 2 while supporting the decree and judgment of the trial Court, contended as follows: 'The trial Court after considering the facts correctly and appreciating the evidence in proper perspective arrived at correct conclusions on all the issues and dismissed the suit of the plaintiffs. After advertng to the legal position, the trial Court rightly held that even if the 2<sup>nd</sup> defendant is an illegitimate son of late Appanna as contended by the plaintiffs, yet, he would be entitled to a share equally along with the legitimate son in the properties of late Appanna. Further, the trial Court rightly held that, when the 2<sup>nd</sup> defendant an illegitimate son is having a share in the plaint schedule properties, the suit for declaration and recovery of possession, which is not maintainable, is liable for dismissal. The trial Court also noted that Appanna settled and gifted his properties on the defendants 1 and 2 by virtue of a registered settlement deed and gift deed. The trial Court in its judgment observed that for the reasons best known, the plaintiffs failed to file a suit for partition. The defendants denied the right, title and interest of the plaintiffs over the plaint schedule property even before the exchange of notices and also in the reply notice (exhibit A3, dated 18.12.1985) and claimed exclusive right, title, interest and possession over the plaint schedule properties. The plaintiffs, who are having knowledge of the hostile claim of the defendants that was openly made long time back, failed to bring a suit for partition till date. Therefore, whatever alleged rights the plaintiffs allegedly had in the plaint schedule property, stood

extinguished by long lapse of time. The plaintiffs have no manner of right over the plaint schedule property, in any view of the matter. The well considered judgment of the trial Court does not call for interference. The contentions raised in the appeal suit are devoid of merit. The appeal suit is liable to be dismissed.'

11. I have given earnest consideration to the facts & submissions. I have carefully gone through the material record.

12. The points for consideration are:

1. Whether the plaintiffs are entitled to the reliefs of declaration of title in respect of the plaint schedule property, recovery of possession of the same and mesne profits?
2. Whether the decree and judgment of the trial Court are unsustainable under facts and in law as being contended by the plaintiffs?
3. To what relief?

13. POINT No.1:

13.1 The 1<sup>st</sup> plaintiff is the son and the 2<sup>nd</sup> plaintiff is the legally wedded wife of late Bora Appanna is not in dispute. Late Appanna had disputes with the said plaintiffs and that a partition was affected, on 24.04.1969, between late Appanna on one hand and the plaintiffs 1 & 2 on the other and that in the said partition, which was reduced into writing, the properties mentioned in 'A' & 'B' Schedule of the deed of partition, dated 24.04.1969, fell to the respective shares of late Appanna and the plaintiffs is also admitted. The subject matter of the suit, that is, the plaint schedule property, which is a site with shop rooms, is not the subject matter of the above said partition is not in dispute. Thus, it

appears from the material record that there is no need to deal with the properties, which were subject matter of partition, as the suit is confined to the present plaint schedule property, which is site with shop rooms on the main road at Tagarapuvalasa. The plaintiffs brought the suit for declaration of title in respect of plaint schedule property and recovery of possession of the same from the defendants 1 & 2. It is borne out by the evidence brought on record that Appanna encroached the site on main road at Tagarapuvalasa and that in that regard there is litigation with the municipality as the site is stated to be that of municipality; however, it also appears that he later constructed three shop rooms in the ground floor and that the property was later further developed. Though there is a dispute with municipality on the ground that the site occupied by late Appanna is municipal property, in this *lis*, this Court need not advert to the said aspect as both the parties are admitting and are proceeding on the admitted fact and on the supposition that the site though said to have been encroached by Appanna is the property of late Appanna. Further, one of the contentions of the plaintiffs is that the present plaint schedule site with the shop rooms in the ground floor was already available at the time of partition in the year 1969; and, however, according to them, it was not subject matter of partition for various reasons and that it was kept joint; this contention *prima facie* appears to be unsupported by any reliable evidence. Even assuming for a moment that this property is available for partition by the year 1969, that is, by the date the partition of the other properties took place between late Appanna on one hand and the plaintiffs on the other, yet the said plaint schedule property is not partitioned between them. Be that as it may. Subject to further

detailed examination of the evidence, it can be noted that the evidence on record only supports the view that after the partition in the year 1969 only Appanna occupied the site on the main road at Tagarapuvalasa, which is the subject matter of the present *lis*. I shall deal with the evidence on various aspects, in further detail, at an appropriate later stage.

13.2 As regards the claims of declaration of title and recovery of possession of the plaint schedule property, it is apt to first restate the case of the plaintiffs, which is as under: 'Late Appanna acquired a centrally located site abutting the main road in Tagarapuvalasa and constructed shop rooms with the aid of the 1<sup>st</sup> plaintiff. After the death of late Appanna, the plaintiffs who are his son and wife, have become entitled to the plaint schedule property. In-fact, late Appanna confirmed before the elders stating that the shop rooms along with the site will be the property of the plaintiffs and that the plaintiffs can take possession and enjoy the same with absolute rights after his demise. Tattara Appalaswamy Patrudu and Chilla Baluvdu were also present at that time along with several other elders. The defendants 1 & 2, after the death of Appanna in the year 1983, started forcibly collecting the rents from the tenants in the shop rooms and tried to construct 1<sup>st</sup> floor over the existing shop rooms without any manner of right. When a notice was issued, on 09.12.1985, they gave a reply, dated 18.12.1985, with untenable allegations and, therefore, the suit was brought.' Thus, according to the plaintiffs, the site was acquired by late Appanna and the shop rooms in the ground floor were constructed by him with the aid of the 1<sup>st</sup> plaintiff. The year of occupation and the year of construction of

shop rooms in ground floor are not stated in the plaint. Further, in the plaint, a bald statement was made that the shop rooms were constructed with the aid of 1<sup>st</sup> plaintiff without giving any details. Nevertheless, in the evidence, PW1, the 1<sup>st</sup> plaintiff, deposed that apart from partitioned properties, late Appanna also owned the plaint schedule property and that no partition of that property was affected and that it was agreed in mediation that as Appanna became old he has to keep the property for his livelihood and that it shall devolve upon PW1 after his demise. If the plaint schedule property (i.e., site with three shop rooms in ground floor) is available for partition and the version of the plaintiffs is true, there is no reason for not mentioning the said aspect in the deed of partition. Be that as it may, this evidence, which is an improvisation, is not in line with the pleading in the plaint. The other evidence brought on record also probablises the fact that the site over which the shop rooms were constructed was acquired/ occupied by late Appanna after 1969, that is, after the partition of the family properties between him and the plaintiffs. PW1 further deposed that Appanna and he first established a cycle shop and that by that time he was 12 years old and that later they both developed the property and constructed shop rooms and at first four shop rooms were constructed and that the same were leased out to tenants and that he (PW1) contributed Rs.5,000/- for constructing the shop rooms and that he and his father used to collect rents from the tenants and that his father used to pay taxes on the property by taking money now and then from him for paying the taxes and that after his father's death, when he went to collect rents, the tenants stated that his younger brother objected for they paying the rents to him (PW1). His said version that at an young or tender age, he contributed for

constructing the shop rooms and that he paid Rs.5,000/- for construction of shop rooms and that he paid money to his father now and then for payment of taxes, on the face of it, appears to be improbable. Further, the said version in the evidence is at variance with the pleaded case of the plaintiffs and is also an improvisation without any basis in the pleadings. This apart, PW1 admitted as follows: - 'It is true that I have not paid any tax to the municipality in respect of the suit property.' He also admitted that from the beginning the defendants are collecting the rents and that he has not received any amount towards rent and that from the date of the death of his father, the 2<sup>nd</sup> defendant is in possession and enjoyment of the property. The two elders named in the plaint are not examined as they are not alive. It is pertinent to note that the defendants contended that the names of dead persons are pressed into service as elders and that the said persons never acted as mediators at any time. Added to this, PW2, who was said to be a person said to be acquainted with the family of Appanna stated in his evidence that three shop rooms situate at Tagarapuvalasa were constructed on encroached land and that the upstairs portion over the ground floor shop rooms was constructed by the defendants 1 & 2. Be it noted that in the legal notice, under the original of exhibit A2, got issued by the plaintiffs to the defendants, it was stated that Appanna occupied certain site abutting the road of Tagarapuvalasa and constructed buddies and shop rooms and that four tenants are in occupation of the shop rooms and they are paying rents to the defendants 1 & 2. In this notice, there was no mention that first a cycle shop was started and that the shops in the ground floor were constructed with the contribution of either of the plaintiffs as spoken to by PW1 in his deposition. Therefore, there was a

contribution of the plaintiffs for construction of the shop rooms in the ground floor in the site acquired/occupied by late Appanna is not established and the evidence brought on record does not support their plea that with the contribution of either of the plaintiffs, late Appanna constructed the shop rooms (ground floor) in the site.

13.3 Having thus examined the case of the plaintiffs and their evidence, it is necessary to now turn to the defence and the defence evidence and examine the same in juxtaposition. The pleaded defence is this: 'There were disputes between Appanna and plaintiffs. At that time, 1<sup>st</sup> defendant was unmarried and Appanna married her. There was a partition between late Appanna and plaintiffs as mentioned in the plaint and that partition was reduced into writing. In the said deed of partition, it is stated that one will not have any right, title and interest over properties acquired by another subsequent to the said partition. Late Appanna acquired the plaint schedule property. Out of love and affection, late Appanna gifted the same to defendants 1 & 2 under a gift settlement deed, dated 06.02.1971, as they are his wife and son. Since then, the defendants 1 & 2 are in peaceful possession and enjoyment of the plaint schedule property and are collecting the rents from the tenants in their own right and are enjoying the same. The defendants 1 & 2 are improving the plaint schedule property and the plaintiffs developed an eyesore and filed the suit to grab the plaint schedule property without any manner of right, title and interest and that the defendants are absolute owners of the same. After the gift settlement deed was executed by late Appanna in favour of the defendants, they have developed the plaint schedule property by constructing shop rooms in the

first floor and leased out the same to tenants and that they are paying taxes regularly all these years and that the alleged elders mentioned in the plaint are the henchmen of the plaintiffs.' To substantiate this defence, DW1 deposed that by the date of death of Appanna, there was a thatched house and that he constructed a terraced house with his own funds and that later he constructed the first floor and thus he constructed three rooms each in the ground and first floors and that the entire property is in his possession and that he leased out the shop rooms to the tenants and that the suit filed against him by the municipality in respect of the plaint schedule property is pending. When it was suggested to him that the suit schedule property is the exclusive property of Bora Appanna, he denied the said suggestion. The said suggestion given on behalf of plaintiffs to DW1 indicates that the plaint schedule property is the self acquired property of late Appanna. Having denied the said suggestion, DW1 stated that Appanna acquired the property in the year 1970. Though the version of DW1 that by the time Appanna died, there was a thatched hut and that he (DW1) constructed a terraced house etcetera is an improvised version without any basis in the pleading, no-doubt, the pleadings and evidence on record on harmonious consideration disclose that the shop rooms in the first floor were constructed by the defendants and that from the beginning the defendants are collecting the rents and that PW1 never received any amounts towards rents and that from the date of the death of Appanna, the 2<sup>nd</sup> defendant is in enjoyment of the plaint schedule property. DW3, who is related to both the sides deposed that late Appanna is his uncle and that he gave him the contract to construct one of the suit shop rooms and that thereafter 2<sup>nd</sup> defendant gave a contract to construct two

shop rooms in the remaining vacant site and that he constructed two shop rooms later, that is, about 4 or 5 years prior to his giving evidence (that is, prior to 29.06.1995) and that all the three shop rooms are in possession of 2<sup>nd</sup> defendant and that the 2<sup>nd</sup> defendant is collecting rents from the tenants in the shop rooms. Thus, this witness gave a total new version regarding construction of three shop rooms in the ground floor, that is, one by Appanna during his life time by giving contract to him and the remaining two shop rooms by the 2<sup>nd</sup> defendant 4 or 5 years prior to 1995. This is not the case of either of the parties. Therefore, the evidence of this witness is not of help to either of the parties. It is pleaded in the plaint that when the defendants 1 & 2, without any manner of right, are trying to construct shop rooms in the first floor, the suit was brought. This pleading also is suggestive of the fact that the shop rooms in the first floor, which are on existence as on today, were constructed by the defendants 1 & 2. DW1 also testified that he constructed the shop rooms in the first floor. As already noted, PW2 also stated that defendants 1 & 2 constructed the shop rooms in the first floor. In the reply legal notice, exhibit A3, got issued on behalf of the defendants 1 & 2 and the tenants, it was stated that 2<sup>nd</sup> defendant is the legitimate son of late Appanna through 1<sup>st</sup> defendant and that Appanna occupied certain site abutting the road at Tagarapuvalasa and constructed buddies and shop rooms. Thus, the version of DW1 that there used to be a thatched house during the life time of Appanna and that DW1 constructed terraced house with shop rooms is only an improvement in the evidence of DW1. In the deed of partition, exhibit A1, dated 24.04.1969, which is an admitted document, there are recitals that after the partition, the parties to the deed of partition, that is, late

Appanna on one hand and the plaintiffs on the other shall not dispute the partition and shall not claim that there are other properties available for partition and that one party shall not claim rights over the property of the other party. The recitals in the partition deed also lay bare that the plaint schedule property was not the subject matter of partition and that the plaintiffs are precluded from claiming share in the properties by stating that there are other properties available for partition and that the same are not partitioned.

13.4 Thus, on a careful scrutiny and appreciation of the entire evidence, it is apparent that Appanna occupied the site and constructed the shop rooms in the ground floor during his life time and that later the defendants 1 & 2 constructed the shop rooms in the first floor and that admittedly since, 08.12.1983, the date of death of Appanna, the defendants 1 & 2 are in possession and enjoyment of the entire plaint schedule property and are collecting rents from the tenants. Therefore, the case that the plaintiffs contributed for construction of shop room in plaint schedule property and that they have joint right along with Appanna in the plaint schedule property is not proved. Thus, from the evidence, it is clear that the plaintiffs could not establish their title, much less, exclusive title in respect of the plaint schedule properties. The law is well settled that in a suit for declaration of title, the legal burden as well as the initial onus of proof, which is very heavy, always lies on the plaintiffs and that in a suit of this nature, the plaintiffs succeed on their own strength but not on the weakness of the defence of the defendants. It is trite to refer to the following ratio in the decision rendered by the

Supreme Court in Union of India v. Vasavi Co-operative Housing Society Limited and others<sup>1</sup>.

It is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.'

13.4 In the light of the facts, evidence and the legal position supra, this Court finds that the plaintiffs are not entitled to the relief of declaration of title in respect of plaint schedule property. As a sequel, it must be held that the plaintiffs are not entitled to the reliefs of recovery of possession and mesne profits.

14. Nevertheless, there is one more vital aspect which needs advertence to and determination. On this aspect, it is to be first noted that while admitting that the 2<sup>nd</sup> defendant is the illegitimate son of late Appanna through the 1<sup>st</sup> defendant, the plaintiffs contend that since the 2<sup>nd</sup> defendant is the illegitimate son and the 1<sup>st</sup> defendant is the kept mistress of late Appanna, they both are not entitled to claim any rights in the properties of late Appanna and that the properties of late Appanna devolved exclusively upon the plaintiffs on his intestate death. However, the defence of the defendants is that the 1<sup>st</sup> defendant is the legally wedded wife of Appanna and the 2<sup>nd</sup> defendant is their legitimate son. Keeping aside for a moment the above stated defence of the defendants, what is to be noted is that even according to the case of the plaintiffs, the 2<sup>nd</sup> defendant is the illegitimate son of late Appanna and the 1<sup>st</sup> defendant. On the basis of this contention, it is now to be examined as to whether the plaintiffs are entitled to make exclusive claim to the

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<sup>1</sup> (2014) 2 SCC 269

plaint schedule property and seek the reliefs of declaration of title and recovery of possession of the same. In other words, the important question is – ‘whether the 2<sup>nd</sup> defendant, who is stated to be the illegitimate son of late Appanna, became entitled to a share in the property of late Appanna on par with his natural son, the 1<sup>st</sup> plaintiff? The answer to this question is no longer *res integra*.

Section 16 of the Hindu Marriage Act, 1955, as amended reads thus: -

16. Legitimacy of children of void and voidable marriages. 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 (68 of 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 on 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.

Thus, this section says -- "Notwithstanding that a marriage is null and void under S. 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.....". This amendment clearly gives right even to illegitimate children even though the marriage might have been void or voidable. Further, in the decision in *Rasala Surya Prakas Rao and others vs. Rasala Venkateswararao and others*<sup>2</sup>, when a question was raised in the second appeal as to whether the illegitimate children of a person can be equated with his natural sons and treated as coparceners for the purpose of claiming a share in their joint family property and when the scope of S. 16(1) of the Hindu Marriage Act as amended in 1976 fell for consideration, the said question being one of general importance a reference was made to a Division Bench for an authoritative pronouncement on the question. While answering the said question, the Division Bench adverted to the legal position obtaining and held as follows:

From the principles enunciated in the various decisions discussed above, it is quite clear that even prior to the advent of Section 16 of the Hindu Marriage Act, both as per the Shastraic 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

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<sup>2</sup> AIR 1992 AP 234

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 seek a partition. He can seek a partition only after the death of the father.

[Emphasis supplied]

Further, in the decision in Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma and others vs. K. Devi and others<sup>3</sup>, it was held as follows:

‘Section 16 contains a legal fiction. It is by a rule of fictio juris that the legislature has provided that children, though illegitimate, shall, nevertheless, be treated as legitimate notwithstanding that the marriage was void or voidable.’... ‘In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents.’

Further, in the decision in Jinia Keotin and Ors. vs. Kumar Staram Manjhi and Ors.<sup>4</sup>, the Supreme Court summed up the legal position as follows:

Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardizing the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of the Parliament in enacting the Hindu Marriage Act, 1955.

<sup>3</sup> AIR 1996 SC 1963

<sup>4</sup> (2003)1 SCC 730

The legitimate status of the children which depended very much upon the marriage between their parents being valid or void, thus turned on the act of parents over which the innocent child had no hold or control. But, for no fault of it, the innocent baby had to suffer a permanent setback in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children is concerned to the properties of the parents only.

15.1 In the light of the precedential guidance and the facts & evidence available on record and even proceeding on the supposition that the 2<sup>nd</sup> defendant is the illegitimate son of late Appanna, nevertheless, it must be held that the 2<sup>nd</sup> defendant becomes entitled to a share in the property of late Appanna and that in that view of the matter also, the suit for declaration, recovery of possession and mesne profits is not maintainable. Point is accordingly answered against the plaintiffs.

16. POINT No.2:

As a sequel to the findings of this Court on point no.1 supra, it is to be held that the contention of the appellants-plaintiffs that the decree and judgment of the trial court are unsustainable under facts and in law is devoid of merit and is liable for rejection. The said contention is accordingly rejected.

Viewed thus, this Court finds that there is no merit in the contentions of the plaintiffs/ appellants and that the appeal suit, which is devoid of merit, is liable for dismissal.

17. POINT No.3: -

In the result, the appeal suit is dismissed.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, in this appeal shall stand closed.

02<sup>nd</sup> March, 2018  
VA

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M. SEETHARAMA MURTI, J

