

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.402 of 2002

Order reserved on: 27-2-2019

Order delivered on: 5-3-2019

Suddu Ram, aged about 45 years, S/o late Ghasiram Gond
Nakaram, R/o Village Chouriya, Police Station Narharpur, Distt.
Kanker (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Kamlesh Kumar, aged about 19 years, S/o Ganga Prasad Halwa,
2. Kamalkant, aged about 16 years, S/o Ganga Prasad Halwa,
(Respondent No.2 is a minor through its legal guardian, Ganga
Prasad Halwa,)

Both R/o Village Chouriya, Police Station Narharpur, Distt. Kanker
(C.G.)

3. Shobhrai (Died and deleted)
4. State of Chhattisgarh, through the Collector, Kanker, Distt. Kanker
(C.G.)

(Defendants)
---- Respondents

For Appellant: Mr. Vishnu Koshta and Mr. Shobhit Koshta, Advocates.

For Respondents No.1 and 2: -

Mr. Rajkumar Pali, Advocate.

For Respondent No.4 / State: -

Mrs. Meha Kumar, Panel Lawyer.

Amicus Curiae: Mr. Ratan Pusty, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

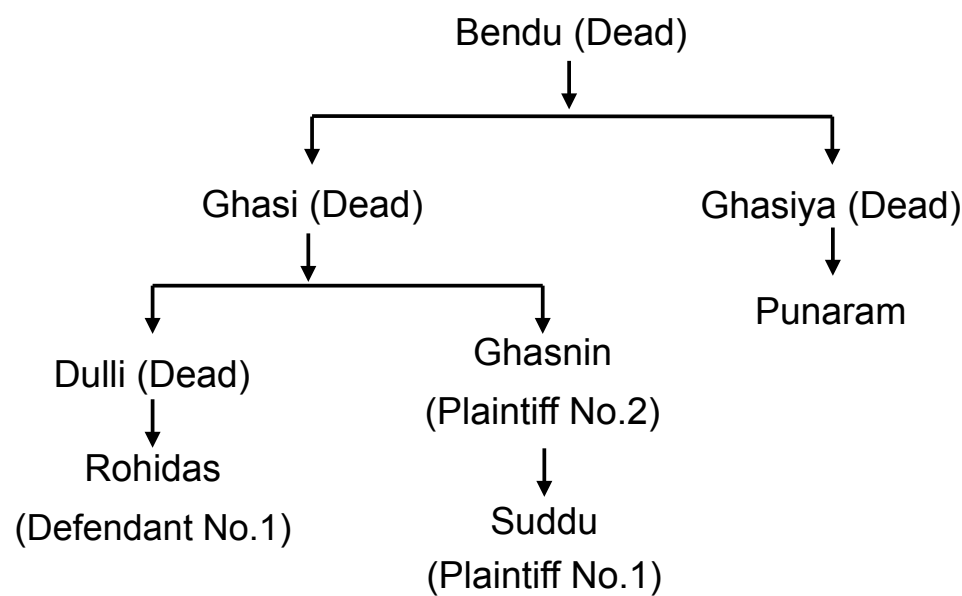
1. This plaintiff's second appeal was admitted for hearing on the
following substantial questions of law: -

“1. Whether the 1st appellate court was justified in
reversing the finding of the trial court holding that the
appellant/plaintiff is not the legal son of Ghasiram?

2. Whether the 1st appellate court was justified in holding that the appellant/plaintiff would not have any right in the property of his father Ghasiram as per provisions of Hindu Succession Act in spite of the fact that the appellant/plaintiff was the son of the 2nd wife of the appellant?”

(For the sake of convenience, parties would be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. Following genealogical tree would demonstrate the relationship among parties: -



3. Ghasi had two wives Dulli and Ghasnin. Defendant No.1 is son of Ghasi from his wedlock with first wife Dulli, whereas plaintiff No.2 is second wife of Ghasi, which according to the plaintiffs, claimed to have entered into marriage with Ghasi in *chudi* form during the lifetime of Dulli. Suddu – plaintiff No.1, son of Ghasi with his second wife Ghasnin, and Ghasnin filed suit that the suit property was inherited by Ghasi from his father, as such, after death of Ghasi, the plaintiffs and defendant No.1 have inherited the property and are entitled for share in the suit property and the sale deed executed by defendant No.1 in favour of defendants No.2, 3 and 4

is null and void. The defendants filed written statement in which the principal plea taken is the plea of denial.

4. The trial Court after appreciating oral and documentary evidence on record, came to the conclusion that plaintiff No.2 Ghasnin was married to Ghasi in *chudi* form and plaintiff No.1 is son of Ghasi with his second wife Ghasnin and each one are entitled for $\frac{1}{3}$ share in the suit property. On appeal being preferred by the defendants, the first appellate Court reversed that finding and held that relationship of father and son between plaintiff No.1 and Ghasi is not established and set-aside the decree against which second appeal has been preferred by plaintiff No.1 in which substantial questions of law have been framed which have been set-out in the opening paragraph of this judgment.
5. Mr. Vishnu Koshta, learned counsel appearing for the plaintiff / appellant, would submit that the first appellate Court is absolutely unjustified in setting aside and reversing the well-reasoned judgment and decree of the trial Court, as plaintiff No.1 is son of Ghasi out of his wedlock with Ghasnin though in *chudi* form, therefore, he will be entitled for $\frac{1}{3}$ share in the suit property. He would further submit that in case the plaintiff is even held to be the illegitimate son then also by virtue of Section 16(3) of Hindu Marriage Act, 1955, he would be entitled to share in the suit property left by his father Ghasi. As such, the judgment and decree of the first appellate Court be set-aside and that of the trial Court be restored.
6. Mr. Rajkumar Pali, learned counsel appearing for the defendants /

respondents No.1 and 2, would submit that the plaintiff has failed to establish his relationship with Ghasi as his son, therefore, the first appellate Court has rightly set-aside the judgment and decree of the trial Court and dismissed the suit which deserves to be upheld. He would further submit that defendants No.2 and 3 are bona fide purchasers of the suit land, therefore, their interest be protected. He would draw the attention of the Court that by order dated 17-8-1999, the trial Court has declared that the statement of Ghasnin shall not be read into evidence, as she did not appear for further examination pursuant to the order of the trial court.

7. Mr. Ratan Pusty, learned Advocate appearing as *amicus curiae*, has brought to the notice of the Court the legal position qua Section 16(1) of the Hindu Marriage Act, 1955 (for short, 'the Act of 1955').
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
9. It is not in dispute that defendant No.1 Rohidas is son of Ghasi from his first and legally wedded wife Dulli. It is also not in dispute that said Ghasi entered into second marriage with Ghasnin, who was earlier arrayed as plaintiff No.2 in the suit, during the lifetime of Dulli and subsistence of first marriage. Therefore, the marriage of Ghasnin with Ghasi was void under Section 11 of the Act of 1955 in view of the contravention of clause (i) of Section 5 of the Act of 1955, but by virtue of the provisions contained in Section 16 (3) of the Act of 1955, children born out of the void marriage namely, plaintiff No.1 herein, though would be branded as illegitimate son of

Ghasi, would still be entitled to inherit the self-acquired property of Ghasi and he will be treated as legitimate for all practical purposes including succession.

10. At this stage, it would be appropriate to quote here Section 16 of the Act of 1955 which states as under: -

“16. Legitimacy of children of void and voidable marriages.—(1) Notwithstanding that 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 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.”

11. The above-quoted provision 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 the matter of Parayankandiyal Eravath Kanapraavan Kalliani Amma

(Smt) and others v. K. Devi and others¹, the Supreme Court, while dealing with the question as to whether illegitimate children were entitled to succeed the property of their parents, has held that by virtue of Section 16 of the Hindu Marriage Act, 1955 illegitimate children out of wedlock of the void second marriage would inherit share in the property of their parents by operation of Section 16 of the Act of 1955. Paragraphs 80 and 82 of the report state as under:--

“80. When an Act of Parliament or a State legislature provides that something shall be deemed to exist or some status shall be deemed to have been acquired, which would not have been so acquired or in existence but for the enactment, the Court is bound to ascertain the purpose for which the fiction was created and the parties between whom the fiction was to operate, so that full effect may be given to the intention of the legislature and the purpose may be carried to its logical conclusion. (See: *J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union of India*²; *American Home Products Corp. v. Mac Laboratories (P) Ltd.*³)

82. 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.”

12. Thereafter, the Supreme Court in the matter of Rameshwari Devi v. State of Bihar and others⁴, has held as under:--

“14. It cannot be disputed that the marriage between Narain Lal and Yogmaya Devi was in contravention of clause (i) of Section 5 of the Hindu Marriage Act and was a void marriage. Under Section 16 of this Act, children of a void marriage are legitimate. Under the Hindu Succession Act, 1956, property of a male Hindu dying intestate devolves firstly on heirs in clause (1), which

1 (1996) 4 SCC 76

2 1987 Supp SCC 350

3 (1986) 1 SCC 465

4 (2000) 2 SCC 431

include the widow and son. Among the widow and son, they all get shares (see Sections 8, 10 and the Schedule to the Hindu Succession Act, 1956). Yogmaya Devi cannot be described as a widow of Narain Lal, her marriage with Narain Lal being void. The sons of the marriage between Narain Lal and Yogmaya Devi being the legitimate sons of Narain Lal would be entitled to the property of Narain Lal in equal shares along with that of Rameshwari Devi and the son born from the marriage of Rameshwari Devi with Narain Lal. ...”

13. In the matter of Jinia Keotin and others v. Kumar Sitaram

Manjhi and others⁵, the Supreme Court held that while engrafting a rule of fiction in Section 16 of the Act of 1955, the illegitimate children have become entitled to get share only in self-acquired properties of their parents. It was held as under: -

“4. ... 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 Parliament in enacting the Hindu Marriage Act, 1955. 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 the 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 set back 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.

5. So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same

5 (2003) 1 SCC 730

time it expressly provides in sub-section (3) by engrafting a provision with a non-obstante clause stipulating specifically that 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”. In the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also would attempt to Court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions on behalf of the appellants ...”

14. This view has been approved and followed by the Supreme Court in the matter of Neelamma and others v. Sarojamma and others⁶ and it has been held that illegitimate children would be entitled to share the self-acquired property of parent and not entitled to the joint Hindu Family Property. Further, in the matter of Bharatha Matha and another v. R. Vijaya Renganathan and others⁷ the same view has been reiterated.

15. This Court in the matter of Sajeevan Das and another v. Tirith Bai and others⁸ has followed the principles laid down by their Lordships of the Supreme Court in Parayankandiyal Eravath Kanapraavan Kalliani Amma (supra), Rameshwari Devi (supra), Jinia Keotin (supra), Neelamma (supra) and Bharatha Matha

6 (2006) 9 SCC 612

7 AIR 2010 SC 2685

8 2014(3) C.G.L.J. 360

(supra).

16. Recently, in the matter of Union of India and another v. V.R. Tripathi⁹, Dr. D.Y. Chandrachud, J. speaking for the Supreme Court, considering the provisions contained in Section 16 of the Act of 1955, has clearly held that children who are born from a null and void marriage, will have a right in the property only of the parents and none other than the parents. Paragraph 15 of the report states as under: -

“15. In sub-section (1) of Section 16, the legislature has stipulated that a child born from a marriage which is null and void under Section 11 is legitimate, regardless of whether the birth has taken place before or after the commencement of Amending Act 68 of 1976. Legitimacy of a child born from a marriage which is null and void, is a matter of public policy so as to protect a child born from such a marriage from suffering the consequences of illegitimacy. Hence, though the marriage may be null and void, a child who is born from the marriage is nonetheless treated as legitimate by sub-section (1) of Section 16. One of the grounds on which a marriage is null and void under Section 11 read with clause (i) of Section 5 is that the marriage has been contracted when one of the parties had a spouse living at the time of marriage. A second marriage contracted by a Hindu during the subsistence of the first marriage is, therefore, null and void. However, the legislature has stepped in by enacting Section 16(1) to protect the legitimacy of a child born from such a marriage. Sub-section (3) of Section 16, however, stipulates that such a child who is born from a marriage which is null and void, will have a right in the property only of the parents and none other than the parents.”

17. A conspectus of the aforesaid authorities referred to herein-above reveals that it has been laid down by Their Lordships of the Supreme Court that illegitimate children would be entitled to inherit the self-acquired property of their parents and not the joint Hindu family property of their parents.

18. Now, the question is, what is the nature of the suit property herein which is the subject matter in dispute in the case in hand.
19. The plaintiffs in the plaint, in para 6, have clearly stated that the suit property was inherited by Ghasi from his father Bendu and after death of his father Ghasi, the plaintiffs and defendant No.1 have inherited the suit property.
20. The Supreme Court in the matter of Shyam Narayan Prasad v. Krishna Prasad and others¹⁰ has clearly held that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property and observed as under: -
- “12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.”
21. As such, the nature of the property which Ghasi had in his hands and which is the suit property, is clearly an ancestral property and it was not the self-acquired property of Ghasi and therefore the plaintiff who is illegitimate son of Ghasi would not be entitled to get share in the ancestral property of his father.
22. Faced with this situation, Mr. Koshta, learned counsel, submits that the Supreme Court in the matter of Revanasiddappa and another

10 (2018) 7 SCC 646

v. Mallikarjun and others¹¹ has doubted the correctness of the view taken earlier by the Supreme Court in **Parayankandiyal Eravath Kanapraavan Kalliani Amma** (supra), **Rameshwari Devi** (supra), **Jinia Keotin** (supra), **Neelamma** (supra) and **Bharatha Matha** (supra) and referred the matter to larger Bench which is pending consideration. As such, the plaintiff is also entitled for share in the self-acquired property of his father or the matter may be deferred till the reference is answered by the larger Bench.

23. In the matters of **State of Uttar Pradesh v. Jal Bir Singh**¹² and **State of Maharashtra and another v. Sarva Shramik Sangh, Sangli and others**¹³, the Supreme Court has held that the principle of law laid down in the matter of **Bangalore Water Supply & Sewerage Board v. A. Rajappa and others**¹⁴ is binding until reference is answered and held that the determination of the present pending industrial dispute cannot be kept undecided until the judgment of the larger Bench is delivered. It was observed as under:-

“27. It is, however, contended on behalf of the appellant that the said undertaking was being run by the irrigation department of the first appellant, and the activities of the irrigation department could not be considered to be an “industry” within the definition of the concept under Section 2(j) of the I.D. Act. As noted earlier, the reconsideration of the wide interpretation of the concept of “industry” in Bangalore Water Supply and Sewerage Board (supra) is pending before a larger bench of this Court. However, as of now we will have to follow the interpretation of law presently holding the field as per the approach taken by this Court in State of Orissa v. Dandasi Sahu (supra), referred to above. The determination of the present pending industrial dispute cannot be kept undecided until the judgment of the larger bench is received.”

24. Similarly, in the matter of **Ashok Sadarangani and another v. Union**

11 (2011) 11 SCC 1

12 (2017) 3 SCC 311

13 (2013) 16 SCC 16

14 (1978) 2 SCC 213

of India and others¹⁵ the Supreme Court relying upon the judgment rendered in the matter of Harbhajan Singh v. State of Punjab¹⁶ has further held that the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. It was observed as under:-

“29. As was indicated in Harbhajan Singh case (supra), the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in *Gain Singh v. State of Punjab*¹⁷ need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.”

25. In view of the principles of law laid down by the Supreme Court in the aforesaid judgments (supra), this Court is of the opinion that the judgment of the Supreme Court in Parayankandiyal Eravath Kanapraavan Kalliani Amma (supra), Rameshwari Devi (supra), Jinia Keotin (supra), Neelamma (supra) and Bharatha Matha (supra) holding the field that the illegitimate son is entitled only for share in the self-acquired property of his father by virtue of Section 16(3) of the Act of 1955 can be followed by this Court while answering the substantial questions of law formulated in this appeal.

26. Now, reverting to the facts of the present case in the light of the principles of law laid down in the above-stated judgments (supra), it is quite vivid that though the plaintiff is illegitimate son of Ghasi, born out of the void second marriage of Ghasi with Ghasnin, but by virtue of Section 16(3) of the Act of 1955, he would be entitled only

15 (2012) 11 SCC 321

16 (2009) 13 SCC 608

17 (2010) 15 SCC 118

to share the self-acquired property of his father Ghasi and the suit property admittedly, being the ancestral property of Ghasi which he had received from his father Bendu, the plaintiff is not entitled to claim share in the suit property and judgments & decrees of the two Courts below are maintained though for different reasons assigned herein-above.

27. Accordingly, the appeal is partly allowed and it is held that though the plaintiff is illegitimate son of Ghasi, but yet, he is not entitled for share in the suit property. The Judgment and decree passed by the first appellate Court is accordingly modified and the substantial question of law is answered accordingly. No order as to cost(s).

28. Decree be drawn-up accordingly. This Court expresses gratitude for the valuable assistance rendered by learned *amicus curiae*.

Sd/-
(Sanjay K. Agrawal)
Judge