

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 355 of 2005**

Amrita Bai, wife of Shri Dayaram Sahu, aged about 50 years, Resident of Village Chhoti Kareli, Tahsil Kurud, District Dhamtari (C.G.)

---- Appellant/Plaintiff

Versus

1. Ramshila Bai, wife of Chamroo, aged about 61 years;
2. Nand Kumar, Son of Chamroo, aged about 35 years;
3. Nemi Chand, Son of Chamroo, aged about 30 years;
4. Leelaram, Son of Chamroo, aged about 25 years;
5. Chunni Bai, D/o Chamroo, aged about 23 years;

All Caste Sahu, and Resident of Village Karga, Tahsil Kurud, District Dhamtari (C.G.)

6. State of Chhattisgarh, Through : The Collector, Dhamtari (C.G.)

---- Respondents/defendants.

For Appellant	:	Mr. Somnath Verma, Advocate.
For Respondents No. 1 to 4	:	Mr. Raj Kumar Pali, Advocate.
For Respondent No. 6	:	Ms. Shivali Dubey, PL

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

24/07/2019

(1) The substantial question of law involved, formulated and to be answered in this second appeal preferred by plaintiff states as under:

“Whether in the absence of any evidence adduced by the defendants, the findings recorded by the trial court on issue Nos. 1 & 2 and affirmed by the First Appellate Court which has a material bearing on the result, are perverse ?

(For the sake of convenience, parties would be referred hereinafter as per their

status shown and ranking given in the suit before the trial Court).

(2) The imperative facts required to be noticed for adjudication of this appeal are as under:

(2.1) The suit property was originally held by Chamru. He had two wives namely Aasbati & Ramsheela. Plaintiff – Amrita Bai is the daughter of Chamru out of his wedlock with his first wife – Aasbai. Chamru had married with Ramsheela (second wife) during life time of his first wife Aasbati and out of his wedlock with Ramsheela, defendants No. 2 to 4 are the sons and defendant No. 5 is his daughter. Admittedly, the suit property is ancestral property of Chamru as he has inherited the suit property from his father Laxman. On 1.4.1991, the plaintiff instituted a suit for partition and possession against the defendants for the property shown in scheduled “A” of the plaint stating that she being the daughter of Chamru out of his wedlock with Aasbati, therefore, she is entitled for share in the suit property.

(2.2) Defendants No. 1 to 4 filed their written stating that on 4.6.1990, Chamru had executed a Will in their favour and, therefore, the plaintiff is not entitled for the share in the suit property.

(2.3) The trial Court, dismissed the suit relying upon Will deed allegedly executed in favour of defendants No. 1 to 4, which was neither produced nor exhibited and it was not proved in accordance with law. On an appeal being preferred, the first appellate Court has also affirmed the judgment and decree of the trial Court against which this second appeal has been preferred by the appellant/plaintiff in which the substantial question of law has been formulated and set out in the opening paragraph of the judgment.

(3) Learned counsel appearing for the appellant/plaintiff would submit that both the courts below are absolutely unjustified in dismissing the suit of the plaintiff as alleged Will deed by Chamroo in favour of defendants No. 1 to 4 is neither produced nor proved in accordance with Section 63(c) of the Indian Succession Act read with Section 68 of the Evidence Act and admittedly plaintiff is the daughter of Chamru and entitled for the share in the ancestral property of her father.

(4) Mr. Pali, learned counsel appearing for respondents No. 1 to 4 would submit that both the courts below have rightly dismissed the suit of the plaintiff, as such, the second appeal deserves to be dismissed.

(5) I have heard learned counsel appearing for the parties and perused the material available on record including judgment and decree impugned with utmost circumspection.

(6) Admittedly, suit property is the ancestral property in the hands of Chamru, which he has inherited from his father Laxman and the plaintiff is daughter of Chamru out of his first marriage with Aasbati whereas defendants No. 1 to 4 are the sons and daughter of Chamru out of his wedlock with second marriage with Ramsheela and, therefore, by virtue of provisions contained in the Section 16(3) of the Hindu Marriage Act, 1955, the plaintiff would be entitled for share in the suit property left by his father Chamru.

(7) 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.”

(8) 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 others**¹, 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

¹ (1996) 4 SCC 76

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.”

(9) Reverting to the facts of the case and in view of the aforesaid legal position, plaintiff is the daughter of Chamru out of his wedlock with Smt. Aasbati and defendants No. 2 to 4 and defendant No. 5 being the sons and daughter out of wedlock with his second wife Ramsheela, each of them (five) will be entitled for 1/5th share in the suit property and in view of the fact that Will in favour of defendant No. 1 is neither produced nor established in accordance with law.

(10) Accordingly, the judgment and decree of both the courts below are set aside. The plaintiff's suit stands decreed holding that she will be entitled for 1/5 share in the suit property shown in schedule “A” of the plaint be made part of the decree.

(11) The second appeal is allowed to the extent indicated hereinabove. No cost(s).

(12) A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

2 1987 Supp SCC 350

3 (1986) 1 SCC 465

