Karnataka High Court
Smt. Sarojamma And Ors. vs Smt. Neelamma And Ors. on 8 July, 2005
Equivalent citations: II (2005) DMC 567, ILR 2005 KAR 3293, 2005 (5) KarLJ 66
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Bench: P V Shetty, S A Nazeer
JUDGMENT S. Abdul Nazeer, J.

1. In this appeal the appellants have called in question the correctness of the judgment and decree dated 28th November 2002 made in O.S. No. 84 of 1996 by the I Additional Civil Judge (Sr. Dn), Davanagere [hereinafter referred to as 'the Trial Court']. While the appellants in this appeal were the plaintiffs in the suit, respondents were the defendants. The parties in this appeal, in the course of the judgment will be referred to by their status as in the Trial Court.

2. The 1st plaintiff claims that she was the wife of Kuruvathi Basavarajappa and plaintiff Nos. 2 and 3 are the children of the 1st plaintiff born to the said Kuruvathi Basavarajappa and while the 1st defendant is one other wife of the said Kuruvathi Basavarajappa, the defendants 2 to 7 were also the children of the 1st defendant and Kuruvathi Basavarajappa; the said Kuruvathi Basavarajappa had expired on 14.3.1992. In spite of the demand made by the plaintiffs for allotment of their 42/100th share and possession of suit schedule property, the defendants having denied the same, the plaintiffs were constrained to file the suit seeking for partition and separate possession of their share in the suit schedule property. The defendants also denied the claim of the plaintiffs that they have been in joint possession of the suit schedule property.

3. On the basis of the pleadings, the Trial Court framed the following issues:

1. Whether the plaintiff-I proves that she is the legally wedded wife of deceased Kuruvathi Basavarajappa?

2. Whether the plaintiffs further prove that they are entitled for the claim as sought in the plaint?

3. Whether defendant is entitled for compensatory cost of Rs. 3,000.00?

4. Whether the plaintiffs are entitled for the decree sought?

5. What Decree or order?

4. The 1st plaintiff was examined as PW-1 and two witnesses were examined as PW-2 and 3 in support of the case of the plaintiffs. The documents Ex.P1 to P11 have been marked in support of their case. On behalf of the defendants, the 1st defendants was examined as DW-1 and documents Ex.D1 to D19 have been marked in support of their case.

5. The Trial Court, on the basis of the pleadings and the evidence on record, held that the 1st plaintiff is not the legally wedded wife of Kuruvathi Basavarajappa. It has also held that the plaintiffs 2 and 3 are the illegitimate children of Kuruvathi Basavarajappa and that they are not entitled for

any share in the properties of Kuruvathi Basavarajappa. Accordingly, the suit was dismissed.

6. We have heard the Learned Counsel for the parties.

7. Sri C.H. Jadhav, Learned Counsel for the plaintiffs while unable to seriously challenged the finding recorded by the Trial Court that the 1st plaintiff is not legally wedded wife of Kuruvathi Basavarajappa, strongly submitted that even if the marriage of the 1st plaintiff with the said Kuruvathi Basavarajappa is held to be void, the plaintiffs 2 and 3, who are born to her through the said Kuruvathi Basavarajappa, are entitled for a share in the property of Kuruvathi Basavarajappa in view of Sub-section (3) of Section 16 of the Hindu Marriage Act, 1955 [hereinafter referred to as 'the Act'] as amended by means of Act No. 68 of 1976 along with the defendants. He pointed out that the words "to the property of any person, other than the parents" referred to in Sub-section (3) of Section 16 of the Act should be understood to mean that all the properties belonging to the parents of the children who were born out of wed-lock which is null and void under Section 11 of the Act along with the wife and children born out of a valid marriage. Therefore, he submits that the Trial Court ought to have granted 2/9th share to plaintiffs 2 and 3 out of the properties of the deceased Kuruvathi Basavarajappa. Learned Counsel has relied upon the following decisions in support of his case.

(i) Parayankandiyal Eravath Kanapravan Kalliant Amma (Smt) and Ors. v. K. Devi and Ors.,

(ii) Rasala Surya Prakasarao and Ors. v. Rasala Venkateswararao and Ors., and

(iii) G. Nirmalamma and Ors. v. G. Seethapathi and Ors., AIR 2001 AP 104

8. However, Sri H.R. Prasad, Learned Counsel appearing for the defendants while strongly supporting the judgment passed by the Trial Court pointed out that the suit schedule property admittedly being the joint family property, the plaintiffs cannot seek a share in the said properties. According to the Learned Counsel Sub-section (3) of Section 16 of the Act only enables the children born out of a wedlock which is null and void under Section 11 of the Act to claim share in the properties of the parents. According to him the properties of parents means only the self-acquired properties of the parents and it will not confer any right on such children to claim share either in the joint family or ancestral properties or of their parents. In support of his submission, he relied upon the decision of this Court in the case of Siddaramappa and Ors., 2004 (2) KCCR 1161

9. In the light of the rival contentions advanced by the Learned Counsel for the parties, the two questions that would arise for consideration in this appeal are:

1. Whether the Trial Court was justified in recording a finding that the 1st plaintiff is not a legally wedded wife of Kuruvathi Basavarajappa and her marriage with Kuruvathi Basavarajappa was void under Section 11 of the Act?

2. Whether the plaintiffs 2 and 3 are entitled for a share in the suit schedule property?

Regarding Question 1:

The evidence on record would show that the 1st plaintiff is the second wife of late Kuruvathi Basavarajappa and she has married him during the subsistence of his valid marriage with the 1st defendant. Section 11 of the Act provides that any marriage solemnized after the commencement of the Act shall be null and void and may, on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5 of the Act. One of the conditions provided under Section 5 of the Act for solemnizing of a marriage between any two Hindus is, neither a party has a spouse living at the time of the marriage. Therefore, since the evidence on record clearly establishes that the 1st respondent had married the said Kuruvathi Basavarajappa during the life time of the 1st defendant, who was admittedly the first wife of Kuruvathi Basavarajappa, we are of the view that the finding recorded by the Trial Court that the marriage of the 1st plaintiff with Kuruvathi Basavarajappa is void under Section 11 of the Act is unexceptionable and not liable to be interfered with by this Court in this appeal. As a matter of fact, the Learned Counsel for the appellant also did not make a serious grievance with regard to the finding recorded by the Trial Court on this question.

Regarding Question 2 :

No doubt, the averments made in the plaint, as rightly pointed out by the Learned Counsel for the defendants, show that the suit schedule properties are joint family properties of Kuruvathi Basavarajappa. Therefore, the question that would arise for consideration is, whether the plaintiffs 2 and 3, who are the children of the 1st plaintiff born to Kuruvathi Basavarajappa out of a marriage which is void under Section 11, are entitled for a share in the suit schedule property in view of the provisions contained in Sub-section (3) of Section 16 of the Act? Sub-section (1) of Section 16 of the Act provides that 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 (Act 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 than on a petition under the Act. Sub-section (2) further provides that where a decree of nullity is granted in respect of 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 the legitimate notwithstanding the decree for nullity is made. Sub-section (3) of the said Section further provides 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, 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. The reading of Sub-sections (1) and (2) of Section 16 of the Act makes it clear that a child which is born out of a marriage which is null and void under Section 11 of the Act or where a decree of nullity is granted in respect of the voidable marriage under Section 12 of the Act, is conferred with the status of legitimate child, though in normal circumstances such child would have been considered as an illegitimate child. Therefore, as

noticed by us earlier, the question is, what is the meaning that is attached to the words "property of any person, other than the parents" referred to in Sub-section (3) of Section 16 of the Act? Whether within the meaning of the words "the properties of parents", the joint family or a ancestral property of the parents are excluded; and it is confined only to the self-acquired properties of the parents as found by the Trial Court? To appreciate this question it will be useful to refer to Section 6 of the Hindu Succession Act, 1956 [hereinafter referred to as 'the Succession Act']. Section 6 of the Succession Act provides that when a male hindu dies after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary properly, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. The proviso to Section 6 provides that if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in the said Class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be under the Act and not by suvivorship. Explanation to the said Section provides that for the purpose of this Section the interest of a hindu Mitakshara coparcener shall be deemed to have the share in the properties that would have been allotted to him if a partition of a property had taken place immediately before his death, irrespective whether he was entitled to claim partition or not. Therefore, if a hindu male dies intestate, his Class-I heirs would be entitled to succeed to his interest in respect of the property in which he was entitled for a share if the partition were to take place immediately before his death. Section 6-A came to be incorporated to the Succession Act by means of Karnataka amendment. The said provision provides that in a joint Hindu family governed by Mitakshara, the daughter of a coparcenar shall by birth become a coparcenar. Section 8 of the Succession Act provides for general rules of succession in the case of males dying intestate. Clause (a) of the said Section provides that property of a hindu male dying intestate would devolve firstly upon the heirs being the relatives specified in Class I of the schedule. The son daughter and a widow mother, etc., and several others who are enumerated in Class I of the schedule are considered as Class I heirs of a male hindu who dies intestate. Sub-section (1) of Section 16 of the Act, by means of a legal fiction makes a child, who is born out of a wed lock, which is null and void in law, as legitimate child. Once such a child is given the status of legitimacy, in our view, for all purposes, such a child should be considered on par with the child which is born out of a wed lock which is valid in law and is not affected by any stigma. In this connection, it is useful to extract Section 16 of the Act, which reads as hereunder:

"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 (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 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."

10. Under these circumstances, when the object of Sub-sections (1)and (2) of Section 16 of the Act is to confer a child which is born out of a wed lock which is null and void or out of a wed lock which can be declared as void in law as provided under Section 12 of the Act, in our view, it would not be right to limit the properties of the parents referred to under Sub-section (1) and (2) of Section 16 of the Act only to the self-acquired properties of the parents and exclude either the joint family or the ancestral properties of the parents. In our considered view, it should not make any difference whether it is a joint family property or a self-acquired property of a parent. Once such a child is given the status of legitimacy, as noticed by us earlier, for all purposes, such a child should be treated on par with the other children born to the parents whose marriage is valid in law. If the marriage is either null and void under Section 11 of the Act or is required to be declared null and void under Section 12 of the Act, the child born out of such marriage, which is given the status of legitmacy under Section 16 of the Act, in no way can be held responsible. For the contravention of law committed by the parents, a child born out of such a wed lock, when it is conferred with the status of a legitimacy and given a right, in properties of the parents, cannot be deprived of the right to take his share either in the joint family property or ancestral properties of the parents. Therefore, once such a child is conferred with the status of legitimacy, we are of the view that such a child should be conferred with the status of a coparcenar and will be subject to all the rights and obligations of the members of coparcenary. It is necessary to point out that the provisions contained in Section 16 of the Act, when it speaks of conferring status of legitimacy to a child born out of a marriage whether void or voidable in law, guarantees right in the properties of the parents. The object of Section 16 of the Act is intended to protect the interest of such children both in regard to their status and the right to succeed to the estate of their parents. Such a beneficial provision, which intended to protect such children, in our view, should be given a liberal and wider meaning, which would serve the object of the legislation. Any restricted meaning, in our view, would be in contravention of the provisions contained in Sub-section (3) of Section 16 of the Act. Further, it is also necessary to point out that such a child of a void or voidable marriage, in our considered view, should be treated as related to its parents within the meaning of Section 3(1)(j) of the Succession Act by virtue of Section 16 of the Act. The proviso given to Section 3(1)(j) of the Succession Act must be confirmed to those children who are not clothed with legitimacy under Section 16 of the Act. Therefore, we are of the view that by virtue of Section 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 properties be originally joint family property or not. However, the only limitation is that during the lifetime of the father, the illegitimate son of a void marriage is not entitled to seek for partition and he can seek for partition only after the death of his father. In our view, we are also supported by the Division Bench decision of the High Court of Andhra Pradesh in the case of Rasala Surya Prakash Rao and Ors. (supra) strongly relied upon by Sri Jadhav wherein it has been held that a child of void marriage is related to its parents within the meaning of Section 3(1)(j) of the Succession Act by virtue of Section 16 of the Act and the proviso to

Section 3(1)(j) must be confirmed to those children who are not clothed with legitimacy under Section 16 of the Act. In the said decision, the Court, after reviewing the decisions of Madhya Pradesh, Madras, Bombay High Courts and the Privy Council, and after referring to the decisions of the Supreme Court in the case of Gur Narain v. Gur Tahal Das, and in the case of Singhai Ajit Kumar v. Ujayar Singh, of the judgment, has observed as follows:

"33. 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 Section 3(1)(j) of the Hindu Succession Act, by virtue of Section 16 of the Hindu Marriage Act. Proviso to Section 3(1)(j) must be confirmed to those children who are not clothed with the legitimacy under Section 16 of the Hindu Marriage Act. In conclusion, we hold that by virtue of Section 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 by originally joint family property or not. The only limitation is that during the life time of the father the illegitimate son of a void marriage is not entitled to seek a partiton. He can seek a partition only after the death of the father. "

11. The same view is reiterated in the case of G. Nirmalamma and others (supra) by another single judge of High Court of Andhra Pradesh. In the said decision, the Court has taken the view that Section 16 of the Act has conferred on an illegitimate son benefits of a legitimate son and his pre-existing rights are in no way curtailed and he becomes a member of family and has the status as a son and by virtue of that he is entitled to right of survivorship.

12. Further the Supreme Court in the case of Parayankandiyal Eravathi Kanapravan Kalliani Amma (supra) has held that the children born of the void second marriage would inherit share in the properties of their parents by operation of the amended Section 16 and enacts a legal fiction deeming the illegitimate children as legitimate for all practical purposes including succession to properties of their parents. In the said decision, it has been held as follows:

"79. 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.

...

...

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".

13. In the light of the discussion made above, we are of the view that the decision of this Court in the case of Rangappa and Others (supra) relied upon by the Learned Counsel for the defendants is of no assistance. The observation made in the said decision at paragraph 4 of the judgment that the deemed legitimate children of the void marriages under Section 16 of the Act are not entitled to share in ancestral estate, was made, in our view, in the facts of that case where a suit for partition was filed by the sons who are found to born of a bigamus marriage during the lifetime of their father. Even otherwise, if the observation made in the said decision is to be understood as this Court laying down that a child born out of marriage which is null and void as not been entitled for a share in the ancestral property or a joint family properties, in our view, the said enunciation of law has to be understood as laying down not a correct law.

14. It is not in dispute that Kuruvathi Basavarajappa was the only son of his father and during his life time the properties of Kuruvathi Basavarajappa has become the joint family property of Kuruvathi Basavarajappa along with his sons who are born to the 1st plaintiff and to the 1st defendant. Therefore, in view of Sub-section (3) of Section 16 of the Act, the plaintiffs 2 and 3 are entitled for a share along with the defendants in the suit schedule property and therefore, we hold that they are entitled for 2/9th share in the suit schedule property.

15. In the light of what is stated above, the judgment and decree dated 28th November 2002 made in O.S. No. 84 of 1996 is hereby set aside and judgment and decree is made holding that the plaintiffs 2 and 3 are entitled for 2/9th share in the suit schedule property. Since the suit is of the year 1996, the Trial Court is directed to conclude that final decree proceedings as expeditiously as possible and at any event not later than six months' from the date of receipt of a copy of this Order. Office is directed to transmit the records to the Trial Court forthwith.

16. In terms stated above this appeal is partly allowed and disposed of. However, no order is made as to costs.