* THE HON'BLE SMT JUSTICE M.G.PRIYADARSINI
+ Appeal Suit No. 3604 of 2004

% 22.08.2023

1. Kumari Krishna Veni @ Sadhu Gyni Krishna Veni,
D/o. Gyni Venkati (Sadhu Venkati)
Age. 22 years, Occ. Unemployee, R/o. H.No. 5-11-24,
Yellammagutta, Nizamabad - 503 001
... Appellant/Plaintiff

Vs.

$ 1. Gyni Venkati @ Sadhu Venkati,
S/o. Narsimloo, Age. 55 years,
Occ. Agriculture, R/o.H.No. 3-5-393/A and 3-5-424/2,
Kotagally, Nizamabad.
2. Gyni Shanker, S/o. Venkati,
Age. 33 years, Occ.Agriculture,
H.Nos.3-5-393/A and 3-5-424/2,
Kotagally, Nizamabad – 503 001.
... Respondents/Defendants

! Counsel for the Appellant: Mr. Y.S.Yella Nand Gupta

Counsel for Respondents: Mr. Mohd Abdul Rafi

< Gist:

> Head Note:

? Cases referred:
(1) (2006) 5 SCC 532
(2) 2008 (4) ALD 759
(3) (2006) 9 SCC 612
(4) (2003) 1 SCC 730
(5) AIR 2010 SC 2685
(6) (2011) 11 SCC 1

THE HON'BLE JUSTICE M.G. PRIYADARSINI

A.S. No. 3604 of 2004

JUDGMENT:

This appeal is preferred by the plaintiff in O.S. No. 4 of 1999 challenging the judgment and decree passed by the District judge, Nizamabad, dated 22.06.2004. By the impugned judgment, the learned District Judge dismissed the suit filed by the plaintiff seeking partition of the suit schedule properties and for allotment of 1/3rd share in her favour and for future mesne profits from the date of the suit till the date of delivery of 1/3rd share.

2. For the sake of convenience, hereinafter, the parties will be referred to in terms of their rank and status before the Trial Court.

3. The brief facts of the case are that the plaintiff is the daughter of defendant No. 1. The defendant No. 1 married one Lingu Bai. Sometime after the marriage, as Lingu Bai fell sick, the defendant No. 1 married Rajamani, who is none other than the sister of Lingu Bai. Defendant No. 2 is the son born to defendant No. 1 through the first wife, Lingu Bai. The plaintiff is the daughter born to defendant No. 1 through the second

wife, Rajamani. The suit schedule properties i.e., agricultural land to an extent of Ac.6.24 guntas in Nizamabad Shivar and two houses at Kotagally, Nizamabad, described as various items of suit schedule A & B properties, are the ancestral immovable properties succeeded by the defendant No. 1. According to the plaintiff, she being the unmarried daughter of defendant No. 1, is in joint possession and coparcener of the Joint Hindu Family of defendant No. 1 and therefore, she is entitled to 1/3rd share in the suit schedule properties. In spite of the demand made by the plaintiff through her mother for partition of the suit schedule properties and for delivery of her share, the defendant No. 1 postponed the same on one pretext or the other, as such, the plaintiff approached the defendant No. 1, along with elders, on 14.02.1999 and demanded for partition of the properties, but the defendant No. 1 refused for the partition of the properties. Hence, she laid the suit for partition and separation possession of 1/3rd share in the suit schedule properties.

4. Contesting the suit, defendant No. 1 filed a written statement *inter alia* contending that the plaintiff is not a coparcener and she is not entitled to seek partition or a share

in the suit schedule properties. According to him, except Schedule-B properties and land admeasuring Ac.0.11 ½ guntas in Sy. No. 957/AU part of item No. 8 of Schedule-A property, he does not possess any of the properties as shown in the suit schedule properties. He disposed of item No. 3 of Schedule-A in the year 1997 to clear off the debts borrowed for the maintenance of the plaintiff and her mother, Rajamani. Item Nos. 1, 2 and 4 to 9 of the Schedule-A properties are not owned by him. Even the C.T. roofed house bearing No. 3-5-424/2 is in dilapidated condition. Much prior to 1986 he was not in talking terms with the plaintiff and her mother, Rajamani and therefore, the question of demand by the plaintiff seeking partition of the suit schedule properties does not arise. Item No. 6 of Schedule-A property in Sy. No. 889 belongs to defendant No. 2 exclusively and the defendant No. 1 has got no right over the same. The written statement filed by defendant No. 2 is in similar lines with that of defendant No. 1. According to him, as the plaintiff is illegitimate child of defendant No. 1, her claim for partition should be confined to the self-acquired properties of defendant No. 1 and it should not extend to the ancestral properties.

5. Based on the above pleadings, the trial Court framed the following issues for trial:

i. *Whether the plaintiff is entitled to partition and separate possession of properties of 1/3rd share in the suit schedule properties as coparcener?*
ii. *To what relief?*

6. During the course of trial, on behalf of plaintiff, PWs.1 to 3 were examined and Exs.A1 to A10 were marked. On behalf of the defendants, DWs.1 to 3 were examined, but no documentary evidence was adduced.

7. Considering the oral and documentary evidence available on record, the Trial Court dismissed the suit holding that the plaintiff is not entitled for partition and separate possession of properties of 1/3rd share in the suit schedule properties as coparcener. Aggrieved thereby, the present appeal is filed by the plaintiff.

8. Learned counsel for the appellant/plaintiff submitted that the plaintiff is the legitimate daughter of defendant No.1 and P.W.2 and as their marriage is valid, the plaintiff, being legitimate child, is entitled for equal share in the joint family

properties as coparcener along with defendant Nos. 1 & 2. The evidence of P.W.3, first wife of defendant No. 1, discloses that as she fell sick and unable to lead the marital life, she had given consent for the marriage of defendant No. 1 with P.W.3, as such the marriage of P.W.3 with defendant No. 1 is valid unless a petition is filed under Section 11 of the Hindu Marriage Act before the competent Court. She being the daughter of defendant No. 1 with P.W.3, even though the marriage is void, by virtue of Section 16(1) of the Hindu Marriage Act, the plaintiff being legitimate child is equally entitled to a share in the joint family properties along with defendant Nos. 1 & 2. In this regard, the learned counsel placed reliance on a decision of the Apex Court reported in **Bhogadi Kannababu and Others v. Vuggina Pydamma and Others**[1]. The decision relied on by the learned counsel in **Vempati Anasuyamma (died) by LRs. And Others v. Gouru Venkateswarloo and Others**[2] is misplaced to the facts of the case on hand.

9. The learned Counsel appearing on behalf of defendants-respondents herein sought to sustain the impugned judgment

[1] (2006) 5 SCC 532
[2] 2008 (4) ALD 759

passed by the Trial Court contending that the Trial Court, after evaluating the oral and documentary evidence available on record in proper perspective, has rightly dismissed the suit and the same needs no interference by this Court.

10. Now the point for consideration in this appeal is whether the judgment and decree passed by the Trial Court below is sustainable under law?

11. According to the plaintiff, she is the daughter of defendant No. 1 and P.W.2. Whereas, the defendants contend that the defendant No. 1 did not marry P.W.2. In order to prove her claim, the plaintiff herself examined as P.W.1 apart from examining her mother as P.W.2 and the first wife of defendant No. 1 as P.W.3. The plaintiff, as P.W.1, testified that defendant No. 1 married Smt. Lingu Bai, elder sister of mother of plaintiff and as she fell sick, he married her mother, Rajamani and that out of their wedlock, she was born on 25.07.1981. She is unmarried daughter of defendant No. 1 and is in joint possession and coparcener in the Hindu Joint Family and therefore, she is entitled for 1/3rd share in the ancestral property held by defendant No. 1. Exs.A.1 to A.5 are valuation

certificates and Exs.A.6 to A.10 are pahanis for the years 1982 to 2000. P.W.2, mother of plaintiff, deposed in line with the evidence of P.W.1. She further deposed that as defendant No. 1 did not maintain them, she filed M.C. No. 2 of 1986 and on allowing the same, the defendant No. 1 maintained P.W.1 till she attained the age of majority. She further deposed that the defendant No. 1 got ancestral property in different survey numbers and that some of the suit schedule properties are not mutated in the name of the defendants as the father of defendant No. 1 has been in possession and enjoyment for the last twenty years. In the cross-examination, P.W.2 admitted that her marriage was performed during her childhood with one Gangaram of Suddalam Village; that two years after the marriage, Gangaram gave divorce to her and thereafter, she stayed at the house of her parents and later she married defendant No. 1 as her sister, Lingu Bai was seriously ill. There remains the evidence of P.W.3, who is the first wife of defendant No. 1. She was blessed with defendant No. 2 during her wedlock. She testified that P.W.2 is her sister; that as she seriously fell sick, defendant No. 1 married her sister, P.W.2, and during the wedlock, they were blessed with the plaintiff.

She further deposed that she is residing in a rented house as she was necked out by the defendants and therefore, she filed M.C.No. 18 of 1990. After the birth of plaintiff, defendant No. 1 necked out P.W.2 as well as the plaintiff and therefore, the plaintiff filed M.C. No. 2 of 1986 on the file of Additional Judicial Magistrate of First Class, Nizamabad. The suit schedule properties are joint ancestral properties.

12. D.W.1 deposed that plaintiff is not his daughter and that he never married P.W.2. The mother of plaintiff was married with one Gangaram of Suddalam Village and that she was not divorced. According to him, the schedule A and B properties are not in his name and they do not belong to him, except Ac.0.11 ½ guntas of land in Sy. No. 957/AU. In the cross-examination, the defendant No. 1 admitted about his paying maintenance amount to the plaintiff and her mother, P.W.2, as per the directions of the Court in M.C. No. 2 of 1986. D.W.2 deposed that the defendant No. 1 married one Lingu Bai, who gave birth to defendant No. 2. According to him, defendant No. 1 never married P.W.2. However, he had admitted about the plaintiff filing of M.C. against defendant No. 1 and his paying

the maintenance till she attained majority. The evidence of D.W.3 is in line with the evidence of D.W.2.

13. From the above evidence, it is to be seen that apart from the crucial evidence of P.W.3 about the marriage of defendant No. 1 with P.W.2 and the birth of plaintiff during their wedlock, the defendant No. 1 himself admitted about P.W.2 filing of M.C. No. 2 of 1986 and his paying maintenance amount as per the orders of the Court till the plaintiff attained majority. Thus, it is clear that the plaintiff is the daughter of defendant No. 1 born through P.W.2. In this regard, it is relevant to refer the provisions of the Hindu Marriage Act. Section 5 of the Act reads as under:-

> "***5. Conditions for a Hindu marriage.—****A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:— (i) neither party has a spouse living at the time of the marriage; [(ii) at the time of the marriage, neither party— (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity (iii) the bridegroom has completed the age of [twenty-one years] and the bride, the age of eighteen years at the time of the marriage; (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the*

parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

14. Section 11 deals with the void marriages, which reads thus:-

"***11. Void marriages.—****Any marriage □olemnized after the commencement of this 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.*"

15. Thus, in view of the above provisions, in the present case, the marriage between the defendant No. 1 and P.W.2 is a void marriage since P.W.3, first wife of defendant No. 1, was very much alive by then. Considering these evidence, the trial Court has rightly came to the conclusion that the plaintiff is the daughter born out of void marriage between defendant No. 1 and P.W.2.

16. Now, Section 16 is relevant to refer, which deals with the legitimacy of children born out of void and voidable marriages, which reads as under:-

"***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 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*."

(Emphasis added)

17. A plain reading of Section 16 of the Act would make it abundantly clear that the right conferred upon the illegitimate children is, only as regards the property left by their parents and nothing more. Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, through 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. In this view, as rightly observed

by the Trial Court, the plaintiff being the daughter of defendant No. 1, through the second wife, P.W.2, whose marriage is *null and void*, could not claim any inheritance in the joint family property, that too while the father was alive. The Apex Court in the decision rendered in **Neelamma and Ors. v. Sarojamma and Ors.**[3] while dealing with the point *as to whether an illegitimate child can acquire/claim as of right a share in the joint Hindu family property*, referring to its earlier decision rendered in **Jinia Keotin v. Kumar Sitaram manjhi**[4] has categorically held that *an illegitimate child cannot succeed/claim a share in the joint Hindu Family property. Such illegitimate child would only be entitled to a share in the self-acquired property of the parents.* Further, the Apex Court in **Bharatha Matha and Anr. V. R. Vijaya Renganathan and Ors.**[5] referring to its earlier decisions in **Neelamma** (supra) and **Jinia Keotin** (supra) and analyzing Section 16 of the Act, has held that *a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenery property but is entitled only to claim share in self acquired properties, if any.*

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[3] (2006) 9 SCC 612
[4] (2003) 1 SCC 730
[5] AIR 2010 SC 2685

18. It must be noted that the Apex Court in the case of **Revannasiddappa and Another v. Mallikarjun and Others**[6] had took note of Section 16(3) of the Hindu Marriage Act and has observed at para-45 as follows:-

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

Thus, the Two-Judge Bench, opining that such children will have a right to whatever becomes the property of their parents, whether self-acquired or ancestral, differed with the view taken by coordinate Benches in the earlier decisions quoted supra and referred the matter for reconsideration by a Larger Bench. Be that as it may, the reference by itself will not tie the hands of the Court in deciding the matters on the basis of the enunciation of law prevailing as on date.

19. In light of the above, the Trial Court was absolutely right in holding that the plaintiff, who born out of a void marriage between defendant No. 1 and P.W.2, cannot claim partition of the joint family properties during the lifetime of defendant No. 1

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[6] (2011) 11 SCC 1

but she may be entitled to share in the self-acquired properties of defendant No. 1 after his death. Therefore, the said findings need no interference by this Court and the appeal is liable to be dismissed.

20. In the result, the appeal is dismissed confirming the judgment of the District Judge, Nizamabad, dated 22.06.2004 in O.S. No. 4 of 1999 in dismissing the suit of the appellant-plaintiff. No order as to costs.

Pending Miscellaneous Petitions, if any, shall stand closed.

M.G.PRIYADARSINI, J

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THE HON'BLE JUSTICE M.G. PRIYADARSINI

A.S.No.3604 of 2004

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