

Narayani Vs. Aravindakshan

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Court : Kerala

Decided On : Jul-07-2005

Reported in : AIR2006Ker26; I(2006)DMC155; 2005(4)KLT1

Judge : Thottathil B. Radhakrishnan, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 2, 2(1), 2(3), 4, 5, 11, 12, 16 and 16(1); Marriage Laws (Amendment) Act, 1976 - Sections 11; Special Marriage Act, 1872 - Sections 26; [Hindu Succession Act, 1956](#) - Sections 3; [Hindu Minority and Guardianship Act, 1956](#); [Hindu Adoptions and Maintenance Act, 1956](#); Matrimonial Causes Act, 1950 - Sections 9; Code of Civil Procedure (CPC) - Sections 100; [Constitution of India](#) - Article 14, 21, 25 and 39; Hindu Code, 1947; Hindu Law

Appeal No. : S.A. No. 700 of 1993

Appellant : Narayani

Respondent : Aravindakshan

Advocate for Def. : T.A. Ramadasan,; A.K. Alex and; Cibi Thomas, Advs.

Advocate for Pet/Ap. : V. Sivaswamy,; V.V. Asokan and; K.I. Mayankutty Mather

Disposition : Appeal dismissed

Judgement :

Thottathil B. Radhakrishnan, J.

1. Defendants 1 to 4 in a suit for partition are the appellants in this second appeal challenging the preliminary decree passed by the trial court, confirmed in first appeal. The first appellant having died during the pendency of the second appeal, appellants 2 to 4 were recorded as her legal representatives.

2. Sri. Ramunni, a Hindu, died intestate on 25-2-1974. His estate is sought to be partitioned. The late first defendant was his widow. Defendants 2 to 4 are their children. Plaintiff and defendants 5 to 8 are, admittedly, the children of Ramunni through Kallyani, who is not a party to the suit, but examined as P.W.2.

3. Defendants 1 to 4, the appellants herein, contended that there was no valid marriage between Ramunni and Kallyani and accordingly, the plaintiff and defendants 5 to 8 were the illegitimate children of Ramunni and hence not entitled to succeed to his estate.

4. On the basis of the evidence on record, the trial court found that Ramunni and P.W.2 had undergone the ceremonies of a marriage in 1957. However, it held that the same was void by reason of Section 11 of the [Hindu Marriage Act, 1955](#) (hereinafter referred to as the 'Act'), being one in contravention of Section 5(i) of that Act, in as much as Ramunni had a spouse living at that time. But, the trial court held that the plaintiff and defendants 5 to 8, the illegitimate children of Ramunni were also entitled to be treated as legitimate and hence entitled to share, in view of Section 16 of the Act.

5. During the course of the suit, the plaintiff and defendants 5 to 8 conceded one share to the mother of Ramunni on the ground that he had predeceased her. She had released her such share to defendants 1 to 4.

6. Accordingly, the trial court passed a preliminary decree directing that the suit properties be divided into 10 shares and, leaving out 1 share that was conceded to Ramunni's mother's estate, the plaintiff and defendants, 8 in number, were to take a share each. The lower appellate court has confirmed it. Hence this second appeal under Section 100 C.P.C. by defendants 1 to 4.

7. I have heard Adv. Sri. V.V. Asokan on behalf of the appellants and Adv. Sri. T.A. Ramadasan, on behalf of the respondents.

8. The learned Counsel for the appellants argued that the Marriage Laws (Amendment) Act, 1976 (Act 68/1976), hereinafter referred to as 'the Amending Act', came into operation, having received the assent of the President and published in Gazette of India only on 27-5-1976 and that therefore, the provisions contained in Section 16 of the Act, as substituted by the Amending Act, could not apply to confer legitimacy on plaintiff and defendants 5 to 8 to succeed to the estate of Ramunni, who died intestate on 25-2-1974, i.e. before the Amending Act came into operation. It is contended that they are illegitimate children who obtained the status of legitimacy only in 1976, by the effect of the Amending Act, long after succession had opened as regards the estate of Ramunni, upon his death. It is urged that, as far as the estate of Ramunni is concerned, succession opened out upon his death on 25-2-1974 and that it cannot be postponed. In support of this argument, reliance is placed on the decision of the Apex Court in Daya Singh 's case, : [1974]3SCR528 . Relying on the decision of the Apex Court in Eapen Chacko's case, 1977 KLT 1, it is urged that while interpreting a statute, rights which are already vested in the parties should be respected. Referring to R. Muthammal's case : [1960]2SCR729 and Deo Kishen's case, ([1983] ILR 5 All. 509) referred to, in R. Muthammal's case, it is pointed out that in similar situations, where disabilities were removed, provisions were held not to affect situations before the coming into force of the statute. It is further urged that the amendment of 1976, to Section 16, is not a declaratory legislation and there is no indication in the Amending Act that the Parliament intended to give retrospective operation to the said provision.

9. This Court had, in the decisions relied on by the courts below, Janu's case (1989 (1) KLT 392) and Karthi Pankajakshy's case (1990 (1) KLT 248), dealt with the applicability of Section 16 of the Act as amended. The learned Counsel for the appellants has attempted to distinguish the said precedents by contending that the question of law specifically raised in this second appeal was not raised and considered in the said decisions, though the judgment in Janu's case would show that Gopalan, whose estate was being considered in that case died before the

Amending Act was notified in 1976.

10. Per contra, the learned Counsel appearing for the contesting respondents (plaintiff and defendants 5 to 8) contended that in Parayankandiyal Eravath Kanapraavan Kalliani Amma's case : AIR 1996 SC1963 wherein the judgment of this Court in A.S.68 of 1980 and connected cases was set aside, the Apex Court had, after considering the effect of the amendment, granted relief to the appellants therein by relying on Section 16 of the Act as amended, though Sri. Raman Nair whose estate was the subject matter of those appeals died on 9-1-1975, i.e. before the Amending Act obtained the assent of the President and was published. He also pointed out two subsequent decisions of the Apex Court - Jinia Keotin v. Kumar Sitaram Manjhi : [2002]SUPP5SCR689 and

11. Though Rameshwari Devi's case (supra) was decided relying on Section 16 of the Act as amended, the date of death of Narain Lal, whose estate was sought to be partitioned, is noticed to be in 1987, i.e. after the amending Act was published. Jinia Keotin's case (supra) related to the question as to whether the provisions of Section 16 enable an otherwise illegitimate child to claim the inheritance in ancestral coparcenary property. The decisions in Rameshwari Devi and Jinia Keotin do not, therefore, throw any light on the controversy at hand.

12. In PEK Kalliani Amma (supra), a judgment having far reaching effects and implications, Section 16 of the Act as amended was examined and interpreted by the Apex Court. Analysing the provision, it was held that by virtue of the words 'notwithstanding that a marriage is null and void under Section 11', the section stands independent of Section 11. It was held that the amended provision which intended the conferment of legitimacy on children born of a void marriage would operate despite the provisions contained in Section 11 which had the effect of nullifying only those marriages held after the Act came into force and which were performed in contravention of Section 5. The significance of this interpretation is that by virtue of the legal fiction in Section 16, children born of a void marriage would have to be treated as legitimate for all purposes including succession to the property of their parents. The net effect of this interpretation is that the benefit of legitimacy is conferred upon any child born either before or after the date of the

amendment. This would mean that even if a marriage had been contracted at the time when there was a legislative bar to such a marriage, the offspring of such a marriage would be treated as legitimate. Such a child would, by virtue of this interpretation, be entitled to succeed to the property of his or her parents.

13. Having regard to the questions advanced, the issue that arises for decision is the one formulated as the substantial question of law arising for decision in this second appeal, on which notice was issued on 23-11-1993. The said substantial question, so formulated, is as follows:

(i) Has Section 16(1) of the Hindu Marriage Act 1955 as amended by the Marriage Laws (Amendment) Act 1976 (Central Act 68 of 1976) got such a retrospective effect as to enable the plaintiff and defendants 5 to 8 to divest defendants 1 to 4 of the estate of Ramunni that had already vested in them in 1974 prior to the commencement of Act 68 of 1976

14. Section 16 of the Act, as it originally stood, is as follows:

'16. Legitimacy of children of void and voidable marriages.--Where a decree of nullity is granted in respect of any marriage under Section 11 or 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 it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this Section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity 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.'

15. Section 11 of the Amending Act provided as follows:

'11. Substitution of new section for Section 16: For Section 16 of the Hindu Marriage Act the following section shall be substituted, namely:-

'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, 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.'

16. PEK Kalliani Amma (supra) was decided by the Apex Court by holding that the children through the second wife, though born before the date of amendment, were entitled to share in the assets of Raman Nair. That case has been decided after noticing that Raman Nair, whose assets were dealt with in the said case, died on 9-1 -1975 which was before 27-5-1976, the date of notification of the Amending Act. The estate dealt with by this Court in Janu's case (supra) arose for consideration on account of the death of Gopalan, before the Amending Act came into force. No decision has been brought to my notice, nor was I able to reach one, where the deemed legitimacy under Section 16(1) of the Act, as amended, was held not to apply in cases where the parent whose estate was being dealt with, died before the coming into force of the Amending Act. In the aforesaid circumstances, in view of the arguments advanced, it is necessary to consider the nature and effect of the amendment of Section 16 of the Act by Section 11 of the

Amending Act.

17. Contextually, I deem it apposite to advert to certain historical facts, to bear in mind the evolution of law, in so far as they are relevant, relating to marriages and their application to 'Hindus'. All such facts have been judicially noticed, but require to be remembered in the context of this case.

18. In *Shastri Yagnapurushdasji v. Muldas Bhundardas Vaishya*, : [1966]3SCR242, the Apex Court quoted Monier Williams to note that Hinduism presents a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen by a continual influx of tributary rivers and rivulets, spreading itself over an ever-increasing area of country and finally resolving itself into an intricate Delta of tortuous streams and jungly marshes.... The Hindu religion is a reflection of the composite character of the Hindus, who are not one people, but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first born with and then, so to speak swallowed, digested, and assimilated something from all creeds. The Apex Court, in *CWT v. R. Sridharan*, : [1976]104ITR436(SC), quoted Mulla on Principles of Hindu Law, to notice that the word 'Hindu' does not denote any particular religion or community. During the last hundred years and more it has been a nomenclature used to refer comprehensively to various categories of people for purposes of personal law. It has been applied to dissenters and non-conformists and even to those who have entirely repudiated Brahminism. It has been applied to various religious sects and beliefs which at various periods and in circumstances, developed out of, or split off from, the Hindu system but whose members have nevertheless continued to live under the Hindu law and the courts have generally put a liberal construction upon enactments relating to the personal laws applicable to Hindus. After succinctly explaining the history and evolution of the concept 'Hindu', their Lordships stated in *Shastri Yagnapurushdasji* (supra) that the Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Article 25 has made it clear, in Sub-clause (b) of Clause (2), that the reference to

Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

19. Based upon decisions of various courts relating to the old uncodified Hindu law, and relying on Mulla's aforesaid treatise, the following have been noticed in CWT v. R. Sridharan (supra) as persons to whom Hindu law was held to apply before codification of law:

(i) not only to Hindus by birth, but also to Hindus by religion i.e. converts to Hinduism;

(ii) to illegitimate children where both parents are Hindus;

(iii) to illegitimate children where the father is a Christian and the mother is a Hindu, and the children are brought up as Hindus. But the Hindu law of coparcenary, which contemplates the father as the head of the family and the sons as coparceners by birth with rights of survivorship, cannot from the very nature of the case apply to such children;

(iv) to Jains, Buddhists in India, Sikhs and Nambudri Brahmins except so far as such law is varied by custom and to Lingayat who are considered Sudras;

(v) to a Hindu by birth who, having renounced Hinduism, has reverted to it after performing the religious rites of expiation and repentance, or even without a formal ritual of reconversion when he was recognised as a Hindu by his community;

(vi) to sons of Hindu dancing girls of the Naik caste converted to Mahomedanism, where the sons are taken into the family of the Hindu grandparents and are brought up as Hindus;

(vii) to Brahmos; to Arya Samajists; and to Santhals of Chota Nagpur and also to Santhals of Manbbum except so far as it is not varied by customs; and

(viii) to Hindus who made a declaration that they were not Hindus for the purpose of the Special Marriage Act, 1872.

20. Consistent with the constitutional provision in Explanation II to Article 25, noticed above, the [Hindu Marriage Act, 1955](#); the [Hindu Succession Act, 1956](#); the [Hindu Minority and Guardianship Act, 1956](#); and the [Hindu Adoptions and Maintenance Act, 1956](#) have extended the application of the said Acts to all persons who can be regarded as Hindus in the broad and comprehensive sense.

21. Section 2 of the Hindu Marriage Act provides that this Act applies-

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina, or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

The same provision is made in the other three aforesaid Acts.

22. The [Hindu Marriage Act, 1955](#), the [Hindu Minority and Guardianship Act, 1956](#), the [Hindu Adoptions and Maintenance Act, 1956](#) and the [Hindu Succession Act, 1956](#) constitute a law in a codified form for the Hindus. Section 2 of the Act specifies the persons to whom the Act is applicable. Clauses (a), (b) and (c) of Sub-section (1) of Section 2 make the Act applicable to a person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj and to a person who is a Buddhist, Jain or Sikh by religion. It is also applicable to any other person domiciled in the territories of India who is not a Muslim, Christian, Parsi or Jew by religion. Sub-section (3) of Section 2 of the Act provides that the expression 'Hindu' in any portion of the Act shall be construed as if it included a person to whom the Act applies by virtue of the provisions contained in Section 2. The applicability of the Act is, therefore, comprehensive and it is applicable to all

persons domiciled in the territory of India who are not Muslims, Christians, Parsis or Jews by religion.

23. As noticed by the Apex Court in *CWT v. Champa Kumari Singhi*, : [1972]83ITR720(SC) , whatever be the position before the amendment and codification of major branches of Hindu law by the four statutes i.e. the Hindu Marriage Act, 1955, the [Hindu Succession Act, 1956](#), the [Hindu Minority and Guardianship Act, 1956](#) and the [Hindu Adoptions and Maintenance Act, 1956](#), the undisputed position is that even if the religions are different, what is common is that all those who are to be governed by the provisions of these enactments are included in the term 'Hindu'. They are to be governed by the same rules relating to marriage, succession, minority, guardianship, adoption and maintenance as Hindus.

24. Thus, it has to be noticed that the four Acts commonly called as 'the Hindu Code', brought under their canopy, diverse social groups and subjected them to uniform laws.

25. Now, the diverse, but accepted, practices regarding marriages, as they existed before the Act, need to be noticed. In *PEK Kalliani Amma*, (supra), the Apex Court referred to *Principles of Hindu Law* by Jogendra Chunder Ghose to state that the legal position of a second marriage under the original Hindu law is that polygamy was not allowable according to the spirit of the law, but it was very generally practiced, though the second wife could not be associated in religious sacrifices, and was styled a wife not for duty but for lust. With reference to the book on *Hindu Law of Marriage and Stridhana* by Sir Gooroodas Banerjee, it was stated that a Hindu husband was always permitted to marry again during the lifetime of his wife, though such marriage, if contracted without just cause, was strongly disapproved. The causes which were treated as relevant were also noticed. Mr. K.P. Saksena's *Commentary on the [Hindu Marriage Act, 1955](#)* was referred to notice that according to the Hindu Jurisprudence, a husband was always permitted to marry again during the lifetime of the first wife but such marriage, if contracted without just cause, was strongly disapproved and that it should be observed that the sages did not prohibit polygamy which was prevalent at the time but the tendency of their

legislation was to discourage that practice by investing the first marriage with a religious character, and by permitting the marriage, for religious purposes, of a second wife in the lifetime of the first, only in certain contingencies when there was a failure of the object of marriage. The Apex Court proceeded to state that it would be seen that though polygamy was not permitted, a second marriage was allowed in a restricted sense, and that too, under stringent circumstances, as for example, when there was a total failure of the object of marriage. In this context, in PEK Kalliani Amma (supra), the Apex Court recalled its decision in Bhaurao Shankar Lokhande v. State of Maharashtra : 1965 CriLJ544 wherein it is observed:

'Apart from these considerations, there is nothing in the Hindu law, as applicable to marriages till the enactment of the Hindu Marriage Act of 1955. which made a second marriage of a male Hindu, during the lifetime of his previous wife, void.'

xxx xxx xxx xxxTherefore, if a second marriage did take place, children born of such marriage, provided it was not otherwise invalid, were not illegitimate and in the matter of inheritance, they had equal rights.'

(emphasis supplied)

26. With the passage of time, different local statutes, governing various groups of Hindus, came into being, some also prohibiting a second marriage while one has a spouse living. But, as noticed in PEK Kalliani Amma (supra), there was no uniformity in the statute law applicable to different classes of Hindus, even in a particular area.

27. It is in the above backdrop that the Hindu Code as drafted by the Rau Committee was introduced in the Legislative Assembly in 1947 and was referred to a Select Committee of the Constituent Assembly of India (Legislative) on 9th April, 1948. The Select Committee submitted its report on the 29th August, 1948 and their revised draft was discussed at considerable length by the Provisional Parliament, but as the Bill could not be passed before the dissolution of that Parliament it lapsed. The Code, as originally conceived, was later on split and the Act came into force on 18-5-1955.

28. As already noticed, the Act applies to any person domiciled in the territories to which the Act extends, excepting Muslims, Christians, Parsis or Jews by religion and the expression 'Hindu' in the Act is to be construed to include a person who, though not a Hindu by religion, is nevertheless, a person to whom the Act applies by virtue of the sweeping and inclusive nature of Section 2 of the Act.

29. It has to be immediately noticed that unless otherwise expressly provided for in the Act, Section 4 thereof prescribes that the Act would have an overriding effect on any text, rule or interpretation of Hindu Law or custom or usage that was part of Hindu Law immediately before the commencement of the Act. All laws in force immediately before the commencement of the Act, in so far as they are inconsistent with the provisions of the Act ceased to be operative from coming into force of the Act.

30. As part of the thus codified and amended law relating to Hindu marriages, Section 5 read with Section 11 of the Act made any marriage, solemnised after the commencement of the Act, inter alia, while a party has a spouse living at the time of the marriage, void. Section 3(j) of the [Hindu Succession Act, 1956](#) provided that unless the context otherwise requires, the word 'related' in the said Act means related in legitimate kinship, subject to the proviso thereto, which is not immediately relevant for this case. The Hindu Marriage Act and the Hindu Succession Act carry provisions in pari materia, as to the identity of the persons to whom the said Statutes apply. Section 16 of the Hindu Marriage Act was intended to confer a status of legitimacy on children of void and voidable marriages. However, contrary to its caption, the provision in Section 16 as it originally stood was unworthy of the intention, as can be seen hereunder.

31. The parties to a voidable marriage continue to be husband and wife till such marriage is annulled by a decree. A voidable marriage can be avoided only on a decree being passed on a petition by either party thereto. The children conceived and begotten prior to the declaration of nullity of such marriage, are legitimate. While in the case of a voidable marriage, the decree changes the status from a valid marriage to an invalid marriage, in the case of a void marriage, the decree merely declares what previously existed, that is, the nullity or void status of the

relationship. A marriage which is null and void, may be declared to be so even at the instance of a stranger whose interests are affected by such marriage. (See *T. Rangaswami v. T. Aravindammal*, : AIR1957 Mad243). It has to be immediately borne in mind that dissolution of a marriage is altogether different, for, only a valid marriage can be dissolved. This principle is a basic one as can be seen from the judgments of Beaumont, C.J. reported as AIR 1934 Bombay 93 and of Blackwell, J. and Broomfield, J. reported as AIR 1935 Bombay 5 in the matrimonial dispute between Muncherji and Jessie Grant. So much so, the children of void marriages are illegitimate, unless specifically saved by legislation. In this view of the matter, a proper understanding of Section 16 of the Act, as it originally stood, would show that the provisions therein for saving the legitimacy of children of voidable marriage were superfluous and devoid of any purpose.

32. Section 16 of the Act, as it stood before the amendment, was subject of severe criticism since the objects sought to be achieved by such a provision in the enactment in 1955 were not to create any classification between the children born in voidable marriages and relationships which are void, owing to the provisions in the Act.

33. In *PEK Kalliani Amma* (supra), the Apex Court noticed the draftman's folly that led to the above situation and stated as follows:

'51. A marriage would be null and void if it was solemnized in contravention of clauses (i), (iv) and (v) of Section 5. Clause (i) prohibits a marriage if either party has a spouse living at the time of marriage. Clause (iv) prohibits a marriage if the parties are not within the degrees of prohibited relationship while Clause (v) prohibits a marriage between parties who are the 'sapindas' of each other. A marriage in any of the above situations was liable to be declared null and void by a decree of nullity at the instance of either party to the marriage. Section 16 was intended to intervene at that stage to protect the legitimacy of children by providing that children begotten or conceived before the making of the decree would be treated to be legitimate and they would inherit the properties of their parents, though not of other relations.

52. Similarly, a marriage solemnized either before or after the commencement of the [Hindu Marriage Act, 1955](#) was made statutorily voidable if it was found that the husband was impotent at the time of marriage and continued to be so till the institution of the proceedings or that a party to the marriage was either idiot or a lunatic or that the consent of the party to the marriage or that of the guardian required under Section 5 of the Act, was obtained by force or fraud or that the girl at the time of marriage was pregnant by some other person. In such a situation, the marriage was liable to be annulled by a decree of nullity at the instance of either party to the marriage. The legitimacy of children of such a marriage was also protected by Section 16 by providing that for purposes of inheritance, the children would be treated to be legitimate and would inherit the properties of their parents.

53. Now, legitimacy is a matter of status.

XXX XXX XXXXXXX XXX XXX55. Illegitimate children, on the contrary, are children as are not born either in lawful wedlock, or within a competent time after its determination. It is on account of marriage, valid or void, that children are classified as legitimate or illegitimate. That is to say, the social status of children is determined by the act of their parents. If they have entered into a valid marriage, the children are legitimate; but if the parents commit a folly, as a result of which a child is conceived, such child who comes into existence as an innocent human baby is labelled as illegitimate. Realising this situation, our Parliament, and we must appreciate the wisdom of the legislators then adorning the seats in the august hall, made a law which protected the legitimacy of such innocent children. This was a bold, courageous and dynamic legislation which was adopted by other advanced countries.

xxx xxx xxxxxxx xxx xxx58. In spite of the foresightedness of the legislators, the intention of Parliament could not be fully reflected in the Act which unfortunately suffered at the hands of persons who drafted the Bill and the various provisions contained therein. The results were startling. Since the Rule of Legitimacy was made dependent upon the marriage (void or voidable) being annulled by a decree of annulment, the children born of such marriage, would continue to be illegitimate

if the decree of annulment was not passed, which, incidentally, would always be the case, if the parties did not approach the court. The other result was that the illegitimate children came to be divided in two groups: those born of marriage held prior to the Act and those born of marriage after the Act. There was no distinction between these two groups of illegitimate children, but they came to suffer hostile legislative discrimination on account of the language employed therein. Indeed, language is an imperfect instrument for the expression of human thought.'

(emphasis supplied)

34. The defect in the language employed in Section 16, as it originally stood was noticed in *T. Ramayammal v. T. Mathummal* : AIR1974 Mad321 as follows:

'The wording of Section 16 so far as it is relevant to a marriage void under Section 11 leads to an anomalous and startling position which could have hardly been contemplated by the legislature. The position and status of children of void marriage should obviously be the same either the marriage is declared a nullity under Section 11 or otherwise. It is seen that the legislature has borrowed in this section the language of Section 9 of the Matrimonial Causes Act, 1950 which deals with the legitimacy of children of only voidable marriages and does not refer to children of marriages void ipso jure and made the section applicable to cases of both voidable and void marriages annulled by a decree of court. Though the language of the section is more appropriate to voidable marriages, it has been applied to void marriages as well, presumably with the object of ensuring that where a marriage was in fact solemnised but was void for any of the grounds mentioned in Section 11, the children of such marriage should not be bastardised whether a decree of nullity is passed or not. But the above obvious intention of the Legislature has not been duly carried out by a proper wording of the section.'

35. It was in the above background that as per Section 11 of the Amending Act, substitution of Section 16 was provided for.

36. Obviously, it was for rectifying the anomaly noticed above, that Section 16 was substituted by the Amending Act, pointing out in the Notes to the Clauses of the Bill of the Amending Act that:

'...this clause seeks to substitute Section 16 so as to clarify the intention and to remove the difficulties in interpretation.'

Their Lordships of the Apex Court referred to the aforesaid Note in PEK Kalliani Amma (supra) and held that the amendment of Section 16 was to give full effect to what was intended to be achieved by enacting Section 16 and it was for such purpose that the Parliament intervened and brought in the substitution as aforesaid.

37. The object of Section 16 was to protect legitimacy of children born of void or voidable marriages. In leaving out one group of illegitimate children from being treated as legitimate, there was no nexus between the object sought to be achieved by Section 16 and the classification made in respect of illegitimate children. The provisions of Section 16, as it stood before substitution, were, therefore, to that extent, clearly violative of Article 14 of the Constitution as held in PEK Kalliani Amma (supra), wherein it was also noticed that the Joint Committee which was constituted to look into the provisions of the Hindu Marriage Act, indicated in its Report that in no case should children be regarded as illegitimate and consequently it followed the principles contained in Section 26 of the Special Marriage Act, 1954, to provide that children born of void or voidable marriages shall be treated to be legitimate.

38. In PEK Kalliani Amma (supra), the Apex Court, proceeded to hold that the Act is a beneficent legislation and, therefore, it has to be interpreted in such a manner as advances the object of the legislation. It was further held that the Act intended to bring about social reforms. Conferment of social status of legitimacy on a group of innocent children, who would have to be otherwise treated as bastards, was found to be the prime object of Section 16. In construing the effect of Section 16, it was held that the mischief from which the earlier legislation (the Act) suffered on account of use of certain words, has since been removed and the subsequent legislation (Amending Act) is constitutionally valid and the use of the new phraseology, implements effectively the intention of the Legislature in conferring the status of legitimacy on children, who are otherwise illegitimate. Section 16, as amended, was held to be not ultra vires the Constitution.

39. As already noticed, Section 16, before its amendment, was a purposeless statutory device in as much as the legitimacy of the children of a voidable marriage always stood dependent on the cessation of that relationship by a decree to that effect. The fact that the intention of the Legislature in introducing Section 16 in the Act was to prevent any child from being treated as illegitimate, is beyond dispute. As noticed in PEK Kalliani Amma (supra), by leaving out one group of illegitimate children from being treated as legitimate, there existed no nexus between the objects sought to be achieved by Section 16, as it originally stood, and the classification made in respect of the illegitimate children, similarly situate and circumstanced. In fact, as it stood then, it was clearly violative of Article 14 of the [Constitution of India](#). Since it was a situation of casus omissus, it was for the Legislature to set the matter right by appropriate legislative intervention, The Notes to the Clauses of the Bill of the Amending Act clearly stated that the said clause seeks to substitute Section 16 so as to clarify the intention and to remove difficulties in interpretation. It was a substitution that was being made. In the backdrop of its making and without, any indication that it attempted to modify the then existing law, the same is a clarificatory amendment, as stated in the Note to the Bill. Section 11 of the Amending Act is a clarificatory legislation intended to remove the absurdity in Section 16 of the Act as it originally stood, thereby removing the difficulty in interpretation of the said piece of legislation.

40. In my considered view, the result of substitution of Section 16 is that the provision has to be read as substituted. By the legal fiction contained in Section 16, Legislature has provided that children, though illegitimate, shall, nevertheless, be treated as legitimate, notwithstanding that the marriage was void or voidable.

41. The plenary power of legislation of Parliament or the State Legislature in relation to the legislative fields specified under the Seventh Schedule of the [Constitution of India](#) cannot be disputed. An enactment may be prospective or retrospective, A retrospective effect indisputably can be given in cases of curative and validating statute. In fact, curative statutes, by their very nature, are intended to operate upon and affect past transactions, having regard to the fact that they operate on conditions already existing. (See ITW Signode India Ltd. v. CCE, : 2003ECR783(SC) .

42. In *Sunil Kumar Rana v. State of Haryana*, : [2002]SUPP5SCR568 , the Apex Court laid down that the modification of the provision, as carried out by the substitution ordered, when found to be needed and necessitated to implement effectively the legislative intention and to prevent a social mischief against which the provision is directed, a purposive construction is a must and the only inevitable solution. It is worthwhile to immediately refer to the decision of the Apex Court in *Zile Singh v. State of Haryana*, : AIR 2004 SC5100 , where a three Judges' Bench upheld the ratio in *Sunil Kumar Rana* (supra). In that case, their Lordships noticed that the proviso appended to a clause in a statute turned out to be a trouble-maker, on account of its faulty drafting. Anomalous consequences verging on absurdity flowed from the proviso that came up for consideration before the Apex Court. In holding the retrospective effect of the substitution made by the Amending Act that fell for consideration in that case, their Lordships stated as follows:

'5. The Second Amendment brought the text of the relevant part of Section 13A in conformity with the legislative intent which prevailed behind the preceding amendment, that is, the First Amendment.

xxx xxx xxx xxxxxx xxx xxx xxx13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only '*nova constitutio futuris formam imponere debet non praeteritis*' - a new law ought to regulate what is to follow, not the past. (See *Principles of Statutory Interpretation* by Justice G.P. Singh, 9th Edn., 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p.440).

14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must

be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-79).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated, (p.388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right.(p.392).'

(emphasis supplied)

Their Lordships quoted with approval Maxwell on Interpretation of Statutes to state that the rule against retrospective operation is a presumption only, and as such it 'may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it'. If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the 'inhibition of the rule' is a matter of degree which would 'vary secundum materiam'. Sometimes, where the sense of

the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act.

43. Following *National Agricultural Co-op. Marketing Federation of India Ltd. v. Union of India*, : (2003)181CTR(SC)1, *Shyam Sunder v. Ram Kumar*, : AIR 2001 SC2472 and *Allied Motors (P) Ltd. v. C.I.T.*, : [1997]224ITR677(SC), it was held in *Zile Singh (supra)* that a simplistic reading of the text of the proviso, considered in that case, spelled out a consequence which the legislature had never intended and could not have intended. It was noticed that the amendment did not expressly give it a retrospective operation. The Apex Court laid down that the absence of a provision expressly giving a retrospective operation to the legislation is not determinative of its prospectivity or retrospectivity. Intrinsic evidence may be available to show that the amendment was necessarily intended to have retrospective effect and if the Court can unhesitatingly conclude in favour of retrospectivity the Court would not hesitate in giving the Act that operation unless prevented from doing so by any mandate contained in law or an established principle of interpretation of statutes. In holding so, it was stated that the substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. 'Substitution' has to be distinguished from 'supersession' or a mere repeal of an existing provision. It is apposite in this context to refer to *Allied Motors (P) Ltd.*, : [1997]224ITR677(SC) wherein it was stated as a principle, that when an amendment is brought to remedy unintended consequences and to make a provision workable such amendment is required to be read to give a reasonable interpretation and hence, required to be treated retrospective in operation so that a reasonable interpretation can be given. Though that decision referred to the introduction of a proviso that was inserted, in my considered view, the said principle applies on all fours to the case in hand.

44. That apart, in interpretation of statutes, courts have steered clear of the rigid stand of looking into the words of the section alone, but have attempted to make the object of the enactment effective and to render its benefits to the person in whose favour it is made. The legislators are entrusted with the task of only making

laws. The interpretation has to come from the courts. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. (See *Bharat Singh v. New Delhi Tuberculosis Centre*, : (1986) IILLJ217SC .

45. The contention of the appellants that Section 16(1) as substituted by the Amending Act of 1976 was one imposing an obligation for the first time and that, therefore, it cannot be made retrospective and that the said provision should be considered as only prospective from the date of the notification of the Amending Act, cannot be upheld. In my view, if the said submission is accepted, it will tend to defeat the very purpose for which the said section has been substituted by Section 11 of the Amending Act. In my considered view, there is nothing in the Amending Act either by way of fixation of a date or otherwise to indicate that the said section shall be treated only as prospective. So much so, it immediately falls for consideration as to whether the substitution made as per Section 11 of the Amending Act has the effect of being applicable with effect from the date on which the Act came into force on 18-5-1955. In my considered view, the clear indication of the Legislature as discernible from the objects sought to be achieved by the substitution is that such substitution shall relate back to the date from which the evil had to be remedied.

46. This view is to be fortified by the larger constitutional prospectus discernible from the goals that the Nation seeks to (sic) eve by the incorporation of Article 39 (e) and (f) in the [Constitution of India](#), apart from Article 21 thereof. As a prime principle, judicially recognised, prevention of vagrancy and destitution had always been part of the dictates of justice, making the courts to incline towards upholding the legitimacy of a child. The law had always leaned in favour of the innocent child from being bastardised, except in exceptional cases where it would be rank injustice to the father to be shouldered with the paternity of a particular child.

47. All that apart, the history of Hindu law as noticed above, would show that the uncodified Hindu law had its diversities and complex situations where polygamy was practised, though only a second marriage was recognised, that too, under

certain conditions, and illegitimate children were, at least, in different classes, treated as entitled to share in the property of the parent. I have referred to the said historical facts to indicate that, in the march of law, when the Hindu Marriage Act and the other three Statutes governing the Hindus were conceived as a Hindu Code in 1947 and later brought into effect as four different Statutes in 1955 and 1956, a uniform law was being applied to all categories of persons brought under the canopy of the said legislations, except those who were excluded from the operation of those statutes. It was not as if the Legislature never knew the variety of conditions that prevailed in the different parts, in the different social strata, of this democracy. But, the Act was consciously brought in, to codify the law relatable to marriages among Hindus. As noticed in *PEK Kalliani Amma (supra)*, Parliament consisting of the representatives of the people, knew, and the courts can legitimately presume that it knew, the situation prevailing all over India with regard to the different laws, customs and usages regulating marriages among Hindus and that it further knew their problems and their need for a uniform codified law concerning marriages.

48. As noticed by the Apex Court in *Maharani Kusumkumari v. Smt. Kusumkumari Jadeja*, : [1991]1SCR193a , under the general law, a child for being legitimate has to be born in lawful wedlock, and if the marriage is void or declared to be so by the court, it will necessarily have the effect of bastardising the child born of the parties to such a marriage. By enacting Section 5(i) of the Act, the Legislature abolished polygamy, which had always remained permissible and prevalent among the Hindus in the past. The Act was bringing about a very significant departure in this regard; and taking into account the possibility of violation of the law in numerous cases at least for some time to come, special provisions were included in Section 16 of the Act with the object of protecting the legitimacy of the children. As further noticed in the said decision, the intention of the Legislature in enacting Section 16 was to protect the legitimacy of the children, who would have been legitimate, if the Act had not been passed in 1955. If it is assumed that the meaning of Section 11 of the Amending Act was not free from ambiguity in so far as it uses the word 'substitution', the rule of beneficial construction is called for in ascertaining its meaning. In doing so, in my considered view, the substitution made by Section 11 of the Amending Act is essentially a supersession. Section 16(1) as substituted by

the Amending Act will be applicable to all children irrespective of their date of birth as well as the date of the death of the parent whose estate falls for division.

49. In arriving at the aforesaid conclusion, another contention of the appellants requires to be considered. This is as to whether the amendment made by Section 11 of the Amending Act can have such effect as to deprive any vested right which would have accrued upon the death of Ramunni (in this case), before 1976. I accept the contention of the learned Counsel for the appellants that succession opened out as regards the estate of Ramunni, upon his death, for, there is no rule available in the Hindu Succession Act that would have applied to the estate of Ramunni, thereby postponing the opening of succession. It is the well accepted principle that vested rights ought not to be disturbed by subordinate legislation. However, it is not as if there cannot be any law made subsequently to affect such vested rights. In so far as the Parliament and the State Legislature making primary legislations are concerned, the power to legislate includes the power to make laws retrospectively and also to affect vested rights, if any, and transactions which have been already made. However, such a law has to be one specifically providing for such divesting by clear legislative indication or necessary implication, which can be clearly inferred. As already noticed, the substitution made by Section 11 of the Amending Act was for giving effect to the intention of the Legislature with effect from the date of the parent Act, namely, 18-5-1955 and it is intended to clarify the intention and remove the difficulties in interpretation of Section 16. Now, if the opening of succession before the notification of the Amending Act is to be held as vesting such rights as are not to be treated as liable to be impaired by the substitution of Section 16 of the Act as per Section 11 of the Amending Act, it will lead to yet another anomalous situation where, owing to the presumption so following, a group of children who would be illegitimate would be deprived of the fruit of a beneficial legislation intended for them, while the others would have it. This, in my considered view, could never be treated as intended. Hence, the amendment made by Section 11 of the Amending Act by substituting Section 16 of the Act has the effect of impairing such rights as would have accrued owing to the opening of succession before the notification of the Amending Act on 27-5-1976. So much so, it relates to even situations like the instant case.

50. Incidentally, it can be noticed that the parties to this Second Appeal are Thiyyas domiciled in that area which was part of erstwhile Malabar District in the then Province of Madras. Though polygamous marriages were declared void in that area, by statutes, even before 1955, the decision of the Apex Court in PEK Kalliani Amma referred to the impact of similar provisions and therefore, even if the statute law that governed the parties before the coming into force of the 1955 Act had prohibited the marriage of a person with a spouse living, it makes no difference in deciding the case in hand. In Preman v. Gopalan, 1993 (1) KLT 640, this Court referred to the decision reported as Kallyani Amma v. Devi, 1989 (2) KLT 80 and followed it in so far as the interpretation of Sections 11 and 16 of the Act is concerned. It is that decision of the Division Bench of this Court in Kallyani Amma's case that stands reversed by the Apex Court in PEK Kalliani Amma. To that extent, it has to be noticed that the decision of this Court in Preman 's case (supra) stands overruled by the Apex Court in PEK Kalliani Amma (supra).

51. Contextually relevant is an interesting case, Rasala Surya Prakasarao and Ors. v. Rasala Venkateswarao and Ors., decided by a Division Bench of the Andhra Pradesh High Court, reported as : AIR 1992 AP234 . There, a question arose as to whether the illegitimate children of one Ramaiah, who died in 1975 in an undivided status, were entitled to claim share. The Bench posed the question as to whether the benefit of Section 16 of the Act as amended in 1976, would entitle the illegitimate children to claim partition of the properties of their father, who died in 1975. After surveying a catena of decisions, the Division Bench upheld the claim of the illegitimate children. In doing so, their Lordships noticed the decision of the Andhra Pradesh High Court in Lakshamma v. Narasamma, 1978 (2) Andh. LT 205, wherein the Court was concerned with the estate of one Narasappa who died in 1966. The Division Bench quoted with approval the said decision as follows:

'A reading of Sub-section (1) in my opinion, does not leave any doubt that the Parliament intended to benefit all the children before or after the commencement of the Amendment Act and those born before or after the decree of nullity, by declaring them as 'legitimate'. Sub-section (3) also provides clue to the intention of the Parliament that such declaration of legitimacy was not intended to be an empty

one but was supposed to be integrally connected with the devolution of properties also. The section says that the children born of void marriages shall be deemed to be legitimate as if the marriage had been valid, notwithstanding the fact that the marriage is declared to be a nullity whether before or after the birth of the child, and notwithstanding the further fact that the child is born before or after the amendment. As a result of the said section, the plaintiff must be deemed to be the legitimate child of Narasappa. If she is a legitimate child, she would be undoubtedly entitled to a share in the properties of Narasappa. Accepting the respondent's contention would mean that the plaintiff would be deemed to be a legitimate child of Narasappa only from the date of coming into force of the Amendment Act, she would be the legitimate daughter of Narasappa, but shall have no share in his properties. Such could not have been the intention of the Parliament. If she is legitimate, she is legitimate from her birth. In other words, she is a legitimate child of Narasappa for all purposes. If so, she is entitled to a share in his properties according to law.'

52. In the decision of Goverdhan Singh v. Hiranman Singh, 1980 (2) Andh. LT 210, the amendment of Section 16 by Section 11 of the Amending Act was understood as follows:

'This amendment was made to remove certain anomalies and handicaps that had come to light after the passing of the [Hindu Marriage Act, 1955](#). By the amendment the sweep of Section 16 has been widened and even where the marriage is null and void and under Section 11 any child of such marriage shall be legitimate whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage has been found void otherwise than on a petition under the Act. Thus the Section declares the legitimacy of a child even when the marriage between the parents is held to be void otherwise than on a petition under the Act. The limitation or doubts placed on the applicability of the benefit by the old section have been removed. It is well settled that a marriage which is null and void ipso jure and is declared to be void by the Court or annulled by the Court on the grounds of its voidability will have the inevitable effect of bastardising any child born to such parties. The effect of a decree of a nullity in the case of a void marriage or annulment of voidable marriage is to render the

marriage null and void from its inception for all intents and purposes. The Legislature enacted the section to see that in no case the children of persons whose marriage is solemnized but is void or voidable under Section 11 or 12 of the Act will be regarded as illegitimate children.'

53. The decision of the Apex Court in *State of Kerala v. Philomina and Ors.*, : [1977]1SCR273 referred to by the learned Counsel for the appellants also lays down the position that a statute is not to be made retrospectively, except as of necessity. In the circumstances pointed out above, in my considered view, it is the necessity that the substitution made as per Section 11 requires to be read as relatable back to the date of the parent Act.

54. The learned Counsel for the appellants referred to the decision of the Apex Court in *Eapen Chacko v. Provident Investment Co. (P) Ltd.*, 1977 KLT 1 to state that the substitution in question ought to be interpreted, respecting the vested rights. In the aforesaid view of the matter, the said decision has no application to the facts of the case in hand.

55. Can it be assumed that it was the intention of the Legislature to classify the children, who would have been illegitimate, but for Section 16 as substituted by the Amending Act, into two categories? If that were so, such children, who were born between 18-5-1955, the date of the Act and 27-5-1976, the date of the Amending Act would be illegitimate and those born after 27-5-1976 would be legitimate, notwithstanding that the marriage between their parents would have been void or voidable. The answer to this situation is available in Section 16(1) itself which provides that the legitimacy deemed by the said section is as regards all children born before or after the commencement of the Amending Act. It is this provision that has been succinctly interpreted by the Apex Court in *PEK Kalliani Amma*, to hold as applicable to all children. After it was so noticed, *PEK Kalliani Amma* was decided by holding that the children through the second wife, though born before the date of amendment, were entitled to share in the assets of Sri. Raman Nair, who died before the amendment.

56. On the basis of the aforesaid discussions, the following conclusions are reached:

(i) The substitution of Section 16 of the [Hindu Marriage Act, 1955](#) by Section 11 of the Marriage Laws (Amendment) Act, 1976 is a substitution relating back to the date of the parent Act.

(ii) The status of legitimacy, that is declared by Section 16, is part of the incidence of birth.

(iii) The right of a child, on the basis of such deemed legitimacy, to share in the properties of the parent, is not nipped by the death of the parent before the notification of the Amending Act.

(iv) The deemed status of legitimacy entitles such a child to demand partition of the property of the parent who died before the notification of the Amending Act, in spite of succession having opened out earlier. The other sharers have no such indefeasible

(iv) The deemed status of legitimacy entitles such a child to demand partition of the property of the parent who died before the notification of the Amending Act, in spite of succession having opened out earlier. The other sharers have no such indefeasible right that has not been affected by Section 16 of the Act as substituted by Section 11 of the Amending Act.

(v) Such partition has to be as on the date of the estate becoming available for partition by the death of the parent.

In the result, this Second Appeal fails. The decrees of the courts below are confirmed. The Second Appeal is dismissed. However, the parties will bear their respective costs.