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**(2001) 07 MAD CK 0062**  
**In the Madras High Court**  
**Case No : S.A. No. 1080 of 1991**

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|---------------------------------------------|------------|
| Gopi, rep. by mother and next friend Santhi | APPELLANT  |
| Vs                                          |            |
| Rathinam                                    | RESPONDENT |

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**Date of Decision :** 24-07-2001

**Acts Referred:**

Evidence Act, 1872 — Section 112  
Hindu Marriage Act, 1955 — Section 11, 16, 16(1), 16(3)

**Citation :** (2002) 1 DMC 90 : (2001) 3 MLJ 470

**Hon'ble Judges :** A. Ramamurthi, J

**Bench :** Single Bench

**Advocate :** Mr. S. Balasubramanian, for the Appellant; Mr. R. Sankaranarayanan, for the Respondent

**Final Decision :** Dismissed

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## Judgement

1. The plaintiff in O.S.No.66 of 1984 on the file of Sub Court, Thirupathur, has preferred the second appeal aggrieved against the judgment and

decree passed by the learned Additional District Judge, Vellore, in A.S.No.72 of 1989 dated 13.11.1989 reversing the judgment and decree of

the trial court dated 28.2.1989.

2. The case in brief is as follows:- The minor plaintiff represented by the mother, Shanthi, filed a suit for partition and separate possession of his

share in the suit property. The defendant married one Vimala, and as they have no issues, the defendant married the mother of the plaintiff on

14.12.1980 according to the custom prevailing in the community in Pallikondan Village. Ever since the date, they lived as husband and wife for a

period of three years and thereafter, she was driven out of the house and the minor plaintiff was born on 2.11.1983 in the Government Hospital at

Ambur. The defendant has not been paying anything towards the maintenance of the plaintiff and he is entitled to half share in the suit property and

the defendant also should be directed to render account. Hence, the suit.

3. The defendant took a plea in the written statement that items 2 to 4 are ancestral properties. Items 1 and 5 were purchased by him out of his

own funds. He married the said Vimala on 12.6.1964 according to Hindu rites. He denied the marriage with Shanthi on 14.12.1980 in Pallikondan

Village and also the birth of the minor plaintiff. He also denied having sent her out of the house and now at the instigation of the enemies, the

present suit has been filed only to grab at the properties.

4. The trial court framed 4 issues and on behalf of the plaintiff, P. Ws. 1 to 4 were examined and Exs.A-1 to A-4 were marked. On the side of the

defendant, D. Ws. 1 and 2 were examined and Exs.B-1 to B-8 were marked. The trial court passed a preliminary decree in favour of the plaintiff

in respect of items 2 to 4 only. Aggrieved against this, the defendant preferred A.S.72 of 1989 and the plaintiff preferred cross objections before

the Additional District Court, Vellore and the learned Judge after hearing the parties, allowed the appeal and set aside the judgment and decree of

the trial court and also dismissed the cross objections. Aggrieved against this the plaintiff has filed the present second appeal.

5. At the time of admission of this appeal, the following substantial questions of law were framed by this Court:

1) Whether the finding of the first appellate court that the appellant is not the son of the respondent is legally sustainable in view of the exhibits, birth

extract and the panchayat muchilika?

2) Whether the finding of the first appellate court that the respondent has discharged the burden of proof lies on him to establish that items 1 and 5

of the suit properties are his self acquired properties is legally sustainable?

6. Heard the learned counsels of both sides.

7. The point that arise for consideration are:

1) Whether the next friend of the plaintiff was the legally wedded wife of the defendant?

2) Whether the plaintiff is the legitimate son of the defendant?

3) Whether the plaintiff is entitled to partition and separate possession of his

share in the suit property?

4) To what relief?

8. Points: The next friend of the minor plaintiff was examined as P.W. 1. P.W.2 is the father of P.W.1. They were examined to prove the marriage

of D.W.1 with P.W.1 and also the birth of minor plaintiff. Ex.A-1 is the birth extract dated 7.11.1983. Ex.A-2 is the legal notice sent through

counsel by P.W.1 to D.W.1. Ex. A-3 is the reply sent by the defendant. According to P. Ws. 1 and 2, the marriage of P.W.1 took place on

14.12.1980 outside the temple in Pallikondan Village and they lived for a period of three years. Thereafter, due to misunderstanding, P.W.1 was

driven out of the house and nothing was paid towards maintenance. P.W.4 was also examined to speak out the marriage of P.W.1 with D.W.1.

P.Ws.3 and 4 were also examined to speak about the panchayat after the misunderstanding between P.W.1 and D.W.1.

9. D.W.1, the defendant categorically stated that he married D.W.2 on 12.06.1964 and produced the marriage invitation under Ex.B-2. He denied

the alleged marriage with P.W.1. D.W.2 also stated about her marriage with D.W. 1 and in view of the documentary evidence, it is evidently clear

that there was valid and subsisting marriage between D.Ws.1 and 2. According to P.W.1, her marriage with D.W.1 took place in the year 1980.

Considering the fact that on 14.12.1980 D.W.2 was the wife of D.W.1 and as the marriage has not been dissolved, it can be concluded that

P.W.1 was not the legally wedded wife of D.W.1. It is only under such circumstances, the lower appellate court came to the conclusion that

P.W.1 is not the legally wedded wife of the defendant.

10. Learned counsel for the appellant/plaintiff contended that the lower appellate court has not properly considered the birth extract Ex.A-1 and

erred in coming to the conclusion that the defendant is not the father ignoring the evidence. The lower appellate court also erred in not placing

reliance on the panchayat muchalika Ex.A-4. In my view, even assuming that there was a marriage between P.W.1 and D.W.1 and due to

misunderstanding there was panchayat, it will not establish that the marriage will be valid under law. It is not the case of the plaintiff that D.W.2 is

not the legally wedded wife of D.W.1. When once the marriage between D. Ws. 1 and 2 is admitted and that is earlier point of time, namely in

1964, the alleged marriage between P.W.1 and D.W.1 said to have taken place in the year 1980 cannot confer the status as a wife under law.

11. Learned counsel for the appellant contended that even assuming that the marriage between P.W.1 and D.W.1 is not valid under law, the

illegitimate son also would be entitled to claim a share in the property of the defendant and, as such, the suit ought not to have been dismissed by

the lower appellate court. Learned counsel further stated that items 2 to 4 are only ancestral properties and out of the income from those

properties only, items 1 and 5 were acquired in the name of D.W.1. There is no evidence to show that there was sufficient nucleus from the

ancestral properties. On the other hand, D.W.1 has filed documents to show that items 1 and 5 are the separate properties. Under the

circumstances, the only question that has to be considered is even assuming that the plaintiff is the illegitimate son of P.W.1 and D.W.1, whether he

is entitled to claim partition of the suit property.

12. Learned counsel for the appellant relied on the decision reported in Sreekumar Vs. Prema, , for the proposition that unchallenged testimony of

husband that marriage had been performed according to customary rites, it was held that the marriage is proved. He also placed reliance upon

Ningu Vithu Bamane and Others Vs. Sadashiv Ningu Bamane and Others, as follows:

When a man and a woman lived together as husband and wife for sufficiently long time and were treated as husband and wife by friends, relatives

and neighbors there is always a presumption in favour of their marriage. If children are born to such a couple, there is a further presumption in

favour of their legitimacy. The presumption in favour of marriage does not get mitigated or weakened merely because there may not be positive

evidence of any marriage having taken place. But if there is some evidence on record that the couple had gone through some form of marriage, the

presumption gets strengthened".

He also placed reliance upon Sarangapani and others Vs. Varadhan and others, relating to Section 112 of the Evidence Act about the presumption

of legitimacy of the child. I am of the view that these decisions are not applicable to the case on hand considering the facts and other

circumstances.

13. Learned counsel for the respondent relied on the decision reported in *Laxmibai Nagappa Matiwadar and Others Vs. Limbabai Nagappa*

*Matiwadar*, and it was held as follows:

Section 16 of Hindu Marriage Act, which is in three parts, has been substituted for the original Section 16 and sub-section (1), which opens with

non obstante clause, declares, in no uncertain terms, that notwithstanding that such a marriage is null and void u/s 11, the off-spring of such

marriage shall be legitimate whether such child was 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 the Act and whether or not the marriage is held to be void otherwise

than on a petition under the Act. The 1976 amendment and the substitution of Section 16(1) in this manner beyond doubt take away and eclipse

the general rule that the offspring of a marriage, which is null and void ipso jure, is illegitimate. That was common law doctrine, inevitably resulting

in the effect of bastardising children. The same has been superseded and the matter is governed by the express declaration available in Section

16(1) of the Act to the effect that though because of the statute the marriage would be void, that would not lead to the inevitable result of

bastardising the children who are born out of such a void wedlock. Sub-section (3) of Section 16 is, no doubt, restrictive in character. It is,

however, in furtherance of the legislative declaration available in sub-sec.(1) of Section 16 of the Act ..... Section 16 thus enacts a complete code

with regard to the off-springs of void or voidable marriages. Firstly, it declares the status of such a child being one as legitimate. Secondly, it

recognises rights in the property of the parents. The provision itself thus is for the benefit of the children and will have to be applied in full so as to

confer status with interest in property. This provision thus removes the disability of such children as far as the property of their parents in

concerned".

There is no dispute about this principle, but the applicability depends upon the facts and circumstances in each case.

14. Learned counsel for the respondent also relied upon the decision of this Court in *Margabandhu v. Kothandarama Mandhiri*, 1987 MLJ 267

that following the decision of the Division Bench in *Sivbagnanavadivu Nachiar v.*

Krishnakanthan, ILR 1977 Mad. 216, it was held that the

illegitimate children are entitled only to a share in their father's share and cannot claim equal share. This decision is applicable to the case on hand.

15. It is therefore clear from the aforesaid decisions and discussion, the lower appellate court has correctly analysed the controversy in the proper

perspective. The alleged marriage of P.W.1 and D.W.1 is void under law and as such, the plaintiff being an illegitimate son, would be entitled to

claim a share only in the property of the father. Now, in the present case, the father is the defendant and so long as he is alive, the plaintiff is not

entitled to claim any share in the property and as such, there is no illegality or infirmity in the judgment passed by the lower appellate court, calling

for any interference. Hence, the points are answered accordingly.

16. For the reasons stated above, the second appeal fails and is dismissed. No costs.