

(1994) 02 KAR CK 0024

In the Karnataka High Court

Case No : Regular First Appeal No. 298 of 1988

Smt. Nirmala and Others

APPELLANT

Vs

Smt Rukminibai and Others

RESPONDENT

Date of Decision : 07-02-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 18
Hindu Succession Act, 1956 — Section 10
Penal Code, 1860 (IPC) — Section 494, 495

Citation : AIR 1994 Kar 247 : (1994) ILR (Kar) 1078 : (1994) 2 KarLJ 62

Hon'ble Judges : M.M. Mirdhe, J;K.H.N. Kuranga, J

Bench : Division Bench

Advocate : B.V. Jigajinni, for the Appellant; Ananth Mandgi, for the Respondent

Judgement

Mirdhe, J.—Appellants herein, the defendants in the trial court, have preferred this appeal under S. 96 of the CPC against the judgment and decree dated 8-2-1988 passed by the II Additional Civil Judge, Belgaum in Original Suit No. 12 of 1982 decreeing the suit of the respondents for declaration and possession of the suit schedule properties.

2. We have heard the learned counsel for the appellants and the learned counsel for the respondents fully and perused the records.

3. Respondents filed a suit against the appellants on the following averments :

That the suit properties were owned and possessed by one Narayanrao Subhanji Mugalikar who was the husband of plaintiff No. 1 and father of plaintiff No. 2. He died intestate in CTS No. 2338 on 21-12-1978. On his death, respondents 1 and 2 who are the widow and daughter of Narayan Mugalikar succeeded to his estate as Class-I heirs under the Hindu Succession Act, 1956 and as such they become the owners of the suit properties and are entitled to possession of the same. Narayanrao married plaintiff No. 1 in or about 1942. In the course of business as carpenter he prospered and extended his business as Timber Merchant with

some partners, and he also put up a saw mill which he run as a sole proprietary concern. He leased the saw mill to defendant No. 8 on a rental of Rs.600/- per month, some time prior to his death. Narayanrao came in contact with defendant No. 1 some time by the end of 1948 or in the beginning of 1949. In the course of time, he developed illicit intimacy with her which led Narayanrao to dislike his wife plaintiff No. 1. He became so infatuated with defendant No. 1 that he became her slave, and, defendant No. 1 started visiting Narayanrao's house often on different pretexts which led to straining of relations between Narayanrao and plaintiff No. 1. Sometime thereafter, defendant No. 1 came to the house of Narayanrao and started living with him though plaintiff No. 1 resisted this move and plaintiff No. 1 was driven out of the house by Narayanrao and defendant No. 1. Since then plaintiff No. 1 has been residing in her parental place at Kadnur. Narayanrao stayed with defendant No. 1 openly in CTS No. 2338. There was no marriage of any sort between Narayanrao and defendant No. 1 at any time. But still defendant No. 1 started styling and conducting herself as the wife of Narayanrao, and, Narayanrao in turn treated her as his wife. Defendants 2 to 7 were born to defendant No. 1 on account of the relationship between Narayanrao and defendant No. 1. As defendant No. 1 was describing herself as wife of Narayanrao, consequently defendants 2 to 7 came to be described as children of Narayanrao. Plaintiff No. 2 was married in 1971 and she is living with her husband at Shahapur, Belgaum. Defendant No. 1 was a kept mistress of Narayanrao since 1950 and defendants 2 to 7 were born to her as a result of that illicit relationship. There was no marriage between Narayanrao and defendant No. 1 and hence defendants have no right of any sort in the properties left behind (by) Narayanrao after his death. After the death of Narayanrao, defendants continued to occupy CTS No. 2338 and they also came in possession of the premises wherein the saw-mill situate and started recovering rents for the said saw mill from defendant No. 8; and, the defendants thus are in actual possession and control of the entire suit properties. Though the plaintiffs called upon the defendants to hand over the possession of the suit properties, they did not agree to do so, and on the other hand gave a reply to their notice. Defendant No. 2 gave worthy to the City Survey Officer, Belgaum to the effect that after the death of Narayanrao plaintiffs and defendants are entitled to the estate of Narayanrao and their names shall be mutated in the place of deceased Narayanrao. Plaintiffs have been residing separately from Narayanrao since 1948. As the defendants have no right, title and interest in the suit properties left behind by Narayanrao after his death and since the defendants were not agreeing to comply with the demand of the plaintiffs for handing over the possession of the suit properties, plaintiffs were constrained to file a suit.

4. Defendants resisted the suit on the following grounds:

That the story put up by the plaintiffs regarding the illicit intimacy between Narayanrao and defendant No. 1 is a cooked up one. In fact, the plaintiff No. 1 left Narayanrao after quarrelling with him and her mother-in-law, and she never resumed back, and there she gave birth to plaintiff No. 2. Narayanrao tried to

bring her back, but plaintiff No. 1 refused to come and stay with Narayanrao in his house. Therefore, Narayanrao had no other alternative but to go in for a second marriage in or about 1948. His marriage with defendant No. 1 was performed with the requisite ceremonies enjoined by the Hindu Law and customs and usage of Maratha community to which they belonged. The said marriage took place in defendant No. 1's parental house at Hebbal, a village in Gadahingalaja taluka of Kolhapur District (Maharashtra State). After marriage defendant No. 1 went and lived with Narayanrao and defendants 2 to 7 were born to them in their wedlock. Hence, it is contended, defendant No. 1 is the legally wedded wife of Narayanrao and defendants 2 to 7 are the children legally born to defendant No. 1 and Narayanrao in their wedlock. Marriages of defendants 3, 4 and 5 and plaintiff No. 2 were performed by Narayanrao during his life time; and the marriages of plaintiff No. 2 and defendant No. 3 Usha took place in Chidambar Rajaram Mandir at Govaves Belgaum at one and the same time, and plaintiff No. 1 also attended the marriages. The defendant No. 1 is the legally wedded wife of Narayanrao and defendants 2 to 7 are the legitimate children of Narayanrao, since they have been living in CTS No. 2338 all along with Narayanrao and they have continued to live therein even after the death of Narayanrao, and during his lifetime Narayanrao acknowledged defendant No. 1 to be his wife and defendants 2 to 7 his children. After the death of Narayanrao, the names of his heirs, namely the plaintiffs and defendants came to be mutated and necessary entries made in the City Survey Register to which plaintiffs were the consenting parties. On the basis of these contentions, amongst others, defendants sought dismissal of the suit.

5. Defendant No. 1 died during the pendency of this appeal and other defendants who are on record are continued also as legal representatives of the deceased defendant No. 1.

6. The trial court framed the following issues :

"1. Does plaintiffs prove that the defendant No. 1 was not the legal wife of deceased Narayanrao Mugalikar and the defendants 2 to 7 are not legitimate children of Narayanrao Mugalikar (deleted) ?

2. Are plaintiffs entitled for actual possession of the suit properties?

3. Whether the plaintiffs are entitled for partition and separate possession of the suit properties? If so, what are the shares of the plaintiffs?

4. Whether all suit properties are available for partition?

5. Are plaintiffs entitled for mesne profit? If so, how much?

6. Whether the court-fee paid is sufficient?

7. What order or decree?

Additional Issues :

1. Whether defendant No. 1 proves that she is the legally wedded wife of the deceased Narayanrao?

2. Whether plaintiffs prove that defendant No. 1 was the kept mistress of deceased Narayanrao?"

7. After perusing the evidence on record and after hearing both sides, the trial court has decreed the suit of the plaintiffs. Though the plaintiffs' suit was for declaration that defendant No. 1 is not a legally wedded wife and defendant Nos. 2 to 7 are not the legitimate children of the deceased Narayanrao, trial court has not given such a declaration. But it has awarded possession of the plaint schedule properties from the defendants to the plaintiffs.

8. Learned counsel for the appellants submitted that there is a presumption of lawful marriage in law in favour of defendant No. 1 and therefore the trial court ought not to have deleted issue No. 1 which was framed casting burden on the Plaintiffs to prove that the defendants are not the legal relations of deceased Narayanrao. On the other hand, learned counsel for the respondents submitted that the trial court has rightly placed the burden of proving the legitimacy of the marriage of Narayanrao with defendant No. 1 on the defendants since it is their case that there was a valid and legal marriage between defendant No. 1 and Narayanrao. Both sides have led their evidence in this case. When both sides have led in their evidence, the burden of proof loses its importance and it remains merely as an academic question. In *Moran Mar Basselios Catholicos v. Thukalan Paulo Avira and others*, etc. reported in AIR 1959 SC 31 the Supreme Court has held as follows :

"The question of burden of proof at the end of the case, when both parties have adduced their evidence is not of very great importance and the court has to come to a decision on a consideration of all materials."

Since both sides have led in their evidence in support of their contentions in this case, the court will have to decide the question on the basis of the evidence placed before it and not merely on the question of burden of proof as the burden of proof becomes an academic question in view of the fact that both sides have led in evidence. The onus of proving their contentions will go on changing between the parties as and when the points are proved by one party as against the other.

9. It is not disputed in this case that plaintiff No. 1 is the legally wedded wife of Narayanrao and plaintiff No. 2 is the daughter of Narayanrao born to plaintiff No. 1 through Narayanrao in their wedlock. Therefore, the plea that plaintiff No. 1 and plaintiff No. 2 are the legally wedded wife and legitimate daughter of Narayanrao is not disputed in this case.

10. What is in dispute in this case is that defendant No. 1 is the legally wedded wife of Narayanrao and defendants 2 to 7 are his legitimate children. The main point to be considered in this case is -- whether there was any valid marriage

between Narayanrao and defendant No. 1. It is not in dispute in this case that defendants 2 to 7 are born to defendant No. 1 through Narayanrao. If marriage between Narayanrao and defendant No. 1 is held to be proved, then defendants 2 to 7 will become the legitimate children of Narayanrao. Therefore, the status of defendant Nos. 2 to 7 as the legitimate children of Narayanrao or not is dependent again on the question whether there was any valid marriage between Narayanrao and defendant No. 1. Plaintiffs in their plaint have admitted that defendant No. 1 was residing with Narayanrao in his house CTS No. 2338 till his death along with defendants 2 to 7. It is also admitted by them in their plaint that Narayanrao described defendant 1 as his wife and described defendants 2 to 7 as his legitimate children. But the case of the plaintiffs is that there was no valid marriage between defendant No. 1 and Narayanrao and any amount of acknowledgment on the part of Narayanrao would not make defendant No. 1 as his legitimate wife and defendants Nos. 2 to 7 his legitimate children.

11. Plaintiff No. 1 has not been examined in this case on the ground she is deaf plaintiff No. 2 has been examined as PW 3 in this case. Admittedly she was born at a time when she was not having personal knowledge about the alleged marriage of defendant No. 1 with Narayanrao. Therefore, her evidence will not be of much avail either to the plaintiffs to prove their contention that there was no valid marriage between defendant No. 1 and Narayanrao PWs. 1 and 2 are the brother and sister of deceased Narayanrao and they have deposed that there was no marriage between Narayanrao and defendant No. 1 and they have said that defendant No. 1 was (not) a legally wedded wife of Narayanrao. PW 1 has stated that none of their family members ever recognised defendant No. 1 as the wife of Narayanrao. Still he had to admit that defendant No. 1 was staying with Narayanrao since 1949-1950. He has also admitted that the marriage of plaintiff No. 2 and defendant No. 3 were performed together in Chidambar Temple at Belgaum and Narayanrao performed the marriages. There are invitation cards of marriages of plaintiff No. 2 and defendant No. 3 at Exhibits D-2 and D-3. It is significant to note that in Exhibit D-2 the name of Narayanrao was shown as the person who has extended the invitation and also the names of defendant No. 1 and Plaintiff No. 1 have been shown to have joined in extending invitation for the marriage and therein compliments are extended by the brothers of Narayanrao. This circumstance that Narayanrao himself performed the marriages of plaintiff No. 2 and defendant No. 3 and extended invitation for the marriage describing defendant No. 3 as his daughter, to which brothers of Narayanrao themselves were the parties, goes to show that PWs-1 and 2 are not coming with truth in this case. They seem to have supported plaintiff No. 1 as against defendant No. 1 for the reasons best known to them. In view of the admitted position that Narayanrao openly treated defendant No. 1 as his wife and defendants 2 to 7 as his children and that he performed the marriages of plaintiff No. 2 and defendant No. 3; that there is a marriage card of this marriage which was supported by the brothers of Narayanrao as the persons offering compliments to the invitees, it will not be safe to act upon the evidence of PWs. 1 and 2 to hold that defendant

No. 1 was the kept mistress of Narayanrao, because during the lifetime of Narayanrao no one treated defendant No. 1 as the kept mistress of Narayanrao and it is only after his death they have come up with an allegation that defendant No. 1 is not the legally wedded wife of Narayanrao. There is no acceptable evidence on behalf of the plaintiffs to show that defendant No. 1 was the kept mistress of Narayanrao. On the other hand, defendants have led evidence of DW-1 and DW-2. DW-2 has deposed that he is a Jangam by caste and he performed the marriage of defendant No. 1 with Narayanrao at Hebbal in the year 1948. When posed with a question in his cross examination that when Narayanrao was Maratha by caste and he a Jangam by caste how he could perform the marriage of Narayanrao with defendant No. 1, DW-2 has made a claim that he has performed the marriages of all communities and castes including that of Muslims. There are two types of liars in the world -- one artful liar and another clumsy liar. DW-2 appears to fall under the latter class, because though he told the lie, he told it clumsily which on the face of it can be disbelieved. There are specific procedures to be followed at the time of marriage in Muslim community, and no other person except Kaji could perform the marriage in that community; and a person like DW-2 will not be in a position to act as Kaji at the time of Muslim marriage. Defendants in their anxiety to ward off the stain of illegitimacy seem to have pressed the services of DW-2 to prove their contention that there was a valid marriage between defendant No. 1 and Narayanrao. Merely DW-2 has deposed falsely that he has performed the marriage of defendant No. 1 with Narayanrao, it is no ground to throw out the entire case of the defendants. The court will have to assess the evidence in entirety i.e. the evidence of DW-2 and all other evidence which can lawfully prove the case of DW-1 that she is the legitimate wife of Narayanrao. DW-1 has stated in her evidence that she married Narayanrao at Hebbal. She also states that her marriage took place in the year when Mahatma Gandhi was assassinated. The Court can take judicial notice of the fact that Mahatma Gandhi was assassinated in the year 1948. Therefore, the evidence of DW-1 is that her marriage was performed according to the rites and customs of the community to which they belong at Hebbal in the year 1948. Learned counsel for the plaintiffs vehemently contended that though it is submitted that the marriage cards were primed no such cards have been produced to prove her contention that there was a marriage between her and Narayanrao. Though at one stage she has stated she has got the invitation cards of her marriage, she later stated that she does not have the invitation cards. Her evidence will have to be read as a whole. Court cannot pick one sentence here and one sentence there to make out a case in favour of either of the parties. It is true that she (DW-1) has stated that the marriage invitation cards were printed and persons from other villages also attended her marriage, but she further in her cross-examination has stated that she had no marriage cards. The marriage is alleged to have taken place in the year 1948 and she has deposed in the year 1986. It is also significant to note that during the lifetime of Narayanrao there was no dispute raised by any one regarding the status of defendant No. 1 and her children. The dispute has arisen

only after the death of Narayanrao in the year 1978, that is thirty years after the marriage of Narayanrao with defendant No. 1. Taking into consideration all these facts, it is not possible to expect a person to keep the marriage invitation cards with him or her for three decades when there was no dispute at all regarding the status marital life of defendant No. 1. Moreover, defendant No. 1 is an illiterate and rustic lady. Therefore, it is not surprising if she has not preserved the marriage invitation card for such a long period i.e. 3 to 4 decades. DW-1 further deposed that she married Narayanrao in 1948 and after marriage she came to the house of Narayanrao and lived a married life and gave birth to defendants 2 to 7 in her wedlock with Narayanrao.

Now what is to be seen is whether the evidence of these witnesses deserves to be accepted. There is no other evidence to speak about the marriage of DW-1 with Narayanrao. Plaintiffs' witnesses claimed that DW-1 is the kept mistress of Narayanrao and not a legally wedded wife of him. The case of the plaintiffs themselves is that defendants 1 to 7 were living with Narayanrao in his house at Belgaum till his death and Narayanrao treated defendant No. 1 as his legally wedded wife and defendants 2 to 7 as his legitimate children and Narayanrao also performed their marriages by extending invitation to the persons in society describing defendants 1 to 7 as his legally wedded wife and legitimate children. The evidence of PW-1 is corroborated by the admission of plaintiffs themselves that Narayanrao had treated DW-1 as his legally wedded wife and defendants 2 to 7 as his legitimate children. This statement made by Narayanrao will be binding on the plaintiffs under S. 18 of the Indian Evidence Act, as the Section lays down that the statement made by persons from whom the parties to the suit have derived their interest in the subject matter of the suit, are the admissions, if they are made during the continuance of the interest of the persons making the statements, and the same will be binding on the persons claiming through such person. Therefore this admission of Narayanrao that defendant No. 1 is his legitimate wife and defendants 2 to 7 are his legitimate children will be binding on the plaintiffs under S. 18 of the Indian Evidence Act.

12. One thing that stands out permanently in this case is that during his life time Narayanrao treated and acknowledged defendant No. 1 as his legally wedded wife and defendants 2 to 7 as his legitimate children. This position is also not disputed but in fact admitted by the plaintiffs themselves.

13. When there is a cohabitation of a man and a woman as husband and wife, a presumption arises to the effect that there was a valid marriage between the parties. In *Badri Prasad Vs. Dy. Director of Consolidation and Others*, the Supreme Court held that where a man and a woman live as husband and wife for about 50 years, a strong presumption arises in favour of their wedlock. It is also further held that the proof as to the factum of marriage by examining the priest and other witnesses is not necessary in such cases. The law in its wisdom has laid this presumption. If a man and a woman live as husband and wife for a pretty long time and the husband acknowledges his woman as his wife, a

presumption can be raised in favour of the legality of their marriage. To expect them to bring witnesses at a point of time when the witnesses will not be available to prove their marriage is to expect something which cannot be done by the parties at that point of time. Therefore, the law in its wisdom has created this presumption in favour of a valid marriage.

14. In *Ramani Ammal (as mother and guardian of Muttu Duraisawmi Taver v. Kulanthai Natchear* reported in Moore's Indian Appeals (Volume 14) at page 346, Their Lordships sitting in the Privy Council held as follows :

"The legal presumption in favour of a child born in his Father's House of a Mother lodged, and apparently treated as a wife, treated as a legitimate child by his Father, and whose legitimacy is disputed after the Father's death, is one safe and proper to be made; and the opposing case should be put to strict proof."

In *Mahadervan v. Mahadervan* reported in 1992 ELR All 3 page their Lordship sitting in Probate, Divorce and Admiralty Division, have held as follows :

"Where a ceremony of marriage is proved and is followed by cohabitation as man and wife, a presumption is raised which cannot be rebutted by evidence that merely goes to show on a balance of probabilities that there was no valid marriage; the evidence must be such as proves beyond reasonable doubt that there was no valid marriage."

In *S.P.S. Balasubramanyam Vs. Suruttayan alias Andali Padayachi and others*, the Supreme Court has held that where a man and a woman are living under the same roof and cohabiting for a number of years a presumption arises that they lived as husband and wife; and such presumption "cannot be destroyed by the circumstance arid evidence proved; and that the children born to them are not illegitimate.

15. In *Surendra Mohan Das Bhoumick and Another Vs. The State of West Bengal and Others*, their Lordships held that where a man and woman living together for a long time (sic) the presumption is rebuttable. In *Parameshwari Bai Vs. Muthojirao Scindia*, this Court has held as follows:

"A man and a woman tied together by wedlock form the least unit of our complex society and whenever a man and woman lived as husband and wife for a fairly long time and were so reputed, law presumes that they are living as husband and wife and not in a state of concubinage. Presumption is both with regard to factum of marriage and legality of it. It is a strong presumption as it goes to the root of the structure of society and the persons who challenge it will have to rebut it by clear, cogent and satisfactory evidence. This burden is heavy on them."

16. In view of the law quoted above, it is clear that a cohabitation of a man and a woman as husband and wife for a long time under the same roof will raise a presumption of a legal and valid marriage in their favour and the off-springs of such union cannot be termed as illegitimate. This presumption will be a

rebuttable presumption. But the evidence required to rebut this presumption cannot be an evidence of mere probabilities but it should be an evidence to prove conclusively that the possibility of such valid marriage is completely ruled out. A perpetual union of a man and a woman goes in favour of legality and not a crime. The evidence of DW-1 proves that there was a valid marriage between her and Narayanrao somewhere in 1948 at Hebbal and the case of plaintiffs that DW-1 was a kept mistress of Narayanrao is difficult to accept. From the evidence, it is clear that the age of DW-1 was 60 when she deposed in the year 1986. Therefore she must have been around 22 years of age when she married Narayanrao in the year 1948. No such antecedents of DW-1 are brought in evidence to show that either she came from a family of ill-repute or she was a woman of loose morals or of a bad character so as to make her to live with Narayanrao at such a young age as kept mistress. Even the treatment that Narayanrao meted out to her and her children in his house and in the society at large is as his legitimate wife and legitimate children born to her in his union with DW-1. This leads to an inference that there was a valid marriage between Narayanrao and defendant No. 1 in the year 1948 at Hebbal as deposed by defendant No. 1. A presumption can be raised in favour of their marriage by virtue of a law of cohabitation of Narayanrao with defendant No. 1 under the same roof as husband and wife and the treatment meted out to defendant No. 1 by Narayanrao as his legitimate wife and to defendants 2 to 7 as his legitimate children. But the argument of the learned counsel for the plaintiffs is that even if there is a marriage it will be void marriage. This argument is based on the ground that admittedly Narayanrao was a married person at the time of his marriage with defendant No. 1 and therefore the marriage of Narayanrao with DW-1 will be a bigamous marriage which was prohibited under the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (this Act will be referred as "Bigamous Marriages Act" for short). The trial court has held that the marriage of Narayanrao with defendant No. 1 was void under the said Bigamous Marriages Act and therefore defendant No. 1 is not a legally wedded wife of Narayanrao. In order to see as to whether the marriage of defendant No. 1 with Narayanrao could be held to be a void marriage under the said Act, it will have to be seen as to when the Act was made applicable to the parties in question. It is not in dispute in this case that Narayanrao was the resident of Shahapur, Belgaum District. Shahapur was in Sangli State before its merger in Bombay State. The Gazetteer of India of Karnataka State pertaining to Belgaum District published in the year 1987 at page 66 makes it clear that Shahapur was in Sangli State prior to its transfer to Belgaum District. It is not in dispute in this case that Shahapur was merged with Bombay State in the year 1948 to be more precise on 8-3-1948. Prior to the merger there was no such law in force in Sangli State Prohibiting bigamous marriages in Hindu community. This Bigamous Marriages Act was made applicable to Shahapur after its merger with Bombay State under the provisions of the Indian States (Application of Laws) Order, 1948 published in Part-IV-A of the Bombay Government Gazette (Extraordinary) dated 28th July 1948 as specified in Schedule-11 thereof. Therefore the Bigamous Marriages Act

was made applicable on 28th July 1948. In view of this position of law, it will have to be held that prior to 28th July 1948 i.e. the date of the said Application Order, there was no such law in Sangli State prohibiting Hindus from contracting second marriage even though the first spouse (wife) was alive at the time of marriage. Under the provisions of the Bigamous Marriages Act, the bigamous marriages are void if they are contracted in the Bombay province after the coming into force of this Act; and, if they are contracted beyond the limits of this Bombay province after the coming into force of this Act and either or both the contracting parties to such marriages are domiciled in the Bombay State. By virtue of merger of Shahapur with Bombay State Narayanrao can be held as domicile in Bombay State itself from 8th March 1948; and his second marriage will come into the teeth of the provisions of the Bigamous Marriages Act if it is proved that the marriage of defendant No. 1 was performed after 28th July 1948 i.e. after this Act was made applicable to Shahapur which came to be merged in Bombay State on 8th March 1948. Now, the position is that the evidence of DW-1 corroborated by the presumption in favour of the said marriage, proves that there was a marriage between defendant No. 1 and Narayanrao. It is also the case of defendant No. 1 that the said marriage took place in the year 1948. The contention of the plaintiffs is that there was no such valid marriage as she came in contact with Narayanrao only at the end of 1948 or somewhere in the beginning of 1949. Now the question is as to who should prove or on whom the onus lies to prove the invalidity of the marriage in this case. In *Parameshwari Bai Vs. Muthojirao Scindia*, one of the grounds raised was that the marriage was void because it was performed after coming into force of the Hindu Marriage Act, 1955. Here also the contention is that the marriage/union of defendant No. 1 with Narayanrao was illegal because she came in contact with Narayanrao either with marriage or without marriage somewhere after the coming into force of the Act prohibiting the Bigamous marriages among Hindus. This Court has dealt with this aspect and held in para 17 *Parameshwari Bai Vs. Muthojirao Scindia*, as follows:

"The other ground raised before us is that the marriage was void, because the Hindu Marriage Act, 1955, had already come into force on 18-5-1955, and the marriage took place thereafter and it was hit by provisions of S. 17 of the Hindu Marriage Act. Section 17 of the Hindu Marriage Act states:

"Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either Party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code shall apply accordingly." Thus, it is obvious that in order to attract the provisions of this Act, it would be necessary (that the respondent must show that the marriage was solemnized after the commencement of the Act, namely, after 18-5-1955."

While holding thus, their Lordships have further observed that:

"We have already observed above that the presumption arising on the facts of

the case is a very strong presumption and that unless the respondent adduces clear, cogent and reliable evidence, the presumption is not rebutted."

In that view of the law laid down in the aforesaid case as applicable to the facts of this case, it is shown by the defendants that there was a valid marriage between defendant No. 1 and Narayanrao somewhere in 1948 and that the presumption will be that it was a legal and valid marriage. If plaintiffs want to show that are other circumstances which go to rebut that presumption or that the marriage or union of defendant No. 1 and Narayanrao took place after the coming into force of the Bigamous Marriages Act, it was for the plaintiffs to prove that contention and not for the defendants in whose favour there is already a presumption that marriage contracted between defendant No. 1 and Narayanrao was a valid marriage and that marriage took place prior to the coming into force of the said Bigamous Marriage Act. Plaintiffs have not produced any cogent and reliable evidence to rebut this presumption or to show that there are any circumstances which are inconsistent to hold that there was a legal and valid marriage between defendant No. 1 and Narayanrao. Therefore, the trial court was wrong in holding that the marriage between defendant No. 1 and Narayanrao was void and that the defendants are not entitled to be treated as heirs of Narayanrao.

17. Learned counsel for the plaintiffs also submitted that the defendants have failed to prove that the alleged marriage of defendant No. 1 with Narayanrao was performed in accordance with customs to which the parties belong. Defendant No. 1 was required to face this question nearly after three decades & after the death of Narayanrao in 1978. When there is a presumption that there is a legal and valid marriage, there is also equally a presumption that all the formalities and customs have been duly performed at the time of the said marriage. Therefore, in view of that presumption also the trial court was not justified in holding that the marriage of defendant No. 1 with Narayanrao was not performed in accordance with the customs and rituals of the community to which they belong. Learned counsel for the plaintiffs relied upon a decision of the Supreme Court in *Surjit Kaur Vs. Garja Singh and Others*, wherein the Supreme Court has held that where customary marriage prevails and where the nature of ceremonies performed not brought out, mere living of the parties as wife and husband will not be enough to confer the status of wife and husband on them. The Supreme Court has observed thus:

"13. Reliance placed on *Charan Singh Harnam Singh and Another Vs. Gurdial Singh Harnam Singh and Another*, is not correct because that will apply only if the widow were to marry the brother of the husband. But, here Gulaba Singh is a stranger. As rightly contended by the respondent, mere living as husband and wife does not, at any rate, confer the status of wife and husband. In *Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another*, it was laid down that the bare fact that the man and woman living as husband and wife does not at any rate, normally give them the status of husband and wife even though they

may hold themselves out before the society as husband and wife and the society treat them as such. The following extract is useful for this purpose (at p. 1565 of AIR) :

"Prima facie, the expression "whoever marries" must mean "whoever marries validly" or "whoever marries and whose marriage is valid one". If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a workman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife."

The Supreme Court has relied on its earlier decision to come to the conclusion that if there is not a valid marriage it is no marriage in the eye of law and such marriage cannot be held to be proved merely on the basis of the presumption of the fact of man and woman lived and cohabited as husband and wife for pretty a long time. But the facts of this case are different from the facts of the case in the said ruling. It has to be noted that prior to the coming of the Bigamous Marriages Act in Shahapur where Narayanrao was residing there was no law prohibiting the bigamous Hindu marriages. The evidence on record discloses that Narayanrao in spite of his first wife being alive marriage defendant No. 1 somewhere in 1948. The question is as to whether that marriage was before the the Bigamous Marriages Act came into force or not i.e. whether that marriage was performed prior to 28-7-1948 or thereafter. When there is a presumption in favour of the legal marriage by virtue of the evidence of cohabitation of defendant No. 1 with Narayanrao, the onus will shift on the plaintiff to prove that the marriage took place after the coming into force of the said Act. Therefore, viewed from any angle, we are of the opinion that the trial court was wrong in holding that the marriage of defendant No. 1 with Narayanrao was not legal and that defendants 2 to 7 are not his legitimate children.

18. Plaintiffs have also prayed for partition and separate possession of their share in the suit property alternatively. The evidence on record is that Narayanrao died leaving behind his two widows (Plaintiff No. 1 and defendant No. 1) and his children -- plaintiff No. 2 and defendants 2 to 7. They are all class-I heirs who are entitled to equal share u/s 10 of the Hindu Succession Act. All children of Narayanrao i.e. plaintiff No. 2 and defendants 2 to 7 will be entitled to 1-8th share each and so far as the plaintiff No. 1 and defendant No. I are concerned they are entitled to 1/8th share together; i.e. plaintiff No. 1 will be entitled to 1/16th share in the property of Narayanrao.

19. For the reasons stated above, we proceed to make the following order.

ORDER

Appeal is allowed. Judgment and decree of the trial court are set aside. Plaintiff No. 1 is entitled to 1/16th share in the suit properties; plaintiff No. 2 is held to be entitled to 1/8th share in the suit property; and they will be entitled to have their share partitioned by metes and bounds and separate possession of the same. There shall be an enquiry as to the mesne profits under Order XX, Rule 12 of the Code of Civil Procedure. There shall also be a preliminary decree accordingly.

In the circumstances of the case, parties to bear their own costs.

20. Appeal allowed.