

**(1992) 11 KL CK 0032**

**High Court Of Kerala**

**Case No:** S.A.O. No. 250 of 1986

Preman

APPELLANT

Vs

Gopalan

RESPONDENT

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**Date of Decision:** Nov. 23, 1992

**Acts Referred:**

- Hindu Marriage Act, 1955 - Section 11, 16

**Citation:** (1993) 2 DMC 147

**Hon'ble Judges:** Balanarayana Marar, J

**Bench:** Single Bench

**Advocate:** K.P. Dandapani and K. Jaiju Babu, for the Appellant; K.P. Balasubramanyan, K.K. Raveendranath and P.C. Sasidharan, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Balanarayana Marar, J.

The short point that arises in this second appeal is whether the son born of a void marriage is entitled to get a share in his father's properties.

1. Plaintiff schedule properties, two in number, admittedly belonged to one Moothoran who died leaving behind his first wife Manikyam, the 9th defendant in the suit and their children, defendants 1 to 8. Plaintiff is the son born to Moothoran in his second wife Manikyam. That marriage was contracted in 1954 by the agreement Ext. A-2. Plaintiff sought partition of the properties into 10 equal shares and claimed one such share. The Trial Court found plaintiff to be one of the heirs of Moothoran and granted the relief of partition. On appeal the lower Appellate Court reversed that decision and refused the relief finding that the marriage between Moothoran and 10th defendant was contracted before the commencement of the Hindu Marriage Act and as such plaintiff was ineligible to claim a share. Hence the second appeal which was admitted on the following questions of law.

(i) Whether the plaintiff is not the legitimate son of deceased Moothoran through his second wife Manikyam ?

(ii) Whether the plaintiff is not entitled to the provisions contained in Section 16 of the Hindu Marriage Act and claim 1/10 share of his deceased father ?

(iii) Whether the plaintiff is not entitled to get the benefit of Section 16 even if the marriage of his father and mother was not duly solemnized as required under the customary rights ?

(iv) In view of the judgment in O.S. 480/74 and the order in O.A. No. 5677/76 whether the suit is barred by res judicata ?

2. Heard Counsel on both sides.

3. That plaintiff was born in the second wife of Moothoran during the subsistence of the marriage relationship with 9th defendant is not disputed. Share is claimed on the basis that Section 16 of the Hindu Marriage Act confers legitimacy on the children born in the second wife. The second marriage was contracted before the commencement of the Hindu Marriage Act, Section 16 of the Act as it stood before the amendment by the Marriage Laws Amendment Act, 1976 confers legitimacy on any child begotten or conceived before a decree of nullity is granted in respect of any marriage u/s 11 or Section 12 and he shall be deemed to be a legitimate child notwithstanding the decree of nullity. The scope of the section was widened by the amendment and it is provided that the benefit of Section 16 can be claimed by any child of a marriage which is null and void u/s 11. In other words, the section has been made applicable to children of marriages void or voidable under Sections 11 and 12.

4. Section 11 of the Act applies only in the case of a marriage solemnized after the commencement of the Act. A question arises whether children born in a void marriage before the commencement of the Act are eligible to the benefits of the section. The position is no longer res integra. A Division Bench of this Court in Kallyani Amma v. Devi 1989(2) KLT 80 held that Section 11 deals with only invalidity of marriage under the Act and not of marriages otherwise invalid. The Division Bench did not see any discrimination in conferring legitimacy by Section 16 of the Act only on those who will be otherwise illegitimate for the reason of the applicability of Section 11 of the Act. It is observed that the disqualification of illegitimacy under the Hindu Marriage Act, lone is removed u/s 16 of the Act. A contention is seen raised before the Division Bench that the benefits conferred u/s 16 of the Act should be extended to the children born of a second marriage at a time when the first marriage was subsisting irrespective of whether the marriage was solemnized before or after the commencement of the Act. This contention was not acceptable to the Court and it was held that Section 16 of the Hindu Marriage Act confers the benefit of legitimacy only on those children born of a marriage void u/s 11 of the Act. In that case the second marriage was contracted in violation of Section

5 of the Madras Marumakkathayam Act which provided that any marriage contracted by either of the parties during the continuance of a prior marriage which is valid u/s 4 of that Act shall be void. The Bench held that Section 16 of the Hindu Marriage Act does not purport to confer legitimacy on children born of a marriage invalid under the law in force prior to the commencement of the Act. I am bound to follow the aforesaid decision. The principle enunciated therein directly applies to the facts of the case.

5. The parties to the suit are Thiyyas of Calicut governed by Hindu Mithakshata Law as modified by custom. Calicut was part of the erstwhile Malabar District in the province of Madras. Bigamous marriages were declared as void and penalised by the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949. Section 4(1) of the Act reads :

""Notwithstanding any rub of law, custom or usage to the contrary, any marriage solemnised after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnisation shall be void, whether the marriage is solemnised within or outside the State of Madras."

6. The second marriage was contracted in 1954 while the Madras Act was in force and before the commencement of the Hindu Marriage Act. Section 16 confers legitimacy only one children born of a marriage which is null and void u/s 11. i.e. a marriage solemnised after the commencement of the Hindu Marriage Act. That section does not confer legitimacy on children born of a marriage void under the Madras Act which was in force prior to the commencement of the Hindu Marriage Act. Appellant therefore cannot claim the benefits of Section 16 of the Act. His claim was rightly denied by the lower Appellate Court. The finding has only to be sustained.

7. Ld. Counsel for the appellant has attempted to distinguish the decision in Kallyani Amman case (supra) by relying on the decision of the Supreme Court reported in [Major Suresh Chand Mehta Vs. The Defence Secretary \(U.O.I.\) and others](#), That decision is of no assistance to the appellant since the main question for decision in that appeal by special leave was whether a petition u/s 11 of the Hindu Marriage Act for declaring the marriage of the petitioner as nullity was maintainable after the death of the petitioner's spouse. After referring to the amendment introduced in 1976 the Supreme Court held that an application u/s 11 before the amendment was maintainable at the instance of a party to the marriage even after the death of the other spouse. While considering the nature of the proceedings and the true construction of the relevant provisions of the Hindu Marriage Act the Supreme Court observed :

"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."

8. While stating that the Act has brought about a very significant departure from the practice of polygamy prevalent among Hindus in the past it was observed that special provisions were included u/s 16 of the Act with the object of protecting the legitimacy of the children taking into account the possibility of violation of the law atleast for some time to come. It was made clear in paragraph 10 of the judgment that the intention of the legislature in enacting Section 15 was to protect the legitimacy of the children who would have been illegitimate if the Act had not been passed in 1955. It is observed that there is no reason to interpret Section 11 in a manner which would narrow down its field. Referring to the changes introduced in Section 16 of the Act the Supreme Court observed that the amendment has only enlarged the applicability of the beneficial provisions. The benefits which were available only to the children of a marriage which has been declared to be a nullity are now conferred on children of a marriage which is null and void u/s 11. There is no indication even in the amended section to suggest that legitimacy was intended to be conferred on children born of a marriage which is void under any law prior to the commencement of the Hindu Marriage Act. The Supreme Court decision cited by the learned Counsel is therefore of no assistance to appellant to claim a share over the property of his father.

For the aforesaid reasons the second appeal is dismissed but without costs.