

LEGAL STATUS AND JUSTICE TO ILLEGITIMATE CHILDREN

Ms. Anisa Shaikh*

“A child born in illegitimate relationship or in a void marriage is innocent, and is entitled to all rights which are given to other children born in valid marriage.”¹

Concepts of Legitimate and Illegitimate Child

The importance of the concept of legitimacy in the law probably stem historically from a concern to protect the family as the unit of society. Brenda Hoggett expressed following view: “The institution of marriage may well have been devised in early societies in order to establish a relationship between father and child....A man may derive spiritual, emotional and material advantages from having children; but whereas motherhood may easily be proved, fatherhood may not. A formal ceremony between man and woman, after which it is assumed that any children she may have are his, is the simplest method of establishing a link. It also enables him to limit his relationships to the offspring of a suitable selected mate. A legal system which wishes to facilitate the orderly devolution of property and status within patrilineal families will therefore place great emphasis on the concept of legitimacy. But a legal system which is no longer so concerned about material provision for future generations of the few, and is far more concerned about the welfare of all young children, is likely to find the concept more and more distasteful.”²

For any society, childhood is an opportunity through which it attempts to realize its vision. In every religion child is considered as the incarnation of divinity and its

* Assistant Professor, New Law College, Bharati Vidyapeeth Deemed University, Pune.

¹ Ashok Kumar Ganguly, J. in *Revanasiddappa v. Mallikarjun*, (2011)11 SCC 1.

² *Brenda Hoggett, Parents and Children*, 2nd Ed., p 119.

bringing up is a religious perception and a moral duty. The child is basic *grundnorm* of the universe.

But sometimes some acts of human beings, prohibited or considered undesirable, do take place, and the consequences of such acts are borne by those who are innocent. A man and a woman commit a sin, and the child so born becomes sinful and is clothed with the taint of illegitimacy because he is not born in wedlock. The reason is that there is legally unrecognized relationship between the child so born and the persons who begot it. Such illegitimate child suffers from social stigma in every legal order. Its sufferings or deprivations are based on the maxim, *pater est quem nuptiae demonstrant*.³

Hindu Law Relating to Legitimacy of a Child

Manu says: “Immediately on the birth of his first born, a man is (called) the father of a son, and is freed from the debt of the manes...”; “That son alone on whom he throws his debts and through whom he obtains immortality, is begotten for (the fulfillment of) the law.....”⁴

These two *slokas* of Manu speak of the sacredness and sanctity of a son because through the son he conquers the worlds; through son’s son he obtains immortality; and through his son’s grandson he gains the world of the son.⁵ So to have a son is *dharma*; failing to have a son one cannot discharge his sacred duties. This is why Manu has spoken of twelve types of sons⁶; six are kinsmen and heirs, and six others not heirs but kinsmen.⁷

Under Hindu law an illegitimate child has never been considered as *nullius filius*.⁸ In some cases he has been considered to be a member of the family. It can be said that in Hindu law the illegitimate child, and putative father and natural mother have never been considered

³ The marriage indicates who the father is/marriage indicates paternity.

⁴ Manu IX-106,107

⁵ Manu IX-137.

⁶ Manu IX-165-179.

⁷ Manu IX-158.

⁸ A child of no one.

strangers to each other. The illegitimate son under *Sastrik* law is put in two categories:

1. The child born to a regenerate class by a permanent and exclusively kept concubine;
2. The child born to a *sudra* by a permanent and exclusively kept concubine.

In the former case⁹ the child is a member of his father's family, though not a coparcener had full rights of maintenance throughout life. In the latter case¹⁰, the child enjoyed a much higher place having status of a son and a member of his father's family.

With this concept in mind even an illegitimate child has been recognized in Hindu law and was called *dasiputra*. So the acknowledgement in Hindu Law is inherently present, and such a separate acknowledgement is not required at all and all his rights are governed by Hindu Law.¹¹

In *Kattari Nagaya Kamarajendra Ramasami Pandiya Naicker v. T.B.K. Visvanathaswami Naicker (deceased) and Ors.*,¹² the Privy Council held when a *sudra* had died leaving behind an illegitimate son, a daughter, his wife and certain collateral agnates, both the illegitimate son and his wife would be entitled to an equal share in his property. The illegitimate son would be entitled to one-half of what he would be entitled had he been a legitimate issue. An illegitimate child of a *sudra* born from a slave or a permanently kept concubine is entitled to share in his father's property, along with the legitimate children.

In *P.M.A.M. Vellaiyappa Chetty and Ors. v. Natarajan and Anr.*,¹³ it was held that the illegitimate son of a *sudra* from a permanent concubine has the status of a son and a member of the family, and share of inheritance given to

⁹ Mitakshara I.12.3.

¹⁰ Manu IX-179; Yajnavalkya II 133-134; Mitakshara I.12; Dayabhaga IX-28.

¹¹ *Rahi v. Govind*, 1 Bom 97; *Chamaya v. Irya*, AIR 1931 Bom 492; *Ratnaraja Kumar v. Narayana Rao*, AIR 1953 SC 433; *Amini Reddy v. Ammireddy*, AIR 1961 AP 131.

¹² (AIR 1923 PC 8); MANU/PR/0029/1922.

¹³ (AIR 1931 PC 294); MANU/PR/0062/1931.

him is not merely in lieu of maintenance, but as a recognition of his status as a son; that where the father had left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son was not entitled to demand a partition of the joint family property, but was entitled to maintenance out of that property. Sir Dinshaw Mulla, speaking for the Bench, observed that though such illegitimate son was a member of the family, yet he had limited rights compared to a son born in wedlock, and he had no right by birth. During the lifetime of the father, he could take only such share as his father may give him, but after his death he could claim his father's self-acquired property along with the legitimate sons.

In *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh and Anr.*,¹⁴ the facts were that Raja was a *sudra*, and died leaving behind a legitimate son, an illegitimate son, a legitimate daughter and three widows. The legitimate son had died and the issue was whether the illegitimate son could succeed to the property of Raja. The Privy Council held that the illegitimate son was entitled to succeed to Raja by virtue of survivorship.

In *Gur Narain Das and Anr. v. Gur Tahal Das and Ors.*,¹⁵ a Bench comprising Justice Fazl Ali and Justice Bose agreed with the principle laid down in the case of *Vellaiyappa Chetty*¹⁶ and supplemented the same by stating certain well settled principles to the effect that: "Firstly, that the illegitimate son does not acquire by birth any interest in his father's estate, and he cannot therefore demand partition against his father during the latter's lifetime. But on his father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with a right of survivorship, and is entitled to enforce partition against the legitimate son(s); and that on a partition between a legitimate and an illegitimate son, the illegitimate son takes only one-half of what he would have taken if he was a legitimate son."

¹⁴ (1890 L R 17 I A 128

¹⁵ (AIR 1952 SC 225); MANU/SC/0078/1952.

¹⁶ AIR 1931 PC 294.

In case of *Singhai Ajit Kumar and Anr. v. Ujayar Singh and Ors.*¹⁷ the main question was whether an illegitimate son of a *sudra vis-à-vis* his self-acquired property, after having succeeded to half-share of his putative father's estate, would be entitled to succeed to the other half share got by the widow. The Bench referred to Chapter 1, section 12 of the Yajnavalkya and the cases of *Raja Jogendra Bhupati*¹⁸ and *Vellaiyappa Chetty*,¹⁹ and concluded that: "Once it is established that for the purpose of succession an illegitimate son of a *sudra* has the status of a son and that he is entitled to succeed to his putative father's entire self-acquired property in the absence of a son, widow, daughter or daughter's son, and to share along with them, we cannot see any escape from the consequential and logical position that he shall be entitled to succeed to the other half share when succession opens after the widow's death."

Modern Hindu law has divided sons into four categories:

1. **Son born in lawful wedlock** (it includes adopted son also): He is a legitimate child and class I heir as per section 8 and Schedule I of the Hindu Succession Act, 1956.
2. **Son born in void or voidable marriages:** Son born in void marriage is covered and the amended section 16 of the Hindu Marriage Act, 1955 which has completely superseded the common law doctrine that 'the offspring of a marriage which is null and void *ipso jure* is illegitimate.' Firstly, it has declared that the status of such a child is legitimate. Secondly, it recognizes his right in the property of the parents and not others.
3. **Son born in invalid marriages:** Children born in a wedlock, which is invalid, are not covered by a statutory provision. If there is a violation of section 5(iii) or section 7 or section 15 of the Hindu Marriage Act, 1955. The marriage is neither void nor voidable, and as such is not covered by

¹⁷ (AIR 1961 SC 1334); MANU/SC/0229/1961.

¹⁸ *Supra* Note 14.

¹⁹ AIR 1931 PC 294.

sections 11 or 12 and consequently not covered by section 16 of the Hindu Marriage Act, 1955. However judicial pronouncements had made the task easy. Section 7 of the Hindu Marriage Act, 1955 shall not turn the children born as illegitimate, and as such shall have a legal shelter under section 16 of the Act.²⁰

- 4. Son born out of wedlock:** In this category the rights of illegitimate children to succeed to their mother's property has been preserved and recognized, but not to the father's property. On the other hand, the illegitimate son of a person by a continuously kept concubine who had a right to inherit his father's property is now denied that right. This is covered by section 3(1)(j) of the Hindu Succession Act, 1956 wherein it is stated that illegitimate children shall be deemed to be related to their mother and to one another ... and in *Gurbachan Singh v. Khichar Singh*²¹ it is said that though ordinarily illegitimate children are not considered as children, yet in so far as relationship with one's own mother is concerned, even illegitimate children are considered as her children by virtue of the proviso to section 3(1)(j).

In modern law two legal instances do give an inference of legitimation by subsequent marriage though indirectly:

- Firstly, section 112 of Evidence Act, 1872 speaks about presumption of legitimacy. It says: "Any person was born during the continuance of a valid marriage between his mother and any man...." This provision speaks of birth, and not conception during lawful wedlock which over rules the Hindu and Muslim law, and this view judicially²² and burden of proof is put on the father to show 'no access'.
- Second instance can be gathered from section 12(1)(d) of the Hindu Marriage Act, 1955. Section 12 speaks of

²⁰ AIR 1996 SC 1963.

²¹ AIR 1971 P & H 240.

²² *Karapaya Servai v. Mayandi*, AIR 1934 PC 49; *Bhagwathi v. Aiyappan*, AIR 1953 TC 470; *Palani v. Sethu*, AIR 1924 Mad 677; *Kahan Singh v. Natha Singh*, AIR 1925 Lah 414.

voidable marriage and provides four grounds to declare the marriage null and void. Section 12(1) stipulates that: "That respondent was at the time of the marriage pregnant by some person other than petitioner." The expression 'other than petitioner' is legally significant. So if the petitioner had pre-marital intercourse with a woman and then latter on marries the same woman, such a marriage is valid and not voidable and the child so born shall be legitimate child under the doctrine of *legitimatio per subsequense matrimonium*.²³

In India, it is very unfortunate that though the illegitimate child has been granted the status of legitimacy, the amended Hindu Succession Act, 1956 and the Hindu Marriage Act, 1955 have failed to protect the interests of innocent children who have no control over their birth. Though a child born out of wedlock is not considered illegitimate any more in the eyes of the law, the same child is not entitled to a share in the property that is inherited by his parents. Vikramjit Sen, Judge, Delhi High Court, known for his progressive rulings, says that a provision of the amended section 16 of the Hindu Marriage Act: "bestows the same legitimacy rights on the offspring of a voidable marriage provided the conception had not occurred after the voidable marriage was declared to be a nullity."

The amendments to the Criminal Procedure Code, 1973 that allow illegitimate children to force their biological parents to pay for their upkeep has had more teeth added to it by an Andhra Pradesh Bill proposed last year that suggests simplified prosecution and enforcement. The Bill says that illegitimate children now have the right to take shelter in the homes of either of their biological parents. Illegitimate children now enjoy all the rights of legitimate children and can claim them from their official parents. If these children file a police case with the help of friends and relatives or NGOs, an alleged biological father can be forced to undergo a DNA test to establish paternity. This new provision gives additional protection to the illegitimate children of rich and philandering persons.

²³ Legitimation by subsequent marriage.

However section 125 of Criminal Procedure Code, 1973 has taken care that no legitimate or illegitimate child is left unattended by the biological father. It says that a man must maintain his legitimate or illegitimate child, and casts an obligation on the biological father if his offspring is without any means of sustenance.

A Bench of Justices G.S. Singhvi and A.K. Ganguly said in a judgement²⁴ that such children cannot be deprived of their property rights as what was considered illegitimate in the past, may not be so in the present changing society. The Apex Court ruled: "The court has to remember that relationship between the parents may not be sanctioned by law; but the birth of a child in such a relationship has to be viewed independently of the relationship of the parents." "A child born in such a relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage. Right to property is no longer fundamental but it is a Constitutional right and Article 300A²⁵ contains a guarantee against deprivation of property right save by authority of law," the Bench said.

The Bench disagreed with a plethora of earlier decisions taken by the Apex Court in *Jinia Keotin v. Kumar Sitaram Manjhi*²⁶ and several other cases that illegitimate children were entitled only to a share in the self-acquired property of the parents and nothing beyond that. It also ruled: "In our view, in the case of joint family property, such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. The only limitation even after the amendment seems to be that during the life time of their parents, such children cannot ask for partition (of property) but they can exercise this right only after the death of their parents."

The Supreme Court in *Jinia Keotin v. Kumar Sitaram Manjhi*²⁷ held as under: "...Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of

²⁴ *Revanasiddappa v. Mallikarjun*, (2011)11 SCC1.

²⁵ Persons not to be deprived of property save by authority of law.

²⁶ 2003 (1) SCC 730.

²⁷ *Ibid.*

contravention of the statutory prescriptions, any child born of such marriage would have the effect, *per se*, or on being so declared or annulled, as the case may be, of bastardising the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of the Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children which depended very much upon the marriage between their parents being valid or void thus turned on the act of parents over which the innocent child had no hold or control. But for no fault of it, the innocent baby had to suffer a permanent set back in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the Legislature in enacting section 16 put an end to a great social evil. At the same time, section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children are concerned to the properties of the parents only.”²⁸

Same position was again reiterated in a recent decision of this Court in *Bharatha Matha v. R. Vijaya Renganathan*²⁹ wherein this Court held that a child born in a void or voidable marriage was not entitled to claim inheritance in ancestral coparcenary property but was entitled to claim only share in self-acquired properties.

In *Rameshwari Devi v. State of Bihar and Ors.*,³⁰ the Court dealt with a case wherein after death of a government employee, children born illegitimately by the woman, who had been living with the said employee, claimed the share in pension/gratuity and other death-cum-retiral benefits along with children born out of a legal wedlock. This Court held that under section 16 of the Act, children of void marriage are legitimate. As the employee, a Hindu, died intestate, the children of the deceased employee born out of void marriage were

²⁸ *Neelamma and Ors. v. Sarojamma and Ors.*, (2006) 9 SCC 612.

²⁹ AIR 2010 SC 2685.

³⁰ (AIR 2000 SC 735); MANU/SC/0043/2000.

entitled to share in the family pension, death-cum-retiral benefits and gratuity.

What happens to children born from live-in relationships, where no marriage has taken place? The Supreme Court had presumed a man and woman to be married despite them only having a live-in relationship if they lived for a very long time under one roof and were known in society as husband and wife.

In *Madan Mohan Singh v. Rajni Kant*³¹ a live-in relationship if continued for a longtime, cannot be termed as 'walk in and walkout' relationship and there is presumption of marriage under section 114 of the Evidence Act and children born to them will not be illegitimate.³²

In *Bharatha Matha v. R. Vijaya Renganathan*³³ wherein the Court held that a child born in a void or voidable marriage was not entitled to claim inheritance in ancestral coparcenary property, but was entitled to claim only share in self-acquired properties.

In *Smt. P.E.K. Kalliani Amma and Ors. v. K. Devi and Ors.*³⁴ this Court held that section 16 of the Act is not *ultra vires* of the Constitution of India. In view of the legal fiction contained in section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents.

In *S.P.S. Balasubramanyam v. Sruttayan*,³⁵ the Supreme Court had said: "If a man and woman are living under the same roof and cohabiting for a number of years, there will be presumption under section 114 of the

³¹ AIR 2010 SC 2933.

³² *Chanmuniya v. Chanmuniya Virendra Kumar Singh Kushwaha and Anr.*, (2011) 1 SCC 141.

³³ AIR 2010 SC 2685.

³⁴ [AIR 1996 SC 1963]; MANU/SC/0487/1996.

³⁵ AIR 1992 SC 756.

Evidence Act that they live as husband and wife and the children born to them will not be illegitimate.”

Conclusion

Dr. Har Dev Kohli, author of *Law and Illegitimate Child - From Sastrik Law to Statutory Law*, suggests a society where the illegitimate child will not be victimized for the sins of his parents. A possible remedy, he points out, lies in the vigorous implementation of the most sacred ideals of human rights and social justice. Some statutory provisions are present in Hindu law. But they remain at best, half-baked provisions, which keep the distinction alive. He suggests legislation in India on the pattern of English Legitimacy Act. But in the largest democracy of the world, where no school readily admits a child who cannot fill the blank asking for the father's name, what legitimacy are we talking about?

With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role. Very often a dominant group loses its primacy over other groups in view of ever changing socio-economic scenario and the consequential vicissitudes in human relationship. Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society law cannot afford to remain static. If one looks at the history of development of Hindu Law it will be clear that it was never static, and has changed from time to time to meet the challenges of the changing social pattern in different time.

The common law view that the offspring's of marriage which is void and voidable are illegitimate *ipso jure* has to change completely. The child remains innocent.