Before Daya Chaudhary, J.

S. AJIT SINGH (SINCE DECEASED) THROUGH LRS. — *Appellants*

versus

KAWALJIT KAUR @ KAWALDEEP KAUR AND ANOTHER— *Respondents*

RSA No.1912 of 2016

May 05, 2017

(A) ***Hindu Marriage Act, 1955 – S.5 – Death of husband – Marriage during subsistence of first wife – Not a legal marriage – Trial Court has rightly held second wife not entitled to grant of any maintenance allowance.***

Held that, although the trial Court has not granted maintenance to widow of Mehain Singh by holding that she was not entitled for any maintenance as her marriage with Mehain Singh was found to be void as Mehain Singh was already married at the time of his second marriage. The birth of plaintiff No.2 Karanbir Singh was duly proved on the basis of documentary evidence and by way of testimonies of PW-1 Vijay Kumar Sharma, PW-4 Sister Sarita, who proved school record to the child as well as the photographs proved on record by PW6-Vijay Kumar Photographer. It was held that Karanbir Signh was born out of cohabitation of plaintiff No.1 with deceased – Mehain Singh and even in case of void marriage, Plaintiff No. 2 – Karanbir Singh was held entitled to succeed to the estate of deceased – Mehain Singh.

(Para 12)

(B) ***Hindu Marriage Act, 1955 – Children born out of second marriage during subsistence of first marriage, are legitimate though second marriage is void and these children are entitled to succeed to the estate of deceased person.***

Held that, it has been held in various judgments of this Court as well as Hon'ble the Apex Court that the children born out of second marriage during the subsistence of first marriage, are legitimate though second marriage is void and these children are entitled to succeed to the estate of deceased person.

(Para 13)

(C) ***Hindu Marriage Act, 1955 – S.16 – Child born out of void or voidable marriage may not be entitled to claim inheritance ancestral coparcenary property but entitled to claim share in self acquired properties, if any.***

Held that, it is apparent that a child born out of void or voidable marriage may not be entitled to claim inheritance in ancestral coparcenary property but is entitled to claim share in self acquired properties, if any.

(Para 20)

Anupam Bhardwaj, Advocate
for the appellants.

DAYA CHAUDHARY, J.

(1) Appellant-defendant (since died) through L.Rs. has filed the present second appeal to challenge judgment and decree dated 03.01.2014 passed by the trial Court as well as judgment and decree dated 01.11.2014 passed by the lower Appellate Court.

(2) Plaintiff-respondents filed a suit under Sections19 and 20 ofthe Hindu Adoption and Maintenance Act, 1956 (for short 'the Act, 1956') for recovery of maintenance allowance stating therein that they are indigent persons and are not possessing sufficient means to pay court fee. Plaintiff No.2-Karanbir Singh was minor son of plaintiff No.1 and his age was about 4½ years at that time. He filed suit through his mother and natural guardian. Plaintiff No.1 is widow of Mehain Singh. Out of wedlock of plaintiff No.1 with Mehain Singh (now deceased), plaintiff No.2-Karanbir Singh was born. Mehain Singh was employed as Assistant Hockey Coach in the office of District Sports Officer, Amritsar. He met with an accident and died on 13.10.2004 at Amritsar. After death of Mehain Singh, the dispute arose with regard to service benefits including gratuity, general provident fund, leave encashment and pension of deceased husband of plaintiff No.1. Widow of Mehain Singh-plaintiff No.1 and her minor son were turned out from the matrimonial home in the month of January 2005. Thereafter, they started to reside in the parental house of plaintiff No.1 at Amritsar. However, the financial condition of parents of plaintiff No.1 was also not sound whereas the family of deceased husband of plaintiff No.1 was having agricultural land and other sources of income. The suit filed by plaintiffs was decreed by the trial Court vide judgment and decree dated 03.01.2014 and plaintiff No.2 was allowed future maintenance @ Rs.10,000/- per month till he attained the age of

majority. It was held by the trial Court that the marriage of plaintiff No.1-Kawaljit Kaur took place on 07.03.2000 and minor aranbir Singh was born out of said wedlock. Since the marriage took place during the subsistence of marriage of Mehain Singh with his first wife Gurmit Kaur, the marriage being void, plaintiff No.1 was not held entitled for maintenance from the self acquired property of Ajit Singh (now deceased) and now in the hands of his legal heirs.

(3) Aggrieved by said judgment and decree passed by the trial Court, the defendant-appellants filed appeal before the Additional District Judge, Amritsar, which was dismissed vide judgment and decree dated 01.11.2014.

(4) Now this regular second appeal has been filed by the L.Rs. of defendant-Ajit Singh to challenge the judgments and decrees passed by both the Courts below.

(5) Learned counsel for the appellants submits that both the Courts below have not properly appreciated the evidence available on record and the plaintiff-respondents were not entitled for any maintenance as after the death of Mehain Singh, they were having eye on the property and service benefits of deceased husband/father. Learned counsel further submits that the suit filed by the plaintiff-respondents was not maintainable and it was liable to be dismissed as it was not properly valued for the purpose of court fee. A specific objection was raised in the written statement that the plaintiff-respondents were not indigent persons and they were having sufficient means. Even no marriage had taken place between plaintiff- respondent No.1 and Mehain Singh. Mehain Singh was married with Gurmit Kaur and two children were also born out of said wedlock. Learned counsel also submits that neither the marriage between plaintiff No.1 and Mehain Singh nor the birth of minor son out of said marriage was proved even onthe basis of statement of plaintiffs' witnesses. Learned counsel also submits that the maintenance has wrongly been awarded and as such, both the judgments and decrees passed by lower Courts are liable to be set-aside.

(6) Heard arguments of learned counsel for the appellants and have also perused the judgments/decrees of both the Courts below as well as other documents available on the file.

(7) The facts relating to filing of suit by the plaintiff-respondents, decretal thereof, filing of appeal by the defendant-appellants and dismissal thereof are not disputed.

(8) As per case of the plaintiff-respondents at the time of filing of the suit, they were indigent persons and were not having sufficient means to pay court fee. After death of Mehain Singh, they were turned out from the matrimonial home and benefits were also not released to them whereas they were entitled for the same being widow and son of the deceased. The suit was opposed by the defendant-appellants and ultimately, it was decreed in favour of the plaintiff-respondents and thereafter, appeal filed by the defendant-appellants was also dismissed by the Lower Appellate Court.

The following issues were framed by the trial Court : -

1. Whether the plaintiffs are entitled to fixation of permanentalimony and if so, at what rate?OPP

2. Whether the plaintiffs have no locus standi to file the present suit?OPD

3. Whether the plaintiffs have no cause of action to file thepresent suit?OPD

4. Relief.

(9) As per judgment of trial Court, widow Kawaljit Kaur could not be held entitled for maintenance from self acquired property of Ajit Singh (now deceased) and now in the hands of his legal heirs but minor Karanbir Singh was held entitled for maintenance. The relevant finding of the trial Court is in Para Nos.14 to 17 of the judgment, which is reproduced as under: -

"14. I find force in the contentions raised by ld. counsel for the plaintiff and I hold that the marriage of Kawaljit Kaur took place with Mehain Singh on 7.3.2000 and child namely Karanbir Singh was born out of this wedlock. Since the marriage took place during the subsistence of marriage of Mehain Singh with the first wife Gurmit Kaur. The marriage being void, so she is not entitled for maintenance from the self acquired property of Ajit Singh (now deceased) and now in the hands of his legal heirs. However, the minor Karanbir Singh is entitled for maintenance.

15. With regard to the quantum of maintenance, I find from the perusal of jamabandi for the year 2000-01 Ex. PW8/5 that the defendant Ajit Singh (now deceased) is recorded as a co-sharer to the extent of 1/4 covered by Khewat No.542, Khatauni Nos.1227, 1229, 1230, 1231,

Khewat No.564 & Khatauni Nos. 1345, 1346, Khewat No.542 Khatauni No.1232, Khewat No.564 Khatauni No.1344 and likewise the other part of the land covered in the said jamabandi pertaining to Hadbast No.203 situated in village Othian, Tehsil & District Amritsar. I also find from the perusal of another jamabandi for the year 2005-06 Ex.PW8/6. That Mehain Singh is alsorecorded as an owner to the extent of 1/3 share. Perusal of certified copy of sale deed Ex.PW8/1 also reveals that Mehain Singh is the owner of a house situated in village Kambo, Tehsil and District Amritsar which was purchased by Mehain Singh during his lifetime vide sale deed dated 27.9.95 which is in illegal possession of defendant Ajit Singh (Now deceased) and the entire property is now in the hands of his legal heirs from which the defendanthad been earning mesne profits. Even otherwise after the demise of Ajit Singh, Mehain Sngh predeceased son of Ajit Singh has got a share from the estate leftby Ajit Singh and in this way, the minor Karanbir Singh has become entitled to succeed to the share qua the share of his deceased father Mehain Singh from the property left by Ajit Singh father of Mehain Singh. So the minor Karanbir Singh is entitled to maintenance out of the estate left by his father in possession of the defendant and as well as ancestral property in the hands of the defendant and as well as from the property left by Ajit Singh qua the share of Mehain Singh beng his predeceased son for which he is now entitled to succeed. Accordingly, this issue is decided in favour of the plaintiffs and against the defendants.

ISSUE No.2 & 3

16. Although the objections that the plaintiffs have no locus standi and cause of action to file the present suit were raised in the written statement, yet no effort was made by the defendants to get it adjudicated before determination of issues on merits, and further these issue were not pressed by the defendants during the arguments, so, these issues are decided against the defendants.

RELIEF

17. In the case in hand, the plaintiff No.2 has claimed maintenance @ Rs.5000/- per month as back as during the

year 2005 and he was allowed interim maintenance @ Rs.3000/- per month vide order dated 20.9.2010. Now during the span of 8-9 years, the prices of the bare necessities of life has gone unabated. The spiraling high rocketing prices have become unbearable. It is difficult to breathe with the meager maintenance. The minor is a school going child. The maintenance despite food and clothes also includes a roof over the head. The minor is now 13 years of age. So keeping in view the status of the defendant (now deceased) represented through hislegal heirs to pay a sum of Rs.3000/- per month tothe plaintiff No.2 till today and continuously paying him the future maintenance @ Rs.10,000/- per month till he attains the age of majority. The defendant through his Lrs is directed to pay the said arrears within a period of three months from the estate left by the deceased Ajit Singh and now in the hands of his legal heirs/nominees. The arrears of maintenance are recoverable by the plaintiff w.e.f. 1-1-05 @ Rs.3000/- per month till decree alongwith the future maintenance @ Rs.10,000/- per month till the plaintiff No.2 attains majority. The suit is decreed accordingly. Decree sheet be drawn and file be consigned to the judicial record room after due compilation."

(10) Similarly, the finding recorded by the Lower Appellate Court is as under: -

"17. After hearing the rival contentions of the learned counsel for the parties and going through the entire evidence on record, this court is of the considered opinion that so far as the marriage of plaintiff No.1 Kawaljit Kaur with deceased Mehain Singh is concerned, the same does not stand proved on record by way of any cogent and convincing evidence. The plaintiff no.1 has miserably failed to prove on record the essential ceremonies of her lawful marriage with deceased Mehain Singh as per the requirement of Section 7 of the Hindu Marriage Act. None of the witnesses so far examined by the plaintiff no.1 in support of her case, could be able to prove the lawful marriage ceremonies of plaintiff no.1 with deceased Mehain Singh. However, only cohabitation of plaintiff no.1 with deceased Mehain Singh has been established on

record by way of documentary evidence viz., photographs Ex.PW6/1 to ExPW6/3 alongwith negatives Ex.PW6/4 to Ex.PW6/5, but even then the presumption of a legal marriage is proved contrary from the cross- examination of the witnesses of plaintiff by the defendants, because PW2 Jasbir Singh, Granthi isthe interested witness set up by the plaintiff. The testimony of this witness has been duly shattered during his cross-examination by the other side. This witness specifically admitted that the plaintiff is his real niece. This witness has not produced any documentary record maintained by the Gurudwara regarding the alleged marriage ceremony of the plaintiff no.1 with the deceased Mehain Singh. The stand taken by the plaintiff Kawaljit Kaur that she was married with the deceased Mehain Singh on 7.3.2000. However, during her cross-examination PW8 Kawaljit Kaur, plaintiff no.1, herself admitted that she came to know about the previous marriage of deceased Mehain Singh with one Gurmit Kaur. The marriage of Mehain Sngh was dissolved by wayof a decree of divorce dated 16.2.2002 by the Courtof Shri Mohinder Pal Singh, District Judge, Fatehgarh Sahib. It is also admitted by Kawaljit Kaur in her cross-examination that she came to know about the dissolution of said marriage of Mehain Singh with Gurmit Kaur, after 6-7 months from her marriage with Mehain Sngh. In the considered opinion of the court, if such was the situation, then certainly at the time of alleged marriage of plaintiff no.1 with Mehain Singh, the previous marriage of Mehain Singh with Gurmit Kaur was still subsisting. Meaning thereby, if the previous marriage of Mehain Singh was still subsisting, then the alleged marriage of plaintiff Kawaljit Kaur with Mehain Singh cannot be held to be a legal marriage as per the provisions enshrined under Section 5 of the Hindu Marriage Act. Resultantly, the marriage of plaintiff no.1 with Mehain Singh is held to be a void marriage in theeyes of law. The learned trial court has rightly held that plaintiff no.1 is not entitled to the grant of any maintenance allowance. However, the birth of plaintiff no.2 from the loins of deceased Mehain Singh is duly proved on record from the documentary evidence in the testimony of PW1 Vijay Kumar, PW4 Sister Sarita who proved the school record of

thechild as well as the photographs proved on record by the PW6. Thus, it is held that the plaintiff no.2 though born out of the cohabitation of plaintiff no.1 with deceased Mehain Singh and which relationship has been held to be void marriage, even then the plaintiff no.2 is entitled to succeed to the estate of the deceased Mehain Singh. In support thereof, I place reliance upon the authority titled as **Smt. Kadsi Devi & another vs. Miss Ram Pyari & others, 1993 (Suppl.) Civil Court Cases 340,** wherein it was held by Hon'ble Himachal Pradesh High Court that children born out of second marriage during the subsistence of first marriage, are legitimate though second marriage is void and these children are entitled to succeed to the estate of the deceased person.

18. It has been contended by learned counsel for the appellants-defendants that the plaintiff Kawaljit Kaur has also filed another suit claiming the rights of service and pensionary benefits of deceased Mehain Singh. In the said civil suit, she got produced from PW7 Amrik Singh, one birth certificate as Ex.DX in which the father's name of the child has been mentioned as Mohan Singh s/o Manohar Singh whereas the father's name of deceased Mehain Singh is Ajit Singh. However, the correction in the birth certificate was made during the pendency of the suit. In the considered opinion of the court, the birth certificate produced by the plaintiff no.1 in the civil suit filed by her for pensionary and service benefitsof Mehain Singh has got no relevancy in the present proceedings. That matter is still pending in the Court and the genuineness of the said document is yet to be determined in the said case. Moreover, the defence of the appellants-defendants was struck off by the learned trial court and as per the version of the counsel for the plaintiff, against that order the appellants-defendants have already availed proper remedy, but the same was declined. In view thereof the prayer of the defendants to produce additional evidence under order 41 rule 27 C.P.C. is without any justification. Thus, the application under order 41 rule 27 C.P.C. filed by the appellants-defendants during the pendency of this appeal, is found to be not sustainable and the same is hereby dismissed being devoid of any merit.

(11) On perusal of finding recorded by both the Courts below, the marriage of plaintiff No.1-Kawaljit Kaur with deceased-Mehain Singh has not been proved on record. However, only cohabitation of plaintiff No.1 with deceased-Mehain Singh has been established by way of documentary evidence. PW2-Jasbir Singh, Granthi, who got solemnized the marriage in Gurdwara, has not produced any documentary record maintained by the Gurudwara regarding the marriage ceremony of plaintiff No.1 with deceased-Mehain Singh. Some photographs of the marriage were produced before the trial Court. It was also proved that plaintiff No.2 was born out of lawful wedlock of deceased-Mehain Singh and Kawaljit Kaur. On the basis of long cohabitation, a presumption was drawn of legal marriage as same was not proved otherwise.

(12) Although the trial Court has not granted maintenance to widow of Mehain Singh by holding that she was not entitled for any maintenance as her marriage with Mehain Singh was found to be void as Mehain Singh was already married at the time of his second marriage. The birth of plaintiff No.2-Karanbir Singh was duly proved on the basis of documentary evidence and by way of testimonies of PW1-Vijay Kumar Sharma, PW4-Sister Sarita, who proved school record of the child as well as the photographs proved on record by PW6-Vijay Kumar Photographer. It was held that Karanbir Singh was born out of cohabitation of plaintiff No.1 with deceased-Mehain Singh and even in case of void marriage, plaintiff No.2-Karanbir Singh was held entitled to succeed to the estate of deceased-Mehain Singh.

(13) It has been held in various judgments of this Court as well as Hon'ble the Apex Court that the children born out of second marriage during the subsistence of first marriage, are legitimate though second marriage is void and these children are entitled to succeed to the estate of deceased person.

(14) This view has been held by the Himachal Pradesh High Court in ***Smt. Kadsi Devi & another*** versus ***Miss Ram Pyari & others***[1].

(15) Section 112 of the Evidence Act provides for a presumption of a child being legitimate and such a presumption can only be displaced by a strong preponderance of evidence and not merely by a balance of probabilities as the law has to live in favour of

[1] 1993 (Suppl.) Civil Court Cases 340

innocent child from being bastardised as has been held by Hon'ble the Apex Court in ***Bharatha Matha & Anr.*** versus ***R. Vijaya Renganathan & Ors.***[2]

(16) In ***S.P.S. Balasubramanyam*** versus ***Suruttayan @ Andali Padayachi & Ors.***[3], Hon'ble the Apex Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate.

(17) In ***Smt. P.E.K. Kalliani Amma & Ors.*** versus ***K. Devi & Ors.***[4] Hon'ble the Apex Court held that Section 16 of the Act isnot 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.

(18) In ***Jinia Keotin & Ors.*** versus ***Kumar Sitaram Manjhi & Ors.***[5] Hon'ble the Apex Court held that while engrafting a rule of fiction in Section 16 of the Act, the illegitimate children have become entitled to get share only in self-acquired properties of their parents. The Court held as under :-

> "4……..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 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

[2] 2010 AIR (SC) 2685
[3] AIR 1992 SC 756
[4] AIR 1996 SC 196
[5] (2003) 1 SCC 730

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 indeed in enacting Section 16 to 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.

5. So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time it expressly provide in Sub-section (3) by engrafting a provision with a non-obstante clause stipulating specifically that 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 this not being the legitimate child of his parents'. In the light of such an express mandate of the legislature itself there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in Sub-section (3) of Section 16 of the Act but also would attempt to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions onbehalf of the appellants……"

(19) Same view was held by Hon'ble the Apex Court in

Vimalben Ajitbhai Patel versus ***Vatslabeen Ashokbhai Patel and others***[6] as well as by this Court in ***Balbir Kaur*** versus ***Harinder Kaur,***[7]**.**

(20) It is apparent that a child born out of void or voidable marriage may not be entitled to claim inheritance in ancestral coparcenary property but is entitled to claim share in self acquired properties, if any.

(21) In view of the facts and law position as discussed above, I find no reason to interfere with the finding recorded by both the Courts below and as such, the present regular second appeal being devoid of any merit is dismissed.

Shubreet Kaur

[6] 2008 (4) SCC 649
[7] 2003(1)RCR (Civil) 624